Nthambiri v Muiruri & 2 others (Environment and Land Appeal 73 of 2021) [2023] KEELC 20280 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20280 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 73 OF 2021

JG KEMEI, J

SEPTEMBER 28, 2023

BETWEEN

BENSON KATHIGA NTHAMBIRI ..... APPELLANT

AND

PATRICK KARIUKI MUIRURI ..... 1ST RESPONDENT

THE LAND REGSITRAR, THIKA ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

(Appeal from the Judgment of Hon J M Nangea CM CM in CMCC No 96 of 2018 delivered on the 17/9/2021at Thika Chief Magistrate Court.)

JUDGMENT

1. The Appeal arises from the decision of the Hon Court delivered on the 17/9/2021 in CMCC No 96 of 2018. The Appellant was the Plaintiff and the Respondents were the Defendants respectively.

2. Vide a Plaint filed on the 22/6/2018 the Plaintiff sought the following orders in the suit;

    a. A permanent injunction be entered against the 1st Defendant restraining him from interfering trespassing alienating subdividing or in any way interfering with land parcel No Thika/mun/block19/778 (suit land).

    b. That the 2nd Defendant be compelled to reverse the transfer from the Plaintiff to the 1st Defendant and the same be reversed to the Plaintiff as the legal and registered owner of land parcel No. Thika/mun/block19/778.

    c. That the 2nd Defendant be ordered to rectify the register/green card and all relevant documents to read the Plaintiff as the legal owner of the suit land.

d. That the Court be pleased to order cancellation of the title deed currently registered in the name of the 1st Defendant.

e. General damages against the Defendants

f. Costs of the suit.

3. The Plaintiffs suit is that he is the registered owner of the suit land having purchased the same from the 1st Defendant through an agent one Rael Njura Kagira who held the suit land in trust for him given that he works and resides in the United States of America (USA). That the said Kagira entered into a sale agreement with the 1st Defendant on the 9/6/2009 wherein at the completion of the transaction Kagira obtained title on the 22/9/2009. Thereafter she transferred the land to him on 21/7/2011. That on carrying out a search he discovered that the suit land had been fraudulently registered in the name of the 1st Defendant. The particulars of fraud were pleaded under para 8 of the Plaint.

4. The 1st Defendant denied the Plaintiffs claim and contended that he is the registered owner of the suit land and never has he sold the land to Kagira or the Plaintiff for that matter. That infact he had charged his title to the Cooperative Bank to secure loan facilities hence the title was held by the bank. In his counterclaim he pleaded fraud against the Plaintiff and the 2nd Defendant for inter alia forging documents of ownership thereby misleading the Land Registrar to issue him with a title without producing the original; dealing illegally with the registration status of the 1st Defendant without his knowledge; 2nd Defendant acted negligently and in total disregard of the sanctity of title; purporting to issue a duplicate title without any basis at all. In the end the 1st Defendant sought the following prayers;

a. That the Plaintiffs suit be dismissed with costs.

b. That a permanent injunction be entered against the Plaintiff restraining him from interfering entering trespassing or in any way interfering with land parcel No Thika/mun/block19/778.

c. That the Court be pleased to order for the cancellation of the alleged title deed in respect of the suit property held by the Plaintiff.

5. The 2nd and 3rd Defendants denied the Plaintiffs claim and admitted that the registration of the suit land in the name of Kagira and the Plaintiff were cancelled and the land was reverted to the 1st Defendant on the 18/4/2018 pursuant to Section 79(1) of the *Land Registration Act*. The particulars of fraud as pleaded by the Plaintiff were vehemently denied and urged the Court to dismiss the Plaintiff's claim.

6. Upon hearing the parties the trial Court rendered itself and dismissed the Plaintiff's case on the grounds inter alia that no land control board consent was obtained for the transaction and the Plaintiff is entitled to seek a refund of the purchase price although the said relief had not been pleaded.

