



REPUBLIC OF KENYA



**Kariuki v Mbugua (Environment and Land Appeal E001 of 2022)  
[2023] KEELC 18080 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**YM ANGIMA, J**

**JUNE 8, 2023**

**BETWEEN**

**SAMWEL NDIRANGU KARIUKI ..... APPELLANT**

**AND**

**KAMAU MBUGUA ..... RESPONDENT**

*(An appeal against the judgment and decree of Hon. S.N. Mwangi  
(SRM) dated 02.02.2022 in Nyahururu CM ELC No. 87 of 2020)*

**JUDGMENT**

**a. Introduction**

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 02.02.2022 in Nyahururu CM ELC No. 67 of 2020 – Samwel Ndirangu Kariuki –vs- Kamau Mbugua & Another. By the said judgment, the trial court dismissed the Appellant’s suit with costs to the Respondent.

**b. Background**

2. By a plaint dated 02.12.2020 the Appellant sought the following reliefs against the Respondent and one, Benson Maina seeking the following reliefs:
  - a. A permanent injunction do issue restraining the defendants by themselves, their agents, servants and/or employees from entering, remaining ploughing, interring bodies, constructing houses, fencing and in any other way interfering with the plaintiff’s occupation on a portion of 1 acre to be excised from L.R. No. Laikipia/Wiyumiririe Scheme/2442.
  - b. Cost of the suit plus interest.
  - c. Any other or further relief that this Honourable Court may deem just and fit to grant.



3. The Appellant pleaded that he was the beneficial owner of one (1) acre out of Title No. Laikipia/Wiyumiririe Scheme/2442 (Parcel 2442) on account of having purchased it from the registered owner, the late Edward Kinyanjui Chau (the deceased) for valuable consideration vide a sale agreement dated 03.08.2020.
4. It was further pleaded that the Appellant was in possession of the said portion of land pending transfer but the Respondent was wrongfully interfering with his quiet possession thereof without any lawful justification. It was contended that despite service of a demand and notice of intention to sue the Respondent had failed to desist from his conduct hence the suit.

#### **c. Respondent's Defence**

5. The record shows that the Respondent entered appearance and filed a defence dated 22.12.2020 denying the Appellant's claim in its entirety. It was denied that the Appellant had purchased the said portion of land from the deceased and that he was in possession thereof. It was also denied that the Respondent had interfered with the Appellant's possession. The Respondent pleaded that the deceased was his cousin who died intestate on 09.11.2020 and was buried on parcel 2442. He pleaded that other than attending the deceased's funeral he had never set foot on Parcel 2442 and that the suit against him was misplaced since he was not the administrator of the estate of the deceased. He consequently prayed for dismissal of the suit. His co-defendant in the suit neither entered appearance nor filed a defence to the action.

#### **d. Trial Court's Decision**

6. The record shows that upon a full hearing of the suit, the trial court was not satisfied that the Appellant had proved his case to the required standard and proceeded to dismiss it with costs to the Respondent. The trial court held, inter alia, that the Appellant had failed to conduct due diligence on the ownership of Parcel 2442 prior to its purchase; that the Appellant was not a bona fide purchaser for value without notice since he had not proved full payment of the purchase price; and that he did not produce a mutation for the sub-division of Parcel 2442. The trial court concluded the judgment by holding that the Appellant had failed to satisfy the requirements for the grant of an interlocutory injunction as set out in the case of *Giella –vs- Cassman Brown & Co. Ltd.* [1973] EA 358.

#### **e. Grounds of Appeal**

7. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 15.02.2022 raising the following six (6) grounds of appeal:
  - a. That the learned magistrate erred in law and in fact in framing the wrong issues for determination in the suit and thus arriving at an erroneous decision.
  - b. That the learned trial magistrate erred in law and in fact in finding that the Appellant did not pay the entire purchase price for sale and purchase of 1 acre of land to be excised from L.R. No. Laikipia/Wiyumiririe Scheme/2442 to the seller contrary to the overwhelming evidence on record supported by a sale agreement dated 03.08.2020.
  - c. That the learned trial magistrate erred in law and in fact in finding that the deceased Edward Kinyanjui Chau did not pass a good title to the Appellant.
  - d. That the learned trial magistrate erred in law and in fact in finding that the Appellant was not a bona fide purchaser for value whereas there was no claim by the estate of Edward Kinyanjui Chau challenging the sale of the 1 acre of land through the agreement dated 03.08.2020.



