



**Kariuki v Nakuru & 3 others (Environment & Land Case
308 of 2017) [2022] KEELC 3413 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 308 OF 2017**

DO OHUNGO, J

MAY 25, 2022

BETWEEN

PETER KARIUKI APPELLANT

AND

CATHOLIC DIOCESE OF NAKURU 1ST RESPONDENT

CHAIRMAN, ST. JOSEPH MAKAO PROJECT 2ND RESPONDENT

PETER MWANGI T/A FANITA COMMERCIAL AGENCIES 3RD RESPONDENT

GACHOKA 4TH RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru
(R. Amwayi, Resident Magistrate) delivered on 19th November 2014 in Nakuru
CMCC No. 1893 of 2001 Peter Kariuki v The Catholic Diocese of Nakuru and 3 others)*

JUDGMENT

1. The background of this appeal is that by a plaint dated September 18, 2001, which the appellant filed in the subordinate court on September 26, 2001, the appellant averred that sometime around 1997 and 1998 he purchased a parcel of land known as plot no. 134 KITI (the suit property) through St. Joseph's Makao project and paid KShs 67,000 to the 3rd respondent who was the 1st and 2nd respondents' agent. He further averred that after being shown his plot he fenced it off, developed it and started carrying out farming on it. That the 2nd respondent allocated the suit property to the 4th respondent who then threatened to evict him on the allegation that the 3rd respondent did not remit the purchase price to the 2nd respondent.
2. The appellant therefore prayed for judgment against the respondents as follows:



- (a) A declaration that Plot Number 14 Kiti St. Joseph's Makao project is the sole property of the [appellant] to the exclusion of the [respondents].
 - (b) An order of permanent injunction restraining the [respondents] either by themselves, their agents, servants or assigns from in any way interfering with the [appellant's] occupation, use and enjoyment of Plot Number 14 Kiti St. Joseph's Makao project.
 - (c) Costs of the suit and interest thereon at court rates.
 - (d) Any other or further relief that this Honourable Court may deem fit and proper to grant.
3. The 1st and 2nd respondents filed their statement of defence on October 16, 2001 in which they admitted that the 3rd respondent was their agent but denied liability for any unauthorised acts of the 3rd respondent falling outside the scope of the agency relationship. They averred that the 3rd respondent received the purchase price without authority from them. They therefore prayed for dismissal of the suit with costs.
 4. The 3rd respondent filed his statement of defence on October 17, 2001 stating that the suit did not disclose any cause of action against him and that he was wrongly sued. He thus prayed for the suit against him to be dismissed.
 5. The 4th respondent filed his statement of defence on August 20, 2001 in which he averred that the appellant entered into the suit property when the 4th respondent had already taken possession and fenced it. He added that he was the owner of the property having been allocated by the 1st and 2nd respondents and having paid valuable consideration for it. He urged the court to dismiss the suit.
 6. Upon hearing the matter, the subordinate court (R. Amwayi, Resident Magistrate) came to the conclusion that the appellant had failed to prove his case and therefore dismissed it with costs through judgment delivered on 19th November 2014.
 7. Aggrieved by the judgment, the appellant filed this appeal in which he prayed that the judgment be set aside and, in its place, judgement be entered as prayed in the plaint. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
 1. That the learned trial magistrate erred in law and in fact in finding that there was not established an Agency-Principal relationship between the 3rd Appellant on one part and the 1st and 2nd Respondent on the other part.
 2. That the learned trial Magistrate erred in law and in fact in finding that the Appellant did not produce any document to prove that there existed an agent relationship between the 1st and 2nd Respondents and the 3rd Respondent.
 3. That the learned trial Magistrate erred in law and in fact in finding that the Appellant while being shown the suit land ought to have been accompanied by another party whom he should have later called as a witness.
 4. That the learned trial Magistrate erred in law and in fact in finding that the money paid by the Appellant for the purchase of the suit land never reached the 1st and 2nd Respondent.
 5. That the learned trial Magistrate erred in law and in fact in finding that the suit land was already in the hands of the 4th Respondent.



6. That the learned trial Magistrate erred in law and in fact in finding that the Appellant ought to recover his purchase price from the 3rd Respondent while it is clear the 3rd Respondent was an agent of the 1st and 2nd Respondent.
7. That the learned trial Magistrate erred in law and in fact in finding that the Appellant had not proved his case on a balance of probabilities and thereby dismissing the Appellant's case.
8. It was ordered that the appeal be canvassed through written submissions and parties were given timelines within which to file and exchange submissions. When the matter came up on September 16, 2021 for mention, I had proceeded on transfer away from Nakuru. The matter was placed before my brother Mwangi Njoroge J. Counsels for the appellant and the 1st and 2nd respondents indicated that they had filed submissions. The court however notified parties that there were no submissions in the file. Parties were given the final adjournment and the matter was scheduled for further mention on November 1, 2021. Come November 1, 2021, the court ordered that judgment shall be on notice and that the file be forwarded to me for preparation of judgment. Only submissions filed by the appellant are in the file. There are no submissions by the 1st and 2nd respondents. The 3rd and 4th respondents did not participate in the hearing of the appeal.
9. The appellant collapsed his grounds of appeal into three issues for determination: whether there existed an agent-principal relationship between the 3rd respondent and the 1st and 2nd respondents, who the appellant should recover the purchase price from and, lastly, whether the 4th respondent is the legal proprietor of the suit property.
10. On the issue of whether there existed an agency relationship between the 3rd respondent and the 1st and 2nd respondents, the appellant relied on the definition of agent-principal relationship in *Bowstead & Reynolds on Agency*, 17th edition, Sweet & Maxwell, page 1-001:

A relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.
11. The appellant submitted that the 1st and 2nd respondents did not deny the agency relationship and that receipts issued to him were similar to those that the 4th respondent relied on. He further contended that the learned magistrate failed to consider that the 1st and 2nd respondents admitted agency in their defence.
12. On the issue of whom the appellant should recover the purchase price from, the appellant submitted that since there was agency relationship, the 1st and 2nd respondents ought to be held liable for the actions of their agent. That since the 3rd respondent was acting within the scope of his authority, the 1st and 2nd respondents are liable even if he acted fraudulently. The appellant, who did not make any submissions on the third issue for determination which he had identified, urged the court to allow the appeal.
13. I have carefully considered the grounds of appeal and the submissions. Only three issues arise for determination in this appeal: whether there was agency relationship between the 3rd respondent and the 1st and 2nd respondent, whether the 3rd respondent had authority to receive the purchase price and whether the reliefs sought were available.
14. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will



therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.

15. The term ‘agency’ is defined in *Black’s Law Dictionary, 10th Edition* as follows:

A relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal’s behalf, subject to the principal’s control, and the agent manifests assent or otherwise consents to do so. An agent’s actions have legal consequences for the principal when the agent acts within the scope of the agent’s actual authority or with apparent authority, or the principal later ratifies the agent’s action.

16. There is no dispute that the 3rd respondent was an agent of the 1st and 2nd respondents. The appellant averred as much at paragraph 4 of his plaint and the 1st and 2nd respondents admitted the averment through paragraph 1 of their defence. They however went ahead, through paragraphs 4, 7 and 11 of their defence to deny that the appellant paid the purchase price and also to deny that the 3rd respondent had authority to receive the purchase price on their behalf.

17. The term ‘authority’ is defined in *Black’s Law Dictionary, 10th Edition* to mean:

The official right or permission to act, esp. to act legally on another’s behalf; esp., the power of one person to affect another’s legal relations by acts done in accordance with the other’s manifestations of assent; the power delegated by a principal to an agent — Also termed power over other persons. ... “The term ‘authority,’ like the term ‘contract,’ may easily be used in three senses, and is therefore a term to be avoided when accurate reasoning is desirable. It may be used to mean (1) the operative acts of the principal, (2) a physical document executed by the principal, or (3) the legal relations consequent upon the preceding operative facts (1) and (2), and especially the legal power conferred upon the agent to bring the principal into new legal relations without any further action by the principal. The operative facts may be spoken words, a document together with the acts necessary to execute it, or other conduct by the principal apparently expressing an intention to create a power....” William R. Anson, *Principles of the Law of Contract* 508 n.1 (Arthur L. Corbin ed., 3d Am. ed. 1919).

18. Thus, existence of agency relationship is one thing, the authority or power of the agent is another thing altogether. Whereas agency relationship was admitted, it was incumbent upon the appellant who was alleging that the 3rd respondent had power to receive payment of the purchase price on behalf of the 1st and 2nd respondents to prove so. That obligation came into sharp focus in view of the denials that the 1st and 2nd respondents put forth in their defence. The law remains that he who alleges must prove. That is the essence of Sections 107 and 108 of the *Evidence Act*.

19. The record shows that at trial, the appellant simply stated that he paid the purchase price to the 3rd respondent who issued to him receipts. He did not offer any evidence to show that the 3rd respondent was authorised to receive payment on behalf of the 1st and 2nd respondents. The defence witness was categorical that the 3rd respondent had no such authority. Whereas I agree with the appellant that the learned magistrate erred in concluding that existence of agency was not proven, the real dispute boiled down to whether the agent had authority to receive the purchase price. The appellant failed to establish such authority. I therefore find and hold that the 3rd respondent did not have authority to receive the purchase price.



20. The last issue for determination is whether the reliefs sought by the appellant were available. The appellant sought a declaration that the suit property belonged to him to the exclusion of the respondents. He further sought a permanent injunction to restrain the respondents from in any way interfering with his occupation, use and enjoyment of the suit property. Among the documents produced at trial by the respondents was a title deed issued to the 4th respondent in respect of the suit property on 3rd December 2007. Earlier, under cross examination, the appellant stated that “title had not been issued if any I am not aware.”
21. Despite being confronted with the title which was issued under the Registered *Land Act* (repealed), the appellant did not seek cancellation of the title. Under Sections 27 and 28 of the said statute, the registration of the 4th respondent as proprietor vested in him the absolute ownership of the suit property with all the attendant rights and privileges. His rights were not liable to be defeated except as provided in the statute. It follows therefore that the declaration and permanent injunction which the appellant sought could not issue without first nullifying the 4th respondent’s title. In the absence of a prayer for cancellation of title, the appellant could not be granted the reliefs which he had sought.
22. In view of the foregoing, I find no merit in this appeal. I dismiss it. Since the respondents did not file any submissions, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma

