



REPUBLIC OF KENYA



KENYA LAW
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**Wagaka v Odera (Environment and Land Appeal E012 of 2022)
[2023] KEELC 19315 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 19315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

MN KULLOW, J

JUNE 29, 2023

BETWEEN

ZECHARIA OTIENO WAGAKA APPELLANT

AND

SAMWEL ONYANGO ODERO RESPONDENT

*(Appeal from the Judgment and Decree of Hon. M. Obiero delivered
on 14th April, 2022 in Migori CMELC Case No. 44 of 2019.)*

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M. Obiero delivered on 14th April, 2022 in Migori CMELC Case No. 44 of 2019, in which the Plaintiff's claim against the Defendant was allowed as prayed in the Plaint. The grounds in the Memorandum of Appeal dated 06.05.2022 are that: -
 - i. The Honourable Trial Magistrate erred in law and in fact by reaching the Appealed decision.
 - ii. The Honourable Trial Magistrate erred in law and in fact by not considering the provisions of section 45(1) and section 55(1) of the Law of Succession Act, Cap 160 Laws of Kenya.
 - iii. The Honourable Trial Magistrate erred in law and in fact by so considering incredible and incompetent Respondent's documents that occasioned him to reach to the Appealed decision thus rendering the same Appealable.
 - iv. The Honourable Trial Magistrate erred in law and in fact by not considering that the Appealed suit was Res Judicata, the same having been determined in Migori CMC Succession Cause No. 4 of 2013. Thus, the provisions of section 7 of the Civil Procedure Act were not taken into account by the Learned Magistrate.
2. Consequently, the Appellant sought the following Order;



- a. This Honourable Court be pleased to set aside the Lower Court's decision with costs and substitute it with an Order that the Appellant is the legal owner of the disputed Land referenced as L.R. No. Suna West/ Wasweta II/ 2078 measuring 1.19Ha.
3. A brief background to bring the Appeal into perspective is that; the Plaintiff/ Respondent instituted the suit against the Defendant/ Appellant vide a Plaint dated 14.03.2019 seeking the following orders against the Defendant/Appellant; an order compelling the defendant to transfer a portion of the suit land No. 20178 measuring 1.7Acres and in default the Executive Officer of the honourable court to execute the relevant documents of transfer in favor of the plaintiff, Permanent Injunction restraining the defendant from entering into, trespassing into, alienating, cultivating or interfering with the plaintiff's peaceful occupation of the portion of the suit land and costs of the suit.
4. It was the Plaintiff's claim that sometimes in the year 2016; they entered into an agreement with the defendant for the sale of land measuring 1.2 Acres for a consideration price of 120,000/=. The said amount was duly paid in full and the defendant acknowledged receipt thereof. The defendant further engaged him for the clearance of a loan with AFC and in exchange he was given an additional 0.5Acres making the entire suit land 1.7Acres. However, despite concluding the succession process, the defendant has refused and/or neglected to transfer the said purchased portion and instead was threatening to evict him hence the instant suit.
5. The Defendant filed a Memorandum of Appearance and a Statement of Defence dated 02.05.2019 in response to the Plaint, wherein he denied all the allegations made against him. Further, it was his claim that the plaintiff's cause of action had already been heard and determined and hence the suit was res judicata. He therefore urged the court to dismiss the suit against him with costs.
6. The suit was heard and judgment was rendered on the 14.04.2022 whose effect was to allow the Plaintiff's claim as prayed against the Defendant hence the instant Appeal.
7. On 14.03.2023, this court issued directions that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 14 days each. Both parties filed their rival submissions and authorities which I have read and taken into consideration.

Appellant's Submission

8. The Appellant filed his written submissions dated 09/05/2023 and Further submissions dated 07/06/2023. It was Appellant's submission that the Learned magistrate erred in failing to differentiate between parcel No. L.R. No. Suna West/ Wasweta II/ 20178 as sought by the Respondent in prayer No. (a) in the Plant and parcel No. L.R. No. Suna West/ Wasweta II/ 20178 as sought in prayer No. (b) of the Plaint. It was therefore his contention that the prayers/ orders granted to the respondent ought to have been supported by way of amending the Respondent's plaint
9. With regards to section 45(1) of the *Law of Succession Act*, it was his submission that the agreement for sale entered into between the Respondent and Appellant's grandmothers in the year 1993 be disregarded since the two old ladies did not have the capacity to sell the said land, which at the said time was registered in the name of their deceased husband (appellant's grandfather) as per the provisions of section 45(1) and 55(1) of the *Law of Succession Act*.
10. On the ground that the lower court suit was res judicata; counsel submitted that the Respondent filed a previous suit involving the same subject matter vide Migori CMC Succession Cause No. 4 of 2013; which was heard and dismissed. He thus maintained that the trial court suit offended the doctrine of res judicata and urged the court to allow the Appeal as prayed.