- e. That the learned trial magistrate erred in law and in fact in completely ignoring the pleadings, evidence and written submissions by the Appellant and in completely missing the gist of the Appellant's case.
  - f. That the learned trial magistrate erred in law and in fact in failing to make a finding on the real issues for determination in the suit including whether the Appellant being a person in possession was entitled to protection from interference by the Respondent.
8. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the appeal be allowed.
  - b. That the decree of the trial court dismissing his suit be set aside.
  - c. That judgment be entered in her favour as prayed in the plaint with costs.
  - d. That the Appellant be awarded costs of the appeal.

#### **f. Directions on Submissions**

9. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed his submissions on 23.01.2023 whereas the Respondent filed his on 08.03.2023. The Appellant thereafter filed supplementary submissions in reply to the Respondent's submissions on 10.03.2023.

#### **g. Issues for Determination**

10. Although the Appellant raised 6 grounds of appeal in his memorandum of appeal, the court is of the opinion that resolution of the following three (3) issues shall effectively determine the appeal:
- a. Whether the trial court erred in law by framing the wrong issues for determination.
  - b. Whether the trial court erred in law and fact in dismissing the Appellant's suit.
  - c. Who shall bear costs of the appeal.

#### **h. Applicable Legal Principles**

11. 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.”



12. 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...”

13. 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 classes 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.”

## **i. Analysis and Determination**

### **(a) Whether the trial court erred in law by framing the wrong issues for determination**

14. The court has considered the material and submissions on record on this issue. It was submitted by the Appellant that the trial court proceeded to consider issues which were not raised by the parties in their respective pleadings and those which did not naturally arise therefrom. It was pointed out that the validity of the sale agreement between the Appellant and the deceased was not an issue for determination. It was submitted that the question of non-payment of the purchase price was not raised in the pleadings and that the registration of the deceased as proprietor of Parcel 2442 was not an issue for determination.
15. It is trite law that issues for determination can only arise from the pleadings filed by the parties or documents tendered by the parties. Under Order 15 rule 2 of the Civil Procedure Rules, the court may frame issues from the following:



- a. The allegations contained in the pleadings or in answers to interrogatories.
  - b. The allegations made on oath by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
16. It is evident from the material on record that the validity of the sale agreement between the Appellant and the deceased was not challenged by the Respondent in his defence. The Respondent only denied knowledge of the sale. The existence or otherwise of a mutation for sub-division of Parcel 2442 was also not pleaded by any of the parties. There was no allegation of fraud, illegality or misrepresentation in the Appellant's acquisition of the land from the deceased. In fact, no particulars of fraud, illegality or misrepresentation or irregularity were pleaded by the Respondent.
17. There was no counter-claim or adverse claim by the estate of the deceased over the portion of 1 acre which was said to be in the Appellant's possession. In the absence of such a claim, the question of whether or not the Appellant was a bona fide purchaser for value without notice of an adverse claim by another person cannot arise. Equally, the issue of alleged non-payment of the balance of the purchase price was not a legitimate issue for determination by the trial court. It was not pleaded by the Respondent or by anyone who would have the capacity to represent the estate of the deceased. On the contrary, the sale agreement dated 03.08.2020 indicated that the deceased acknowledged receipt of the purchase price without any reservation.
18. There was no dispute at the trial that the deceased was the registered proprietor of Parcel 2442. Both the Appellant and the Respondent were agreed on this issue according to the pleadings on record. In the circumstances, the question of whether or not the Appellant conducted an official search to confirm the registration details prior to the purchase cannot be a legitimate issue for determination in the absence of an adverse claim by a third party over the same parcel of land. The court, therefore, agrees with the Appellant's submission that the trial court erred in law by considering several issues which were not legitimate issues for determination before her.

