



**Barasa & another v Wetungu (Environment and Land Appeal
16 of 2022) [2023] KEELC 19268 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 16 OF 2022**

EC CHERONO, J

JULY 28, 2023

BETWEEN

EUNICE NUNGA BARASA 1ST APPELLANT

KEVIN NAMASAKA 2ND APPELLANT

AND

ROBERT EKAM WETUNGU RESPONDENT

*(Being an appeal arising from the decree & judgment delivered on 9th March,
2022 by Hon. S.O. MOGUTE (PM) Bungoma in CMC ELC Case no. 280 of 2018)*

JUDGMENT

Introduction

1. The respondent had filed a suit before the High Court Bungoma which matter was subsequently referred to the Chief Magistrate's Court for determination on grounds of pecuniary jurisdiction. The suit was commenced by way of a Notice of Motion under Certificate of Urgency and a plaint both dated June 30, 2015.

In his plaint the respondent/plaintiff sought the following orders:-

- a. A declaration that the creation of title number EBukusu/NKanduyi/2197 and subsequent sale and transfer to the 1st and 2nd defendant as far as the Plaintiff's portion is concerned is fraudulent, unlawful and illegal.
- b. A permanent injunction restraining the defendants, their servants or agents or any other person claiming under them from continuing constructing, selling, alienating, disposing, charging or leasing out or occupying that portion of the Plaintiffs land now known as EBukusu/NKanduyi/7855.



- b. Costs of the suit be provided for.
 - c. Any other relief as the Court may deem just to grant.
2. The appellants' filed a joint defence dated July 15, 2013 denying the plaintiff's claim in the plaint. The parties filed their compliance documents under Order 3, 7 & 11 of the *Civil Procedure Rules* and the case proceeded for hearing on various dates. On March 9, 2022, the trial court delivered its judgment whereby judgment was entered in favour of the plaintiff/respondent with costs.

Aggrieved by the said decision, defendants'/appellants preferred an appeal to this honourable court. The Memorandum of Appeal raises eight grounds as follows:-

- a. The learned trial Magistrate erred in law and in fact when he failed to find that the suit by the respondent was bad in Law ad statute barred having based his case on oral land purchase agreements of June 14, 1991 and February 6, 1993.
- b. The learned trial Magistrate erred in law and in fact when he failed to find that there was no privity of contract of nexus between the Respondent and the appellants as the people who sold land to the respondent had allegedly died and never even got registered on the suit parcel ever since.
- c. The learned trial Magistrate erred in law and in fact when he held that failure by the 1st appellant to give oral evidence meant the suit was not opposed yet evidence was properly adduced.
- d. The learned trial Magistrate erred in law and in fact when he allowed a claim that was not proved, supported by any cogent evidence and was out rightly malafides an unmaintainable.
- e. The learned trial Magistrate erred in law and in fact when he failed to find that th Respondent or the alleged sellers other that the fact they have never been registered on the suit land since 1991 or at all and that they had no title or interest in the suit parcels of land that were challenged.
- f. The learned trial Magistrate simply overlooked the defence case unjustifiably.
- g. The learned trial Magistrate erred in law and in fact when he ignored the most crucial evidence on guiding principles of Land Control Board consent and the protectable rights of a purchaser.
- h. The entire judgment is contradictory and against the overall tenets and veracity of evidence adduced.

1st & 2nd Appellant's Written Submissions

3. From the eight grounds of appeal raised the appellants argue that that the respondents claim was null and void ab initio and that the respondent purchased the property without carrying out an official search as per his testimony in court. Further the appellants submitted that the claim violated provisions of the statue on *Limitation of Actions Act*, section 4 (1). Which states that actions founded on contracts ought to be brought to court within six years from the date of the cause of action.

The appellant further submitted that the respondent did not carry out due diligence prior to purchasing of the suit property. Lastly, no contractual relationship exists between the appellants and the respondent and vice versa.