7. Aggrieved by the said Judgement of the Hon. Court the Appellant filed an Appeal on the grounds set out as ;

a. That the learned Trial Magistrate erred in law and fact and misdirected himself in finding that no consent had been obtained for the transfer of land parcel No.thika Municipality Block 19/778 from the 1st Respondent to the Appellant despite the same not having come up as an issue in the pleadings and at trial.

b. That the learned trial Magistrate erred in law and fact and misdirected himself by making his decision based on an issue that did not come up in the pleadings but only came up in submissions, yet submissions do not constitute evidence.

c. That the learned trial Magistrate erred in law and fact and misdirected himself in finding that the failure of either party to produce the consent of the Land Control Board amounts to the absence of such consent.

d. That the learned trial Magistrate erred in law and fact and misdirected himself by failing to consider the evidence by the Appellant's representative that all documents regarding the transfer had been submitted to the office of the 3rd Respondent including the Land Control Board Consent.

e. That the learned trial Magistrate erred in law and fact in failing to consider the testimony of the 3rd Respondent who stated that the transfer documents submitted by the Appellant had been misplaced by the office which would ideally include the Land Control Board Consent.

f. That the learned trial Magistrate erred in law and in fact by failing to consider that the initial transfer of the land from the 1st Respondent to Rael Njura would not have been carried out with a consent from the Land Control Board.

g. That the learned trial Magistrate erred in law and in fact by failing to consider that the 2nd Respondent in his evidence confirmed that the transfer to the Appellant was done regularly.

h. That the learned trial Magistrate erred in law and in fact by failing to consider that the Respondents failed to prove that any fraud was carried out by the Appellant or Rael Njura in the transfer of land from the 1st Respondent.

i. That the learned Trial Magistrate erred in law and in fact by inferring that the Appellant and the 2nd Respondent had colluded to register the transfers to Rael Njura and subsequently the Appellant without a consent despite no evidence having been tendered to support that position.

j. That the learned Trial Magistrate failed to appreciate the massive irregularities carried out while transferring the suit land from Appellants to the 1st Respondent and the massive gaps of evidence by the 1st Respondent.

k. That the learned Trial Magistrate erred in law and in fact and misdirected himself by failing to consider that the Appellant had attached LCB application form duly executed by the 1st Respondent and none of the Respondents alleged that the consent was not subsequently obtained.

l. That the learned Trial Magistrate erred in law and in fact and misdirected himself by inferring fraud in the transfer of Rael Njura and the Appellant based on the lack of presentation of a LCB consent which was the never raised as an issue apart from in submissions.

m. That the learned Trial Magistrate erred in law and in fact and misdirected himself by isolating a single issue and thus failing to address the other flaring issues of fraud, misrepresentation and irregularity that ought to have been wholesomely addressed in order to arrive at a just and conscious decision.

n. That the learned Trial Magistrate erred and misdirected himself by failing to consider submissions and quoted authorities by learned counsel for the Appellant when arriving at his decision.

8. The Appellant seeks the following prayers on Appeal;

a. That this Appeal be allowed

b. That the Judgment and Decree of Hon. J.M. Nang'ea (CM) delivered in Thika Chief Magistrate's MCL& E case No. 96 of 2018 on 17th September 2021 and all consequential orders be set aside.

c. That the prayers in Appellant's plaint filed in Thika Chief Magistrate's MCL &E case No. 96 of 2018 be allowed as prayed.

d. That this Honorable Court be pleased to grant any other orders it may deem fit to grant in the circumstances.

e. That the costs of the Appeal and costs at the Magistrate's Court be awarded to the Appellant.

9. The Appeal was canvassed by way of written submissions. As at the time of writing this Judgement neither of the Respondents had complied with the Courts directions on filing written submissions. The Court will determine the Appeal based on what has been placed before it.

10. The Appellant submitted that the Court was not addressed on the issue of land control board consent in the pleadings before it. That the same having arisen from submissions should not have been made an issue for determination by the trial Court. That the burden of proof was on the Respondents to proof their case.

11. On the issue of land control board consent, the Appellant submitted that pursuant to section 34 of the Practice Directions of the *High Court (Organization and Administration) Act* submissions shall not raise or address any new issues or grounds or points of law not contained in the pleadings filed before the Court. The Appellant faulted the 1st Respondent for raising the issue of want of land control board consent in submissions instead of in its pleadings. In advancing his point the Appellant relied on the case of Avenue Car Hire & Anor Vs Slipha Wanjiru Muthegu CA 302 of 1997 where it was held that no Judgement can be based on written submissions and that such a Judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 18 rule 2 of the Civil Procedure Rules.

12. Further in the case of Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Anor (2014) eKLR the Court had this to say;

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties marketing language each side endeavouring to convenience the Court that it is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based on evidence presented."