**(b) Whether the trial court erred in law and fact in dismissing the Appellant's suit**

19. The court has considered the submissions on record on this issue. The court has also fully considered the pleadings and evidence before the trial court on this issue. In his plaint dated 02.12.2020 the Appellant made merely general allegations of alleged interference with his possession of 1 acre of Parcel 2442 which he had purchased from the deceased. No particulars of the alleged interference were given in the plaint. However, by his reply to defence dated 12.01.2021 the Appellant pleaded that the Respondent had caused him to be summoned to an advocates office at Wiyumiririe town on 16.11.2020 and harassed him over his purchase of the disputed land. He further pleaded that in December, 2020 he was summoned to the office of the area District Officer for a meeting over the purchase of the land.
20. The Appellant submitted that although he was not yet registered as proprietor of the portion of one acre which he bought from the deceased, he had a better claim over it as the person in possession against



the Respondent who was merely a stranger. The Appellant cited the following passage from the case of Samuel Mwangi –vs- Jeremiah M’Itobu in support of the appeal:

“The learned judge of the High Court erred in his conclusion that only an ‘owner’ of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book ‘Tort’ (12<sup>th</sup> Edition @ page 361):

“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the ‘just tertii’) unless he can prove that he acted with that person’s authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”

21. The court agrees fully with the statement of the law by the Court of Appeal on the rights of the person in possession as against a stranger who interferes with such possession. So, what was the evidence of the Respondent’s interference with the Appellant’s possession of the one acre of land which he bought from the deceased? According to the Appellant’s reply to defence, the Respondent had caused him to be summoned to his (Respondent’s) advocates office in Wiyumiririe town on 16.11.2020 and he had also caused him to be summoned to the office of the area District Officer in December, 2020 over the said portion of land.
22. The record of proceedings shows the during the Appellant’s cross-examination by the Respondent he stated that:

“Since you buried Kinyanjui, I have never seen you on that land, so you cannot tell what was going on that land...”
23. The Respondent’s witness statement and his evidence at the trial indicated that he was a teacher who was resident in Muhoroni at the material time. The Appellant confirmed at the trial that the Respondent had not gone back to the disputed one acre of land since the burial of the deceased in November, 2020. The only action the Respondent may have taken was to report the Appellant’s purchase and occupation of the 1 acre of land to his own advocate at Wiyumeririe town and to the area District Officer in consequence where of the Appellant was allegedly summoned to attend those two offices. The court is not satisfied from the material on record that the Respondent took any concrete steps to dispossess the Appellant or to interfere with his possession in any manner. Making a report to one’s advocate or to a District Officer cannot, without more, constitute interference with another person’s possession of property.
24. There was no evidence on record to demonstrate that the District Officer ever issued an eviction notice to the Appellant as a result of the Appellant’s report. The mere act of an administration officer issuing a summons for one to attend an office for resolution of a reported dispute cannot constitute interference with one’s possession of a portion of land. There was no allegation or demonstration that the said summons was unlawful or irregular in the circumstances.
25. There was also no evidence on record to demonstrate that the Respondent had either issued the Appellant with an eviction notice or threatened to dispossess him at any given time. It would thus appear that the Respondent was simply sued because he appeared to be the spokesman of the extended family of the deceased and he had refused to accept or acknowledge the sale of the disputed property to the Appellant. As a matter of law, the Respondent was not under any legal obligation to recognize or



acknowledge the sale. The material on record shows that he was not the personal representative of the deceased hence his opinion on the validity or otherwise of the sale was really immaterial. He could not, therefore, be sued simply for refusing to recognize the sale transaction between the Appellant and the deceased. He could only be sued if he took steps or threatened to take steps to dispossess the Appellant.

26. The court is thus of the opinion that although the trial court erred in law in framing the wrong issues for determination, a fresh analysis and re-evaluation of the evidence on record still reveals that the Appellant's case falls short of the required standard of proof. There was simply no sufficient evidence on record to demonstrate that the Respondent had wrongfully interfered with the Appellant's possession of the portion of one acre out of Parcel 2442. There is no doubt from the material on record that the Appellant was a purchaser for value of the said portion of land and that he took possession thereof during the lifetime of the deceased. However, in the absence of evidence of unlawful interference with possession on the part of the Respondent, the Appellant's appeal cannot succeed. In the result, the court finds that the ultimate holding of the trial court in dismissing the Appellant's claim should be upheld.

**(c) Who shall bear costs of the appeal**

27. 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 litigant should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

**J. Conclusion and Disposal Orders**

28. The upshot of the foregoing is that although the trial court erred in law by framing the wrong questions for determination, the appeal shall nevertheless fail on the merits since there was no evidence before the trial court to prove the Respondent's interference with the Appellant's possession. Consequently, the appeal is hereby dismissed with costs to the Respondent.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 8<sup>TH</sup> DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

N/A for the Respondent

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