Respondent's Submissions

11. The Respondent's counsel submitted on two main issues; whether this court has jurisdiction to hear and determine the appeal as filed, considering the certified copy of the decree appealed against did not form part of the Record of Appeal filed. On this issue, it was his submission that the court lacked jurisdiction to hear and determine the appeal, that from the Index of the Record of Appeal, it is evident that the Decree has not been included in the Record of Appeal according to the provisions of Order 42, Rules 2 & 13(4) of the Civil Procedure Rules.
12. He further relied on the Supreme Court decision in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others* [2015] eKLR and the Court of Appeal decision in *Chege vs Suleiman* [1988] eKLR in support of his assertions.
13. The second issue was whether the learned magistrate made any error in law or facts as alleged in the grounds of appeal. It was counsel's submission that the learned magistrate did not make any error either in law or fact. He relied on the Court of Appeal case of *Mbugua Kiruga vs Mugecha Kiruga & Another* [1988] eKLR in adopting the trial court judgment and dismissing the Appeal with costs.
14. I have looked at the grounds of Appeal and it is my considered opinion that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on 14.04.2022 and I will proceed to discuss the same on account of;
 - i. Whether the Record of Appeal as filed is complete and competent.
 - ii. Whether the Appeal is merited.
15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on board matters which were not subject of the trial court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows: -

“..this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

I. Competency of the Record of Appeal
16. It is the Respondent's claim that the Record of Appeal as filed is incompetent and incomplete for the reason that the record does not include the Decree appealed against contrary to the provisions of Order 42 Rules 2 & 13(4) of the Civil Procedure Rules. He thus urged the court to find that the record of appeal is incurable defective and strike out the same.
17. Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 outlines the necessary document that must be included in an Appeal and the Record of Appeal. It provides as follows: -
 - (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:



- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

18. I have carefully looked at the Record of Appeal filed in court and dated 10.03.2023, in order to ascertain the averments made by the Respondent herein. From a perusal of the same, I do note that the Record indeed contains the Decree of the judgment appealed against even though the same is not certified. The question that therefore follows is whether the failure to include the certified copy of the decree is fatal and invalidates the Record of Appeal.
19. I have further looked at the Decree contained in the Record of Appeal dated 10.03.2023 against the Decree contained in the lower court file and I do note that the 2 copies of Decree are significantly similar. It is therefore my considered opinion that from a plain reading of Order 42 Rule 13(4) indicated above, the Appellant is under a duty to include a copy of the Decree appealed against in the Record of Appeal, the same was done in the instant case. While it is good practice that the said Decree should be certified as a true copy of the original, it is my considered view that failure to include the certified copy thereof is not fatal to the extent of rendering the Record of Appeal incurable defective, especially where the said Decree is significantly similar to the decree contained in the trial court record.

II. Whether the Appeal is merited.

20. The Appellant herein sought the substitution of trial court judgment and a declaration that he is the legal owner of the disputed suit land measuring 1.19Ha. It is his claim that the trial court did not consider the provisions of section 45(1) and 55(1) of the Law of Succession and further that the matter is res judicata contrary to section 7 of the of the *Civil Procedure Act* since the matter was heard and determined in Migori CMC Succession Cause No. 4 of 2013.
21. In determining this issue, I will reevaluate the parties' claim and the evidence adduced in support of the rival claims in the trial court, to establish whether the trial court case was indeed res judicata and contrary to the provisions of sections 45 and 55 of the *Law of Succession Act*.
22. The doctrine of Res Judicata goes to the root of the case; it is the Appellant's claim that the matters in the lower court had previously been litigated over vide Migori CMCC Succession Cause No. 04 of 2013. The elements to be satisfied in a claim of res judicata are now well settled and this court will not



re-invent the law. In determining the claim of res judicata, I will look at the Ruling in the Succession Cause and the issues in the trial court.

23. From a critical analysis of the issues and the orders in the two cases, it is my considered opinion that even though the same was on account of the same agreement and/or transaction, the matters directly and substantially in issue in the Succession Cause are not the same issues in the trial court case. Further, a look at the orders sought in the trial court, the same includes orders which cannot be granted by a family/ succession cause. It cannot therefore be said that the matters directly and substantially in issue on both files were heard and determined on merit by a court of competent jurisdiction. To this end therefore, I find that the matter was not res judicata and the trial court therefore correctly exercised its jurisdiction in determining the same.
24. The Appellant further faulted the trial court judgment on the ground that the same was contrary to the provisions of sections 45 and 55(1) of the Law of Succession Act. It was his contention that the vendors in the agreement entered into in the year 1993 did not have the capacity to enter into the said transactions at the time.
25. I have looked at the respective exhibits produced by the Respondent in the trial court in support of his case and which included several sale agreements in respect to the subject land herein L.R. No. Suna West/ Wasweta II/ 2078 and particularly the agreement dated 28/01/2011 and 09/05/2016 which were produced by the Respondent as Pexh. 2 and 4 respectively. The said agreements were entered into between the Appellant and the Respondent in respect to the subject land herein. From a cursory look at the same, the two agreements meet the threshold set out under section 3 of the Contract Act. Even though the Appellant/ Defendant denied having signed the agreement and that the signatures thereon are forgeries, he did not prove his claim of forgery to the required standard.
26. In view of the foregoing, this court finds that the Appellant was fully aware and took part in the transactions with the Respondent in respect to the suit land and he is therefore estopped from denying the same.
27. In the premises, I find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim. The analysis and judgment were purely made upon examination of the full facts of the case and evidence adduced in support of each party's claim. I find no need to interfere with the said decision.

Conclusion

28. In conclusion, I accordingly find that the Appeal is not merited and the Memorandum of Appeal dated 6th May, 2022 is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

_____ for the Appellant

_____ for the Respondent

Court Assistant- Tom Maurice/ Victor

