Njuri v Rwara (Suing as the administrator of the Estate of Rwara Kimaru alias Benson Rwaba Kimaru) (Environment and Land Appeal 5 of 2020) [2023] KEELC 18826 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18826 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 5 OF 2020

YM ANGIMA, J

JULY 13, 2023

BETWEEN

CHARLES KARIUKI NJURI .... APPELLANT

AND

FRANCIS KIMARU RWARA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF RWARA KIMARU ALIAS BENSON RWABA KIMARU) .... RESPONDENT

(An appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 09.02.2020 in Nyahururu CM ELC No. 262 of 2018)

JUDGMENT

A. Introduction

1. This is a judgment against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 19.02.2020 in Nyahururu CM ELC No 262 of 2018 – Francis Kimaru Rwara (suing as the administrator of the estate of Rwara Kimaru also known as Benson Rwara Kimaru) v Charles Kariuki Njuri. By the said judgment the trial court allowed the Respondent's suit for recovery of Title No Mutara/Mutara/Block II/(Uruku)/460 (the suit property) and cancelled the Appellant's title thereto. The Respondent was also awarded costs of the suit. The Respondent was the Plaintiff in that suit whereas the Appellant was the Defendant.

B. Background

2. The material on record shows that vide a plaint dated and filed on 11.09.2015 the Respondent sought the following reliefs against the Appellant:

a. The Defendant be ordered to relinquish the parcel of land Mutara/Mutara/Block 11/Uruku/460 to revert to the name of the deceased Benson Rwara Kimaru for distribution among his beneficiaries.

b. The honourable court do declare the transaction and the process of registration of the Defendant as the owner of this land null and void ab initio.

c. The Defendant to pay costs of this suit.

d. Any other or further relief this honourable court may deem fit to grant.

3. The Respondent pleaded that at all material times his late father, Benson Rwara Kimaru (the deceased) was a shareholder of Othaya Mahiga Exffaco Company Ltd (the deceased) and by virtue of his membership he was allocated the suit property. It was further pleaded that the Appellant had wrongfully entered and occupied the suit property and caused the same to be fraudulently transferred into his name. He listed 3 particulars of fraud against the Appellant.

4. It was the Respondent's case that one of the deceased's sons had lodged a claim for the recovery of the suit property before the defunct Land Disputes Tribunal (the Tribunal) which heard and determined the claim in favour of the deceased but the Tribunal's award was subsequently challenged in judicial review proceedings in Nakuru High Court JR No 61 of 2011 (the judicial review case).

5. The record shows that the Appellant filed a defence dated 19.11.2015 denying the Respondent's claim in its entirety. He denied that the deceased was ever allocated the suit property and put him to strict proof thereof. The Appellant further denied the fraud and particulars of fraud alleged against him and put the Respondent to strict proof thereof.

6. The Appellant conceded that the dispute had previously been heard and determined by the Tribunal but pleaded that the resultant award was challenged in the judicial review case which was still pending determination.

7. Finally, the Appellant pleaded that he was the absolute owner of the suit property by virtue of his registration as proprietor on 22.05.1998 and by virtue of his possession since 1994 hence he contended that the Respondent's suit was statute-barred under the *Limitation of Actions Act* (Cap. 22). Consequently, he prayed for dismissal of the Respondent's suit with costs.

C. Trial Court's Decision

8. The record shows that upon hearing both parties and their witnesses, the trial court held that the Respondent had proved his claim to the required standard and consequently entered judgment in his favour as prayed in the plaint together with costs and interest. The trial court was of the view that the evidence on record demonstrated that the deceased was allocated the suit property by the company way back in 1975 hence the same was not available to the Appellant in 1994 when the Appellant became a member of the company. The trial court pointed out various irregularities in the Appellant's documentation in support of the title and concluded that the root of his title had not been satisfactorily explained.

D. Grounds of Appeal

9. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 11.03.2020 raising the following eight (8) grounds of appeal:

a. The learned trial magistrate erred in law and fact in holding that the Appellant's tittle to the suit land was obtained through fraud without any iota of evidence to support the same.

b. The learned trial magistrate erred in law and fact in shifting the burden of proof to the Appellant without any legal basis whatsoever.

c. The learned trial magistrate erred in law and fact in holding that there was no evidence to support the Appellant's registration as proprietor of the suit land and thereby proceeded on a misapprehension of the law to order cancellation of his title.

d. The learned trial magistrate erred in law and fact in holding that failure by the Respondent to specifically plead and prove grounds of alleged fraud was a procedural violation of rules of pleadings contrary to well settled law and thereby proceeded to cancel the Appellant's title without any proper pleadings and evidence to support the same.

