



**Ndiritu v Ndiritu & another (Environment and Land Appeal
6 of 2020) [2023] KEELC 18429 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL 6 OF 2020**

**YM ANGIMA, J
JUNE 29, 2023**

BETWEEN

PAULINE WACHERA NDIRITU APPELLANT

AND

REBECCA WAMBUYU NDIRITU 1ST RESPONDENT

NYANDARUA PROGRESSIVE AGENCIES LTD 2ND RESPONDENT

*((An appeal against the judgment and decree of Hon.
S.N. Mwangi (SRM) dated 11.03.2020 in Nyahururu))*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 11.03.2020 in Nyahururu CM ELC No. 483 of 2017 – Pauline Wachera Ndiritu v Rebecca Wamuyu Ndiritu & Another. By the said judgment, the trial court disallowed the Appellant’s claim for recovery of Title No. Solai/Arutani Block 1 (NPA)/1077 and directed that the same be registered in the name of the deceased husband of the Appellant and the 1st Respondent.

B. Background

2. The material on record shows that vide a plaint dated 04.09.2017 and amended on 01.11.2017 the Appellant sought the following reliefs against the Respondents:
 - a. A declaration that plot No. 1077 Nyandarua Progressive Agencies Limited (Now Parcel No. Solai/Arutani Block 1 (NPA)/1077 “the suit Property” exclusively belongs to the Plaintiff and that the 1st Defendant is registered as the owner in trust for the Plaintiff.



- b. A declaration that all the entries on the register relating to Plot No. 1077 Nyandarua Progressive Agencies Limited (Now Parcel No. Solai/Arutani Block 1 (NPA)/1077 conferring ownership of the suit land are illegal and irregular and therefore null and void.
 - c. A mandatory injunction compelling the land registrar Nakuru to cancel and rectify all entries on the register relating to the suit land conferring ownership of the suit land and to register the plaintiff as the owner thereof.
 - d. A permanent injunction restraining the defendants, their agents and/or servants or any other person acting for them or with their authority from entering, cultivating, remaining, trespassing, leasing charging alienating disposing off or in any way from interfering with Plot No. 1077 Nyandarua Progressive Agencies Limited (Now Parcel No. Solai/Arutani Block 1 (NPA)/1077.
 - e. Orders for eviction of 1st defendant or any other person that may be occupying or illegally trespassing on the suit land and that the plaintiff be granted vacant possession.
 - f. Costs of the suit together with interest at court rates.
 - g. Any other relief that the court may deem fit and just to grant.
3. The Appellant pleaded that she and the 1st Respondent were wives of the late Daniel Ndiritu Watutui (the deceased) who was the owner of Parcel No. Solai/Arutani Block 1 (NPA)/1077 (Parcel 1077) by virtue of his shareholding in Nyandarua Progressive Agencies Ltd as well as Parcel No. Laikipia/Ngobit Supuko/Block 11/1672 (Wiyumiririe) (Parcel 1672) by virtue of his shareholding in Wiyumiririe Farmers Co-operative Society.
 4. The Appellant pleaded that following the death of the deceased in 2004 she and her son, Boniface Mbutia, applied for a grant of letters of administration intestate for the estate of the deceased in Nyeri High Court Succession Cause No. 357 of 2005 (the Succession Cause) as a result of which they were issued with a grant on 14.01.2007. The Appellant pleaded that upon confirmation of the grant on 12.10.2007 Parcel 1672 was given to the 1st Respondent whereas Parcel 1077 was given to her.
 5. It was further pleaded that during the pendency of the Succession Cause the 1st Respondent secretly caused Parcel 1672 to be registered in her name on 10.01.2007 and that later in 2016 she fraudulently colluded with the 2nd Respondent and caused Parcel 1077 to be registered in her name as well in contravention of the certificate of confirmation of grant dated 12.10.2007. The Appellant enumerated 4 particulars of fraud against the Respondents in her amended plaint. The Appellant contended that as a result of the Respondents' actions she had suffered loss and damage hence the suit.
 6. The 1st Respondent filed a statement of defence dated 18.10.2017 denying liability for the Appellant's claim. She denied that parcel 1672 ever belonged to the deceased and asserted that it was her own property. She consequently denied any fraud in its transfer into her name. She further pleaded that prior to his death, the deceased had gifted her son Paul Gachara Parcel 1077 absolutely and that it was her said son who had in turn gifted the same to her absolutely. She, therefore, denied the fraud and particulars of fraud alleged against her and put the Appellant to strict proof thereof. In the end, she prayed for dismissal of the Appellant's suit.
 7. The 2nd Respondent filed a statement of defence dated 23.10.2017 and amended on 17.09.2018 in which it denied liability for the Appellant's claim. It was pleaded that the deceased was the initial owner of Parcel 1077 by virtue of his shareholding and subscription to the company but stated that it acted in good faith whilst transferring the same to the 1st Respondent as the widow of the deceased. The 2nd



