



**Mwiti & 3 others v M'aritho (Environment and Land Appeal
E086 of 2022) [2023] KEELC 22098 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E086 OF 2022**

CK NZILI, J

DECEMBER 6, 2023

BETWEEN

**NICHOLAS MWITI 1ST APPELLANT
LUCIA KATHURE 2ND APPELLANT
JOSPHAT MURIUKI 3RD APPELLANT
STANLEY KINYURU KIMOTHO 4TH APPELLANT**

AND

GEOFFREY M'ARITHO RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate
Githongo E.W Ndegwa in E.L.C. No. 31 of 2019 delivered on 30.11.2022)*

JUDGMENT

1. The appellants, the defendants in the lower court, have appealed to this court against the judgment the trial court failed to find the respondent holds L.R. No. Abothuguchi/Igane/2723 in trust for them; failed to find the appellants' sibling, the late Riungu Kimotho, was registered to hold the land in trust for them and hence, as such could not dispose it to the respondent; failed to hold the appellants were entitled to a share of the land which was held by the late Riungu Kimotho; failed to find the respondent was not a purchaser for value without notice as he bought the land occupied by the appellants and lastly, it went against the facts and the law.
2. As a first appellate court, the mandate is to approach the lower court record with an open mind and a fresh perspective to come up with independent findings on facts and the law, giving credit to the lower court, which had seen the demeanor of the witnesses. See *Peters v Sunday Post Ltd* (1958) EA 424 and *Gitobu Imanyara, and others v Attorney General* (2016) eKLR.



3. At the lower court, by an amended plaint dated 23.4.2021, the respondent had averred that he was the registered owner of L.R. No. Abothuguchi/Igane/2723 measuring 1.2 ha. He claimed that in February and June 2019, the appellants, without any color of right, threatened, chased and prevented his employees from accessing, utilizing and or harvesting maize from the land and instead trespassed into it, hence depriving him of his constitutional rights to use as a title holder up to the filing of the suit. He termed the actions unlawful, illegal, a nuisance and a threat to his rights and freedoms. His prayers were for a permanent injunction, eviction and general damages.
4. The 1st – 3rd appellants filed a defence and counterclaim dated October 5, 2019. They denied the contents of the plaint. In reply to paragraphs five thereof, they averred the suit land was transferred to the respondent secretly and illegally assisted by one Riungu Kimotho, a clan's man, while there was in existence Nkubu E.L.C. No. 1 of 2018, between the transferee and the respondent herein. The 1st – 3rd appellants admitted they had received a demand letter dated July 19, 2019. They claimed the respondent had threatened to evict them from their ancestral or family land, which had illegally been sold to him. They urged the suit to be transferred and consolidated with the referenced pending suit in Nkubu Law Courts.
5. By way of counterclaim, the 1st – 3rd appellants as plaintiffs sued the respondent as the defendant, claiming his registration status as owner of the land sold and transferred to him by their kin was subject to and in breach of a customary trust.
6. Further, the 1st – 3rd appellants pleaded that the initial land was L.R. No. Abothuguchi/Igane/707, which had been gathered by their late father, who left them under the care of their mother, the 2nd plaintiff in the counterclaim who, during the registration for the land in 1970 had registered it under the name of the elder brother, one Riungu Kimotho, to hold as a trustee of the rest, who were of tender years. The 3rd appellant averred that the said Riungu Kimotho had obtained a title deed on June 4, 1979 but, in breach of the customary trust, subdivided the land into L.R. No. Abothuguchi/Igane/2722 and 2723 and disposed of the latter to the respondent herein
7. The 1st – 3rd appellants averred the sale and transfer was subject to their overriding rights since in occupation of the land depending on the suit land. Additionally, the 1st – 3rd appellants averred the suit land was subject to Kimeru customary law and norms concerning ancestral land on account of intergenerational equity and therefore, the respondent breached the said trust by transferring the land to himself through collusion, secrecy and while aware of their occupation and possessory rights, by threatening to evict them from the land during the pendency of Nkubu E.L.C. No. 1 of 2018.
8. The 1st – 3rd appellants prayed for a declaration of the customary trust, perpetual prohibitory order, cancellation of the registration and the land to revert to the initial parcel and registration under the names.
9. From the court record, it is unclear if the defence and counterclaim was paid for and or was accompanied by any verifying affidavit or authority to plead. Additionally, there is no evidence whether the 1st – 3rd appellants ever amended their defence and counterclaim as per an order dated May 24, 2021, following the amendment of the plaint to join or include the 4th appellant. Again, there is no evidence that the appellants complied with Order 11 of the *Civil Procedure Rules* per the orders made on June 28, 2021 and October 18, 2021 by filing witness statements and documents. There is also no evidence that the respondent filed a defence to the counterclaim.
10. At the trial, the respondent testified as PW 1 and adopted his witness statement dated September 21, 2019, as his evidence in chief. He told the court he was the registered owner of L.R. No. Abothuguchi/Igane/2723, which he had utilized all his life until the appellants forcefully took over and denied him



his occupation and possessory rights by chasing away or threatening his workers. He said the appellants had taken advantage of his absence from the country and caused him to lose income from the land. He produced a copy of the title deed dated March 15, 2018, an order issued on November 9, 2021 dismissing Nkubu PM ELC No. 1 of 2018, a demand letter dated 19.7.2019 and an official search for the suit land dated October 19, 2021 as P. Exh No's. "1"- "4" respectively.

11. In cross-examination, PW 1 told the court he bought the land from Riungu Kimotho, a brother of the appellants, without knowledge that they were occupying the land. He said he never conducted an official search of the land before purchasing it but was sure there were no inhibitory orders against the title. Further, PW 1 told the court he learned about the appellants' claim when he obtained a title deed. He said he had sent someone to buy the land for him since he lives out of the country.
12. In re-examination, PW 1 told the court that the 4th appellant with his nuclear family were living on the land though he had agreed to hand over vacant possession, which he did and started utilizing 2 out of the 3 acres. PW 1 said he planted trees, maize and bananas. In addition, he said there was never a challenge or objection to his ownership through inhibition orders to the transfer and registrar of the title. He said in P. Exh No. 4 that the appellants had claimed customary trust, but the suit was dismissed, though he was not a party to it.
13. At the close of the respondent's case, the appellants sought to call witnesses, which the respondent objected to since there was no compliance with Order 11 of the *Civil Procedure Rules* as earlier ordered by the trial court. In a ruling dated December 3, 2021, the trial court upheld the objection. The record shows the appellants, after adjourning the defence hearing on January 14, 2023, February 14, 2022, 25.2.2022, March 25, 2022, and April 22, 2022, tendered evidence on June 20, 2022 through Nicholas Mwiti, the 1st appellant.
14. His evidence was that the respondent bought the suit land, which belonged to him and Riungu Kimotho, before it was subdivided. He said he lived on the land with the 2nd appellant, having been born on it. D.W. 1 said the land was registered in the eldest son's name, Riungu Kimotho, by his mother in trust, for their father was already deceased. D.W. 1 said he occupied around one acre of the land while the other appellants occupied the rest, since it was 3 ½ acres. He said the land had been equally divided among the brothers and that the respondent could only acquire the share belonging to the late Riungu Kimotho.
15. In cross-examination, D.W. 1 said he lodged a suit against Riungu Kimotho for selling his land, in Nkubu law courts, which was dismissed. He said he was unaware if the land had been subdivided and a title deed issued. D.W. 1 said he had lodged an inhibition order over the title. If Riungu had been issued with a title deed in 1979, D.W. 1 said he was then 29 years old. He said the family attended the land control board at Chaaria to object to the land transfer to the respondent, but the transfer was effected through the back door. He denied any occupation or developments on the land by the respondent, since all the trees and banana plants were his. Further, he denied knowledge of any sum paid by the respondent to acquire the land. However, he insisted that the deceased brother held the land in trust for him.
16. In re-examination, D.W. 1 said he had no objection to the share of the land belonging to his deceased brother going to the respondent since he was the one who sold the land. His view was that each appellant was entitled to their portion; otherwise, the respondent could only acquire that share that belonged to the deceased.
17. On October 5, 2023, the appellants were granted an opportunity to file a supplementary record of appeal to introduce the omitted documents and file written submissions by 5.11.2023. The said orders were not complied with.



18. The court has carefully reviewed the pleadings, the evidence tendered and the law. The issues for determination are:
- i. If the appellants filed a competent defence and counterclaim to the suit.
 - ii. If the failure to file witness statements and exhibits was fatal to the appellant's defence and counterclaim.
 - iii. If the respondent had proved his claim to the required standards.
 - iv. If the appeal has merits.
 - v. What is the order as to costs?
19. In *Plotti v Acacia Co.* (1959) EA 248, on page 251, Forber V-P said that pleadings in law were the known means by which a party gives another a fair notice of his case, which has to be met so that the opposing party may direct his evidence to the issues(s) disclosed. A party should not be condemned on grounds without fair notice; otherwise, this would be a significant denial of justice.
20. In *IEBC v Stephen Mutinda Mule & others* (2014) eKLR, the court set out the proper grounds of appeal. The court said the grounds should not be argumentative or in a narrative manner; otherwise, by invoking factual errors, it was likely to invite jurisdictional objections to the entire appeal. The court stated that a party should not frame new issues on appeal that the parties had not pleaded or responded to. The court cited with approval *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3, that parties through pleadings formulate their case in their way, subject to the basic rules of pleadings, for the sake of certainty and finality, for the pleadings bind each party and cannot be allowed to raise a different or fresh case without amendments.
21. In this appeal, the respondent's claim was based on an amended plaint dated 23.4.2021 which introduced the 4th appellant to the claim. The appellants were given 14 days to file an amended defence and counterclaim. The same was not filed. Additionally, witness statements and a list of documents were not filed. The record of the appeal contains only the initial plaint.
22. Order 42 of the *Civil Procedure Rules* clearly defines what a record of appeal should contain. In *Samuel Mwebia Gitau v Elijah Kipng'eno Arap Bii and another* (2006) eKLR, the court cited with approval *Delphis Bank Ltd v Canelan Ltd and others* C. Application No. Nai 33 of 1999 (UR) and *Dhanji Ramji v Mulde Timber* (1970) EA 427 that a record of appeal should contain the amended pleadings, which were the primary pleadings in the lower court and that the non-inclusion would render the appeal incurably defective, incompetent and liable for striking out.
23. As to the want of an authority to plead and swear in a counterclaim, a counterclaim is like a cross-suit. It has to adhere to the rules on pleadings, such as Orders 1 and 5 of the *Civil Procedure Rules*. Order 7 Rule 8 provides that a counterclaim must have a titular heading. Before the trial court, the counterclaim had no verifying affidavit and authority to plead in line with Order 4 of the *Civil Procedure Rules*.
24. There is no evidence that the reliefs sought were paid for. The court record has no original copy of the assessed filed and stamped defence and counter claim. The appellants were given an opportunity but declined to introduce the omitted documents through a supplementary record of appeal. In *Sheikh Mohamed Nunow v Ali Ibrahim Hassan* (2019) eKLR, the court said an authority to sue should have been filed as part of the pleadings in line with Order 4 Rule 1 (1) of the *Civil Procedure Rules*. The court cited with approval *K.A.R v Farah Ali* (2011) eKLR that a suit filed without authority is incompetent.



25. Given the preceding case law, I find the appeal before fatally incompetent. Similarly, I find the counterclaim by the appellants was equally incompetent and defective in law for lack of a verifying affidavit and an authority to sue.
26. The next issue is the consequences for the appellants of not filing a list of witnesses and their statements. As indicated above, a counterclaim is a cross-suit which falls or stands on its own regardless of the outcome of the plaint. The lower court record shows that the appellants were given more than enough chances to comply with Order 11 of the *Civil Procedure Rules* and file their list of witnesses and documents.
27. Order 7 of the *Civil Procedure Rules* lists documents and witness statements that ought to accompany a defence and counterclaim.
28. Order 11 of the *Civil Procedure Rules* grants the court powers during the pre-trial conference to extend the time to comply with the filing and service of documents and witness statements, failure of which there are sanctions.
29. In *Cyril J Haroo & another v Uchumi Services Ltd and 3 others* (2014) eKLR, the court said the oxygen principle could not save a suit filed contra-statute or Article 159 of the *Constitution*, especially where a party, whether intentionally or by mistakes, moves to court contrary to the law.
30. In *Stanley Ng'ethe Kinyanjui v Tony Keter & 5 others* (2015) eKLR, the court said it was not open for parties to pursue and for the court to allow a path of circumventing the rules since litigation was a game with clear rules of engagement, which the oxygen rules cannot save.
31. In *Raila Amolo Odinga and another v IEBC and 2 others* (2017) eKLR, the court said that evidence, if any, produced by a party cannot be considered in the absence of pleadings. If the defence and counterclaim were incompetent and there were no witness statements or list of documents, was the trial court right to allow the 1st appellant to testify?
32. In *Rent Works E. A Ltd v Jeniffer Kinya Simon* (2022) eKLR, the court said fairness under Article 50 (1) of *the Constitution* connotes impartial and just treatment to parties. In *Mbituka Titus v Jackline Mutindi* (2020) eKLR, the court said the general rule under Order 7 Rule 5 of the *Civil Procedure Rules* is that the defence and counterclaim shall be accompanied by an affidavit under Order 4 Rule (12) thereof list of witnesses to be called at the hearing witness statements signed by parties except for experts and copies of document to be relied upon at the hearing.
33. The court cited with approval *Hart Sheth t/a Harit Sheth Advocate v Shama Chanaria* C.A No. Nai 68 (2008), that before a court, there was a need for proportionality and a level playing field for all the parties on equality of arms in every trial stage. The court said the failure to comply with Order 11 Rule 2(1)(a), Order 3(2) and Order 7 Rule 5 of the *Civil Procedure Rules* could attract sanctions. The court cited with approval *United Insurance Co. of (K) Ltd v Ramzan Abdul Dhanji* C. A No. Nrbi No. 778 of 1998 that where a party is given a chance to be heard, the law is that the party must be given every chance to be heard in every litigation, and so long as he has been given a reasonable opportunity but has not utilized it, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.
34. In this appeal, the appellants were granted more than six adjournments to comply with Order 11 of the *Civil Procedure Rules*, avail witness statements documents, and ventilate their defence. On the grounds of appeal, the appellants accuse the trial court of not following their facts, law, and evidence. One of the ways to adduce evidence is to file and serve witness statements and a list of documents by giving the other party adequate notice and opportunity to know the case before it.



35. The appellants were given a humble opportunity. They have not given this court a single justification why it was difficult for them to comply with the law and the court directives. The appellants decided to play on their own rules and convenience.
36. In *Peter Gitari v B.O.M. Kanyakine High School* (2019) eKLR, the court held that non-failure to file a witness statement per Article 25 of *the Constitution* precludes a witness from testifying. In *Sanjay Varma & 2 others v Jackson Eshiwani Likoye & 7 others* (2019) eKLR, the court said allowing a witness to testify without a statement would have amounted to reviewing an earlier decision rejecting a witness statement.
37. In this appeal, the appellants were granted an opportunity to offer a defence. They did not seek a review or appeal of the order objecting to the filing of witness statements. In allowing D.W. 1 to testify without a witness statement, the trial court prejudiced the respondent.
38. The burden was on the appellants to impeach the title held by the respondent on the legal grounds set under Sections 24, 25, 26, 27 and 28 of the *Land Registration Act*, mainly because of overriding interests under Sections 107 – 112 of the *Evidence Act*.
39. The ingredients of customary trust as set in *Isaack M’Inanga Kiebia v Isaya Theuri M’Lintari & another* (2018) eKLR, required the appellants to lead evidence to found a trust. Trust is a matter of facts established through cogent and tangible evidence. Even if the defence and counterclaim by the appellants were to be found competent, it had to be proved against the respondent. The appellants were given enough time to attend court and ventilate their defence and counterclaim. None filed witness statements. Through witness statements, a party raises evidence in support of a claim. D.W. 1 had no basis to vest on his evidence before the trial court. I find his evidence both incompetent and lacking merits. The upshot is that I find the appeal incompetent and lacking merits. I direct that the appellants shall be accorded the statutory three-month notice of eviction, failure of which the respondent shall evict them from the land at their expense; otherwise, the appeal is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH DAY OF DECEMBER 2023

In presence of

C.A Kananu

Mwirigi B for the respondent

HON. CK NZILI

JUDGE

