



**Njoroge 'A' & another v Njoroge 'B' & another (Environment and Land
Appeal E063 of 2021) [2023] KEELC 18452 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E063 OF 2021**

BM EBOSO, J

JUNE 26, 2023

BETWEEN

SIMON CHEGE NJOROGE 'A' 1ST APPELLANT

DOMINIC KIRAKA 2ND APPELLANT

AND

SIMON CHEGE NJOROGE 'B' 1ST RESPONDENT

REGISTRAR OF LANDS, THIKA 2ND RESPONDENT

*(Being an Appeal against the Judgment of Hon J. M Nang'ea Chief Magistrate,
delivered on 27/07/2021 in Thika Chief Magistrate Court Civil Case No. 368 of 2016)*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon JM Nangea [Chief Magistrate] on 27/7/2021 in Thika CMC Civil Case No 368 of 2016. The dispute in the trial court revolved around entries that were made in the land register relating to land parcel number Kiganjo/Kiamwangi/791. The effect of the impugned entries was to reflect apportionment of shares in the proprietorship section of the suit land assigning the 1st appellant 0.809 of a hectare. Through the entry, the 1st respondent was assigned 0.20 of a hectare.
2. The 1st respondent was the plaintiff in the trial court. He contended that apportionment was fraudulent. The trial court concurred with the 1st respondent and entered judgment in his favour. Before I dispose the issues that fall for determination in the appeal, I will outline a brief background to the appeal.
3. Both the 1st appellant and the 1st respondent go by the name Simon Chege Njoroge. In the original entry in the land register, they were identified as Simon Chege Njoroge 'A' and Simon Chege Njoroge



‘B’ respectively. They were similarly identified as ‘A’ and ‘B’ in the impugned entry. The trial court did not deem it necessary to distinguish them in the impugned Judgment. On the part of this court, I have found it necessary to distinguish them in the manner they were distinguished in the impugned entry. Consequently, the 1st appellant shall be identified as Simon Chege Njoroge ‘A’ and while the 1st respondent shall be identified as Simon Chege Njoroge ‘B’.

4. Land parcel number Kiganjo/ Kiamwangi/791 [the suit property] belonged to Wambaire Njoroge [hereinafter referred to as the ‘the deceased’]. She had two sons:
 - (i) Patrick Njoroge [the deceased father to the 1st respondent, Simon Chege Njoroge ‘B’]; and
 - (ii) Simon Chege Njoroge ‘A’ [the 1st appellant].

In or about 2007, the deceased decided to transfer the suit property to her surviving son [Simon Chege Njoroge ‘A’] and her grandson [Simon Chege Njoroge ‘B’]. She executed an instrument of transfer conveying the suit land to the two. An entry relating to the transfer was made in the land register as Entry No 4. It designated the duo as co-proprietors without apportioning to them any specific shares. Entry Number 5 was subsequently made denoting issuance of a title deed in pursuance of the new registration. Wambaire Njoroge subsequently died in 2014.

5. The 1st respondent contended in the trial court that all was well until 2016 when the two appellants encroached onto the 1st respondent’s portion of the suit property and started building a permanent house on the 1st respondent’s portion. This prompted the 1st respondent to apply for an official search which revealed that subsequent to their registration as co-proprietors of the suit property, another registration had purportedly been made assigning the 1st appellant 0.809 hectares of the suit land and assigning the 1st respondent 0.20 hectares. Aggrieved, the 1st respondent initiated Thika CMC Civil Case No 368 of 2016 seeking a nullification of the subsequent registration that reflected the impugned apportionment. His case was that the subsequent registration was procured fraudulently.
6. The appellants filed a statement of defence dated 26/6/2016 in which they denied the allegations of fraud and contended that the impugned apportionment was effected by the deceased and was reflective of the wishes and desires of the deceased. They urged the trial court to dismiss the 1st respondent’s suit.
7. Upon conclusion of trial and upon receiving submissions from the parties, the Chief Magistrate Court delivered the impugned Judgment in which it rendered itself thus:

“22. From the copies of the transfer documents dated 26/6/2007 tendered by both parties, the transferees of the suit land were to hold the same as “joint proprietors/ as proprietors in common” in undivided shares. This position has been confirmed by DW2. There is therefore no basis or justification for the subsequent registration of the suit land in unequal shares in favour of the plaintiff and the 1st defendant. The registration smacks of fraud as alleged by the plaintiff. Authenticity of the Land Control Board consent which purports to grant the parties different portions of the suit land is doubtful in the circumstances given that the deceased thereafter signed the transfer showing that the parties were to hold undivided shares as joint proprietors.

23. For the reasons given, I find that the plaintiff has proved his entitlement to half of the suit land on a balance of probability.”



Appeal

8. Aggrieved by the Judgment of the trial court, the appellants brought this appeal. They advanced the following six verbatim grounds of appeal:
- 1) That the learned magistrate erred in law by failing to find that the 1st respondent had not proved his case as to the required standard on a balance of probability.
 - 2) That the learned magistrate erred in law and in fact by deciding the case against the weight of the evidence adduced.
 - 3) That the learned magistrate erred by failing to give due consideration to the appellants' submissions.
 - 4) That the learned magistrate erred in law and in fact by failing to find that the registration of Land Reference No. Kiganjo/ Kiamwangi/791 was procedural and regular as per the evidence adduced by the 1st and 2nd appellants.
 - 5) The learned magistrate erred in declaring equal distribution between the 1st appellant and the 1st respondent whereas the Land Control Board consent had indicated their respective and varied allocation of portions to land Reference No. Kiganjo/ Kiamwangi/791.
 - 6) That the learned magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.
9. The appellant urged the court to set aside the Judgment of the trial court in its entirety. They urged the court to award them costs of the appeal. They did not, however, indicate any other order that was to be made by this court.

Submissions

10. The appeal was canvassed through written submissions dated 4/7/2022, filed by M/s J. K Kinyua & Co Advocates. Counsel for the appellants identified the following as the three issues that fell for determination in the appeal: (i) Did the 1st respondent prove his case as to the required standard of proof and on a balance of probability?; (ii) Was registration of land parcel No Kiganjo/ Kiamwangi/791 done procedurally?; and (iii) Did the learned magistrate err in law by applying the wrong principles of law thereby arriving at a wrong decision?
11. Counsel for the appellants submitted that under Section 7 of the *Evidence Act*, the burden of proof rested with the 1st respondent and that the 1st respondent had failed to discharge that burden. Citing the Court of Appeal decision in *Vijay Marjoria v Nansingh Madhusingh Darbar & another* [2002] eKLR, counsel argued that the 1st respondent had failed to prove fraud on the part of the 1st appellant. Counsel faulted the trial court and contended that it failed to pay due regard to the appellants' documentary and oral evidence.
12. Counsel added that the suit property was conveyed to the proprietors as a gift and that the intention of the donor [the deceased] on how the gift was to be apportioned "was clearly inferred from her conduct".
13. Counsel argued that it was the deceased who apportioned the land and ensured that she reserved a life interest in the land. Counsel added that indication of the apportionment on the instrument of transfer



was not necessary because the apportionment could be inferred from “supporting documents”. Counsel contended that the impugned registration was procedurally done.

14. On the double entries in the land register, counsel argued that the Land Registrar had testified that the endorsement “EIE” – meaning “entered in error,” had been noted in the Land Register. Lastly, counsel submitted that it followed from the above submissions that the trial court applied wrong principles of law and arrived at a wrong decision. Counsel urged the court to allow the appeal.
15. The 1st respondent filed brief written submissions dated November 25, 2022 through M/s Mwiha & Mutai Company Advocates. Counsel for the 1st respondent faulted the appellants for inviting this court to set aside the Judgment of the trial court without making any prayer regarding what should happen once the Judgment of the trial court is set aside. Counsel faulted the appellants for seeking declaratory orders through submissions.

