Macharia & 2 others v Macharia & another (Environment and Land Appeal 16 of 2019) [2023] KEELC 17316 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17316 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 16 OF 2019

YM ANGIMA, J

MAY 11, 2023

BETWEEN

JANE WANGUI MACHARIA ..... 1ST APPELLANT

ALICE WAMBUI MUIGA ..... 2ND APPELLANT

MARY WANGUI MACHARIA ..... 3RD APPELLANT

AND

RUTH MOHAGI MACHARIA ..... 1ST RESPONDENT

CATHERINE WANGECHI MUGO ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable S.N. Mwangi (SRM) dated 9th October, 2019 in Nyahururu C.M. Environment & Land Case No. 248 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S. N. Mwangi (SRM) in Nyahururu CM ELC No. 248 of 2018 – Jane Wangui Macharia & 2 Others –vs- Ruth Mohagi Macharia & Another. By the said judgment, the trial court dismissed the Appellants' suit and allowed the 2nd Respondent's counterclaim with costs. Aggrieved by the said decree, the Appellants filed the instant appeal.

B. Background

2. The record shows that the Appellants are the children of the 1st Respondent, Ruth M. Macharia, whereas the 2nd Respondent was a purchaser for value of one acre out of the suit property known as Title No. Nyandarua/Gilgil West/899 (the suit property).

3. Vide a plaint dated 10.05.2017 the Appellants sued the Respondents seeking the following reliefs against them:

   a. A declaration that all that parcel of land known as Nyandarua/Gilgil West/899 is a trust land.

   b. An order of mandatory injunction freezing Equity Bank Nakuru Branch Account No. 1460172705917 belonging to and or held on behalf of the 1st Defendant.

   c. An order of permanent injunction against the Defendants both jointly and severally either by themselves, agents, employees and servants be restrained from transferring, charging, subdividing, alienating and or in any way interfering with the Plaintiff's quite use, occupation, title to and quite possession of all that parcel of land known as Nyandarua/Gilgil West/899.

   d. A declaration that the sale of all that parcel of land known as Nyandarua/Gilgil West/899 is illegal and fraudulent and hence null and void ab initio.

   e. Costs and interest of the suit.

4. The basis of the Appellants' claim was that the 1st Respondent had acquired the suit property from the estate of their late grandfather, Onesmus Macharia Njuguna (the deceased) on 09.03.2011 to hold it on her own behalf and in trust for her children who included the Appellants. They pleaded that they were consequently beneficial owners of the suit property as family land and their consent was required before the 1st Respondent could deal with it.

5. The Appellants pleaded that on or about 04.05.2017 the 1st Respondent had fraudulently and illegally purported to sell one acre out of the suit property to the 2nd Respondent for Kshs.1,310,000/= which sum was deposited with Equity Bank Account No. 1460172705917. They consequently sought the reliefs set out in paragraph 3 hereof.

C. The 1st Defendant's Response to the Suit

6. The 1st Defendant filed a defence dated 21.06.2017 denying liability for the Appellants' claim. She admitted having inherited the suit property as a daughter of the deceased but denied holding it in trust for the Appellants or any of her children and put the Appellants to strict proof thereof. She denied that the suit property was trust land and pleaded that there was no law which required parents to seek the consent of their children before dealing with property acquired during their lifetime. She also pleaded that she was not legally obligated to distribute her property amongst her children during her lifetime.

7. The 1st Respondent further pleaded that the Appellants who were married had established their homes in Tumaini, Nyeri and Mombasa and that the Kikuyu customary law did not permit them to establish any matrimonial homes on their parent's property. She consequently prayed for dismissal of the suit.

D. 2nd Respondent's Defence and Counterclaim

8. The 2nd Defendant filed a defence and counterclaim dated 21.06.2017. By her defence, she denied the Appellants' claim in its entirety and put them to strict proof thereof. She denied that the 1st Respondent was holding the suit property in trust for the Appellants and put them to strict proof thereof. She also denied any fraud or illegality in her purchase of one acre out of the suit property from the 1st Respondent. The rest of the contents of her defence simply adopted the 1st Respondent's defence and she consequently prayed for dismissal of the Appellants' suit.

9. By her counterclaim, the 2nd Respondent reiterated the contents of her defence and pleaded that the 1st Respondent had inherited the suit property from the estate of her late father (the deceased) as absolute

owner and that the sale agreement of 04.05.2017 did not require the consent of the Appellants. It was pleaded that the Appellants had embarked on a scheme to frustrate the completion of the sale by wrongfully claiming an interest in the suit property through misrepresentation and concealment of material facts.

10. The 2nd Respondent further stated that she was a purchaser for valuable consideration of a portion of one of the suit property hence she sought the following reliefs in her counterclaim:

    a. A declaration that the 1st Defendant is the absolute owner of all that parcel of land known as Nyandarua/Gilgil West/889 and that the Plaintiffs have no claim whatsoever over the property during her life time.

    b. A permanent injunction restraining the Plaintiffs either by themselves or their agents, servants, employees, or otherwise howsoever from entering, wasting, trespassing onto, or interfering with the 2nd Defendant's peaceful and quiet occupation and possession of her parcel of land measuring 1 acre to be excised from that parcel of land known as Nyandarua/Gilgil West/88.

    c. That the 2nd Defendant be awarded the costs of the counter-claim together with interest thereon at such rate and for such period of time as this honourable court may deem fit to order.

    d. Any other or further reliefs this honourable court may deem fit to grant.

E. The Judgment of the Trial Court

11. The record shows that upon a full hearing of the suit the trial court found and held that the Appellants had failed to demonstrate the existence of the alleged trust. Consequently, the trial court dismissed the Appellants' suit and allowed the 2nd Respondent's counterclaim with costs.

F. The Grounds of Appeal

12. The Appellants filed a memorandum of appeal dated 08.11.2019 raising the following five (5) grounds of appeal:

    a. That the learned Magistrate erred in fact and law in holding That the Plaintiffs are not entitled to an injunction against{{^}} the Defendants thus dismissing the Plaintiff's suit.

    b. That the learned Magistrate erred in fact and law in issuing a declaration that the 1st Defendant is the absolute owner of all that parcel of land known a Nyandarua/Gilgil West/899 and that the Plaintiffs have no claim whatsoever over the property during her life time, contrary to the evidence that the 1st Defendant was holding the land in trust for the Plaintiffs.

    c. That the learned Magistrate erred in fact and law in issuing a permanent injunction against the Plaintiffs.

    d. That the learned magistrate erred in law and fact by totally failing to take into account the evidence of the Appellants' witnesses.

    e. The learned Magistrate erred in fact and law and in fact in failing to consider the submissions of the Appellants' counsel together with the case law in support.

13. As a consequence, the Appellant sought the following reliefs:

    a. That the appeal be allowed.

    b. That the judgment of the trial court be set aside and substituted with the judgment of this court.

c. That the Appellant be awarded costs of the appeal.

G. Directions on Submissions

14. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 22.12.2022 whereas the 2nd Respondent's submissions were filed on 06.01.2023. The 1st Respondent's submissions, however, were not on record by the time of preparation of the judgment.

H. The Issues for Determination

15. Although the Appellants raised 5 grounds of appeal in their memorandum of appeal the court is of the opinion that the appeal may be effectively determined by resolution of the following issues:

a. Whether the trial court erred in law and fact in dismissing the Appellants' suit.

b. Whether the trial court erred in law and fact in allowing the 2nd Respondent's counter-claim.

c. Who shall bear costs of the appeal.

I. The Applicable Legal Principles

16. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at P.126 as follows:

> " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English

terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

19. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

> " (a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> a. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> b. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

J. Analysis and Determination

a. Whether the trial court erred in law and in fact in dismissing the Appellants' suit

20. The court has considered the material and submissions on record on this issue. The Appellants submitted that the trial court erred in law and fact in holding that they had failed to demonstrate that the 1st Respondent was holding the entire suit property on their behalf in spite of abundant evidence to that effect. The Appellants submitted that the suit property constituted their ancestral land and that the 1st Respondent was holding it in trust for them. The Appellants cited the case of Douglas Macharia Waithera –vs- Samuel Mugo Njoki [2018] eKLR in support of the appeal and urged the court find that they had demonstrated the existence of a trust.

21. The 2nd Respondent submitted that the trial court was right in dismissing the Appellant's claim because no trust of any sort was proved at the trial. It was submitted that the Appellants were simply claiming an interest in the suit property because the 1st Respondent had acquired it from the deceased. It was submitted that the Appellants as grandchildren of the deceased were not legally entitled to a share of his estate and that it was their mother (the 1st Respondent) who was given the suit property through

a will. It was pointed out that neither the deceased's will nor the certificate of confirmation of grant of probate contained the alleged trust.

22. The 2nd Respondent submitted that a trust should not be lightly inferred in a suit unless there is clear and compelling evidence to that effect. In opposition to the appeal, the 2nd Respondent relied, inter alia, upon the cases of the mater of the estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR and Jemutai Tanui –vs- Joliana Jeptekeny & 5 Others [2013] eKLR. The court was consequently urged to uphold the decision of the trial court on the issue of trust.

23. It is evident from the material on record that the trial court was faced with contradictory evidence on the existence or otherwise of the trust. Whereas the Appellants contended that the suit property was subject to a trust in their favour, the Respondents contended otherwise. It must be remembered that under Section 107 and 108 of the *Evidence Act* (Cap. 80) the Appellants had the burden of proof. They were obligated to prove the existence of the alleged trust otherwise their suit was bound to fail. Section 107 of the said Act stipulates as follows:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

24. In the case of Peter Ndungu Njenga –vs- Sophia Watiri Ndungu [2000] eKLR, the Court of Appeal held, inter alia, that:

> "The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied."

25. Similarly, in the case of Isack Kiebia M'Inanga –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR the Supreme Court of Kenya considered the issue of customary trust as follows:

> "...each case to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as customary trust. In this regard, we agree with the High Court in Kiaries –vs-Kinuthia that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary law would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
>
> a. The land in question was before registration, family, clan or group land;
>
> b. The claimant belongs to such family, clan or group;
>
> c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;
>
> d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and

e. The claim is directed against the registered proprietor who is a member of the family, clan or group."

26. So, what was the evidence of trust before the trial court? The record shows that the Appellants' evidence was to the effect that the 1st Respondent had inherited the suit property from the deceased through succession proceedings. The Appellants contended that one of their uncles had informed a family gathering that the 1st Respondent was to hold the suit property in trust for all her children including the Appellants. The Appellants' said uncle was, however, not called as a witness at the trial. The letter alleged to have been authorized by the said uncle on the existence of the alleged trust was, therefore, not of much probative value. It is also strange that the issue of trust did not feature in the succession proceedings for the estate of the deceased. It was also not captured in the certificate of confirmation of grant.

27. The court is thus of the opinion that the trial court correctly appreciated the evidence before it when it stated as follows:

> " ...From the evidence led by both parties, it is not in dispute that the suit land was registered and owned by the 1st Defendant's father and upon his death, it devolved to ten of his children as evidenced by the certificate of confirmation of grant dated 20th June, 2007. The subdivision of the deceased estate was testate as he left behind a will which was not challenged by either of his ten (10) children or any other objector including his own grandchildren who included the Plaintiffs herein. If at all the Plaintiffs herein had an objection as they have raised herein they ought to have raised it in the succession cause. This is so because they produced a note from their alleged uncle stating that they were to hold in trust on behalf of themselves and their children, which is not the case. There is therefore no evidence tendered before this court to show that the land is such as is a customary land that is to say is that land was encumbered with a trust.
>
> From the foregoing, it is clear that the Plaintiffs failed to satisfy their burden of proof during evidence as to how the trust was created, the circumstances under which it was created and the common intention as to its establishment and/or creation. The Plaintiffs only averred that trust was created on 20th June 2007 when the 1st Defendant, their mother, inherited the 2 acres of land from her father who allegedly stated that the land should never be sold but that the same was to be inherited by their children. The court notes that there is no evidence on record of the certificate of confirmation of grant to denote the presence of customary or family trust. Be that as it may, it is apparent from the record that the 1st Defendant got the land from the estate of her late father as a beneficiary."

28. In the premises, the court finds that the trial court did not err in law on fact in finding and holding that the Appellants had failed to demonstrate the alleged trust. Consequently, the trial court was right in dismissing the Appellants' claim as it did and this court is not entitled to disturb that decision.

b. Whether the trial court erred in law and in fact in allowing the 2nd Respondent's counterclaim

29. The court has considered the material and submissions on record. It is evident that the Appellants' claim and the 2nd Respondent's counter-claim were mutually exclusive. The Appellants' claim was based upon the alleged existence of a trust over the suit property. That is why they objected to the sale of a portion thereof to the 2nd Respondent. This court having found that the trial court was right in holding that the Appellants had failed to prove the existence of trust it would follow that the Appellants had no legitimate reason to interfere with the sale transaction between the 1st and 2nd Respondents.

In the event, the 2nd Respondent was entitled to succeed in her counterclaim against the Appellants. The court is thus of the opinion that the trial court did not err in law or in fact in allowing the 2nd Respondent's counter-claim.

c. Who shall bear costs of the appeal

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful litigants should be deprived of the costs of the appeal. The court is, however, inclined to award costs to the 2nd Respondent only since the 1st Respondent did not participate in the appeal.

K. Conclusion and Disposal Orders

31. The upshot of the foregoing is that the court finds no merit in the appeal. Consequently, the court makes the following orders for disposal thereof:

    a. The Appellants' appeal be and is hereby dismissed in its entirety.

    b. The judgment and decree of the trial court dated 09.10.2019 in Nyahururu CM ELC No. 248 of 2018 is hereby affirmed.

    c. The 2nd Respondent is hereby awarded costs of the appeal to be borne by the Appellants.

    It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 11TH DAY OF MAY, 2023.

Y.M. ANGIMA

.....

JUDGE

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Odhiambo Odhim for the Appellants

N/A for the 1st Respondent

Ms. Ekesa holding for Mr. Ratemo for the 2nd Respondent

C/A - Carol