13. The Appellants faulted the Hon. Court of going out of its character and adding new cases not presented by the Respondents to advance the arguments in favour of land control board consent, a matter not pleaded. It was submitted that the Hon Court demonstrated bias against the Appellant in making a finding that all the allegations of fraud by the Respondents had been proven and the onus was on the Appellant to demonstrate why it should not be held liable for the consequences of the alleged

fraud. This is despite the Court finding that there were glaring issues of fraud misrepresentation and irregularity. Relying on the dicta in the case of Porter Vs Magill (2002) 2 AC at 357 as follows;

> "We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

14. The Court was asked to set aside the Judgement of the trial Court on the grounds that the Judgement is uncertain as to its meaning, manifest bias in the findings in favour of the Respondents notwithstanding the weight of the evidence presented before the Court.

15. The key issue is whether the Appeal is merited.

16. This being a first Appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated as thus:

> "....this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. 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 this respect...."

17. With that in mind I shall now evaluate the evidence before me and draw conclusions accordingly.

18. The Court notes that the Appellant's case was based on fraud against the Defendants. The 1st Defendant in his counterclaim too claimed that the Plaintiff had through fraud acquired the title deed in his name. The Court therefore appreciated the claims of both parties and in its considered Judgement believed the case of the Appellant and disbelieved the case of the 1st Defendant with reasons. I say so based on the excerpts of the Judgement as follows;

> 29. The 1st Defendant has not satisfactorily explained why the purported charge or discharge of charge over the suit land was not registered as is procedure to protect the rights of the parties to the loan agreement. No evidence from Co-operative Bank that supposedly lent money to the 1st Defendant and retained his original title was tendered. The 1st Defendant didn't also call the Government Printer to testify regarding the Gazette Notices by which his original title was allegedly announced as lost to pave the way for issuance of a new title to the Plaintiff. The Court therefore lost an opportunity to interrogate authenticity or otherwise of the Gazette Notice.
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> 31. I accept the Plaintiff's evidence that the 1st Defendant did sign the sale agreement. PW1 states that the 1st Defendant is well known to him and was shocked that he was distancing himself from the agreement. I concur with the Plaintiff's evidence and his Advocate's submissions that the 1st Defendant dishonestly reneged on the transaction and the allegation of his influence peddling can't be ruled out in the circumstances.

36. Regarding the alleged failure of consideration, the Court has already observed that the 1st Defendant at least acknowledged receipt of a substantial part of the purchase price as per the sale agreement. Although there is no evidence of payment of the balance this could be explained by the conduct of the 1st Defendant who may be in breach of the sale agreement. I am therefore unable to hold that the element of consideration was missing in the transaction in question.

39. The 1st Defendant in his statement of defence pleads for a permanent injunction against the Plaintiff and cancellation of the Plaintiff's title. I agree with the Plaintiff's Advocates that the 1st Defendant didn't properly put up a counter claim so the Plaintiff could defend himself. Regarding the prayer for cancellation of a title issued to the Plaintiff, this is contradictory as the 1st Defendant claims to already hold the title. This only goes to demonstrate how the 2nd Defendant in association with the 1st Defendant mishandled the transaction subject of this case."

19. I understand the trial Court to say that upon considering the evidence presented by both parties the particulars of fraud pitting the Appellant and the 1st Defendant were settled. In other words the issue of fraud was determined in favour of the Appellant. Having been settled by the Court there is no ground of Appeal founded on this issue.

20. The only issue for determination is the crux of the Appeal which is whether the learned trial Magistrate erred in considering the issue of land control board consent when it was not pleaded. The Court dismissed the Appellants case on the ground of want of land control board consent. The question for determination is whether this was a matter pleaded in the parties pleadings.

21. In the case of Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the Court's decision that way. Submissions are not evidence on which a case is decided."

22. Equally in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this Court's view, are a course by which counsel or able litigants focus the Court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a Court may well proceed to give its Judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

23. Similarly in in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis

of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

24. The same principle of law was laid down in the Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs. Nyasulu [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

25. Lord Denning in Jones Vs. National Coal Board [1957]2 QB 55 was alive to the fact that judges being the arbiters of cases must remain so, so that they are not accused of entering the rough terrain and arena of conflict. The good Lord had this to say;

> " In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

26. In the case of Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

> " .... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

27. In conclusion I dare say that parties are not allowed to depart from their pleadings as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

28. In this case I have carefully perused the Pleadings of the Appellant and the 1st Respondent and none of the parties premised their case on the lack of land control board consent to transfer the property. In particular the particulars of fraud I find that none of the parties sought to attack the sale agreement

on the basis of lack of consent. It is clear that this issue was raised by the 1st Defendant on page 123 and 124 of the record of Appeal.

