



REPUBLIC OF KENYA



KENYA LAW
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**Njoki & another v General & 8 others (Environment and Land Appeal
29 of 2019) [2023] KEELC 21939 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 29 OF 2019
EC CHERONO, J
NOVEMBER 30, 2023**

BETWEEN

MOFFAT UCHERU NJOKI 1ST APPELLANT

NICKSON GICHUI WANJA 2ND APPELLANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE COUNTY GOVERNMENT OF BUNGOMA 2ND RESPONDENT

HARRISON WA NDUN'GU 3RD RESPONDENT

HENRY YOKELA 4TH RESPONDENT

PAUL CHEGE ALIAS KING SIZE 5TH RESPONDENT

PAUL AMUNGA WALOBWA 6TH RESPONDENT

SAMUEL MUNG'ARE ALIAS LUCKY BOY 7TH RESPONDENT

NELSON NAMBUCHI 8TH RESPONDENT

SIMIYU ALIAS BORA HARDWARE 9TH RESPONDENT

*(Being an appeal arising from the decree & judgment by Hon. G. ADHLAMBO
(P.M) in Kimilili ELC Case no. 19 of 2018 delivered on 23rd September,2019)*

JUDGMENT

1. This appeal arises from the ruling of the Principal Magistrate Hon. G. Adhiambo delivered on 23rd September,2019 in Kimilili Magistrate Court SPM-ELC Case No.19 OF 2018.



2. The brief background of this case is that vide a plaint dated 17th July,2018 the Appellant sued the Respondents jointly and severally for; a declaration that they fraudulently obtained plot titles by encroaching into Parcel no. Kimilili/Kimilili/930 and forging documents of ownership, eviction and demolition orders of developments erected therein plus costs and interests.
3. The 3rd-9th Respondents entered appearance and filed a joint statement of defence dated 12th September,2018 denying the Appellants claim and stating that Parcel no. Kimilili/Kimilili/930 had been consumed by a road expansion project and that its registered owner had been duly compensated for its acquisition. They further claimed that there was an ongoing case being Kimilili SPM Land Case NO. 32 OF 1999 between Theresia Wanja Macharia and some of the Respondents thus the Appellants case was res judicata and sub judice.
4. On 21st January,2019, the Appellants herein filed an application for orders restraining the 3rd-9th Respondent/Defendants from carrying out any activity on land parcel no. Kimilili/Kimilili/930 until the case is heard and determined, that the Assistant County Commissioner Kimilili Division be ordered to avail the investigation report dated 4th January,2018 concerning the dispute between land Parcel no. Kimilili/Kimilili/930 and Parcel no. Kimilili/Kimilili/1536 and 7 others and for costs. The application was premised on grounds apparent on the face of the application supported by an affidavit sworn by both Appellants dated 21st January,2019.
5. The 3rd Respondent herein filed a replying affidavit sworn on 25th March,2019 on his behalf and on behalf of the 4th-9th Respondents in opposition to the Appellants application in which he averred that Land Parcel no. Kimilili/Kimilili/930 had been consumed by a road expansion and thus it was non-existent and the registered owner had since been compensated for the acquisition. It was also stated that there was a case i.e. Kimilili SPM Land Case NO. 32 OF 1999 between the parties over the same subject matter that has since been determined and so far no appeal has been preferred. He stated that in view of the aforestated matters, this case is therefore sub judice and res judicata.
6. The 8th Respondent herein equally filed grounds of opposition on the application and averred that the Appellant had not linked him to the allegation contained in the application and further that the issues raised in the Appellants claim had long been resolved in another forum.
7. The 3rd to 9th Respondents on their part filed a Notice of Motion application dated 12th March,2019 seeking to have the Appellants suit struck out with costs for being an abuse of the court process and res judicata. The application was premised on the grounds on the face thereof supported by an affidavit sworn by the 3rd Respondent on 12th March,2019 stating that the issues in controversy had been determined in Kimilili SPM Land Case NO. 32 OF 1999 which case was heard and determined and no appeal had been preferred.
8. In response to the said application, the Appellants herein filed a joint replying affidavit and deposed that land parcel Kimilili/Kimilili/930 measuring 0.20HA is registered in the name of Teresia Wanja Wachira but the case at Kimilili SPM Case NO. 32 OF 1999 was filed by one Naomi Muthoni Amos who initially filed a case at Kimilili Land Dispute Tribunal where the tribunal found that Teresia Wanja Wachira was indeed the owner of land parcel Kimilili/Kimilili/930 measuring 0.20HA. The tribunal further ordered that land parcel Kimilili/Kimilili/930 be re-surveyed and beacons established to clearly separate the land, the access road and road reserve. The decision by the tribunal was subsequently adopted by the court in Kimilili. The Appellants averred that instead of re-surveying land parcel Kimilili/Kimilili/930, the land officials re-surveyed land parcel Kimilili/Kimilili/536 the result of which a misleading report was tabled before the court indicating that the land had been consumed by the road expansion.



9. Lastly, the 2nd Appellant herein filed an application dated 1st July,2019 seeking to have the 1st Appellant herein struck out from the proceedings for the reason that the powers/interests donated to him by one Theresia Wanja Wachira through a power of attorney had been revoked and only donated to the 2nd Appellant.
10. Parties took directions to have the three applications heard and determined together and thereafter the Court delivered a ruling dated 23rd September,2019 where it ruled that the Appellants claim was not res judicata but that the Appellants lacked locus standi to institute the suit for lack of a duly stamped and registered power of attorney as required under Section 19(2) of the [Stamp Duty Act](#) and the same was thereby struck out.
11. Being aggrieved by the trial court's decision/order, the Appellants herein preferred this appeal vide a memorandum of appeal dated 2nd September,2019 on the following grounds;
 - a. That the Honourable Magistrate erred in law and fact in failing to find that the Appellants indeed validly registered their power of attorney in respect of land parcel no. Kimilili/Kimilili/930 with the land department Bungoma registry vide official government receipt dated 12/7/2017, 5/1/2018 and further that the Appellants power of attorney dated 21/6/2019 was also validly registered, signed and rubber stamped by the land registrar Bungoma.
 - b. That the learned Magistrate erred in law and fact in failing to find that the Appellants had the power of attorney validly donated by the registered owner of the land parcel no. Kimilili/Kimilili/930 known as Theresa Wanja Wachira.
 - c. That the learned Magistrate erred in law and fact in failing to find that the reason of the power of attorney donated to the appellants was to protect the land parcel no. Kimilili/Kimilili/930 a property of Theresa Wanja Wachira who is a patient diagnosed with depression and thyroid disorder currently being treated at Mathari Teaching and referral Hospital.
 - d. That the learned Magistrate erred in law and fact in failing to find that the Appellants land parcel no. Kimilili/Kimilili/930 is registered land which the title deed was issued vide Kenya Gazette Notice No. 3289 dated 7/4/2017 with title deed dated 9/6/2017.
 - e. That the learned Magistrate erred in law and fact in failing to find that the 3rd-9th Respondents are encroachers on the Appellants land and further that the respondents have tampered with the records on the green card of land parcel No. Kimilili/Kimilili/930 in unlawful and fraudulent process and further forged documents to make it look like the Appellants land was consumed by a public road.
 - f. That the learned Magistrate erred in law and fact in deciding against the weight of the evidence on record.
 - g. That the learned magistrate erred in law and in fact by only considering the evidence of the Respondent and failing to consider the Appellants explanation and the Appellants evidence on record.
 - h. That the learned magistrate erred in law and in fact in failing to find that there was no any Kenya Gazette Notice for compulsory acquisition of the Appellants land by the government of Kenya and further that the Appellants never transacted nor signed any land sale agreement with the Respondents whatsoever and neither sold the land nor compensated for the same by the government of Kenya.



- i. That the learned magistrate erred in law and in fact in taking into account the extraneous matters and evidence in reaching the decision in favour of the Respondents without considering the weight evidence of the Appellants.
12. The Appellants pray that the decision/order by the Kimilili SPM be set aside and the appeal herein be allowed plus cost of the appeal.
13. Directions were taken by consent to canvass this appeal by way of submissions. However, neither of the parties filed submissions on the appeal as directed.
14. The court has carefully considered the extract of the appeal and the relevant law.
15. It is trite law that as a first appellate court, this Court is mandated to examine the evidence afresh and make a determination on the Appellants' claim on its merits as was held in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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. 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 ...”
16. From the memorandum of appeal, it is clear that the Appellants are contesting the trial court’s ruling that they lacked locus standi to present the claim as per their plaint for failure to present a duly stamped and/or registered power of attorney. It is imperative to note at this stage that the power of attorney in question was intended to confer rights to deal with immovable property, in this case land. This appeal is directed to this single aspect of the courts ruling and this court shall limit itself to those parameters for the purposes of determining this appeal.
17. From the Appellants pleadings, it is clear that the Appellants approached the trial court at Kimilili to recover land parcel NO. Kimilili/Kimilili/930 on behalf of the registered owner, one Teresa Wanja Wachira. They averred in their plaint that they drew their authority from a power of attorney attached to their list of documents dated 5th January,2018. Later, the 2nd Appellant filed a Notice of Motion application dated 1st July,2019 seeking to remove the 1st Appellant from the former suit claiming that the powers donated under the initial power of attorney had since been withdrawn and that Nickson Gichui Wanja was the sole donee in the most recent power of attorney.
18. In support of his application, the 2nd Appellant attached a revocation of power of attorney dated 21st June,2019 revoking the powers donated to the 1st Appellant and attached a fresh power of attorney dated 21st June,2019 wherein he (the 2nd Appellant) was the sole donee. It was therefore urged that the Appellants had capacity to present that subsequent claim.
19. The term locus standi is defined in the Black’s Law Dictionary, 9th Edition at page 1026 as; “The right to bring an action or to be heard in a given forum”. In the case of *Alfred Njau & Others vs City Council of Nairobi* (1982) KAR 229, the Court held that;