e. The learned trial magistrate erred in law and fact in failing to find that the Respondent's deceased father had been allocated Plot No 533 during his lifetime and his Estate could not claim plot No 460 after his death.

f. The learned trial magistrate erred in law and fact by ignoring evidence of (Land Registrar, Laikipia) Who was the custodian of al title record$ pertaining to Othaya Mahiga Chinga ex-facco Company Ltd and proceeded to give undue weight to the evidence of PW2 who only became Secretary of the company in 1998 long the process of title documentation had been completed.

g. The learned trial magistrate erred in law and fact in failing to find that the Respondent's suit was statute barred by dint of the *Limitation of Actions Act*, Cap 22 laws of Kenya and proceeded to cancel the Appellant's title without jurisdiction.

h. The learned trial magistrate erred in law and fact in giving a judgement that was against the weight of evidence.

10. As a result, the Appellant sought the following reliefs in the appeal:

    a. That the appeal be allowed with costs.

    b. That the judgment of the subordinate court be set aside.

    c. That any other or better relief deemed fit by the honourable court be granted.

E. Directions on Submissions

11. When the appeal was listed for directions, it was directed, with the concurrence of the parties, 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 30.06.2023 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

12. Although the Appellant raised 8 issues for determination in his memorandum of appeal, the court is of the opinion that resolution of the following key issues shall effectively determine the appeal:

    a. Whether the trial court erred in law in failing to find and hold that the Respondent's suit was time-barred.

b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim against the Appellant to the required standard.

c. Who shall bear costs of the appeal.

G. Applicable legal principles

13. 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."

14. 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..."

15. 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 court, 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."

16. In the case of *Kapsiran Clan v 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 in failing to find and hold that the Respondent's claim was time-barred

17. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for failing to find that the Respondent's claim for recovery of the suit property was time-barred under the *Limitation of Actions Act*, (Cap.22) (*LAA*). It was contended that under Section 7 of *LAA* a claim for recovery of land can only be entertained if filed within 12 years from the date of accrual of the cause of action. It was contended that the Appellant having been possession of the suit property since 1994 and having obtained a title deed in 1998 then the Respondent's suit was time-barred.

18. The Respondent, on the other hand, submitted that his claim was not time barred because under Section 26 of *LAA* time does not begin to run in a claim based upon the fraud of the Defendant until the Plaintiff has discovered the fraud. It was submitted that the Respondent only discovered the Appellant's fraud in 2009 when a claim for recovery of the suit property was filed before the Tribunal. The court was consequently urged to hold that the Respondent's claim was not statute-barred.

19. The court has noted from the record of the trial court that it did not consider and address this issue in its judgment. This court, therefore, does not have the benefit of the reasoning of the trial court on the issue. However, the material on record shows that the Respondent's evidence at the trial was that as he was following up on the deceased's share of land with the company he conducted a search on 03.02.2009 and discovered that the Appellant had already been registered as proprietor hence the reason why his brother filed a claim before the Tribunal for recovery of the suit property. Although the Respondent's brother obtained a favourable award before the Tribunal, the same was subsequently nullified and quashed in the judicial review case because the Tribunal lacked jurisdiction to entertain the claim.

20. The Respondent's evidence that he discovered the Appellant's acquisition of the suit property in 2009 was not seriously challenged at the trial by the Appellant. The court is inclined to accept that the Respondent discovered the alleged fraudulent registration of the Appellant as proprietor of the suit property on 03.02.2009. If the limitation period of 12 years were to be reckoned from that date then the period would expire on or about 02.02.2021. The material on record shows that the suit was filed in 2015, about 6 years after the Respondent's discovery of the alleged fraud.

21. It has been held that the limitation period in claims based upon fraud does not begin until the Plaintiff has discovered the said fraud. In the case of *Kenya Ports Authority v Timberlake (K) Limited* [2017] eKLR it was held, inter alia, that:

> "It is the finding that the appellant's conduct was fraudulent that provided the basis for the learned Judges' holding that the respondent's delay was cured under section 26(b) of the *Limitation of Actions Act* which we have earlier set out. That provision expressly states that a prescribed period of limitation for a cause of action does not begin to run where the right of action is concealed by the fraud of the defendant or his agent until the plaintiff has discovered the fraud. Our reading of the same does not at all suggest that the limitation period has to be one prescribed by the *Limitation of Actions Act* alone and so the exception or extension triggered by fraud would apply to any time statutory limitation wherever prescribed."