29. Taking the cue from the case law cited above I find that submissions alone cannot come to the aid of the 1st Defendant. The Court erred in basing its decision on a matter that was not pleaded and therefore no evidence was led at the hearing. Had it been made a fact for calling evidence perhaps the Appellant would have sought the letter of consent or the proceedings in the land control board minutes to support the point. That said I have perused the proceedings where PW2 was emphatic that she and the DW1 attended a land control board meeting at which time the balance of the purchase price was paid. The 1st Defendant denied attending any meeting at all. Perhaps had this been made a plea the parties would have applied their minds and led concise evidence for and against the same.

30. The Court is therefore in agreement with the trial Court to the extent that the Court reached a finding that the 1st Respondent is trying to renege on the transaction. In other words the 1st Respondent was involved in the transaction. How else could PW1 and PW2 have gotten such personal documents like the ID, PIN and photographs that were annexed to the sale agreement. On a balance of probabilities and on the basis of the evidence placed before this Court the Court arrives at the convergence on the same conclusion with the Trial Court.

31. I find that the Court erred in its finding on a matter that parties ought to have pleaded and presented evidence on.

32. Before I pen off I must point out some pertinent historical facts of this case going by the green card. The title was registered in the name of the 1st Respondent in 1989. On the 10/7/2009 a replacement title was issued to the 1st Respondent. PW1 and PW2 led evidence that the 1st Respondent informed them that the title was lost but was going to get a replacement. This was around June 2009. A Gazette notice was issued by the Land Registrar on 10/7/2009. Though the 1st Respondent led evidence that his title was held by the Cooperative Bank, no evidence in support of this was presented before the Court. The letter dated the 10/2/17 falls short on the period when the title was forwarded to the bank and the purpose for which it was held. A perusal of the green card does not show any evidence of registration of a charge or such other encumbrance in favour of the bank or such other party. There was therefore no evidence to support the 1st Respondents averment that his title was with the bank.

33. The Land Registrar DW2 was very forthright with the Court. He admitted that the entry No 8 by the Land Registrar, one Mr Gichuki cancelling entries Nos 4-7 that is to say entries in the name of Rael and the Plaintiff were erroneous to the extent that they were not supported by any evidence; cancelled using the wrong provisions of the *Land Registration Act*; contrary to the law; the registered owner as per the record being the Appellant ought to have been heard prior to the cancellation. It is to be noted that the said Mr Gichuki is the same one who gazette the loss of title in June 2009. That said DW2 being the custodian of the register failed to explain to the Court how the title was lost and the basis of the replacement.

34. Section 33 of the *Land Registration Act* provides for the replacement of a title. It states as follows;

> " Lost or destroyed certificates and registers
>
> (1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the charges that the certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of lease upon the expiry of sixty days from the date of publication in the gazette or circulation of such newspapers, whichever is first.

(4) If lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquires as may be necessary and after given notice of Sixty days in the gazette.

(6) Upon the issue of replacement of certificate no further dealings shall be carried out using the replaced certificate."

35. In this case the Affidavit deponed by the registered owner of the land was not presented, the Police Abstract was not presented and therefore the Court was unable to delve into the reasons for the replacement. The fact that this entry was never cancelled demonstrates that this entry was indeed legitimate.

36. DW2 in his evidence stated that on the 8/8/19 while the case was ongoing the land registrar sought to remedy the errors made before by reversing entry No 8 hence reverting the land to the Plaintiff. As at the time the Court rendered its decision therefore the suit land was in the name of the Plaintiff.

37. In the end the Court finds that the learned Magistrate evaluated the case correctly but detoured to consider an unpleaded issue hence falling into error.

38. I find the Appeal is merited. It is allowed as follows

a. That the Judgment and Decree of Hon. J.M. Nang'ea (CM) delivered in Thika Chief Magistrate's MCL& E Case No. 96 of 2018 on 17th September 2021 and all consequential orders be set aside.

b. That the prayers in Appellant's Plaint filed in Thika Chief Magistrate's MCL &E Case No. 96 of 2018 be allowed as prayed.

c. That the costs of the Appeal and costs at the Magistrate's Court be awarded to the Appellant.

39. For avoidance of doubt the consequence of this Judgement is that Plaintiff succeeded in his claim.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ndale for Appellant

Tumu for 1st Respondent

AG for 1st and 2nd Respondents – Absent

Court Assistants – Phyllis/Lilian