The appellants relied on the case of *Willy Kimutai Kitlit & Micheal Kibet* Eldoret HCCA 5 of 2015 (2018) eKLR



Respondent's Submissions

4. The respondent through the firm of Ocharo Kibereia & Company Advocates placed reliance on section 26 (1) (a) and (b) of the [Land Registration Act](#) and reiterated that the title over the suit property was obtained illegally and unprocedurally without his involvement despite his interest. The respondent further submitted that his claim was not time barred and relied on Section 26 of the [Limitation of Actions Act](#) which in essence states that an action for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could have with due diligence discovered it.

The respondent on the issue of privity of contract between the parties submitted that neither of the three parties involved knew each other and that they all allege to have purchased their respective parcels from different individuals. The respondent further submitted that the 1st appellant employed fraudulent tactics in acquiring EBukusu/NKanduyi/2197 which the respondent had equal interest while his brother one Francis Kunania Wetungu held the other half; and further in subdivision to EBukusu/NKanduyi/7855 and EBukusu/NKanduyi/7856.

He relied on the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguns & another](#) (2013)eKLR

Analysis And Determination

5. I have considered the record of Appeal and the submissions by both counsel for the appellant and the respondents. My mandate as the first appellate Court is analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that. This duty was well stated in [Selle & another v Associated Motor Boat Co. Ltd. & others](#) (1968) EA 123.

It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in [Mbogua Kiruga v Mugecha Kiruga & another](#) [1988] eKLR where the Court of Appeal held:-

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

I now determine this appeal based on the eight grounds enumerated in the Memorandum of Appeal as follows:-

Ground 1 and 2

6. The appellant has stated that the trial magistrate failed to find that the respondent's suit was time barred and relied on Section 4 (1) of the [Limitation of Actions Act](#), which states that actions founded on contracts ought to be brought within six years from the date of the cause of action. Surprisingly while invoking the above section the appellants in their 2nd ground of opposition the appellants argue that there was no contractual relationship between the parties herein. Suffice to say these two grounds are at a cross purpose.



From the plaint it is clear that the respondents claim is based on alleged fraudulent dealings over the suit property wherein the respondent claims interest and not enforcement of a contract. The respondents in his evidence states that the parcel he claims was vacant since he purchased it and was alarmed in the year 2015 when the 2nd appellant deposited construction materials on the property and started constructions.

7. In essence therefore the applicable provision of the *Limitation of Actions Act* is section 7 stipulates thus: ‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

I therefore agree with the observations of the trial magistrate that the respondent’s claim was not based on a contractual relationship but on a claim for recovery of land and that time started running from the year 2015 and not 1991 /1993.

Having stated the above it therefore follows that the issue of privity of contract does not arise.

This ground therefore fails.

Ground No. 3,4,5,6 and 8

8. The third, fourth, fifth, sixth and eighth grounds of the appeal is that the trial magistrate failed to consider the evidence tendered by the appellants and arrived at an erroneous decision.

I will start off by looking at the burden of proof in civil cases.

The legal basis for the legal burden of proof is provided in section 107 of the *Evidence Act*, cap. 80 of the Laws of Kenya. The said section states 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.”

I also refer to The *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial



varies, so will the evidential burden shift to the party who would fail without further evidence?”

9. From the evidence tendered, it is clear that the respondent and 2nd Appellant lay claim over the same piece of land i.e EBukusu/NKanduyi/7855 which was subdivided from EBukusu/NKanduyi/336 which gave forth 5 pieces i.e. EBukusu/NKanduyi/2193 to EBukusu/NKanduyi/2197. EBukusu/NKanduyi/2197 was further subdivided into EBukusu/NKanduyi/7855 and EBukusu/NKanduyi/7856 by the 1st appellant.

It is not in dispute that neither the 2nd appellant nor the respondent are registered as legal owners of EBukusu/NKanduyi/7855. What both parties have to show are agreements for sale over the property from various sellers.