22. The court is thus satisfied on the basis of the material on record that the Respondent's claim was not time-barred under Section 7 of *LAA* as contended by the Appellant. There was no evidence on record to demonstrate that the Respondent discovered the Appellant's acquisition of the suit property in 1998 when he was registered as proprietor thereof. This ground of appeal on account of limitation of actions consequently fails.

b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim to the required standard

23. The Appellant faulted the trial court for holding that the Respondent had proved his claim on several grounds. First, it was contended that there was no evidence of fraud on the part of the Appellant in his acquisition of the suit property. Second, it was contended that the Respondent had not specifically pleaded and particularized the alleged fraud in violation of the rules of pleadings. Third, that the evidence on record showed that the deceased was allocated Plot No 533 by the company whereas the Appellant was the one allocated Plot No 460 (the suit property). Fourth, that the trial court gave undue weight to the evidence of the secretary of the company and ignored the evidence of the Land Registrar – Laikipia who was the custodian of the relevant title registration documents of the company.

24. The court has considered the pleadings and evidence before the trial court. The Respondent's plaint indicates that he pleaded fraud against the Appellant and enumerated 3 particulars of fraud in paragraph 5 of the plaint. It is, therefore, not true that he did not plead with particularity his allegations of fraud. The key question for determination is this appeal is whether the alleged fraud was actually proved at the trial by credible evidence.

25. When tracing the root of a title in a dispute of the nature which was before the trial court, there is no general principle of law that the land registrar's evidence is to be believed and that the evidence of the secretary of the company is to be ignored. It must be borne in mind that the documents which would facilitate the issuance of title deeds to members of a land buying company would ordinarily originate from the company. It is the company which would be expected to know the identity of their members, when they joined the company, how many shares they hold, et cetera. It is usually the company which would issue share certificates, maintain a register of members and issue clearance certificates.

26. The material on record shows that the trial court was presented with contradictory evidence by the parties, with each asserting ownership of the suit property. The trial court had the advantage of seeing and hearing the witnesses. It had the advantage of assessing their credibility and it believed the Respondent and his witness. The trial court was justified in holding that once the deceased who become

a member of the company in 1975 was allocated the suit property in 1985 then the same was not available for allocation to a member who joined the company in 1994. The trial court was satisfied that the plot initially known as Plot No 533 was the same one which became Plot No 460 after the second balloting. This court finds no reason to interfere with that finding of fact.

27. The record further shows that the trial court found various inconsistencies and improbabilities in the Appellant's documents supporting the root of his title. For instance, the court found that the Appellant's share certificate was issued 5 months after he had already obtained a title deed. The court also found that whereas the Respondent's share certificate was sealed and signed by directors of the company, the Appellant's certificate only had a seal. The trial court, therefore, concluded as follows:

> " There is no evidence adduced by the Defendant that he bought the suit land from any other person or even the ballot card which caused him to be registered herein as the owner of the suit land and that his share certificate and clearance were issued through another person that caused the same to be registered in his own names. This court therefore finds that the Defendant has not satisfactorily explained the root of his title. Although the title deed was issued to him and DW2 confirmed that the title deed was issued from their office, the process through which the Defendant acquired the title was however unlawful as noted above. This court thus finds that there was fraud that was proved on the part of the Defendant and hold that he is not the lawful proprietor of the suit land."

28. The court is of the opinion that the trial right was right in reaching the decision it did on the basis of the evidence placed before it. This court's own reevaluation of the evidence on record leads to the inevitable conclusion that the suit property was allocated by the company to the deceased following two sets of balloting. The trial court was right in believing the evidence of PW2 who was the secretary of the company in tracing the root of the Appellant's title. As it was held in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR a title deed is an end product of an elaborate process in acquisition of an interest in land. In the said case, it was held, inter alia, that:

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, and free from any encumbrances including any and all interests which need not be noted in the register."

29. The court is satisfied that since the suit property was allocated to the deceased by the company there is no other manner in which the Appellant could have obtained a title deed in his name save through fraudulent means as pleaded and particularized by the Respondent in his plaint. It is not normal for a land buying company to allocate a parcel of land to one person and for a title deed to be issued to a completely different person without a transfer or assignment by the initial allotee to the one who is subsequently issued with a title deed.

c. Who shall bear costs of the appeal

30. 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 v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

31. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a result, the court makes the following order for disposal of the appeal:

    a. The appeal be and is hereby dismissed.

    b. The judgment and decree of the trial court dated 19.02.2020 in Nyahururu CM ELC No 262 of 2018 is hereby affirmed.

    c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 13TH DAY OF JULY, 2023.

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Y. M. ANGIMA

JUDGE

In the presence of:

Ms. Ndegwa for the Appellant

Mr. Kebuka Wachira holding brief for Mrs. Maina for the Respondent

C/A - Carol