“the term locus standi means a right to appear in Court, and conversely, to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.”



20. . In this case, the Appellants indicate that they draw their authority to institute the suit from the various power of attorneys. A power of attorney ideally allows a person (donee) to whom it is directed by the donor (principal) to act in accordance with the instructions thereon. For the foregoing to happen, the power of attorney has to be lawfully donated to an identifiable person, accepted, properly executed and registered such that when such donee so acts, he/she does so as if it was the donor. Further, It ought to be stamped once stamp duty is paid as provided under Section 4 of the [Registration of Documents Act](#) which provides as follows:-

4. Documents to be registered

All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory—

- (i) any composition deed;
- (ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;
- (iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;
- (iv) Any endorsement upon or transfer of any debenture issued by any such company
- (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;
- (vi) any lease or licence of land for any term not exceeding one year; or
- (vii) any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered [Land Act](#) (Cap. 300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.

21. That whereas the power of attorney is not specifically mentioned in the said provision to be among those requiring registration, it falls under the documents which declare certain rights or limitations over immovable properties which must be registered.

22. It therefore follows that the power of attorney which confers upon the donee a right to deal with immovable property, like the one the Appellants rely on, must be registered. The failure to register such a power of attorney means the Appellants (donee), cannot claim any right under it. The failure to register the power of attorney means the stamp duty was not paid on it as required under Section 19 of the [Stamp Duty Act](#) which provide that;



19. Non-admissibility of unstamped instruments in evidence; and penalty
- (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—
 - (a) in criminal proceedings; and
 - (b) in civil proceedings by a collector to recover stamp duty,
 - (2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.
 - (3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—
 - (a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;
 - (b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;
 - (c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.
 - (4) If any person is empowered or required by any written law to act upon, file, enroll or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enroll or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.
 - (5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.
23. From the foregoing provisions, it follows that a power of attorney whose stamp duty has not been paid cannot be accepted for registration under Section 46 of the [Land registration Act](#).



24. I have perused the power of attorney attached to the Appellants claim carefully and I note that the same does not bear the stamp duty payment stamp which would ideally appear on the face of the document. Further, no receipts for payment of the requisite stamp duty were attached thereto. Consequently, the documents were not registered and do not bear the registrar of documents stamp showing that the documents were indeed presented for registration. In my considered view, the Appellants had an obligation in law under Section 107 of the *Evidence Act* Chapter 80 of Laws of Kenya to tender evidence that the power of attorney's they sought to rely on as the basis of their capacity had been registered in accordance with the law, but failed to do so.
25. I am further guided by the persuasive decision of the Court in the case of *Francis Mwangi Mugo Vs David Kamau Gachago [2017]* eKLR, where it was held that;
- “...I think the more fatal omission is not necessarily payment of stamp duty important as it is, but the failure to register the power of attorney before filing suit, for to me, it is the act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity for one cannot act for another without having the legal capacity to do so. I hold the view that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.”
26. Further, the Appellants cannot take refuge on the provisions of Article 159 (2)(b) of *the Constitution* of Kenya, 2010 that enjoins the Court to look at substantive issues and not technicalities since the issue of capacity to sue or defend a suit is so central in legal proceedings that it cannot be classified as a technicality.
27. Ultimately, I find that this appeal lacks merit and proceed to dismiss it which I hereby do with costs to the Respondent.
28. Orders accordingly.

DATED AND SIGNED BUNGOMA THIS 30TH DAY OF NOVEMBER, 2023.

HON.E.C CHERONO

JUDGE

In the presence of;

1. Wasilwa for 2nd Respondent
2. 1st Appellant-present
3. 2nd Appellant-absent
4. Okwaro C/A