Analysis and Determination

16. I have read and considered the entire original record of the trial court; the record in this appeal; the grounds of appeal; and the parties’ rival submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issue that falls for determination in this appeal. The key issue to be determined in this appeal is whether the 1st respondent proved his case in the trial court to the required standard. Before I dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction.
17. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) [2013] eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
18. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
19. The case of the 1st respondent [the plaintiff in the trial court] was that his late father [Patrick Njoroge] and the 1st appellant [Simon Chege Njoroge “A”] were brothers and children of the late Wambaire Njoroge [the deceased]. The deceased executed an instrument of transfer and conveyed the suit property measuring 1.09 hectares to the 1st appellant and himself as joint proprietors without any apportionment. The 1st respondent contended that subsequent to that, the 1st respondent and the Land Registrar colluded to fraudulently change the registration and apportioned 0.809 hectares to the 1st appellant, leaving the 1st respondent with only 0.2 hectares.
20. Was the above case proved on a balance of probabilities? Having examined the evidence that was placed before the trial court, my answer to the above question is in the affirmative. Although the Land Registrar withheld the original land register for reasons that were not disclosed, the handwritten extract of the land register that was presented as evidence by the parties to the suit, including the Land



Registrar, confirmed that on 27/6/2007, entry number 4 was made in the land register, registering the suit property in the joint names of Simon Chege Njoroge 'A' [the 1st appellant] and Simon Chege Njoroge 'B' [the 1st respondent] as joint proprietors. No apportionment of the suit property was made in the said registration. Secondly, the land register shows that on 29/6/2007, entry number 5 was made in the land register reflecting that a title deed had been issued to the two joint proprietors pursuant to the registration of 27/6/2007.

21. The land register further reveals that a sixth entry was made in the land register but instead of the Land Registrar properly capturing the entry as entry number 6, he captured it as entry number 4 and purported to assign the entry the date of 27/6/2007. This cannot be said to be a bonafide entry because prior to that, on 29/7/2007, the entry relating to issuance of a title to the co-proprietors had already been made in the land register. The impugned entry that was backdated was without doubt an irregular entry. The impugned entry is the one that purported to alter the register and apportion the suit property at the ratio of 0.809 hectares to 020 hectares.
22. That was not the only irregular entry. The seventh entry was also irregularly marked as entry number 5. It related to issuance of a title pursuant to the illegal alteration of the land register. The two entries were certainly irregular and illegal.
23. Why do I say the two impugned entries were illegal? Under Section 142 of the repealed [Registered Land Act](#), the Land Registrar had no powers to unilaterally alter the land register. Once the suit property was registered in the joint names of the 1st appellant and the 1st respondent, the Land Registrar had no powers to unilaterally alter the register to apportion the land without the formal concurrence of the 1st respondent or that of his duly appointed guardian, if indeed he was a minor at the time.
24. Both the 1st appellant and the 1st respondent relied on the same instrument of transfer [Transfer of Land Form RL 1] which the deceased had executed. The Land Registrar who gave evidence presented the same Form as the instrument which conveyed the suit property to the two. There is nothing in the executed instrument of transfer [Transfer of Land Form RL 1] reflecting the apportionment that the Land Registrar purported to effect. The deceased simply transferred the suit property to the duo as joint proprietors without any apportionment.
25. From the foregoing, it is clear that the impugned entries and the impugned apportionment were effected fraudulently and illegally for the purpose of divesting a major chunk of the suit property from the 1st respondent and vesting it in the 1st appellant.
26. Given the above evidence which was before the trial court, this court is satisfied that the 1st respondent fully proved his case on the balance of probabilities. The finding of the trial court cannot be faulted. That is my finding on the single issue in this appeal.
27. The result is that this appeal fails. It is dismissed. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Mboha for the 1st Respondent

Court Assistant: Hinga/Osodo