10. The respondent testified that he purchased two portions of land from one Mr. Tom Manana Tabani to be curved out of EBukusu/NKanduyi/336. The said Tom Manana had bought the said parcel from one Mr. Bonventure Nyongesa who had bought it from Mr. William Wayongo Nyanga who was the original proprietor(now deceased). The respondent called three witnesses in support of his case i.e. himself, Tom Manana Tabani and the Land Registrar one Allan Baabu. The witnesses explained the chain of purchase of the suit property and produced the respective agreements for sale. The land registrar who is the statutory custodian of all land records and in his evidence he stated that he could not trace the transfer forms in respect to the property.....

The appellant as noted from the evidence stated that he purchased two portions from Simon Makoha Sabune and Francis Kunani Wetungu in the year 2007 and 2012 respectively. He further states that he was directed by the sellers to follow up on his title from the 1st appellant who surprisingly is the registered proprietor of the entire parcel known as EBukusu/NKanduyi/2197 since the year 2012 as per the certificate of title produced as D exhibit 1. No explanation was tendered as to how the 1st appellant obtained title over EBukusu/NKanduyi/2197 and how she was tasked with the duty to transfer ownership of the 2 portions to the 2nd appellant and under what circumstances.

11. Further it is not clear under what circumstances the 2nd appellant purchased the last portion to be curved out of EBukusu/NKanduyi/2197 from Francis Wetungu Kunania on September 26, 2012 while the 1st appellant had already been issued with title of the entire EBukusu/NKanduyi/2197 on August 22, 2012. Notably the 1st appellant was not a party to that agreement despite being the registered owner. Again it is unclear why the 2nd appellant did not produce his certificate of title, stamp duty receipt and transfer forms despite testifying that he had already been issued with a title in his name by the 1st appellant in relation to EBukusu/NKanduyi/7855. It should however be noted from the record it is indicated that he (the 2nd appellant) later stated that he had not been issued with the same.

From the above, the 2nd appellant’s evidence is full of loopholes and contradictions. The 1st appellant and four other witness who recorded statements did not appear in court to testify in support of the appellant’s case. I agree with the trial court in its finding that the respondent had discharged its evidential burden of proof on a balance of probabilities and that the same shifted to the appellants who failed to discharge the burden of proof on a balance of probabilities.

12. I further find that the trial magistrate correctly noted that pleadings are not evidence and the failiure by the 1st appellant to testify and support the averments in the statement of defence was fatal on the appellants’ case. The above principle was appreciated in *Francis Otile vs. Uganda Motors* Kampala HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleadings since pleadings



are not evidence and nor can they be a substitute therefor. In *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

I therefore find the trial magistrate properly directed his mind to the evidence and the applicable law in arriving in that decision.

These grounds also fails.

Ground No. 7

13. The appellant challenges the impugned judgment on grounds that the learned trial magistrate erred in law and fact by failing to consider the guiding principles of Land Control Board consent and the protectable rights of a purchaser.

From the evidence tendered by the respondent (I refer to page 141 of the record of appeal) is that he was alarmed when he saw the 2nd appellant depositing construction material on his land in the year 2015. Up until then he believed the title to the property was registered in the name of William Wanyonyi and that sub-division had not yet been done thus he had not attended the Land Control Board. He stated that it is only in 2015 that he found out about the sub-division had been done and that title had been issued.

Further the appellants did not also produce any Land control Board consent forms or receipts were to support their case.

I therefore find the observation by the trial Court on this issue sound and correct.

The seventh ground equally fails

Decision

14. From my re-evaluation of the evidence in totality, I find that the trial magistrate properly evaluated and analyzed the evidence and the materials placed before him and arrived at a considered decision. As such, I find this appeal lacking merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

READ. DELIVERED PHYSICALLY AND SIGNED AT BUNGOMA THIS 28TH DAY OF JULY, 2023.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Nyarotso H/B for Mr. Sichangi for Appellant



2. Respondent-present
3. M/S Joy C/A-present