Respondent pleaded that it was not aware of the Appellant being also a widow of the deceased and that it was not aware of the certificate of confirmation of grant issued in the succession cause.

8. It was the 2nd Respondent's defence that it acted in good faith in transferring the deceased's parcel to the 1st Respondent who had presented a letter from the chief, NHIF identification card, taxpayer registration certificate, death certificate and application for change of particulars of National Identity Card. It was further pleaded that it was the responsibility of the Appellant to present the certificate of confirmation of grant expeditiously upon its issuance to enable the 2nd Respondent to act appropriately. Ultimately, the 2nd Respondent prayed for dismissal of the Appellant's suit.
9. The Appellant filed a reply to the 1st Respondent's defence dated 01.11.2017 in which she joined issue with the 1st Respondent upon her defence and reiterated the contents of her plaint. It was denied that the deceased had during his lifetime gifted Parcel 1077 to Paul Gachara or any other person. It was further pleaded that if it was true that Parcel 1077 had been gifted to Paul Gachara then it would not have been necessary for the 1st Respondent to present the documents she presented to the 2nd Respondent to facilitate the transfer into her name.

C. Trial Court's Decision

10. The record shows that upon hearing the parties the trial court found that there was no evidence to demonstrate that the deceased had gifted Parcel 1077 to Paul Gachara and that it was the latter who transferred it to the 1st Respondent. The trial court further found and held that the 1st Respondent had fraudulently caused herself to be registered as proprietor of Parcel 1077 and that the 2nd Respondent had acted unlawfully by effecting the transfer in the absence of a certificate of confirmation of grant.
11. The trial court was, however, concerned that the Appellant had not made full disclosure to the High Court in the succession cause that Parcel 1672 was not registered in the name of the deceased at the material time. Consequently, the trial court directed that the 1st Respondent's registration as proprietor of Parcel 1077 be cancelled and that the same be registered in the name of the deceased. The court ordered that each party should bear his own costs of the suit.

D. Grounds of Appeal

12. Being aggrieved by the said judgment and decree the Appellant filed a memorandum of appeal dated 19.03.2020 raising the following seven (7) grounds of appeal:
 - a. The learned trial Magistrate erred both in law and fact in failing to find that the Appellant had proved on a balance of probability that she was the rightful beneficial owner of Plot No.1077 Nyandarua Progressive Agencies Limited (Now Parcel No. Solai/Arutani Block 1 (NPA)/1077 same having been vested on Appellant by the High court vide Nyeri High Court Succession Cause No.357 of 2005.
 - b. The learned trial Magistrate erred in law in failing to appreciate that she did not have jurisdiction to question the judgement made and decree issued by the High court in Nyeri High Court Succession Cause No.357 of 2005.
 - c. The learned trial Magistrate erred both in law and fact in failing to appreciate that the decree issued in Nyeri High Court Succession Cause No.357 of 2005 on 952008 finally and conclusively determined the rights of the Appellant in respect to parcel Plot No.1077 Nyandarua Progressive Agencies Limited (Now Parcel No.Solai/Arutani Block 1 (NPA)/1077



and the 1st Respondent in respect to Parcel No.Laikipia/Ngobit Supuko Block 11/1672 (Wiyumiririe).

- d. The learned trial Magistrate erred both in law and fact in ordering that the register in respect of Plot No.1077 Nyandarua Progressive Agencies Limited (Now Parcel No.Solai/Arutani Block 1 (NPA)/1077 be rectified by cancelling the name of the 1st Respondent and substituting it with the name of Daniel Ndiritu Watutui (Deceased) when same had already been vested on the Appellant by the High court in Nyeri High Court Succession Cause No.357 of 2005.
- e. The learned trial Magistrate erred both in law and fact in failing to make a finding that the Appellant had met the legal threshold for granting an order for injunction.
- f. The learned trial Magistrate erred both in law and fact by failing to properly evaluate the credible evidence adduced by the Appellant thus misdirecting herself on the issues before her which resulted in the miscarriage of justice to the Appellant.
- g. The learned trial Magistrate erred both in law and fact in dismissing the Appellant's suit.

E. Directions on Submission

13. 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 22.02.2023 whereas the 2nd Respondent's submissions were filed on 13.03.2023. However, there is no indication on record of the 1st Respondent having filed any submissions. In fact, the record reveals that she did not participate in the proceedings despite service of court process.

F. Issues for Determination

14. Although the Appellant raised 6 grounds of appeal in her memorandum of appeal, the court is of the opinion that resolution of the following three (3) issues shall effectively resolve the appeal:
 - a. Whether the trial court erred in law and in fact in holding that the Appellant was not entitled to all the reliefs sought in the suit.
 - b. Whether the trial court erred in law in reviewing the certificate of confirmation of grant issued by the High Court.
 - c. Who shall bear costs of the appeal and of the suit before the trial court.

G. Applicable Legal Principles

15. 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 v 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.”

16. Similarly, in the case of *Peters v 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...”

17. In the same case, Sir Kenneth O’Connor quoted *Viscount Simon, L.C in Watt v 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 course, 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.”

18. 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;
- b. 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
- c. 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.



H. Analysis and Determination

a. Whether the trial court erred in law and in fact in holding that the Appellant was not entitled to all the reliefs sought in the suit

19. The court has considered the material on record on this issue. There is no doubt from the material on record that the High Court issued a certificate of confirmation of grant dated 12.10.2007 regarding the estate of the deceased which was amended on 09.05.2008 to incorporate the sharing of the death gratuity. There is no doubt that the Appellant was entitled to Parcel 1077 whereas the 1st Respondent was to take Parcel 1672. It is on the basis of the said certificate of confirmation of grant that the Appellant contended that she was the beneficial owner of the Parcel 1077.
20. There is no doubt from the material on record that the trial court found and held that there was no evidence to demonstrate that prior to his death, the deceased had gifted Parcel 1077 to the 1st Respondent's son Paul Gachara. The court also found and held that the 1st Respondent had obtained registration as proprietor of Parcel 1077 through fraud and misrepresentation. The court is of the opinion that those findings were well supported by the evidence on record. In fact, there was no cross appeal by any of the two Respondents on the issue of the fraudulent transfer.
21. The court is, however, of the opinion that the trial court erred in law and fact in declining to grant the Appellants all the reliefs she was entitled to in her suit on account of extraneous factors which were not properly before it for determination. There was no plea by 1st Respondent in her defence that the High Court was misled by the Appellant in issuing the certificate of confirmation in the succession cause. There was no evidence before the trial court to the effect that the 1st Respondent had challenged the said certificate or that she had applied for its revocation before the right forum.
22. The Appellant's evidence at the trial was that the 1st Respondent had caused Parcel 1672 to be registered in her name during the pendency of the succession cause. This is borne out by the fact that the 1st Respondent obtained registration on 10.01.2007 whereas the grant of letters of administration was made by the High Court on 14.01.2007. There is no way the Appellant could have filed her petition for letters of administration after 10.01.2017 and obtained the same on 14.01.2007 bearing in mind the requirement of publication in the Kenya Gazette. If the 1st Respondent was registered as proprietor of Parcel 1672 on 10.01.2017 then it would follow that she was not the registered owner prior to that date.
23. There is no evidence on record to demonstrate that the 1st Respondent notified the Appellant that she had obtained registration of Parcel 1672 during the pendency of the succession cause. It could not, therefore, be assumed that the Appellant knew about the registration in 2007 and deliberately failed to inform the High Court of it before confirmation of the grant.
24. The court is further of the opinion that the trial court erred in another respect. The Appellant's claim was solely about recovery of Parcel 1077 in her capacity as the beneficial owner. The suit property for purposes of the suit was Parcel 1077 hence the trial court was not at liberty to undertake investigations on Parcel 1672 and use the same as a reason for denying the Appellant the reliefs she was entitled to with respect to Parcel 1077. The court is thus of the opinion that there was no legitimate reason to deny the Appellant her entitlement to Parcel 1077.

b. Whether the trial court erred in law in reviewing the grant issued by the High Court

25. The Appellant submitted that the trial court, as a subordinate court, had no power or jurisdiction to review, set aside or nullify the distribution of the deceased's assets as set out in the certificate of confirmation of grant. The court fully agrees with the Appellant's submissions in that regard. It is



evident from the material on record that the High Court at Nyeri had distributed the assets of the deceased in the manner set out in the certificate of confirmation of grant. There is no indication on record to demonstrate that any of the concerned beneficiaries ever applied for review, variation or setting aside of the mode of distribution.

26. The court is of the opinion that the role of the subordinate court and even the Environment and Land Court would merely be to give effect to the certificate of confirmation of grant by ensuring that each of the beneficiaries get their entitlement as determined by the High Court. A magistrate's court has no jurisdiction to review, alter, or nullify the mode of distribution on account of alleged non-disclosure or concealment of material facts. Moreover, a subordinate court would have no jurisdiction to nullify the mode of distribution and direct that any property do revert to the name of the deceased for fresh distribution by the High Court.
27. In view of the order made by the trial court, it would mean that the High Court would have to revisit the matter and re-distribute Parcel 1077 in the succession cause once again. In the event, the subordinate court would have effectively sat on appeal over a decision of the High Court through the back door. This court has no doubt in its mind that the trial court has no such powers in our legal and constitutional structure.

(c) Who shall bear costs of the appeal

28. 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). The court finds no good reason why the successful Appellant should not be awarded costs of the action. However, the 2nd Respondent shall bear its own costs for displaying negligence in transferring Parcel 1077 to the 1st Respondent without being presented with a certificate of confirmation of grant. In the premises, the Appellant shall be awarded costs of the appeal as well as costs of the suit before the trial court.

I. Conclusion and Disposal Orders

29. The upshot of the foregoing is that the court finds merit in the Appellant's appeal and makes the following orders for disposal thereof:
 - a. The appeal be and is hereby allowed.
 - b. The judgment of the trial court dated 11.03.2020 in Nyahururu CM ELC No. 483 of 2017 is hereby set aside and substituted with a judgment allowing the Appellant's suit in terms of prayers (a) (b) (c) (e) and (f) of the plaint dated 04.09.2017 and amended on 01.11.2017.
 - c. The prayer for a prohibitory injunction is hereby declined since the 1st Respondent has been in possession hence only an eviction order in terms of prayer (e) of the amended plaint shall be an effective remedy.
 - d. The Appellant is hereby awarded costs of the appeal and of the suit before the trial court. However, the 2nd Respondent shall bear its costs of the appeal and the suit before the trial court.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 29TH DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Mburu holding brief for Ms. Njeri Wamithi for the Appellant



N/A for the Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE

