



REPUBLIC OF KENYA



**Warfa v Mwangi & 3 others (Environment and Land Appeal
E072 of 2023) [2025] KEELC 3272 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E072 OF 2023**

JA MOGENI, J

APRIL 8, 2025

BETWEEN

SIRAD OSMAN WARFA APPELLANT

AND

SAMUEL KURIA MWANGI 1ST RESPONDENT

GITHINJI & ASSOCIATES 2ND RESPONDENT

REGISTRAR OF LAND, RUIRU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Appeal from the Ruling and/or Order of Hon. JA Agonda dated 8th November
2023 in Chief Magistrate Court at Ruiru – Magistrate ELC NO E107 OF 2023)*

JUDGMENT

1. The facts leading to this Appeal are rather baffling and also interesting. They would make for a blockbuster. They also hinge on the song by Shaggy or so I hear he is referred to, which says “.... it is not me”. Or maybe one may compare the happening with what is recorded in the good book where Simeon Peter when questioned about his association with the Master denied him as it is recorded three times. When the cock crowed, only then did he realized that his mistake and wept bitterly.
2. Now the Appellant asserted ownership of all that piece or parcel of land known as LR Ruiru/Ruiru East Block 3/2089, measuring approximately 1,214 Hectares, (“the suit property”). He allegedly bought it from the 1st Respondent who was represented by the 2nd Respondent as his Counsel in the transaction. The 2nd Respondent in addition to drafting the agreement he also received consideration on behalf of the 1st Respondent, handed over the original completion documents to the Appellant and/or the Appellant’s Advocates for registration of the transfer instrument, attested the sale agreement dated 21/12/2022 between the parties and facilitated the transaction relating to the suit property.



3. It is the Appellant's averment that by virtue of the fact that the 1st Respondent as the alleged legal proprietor of the suit property personally appeared before the 2nd Respondent to execute the sale agreement pursuant to Section 44(2) & (3) of the *Land Registration Act*. Thus this fact alone made the 2nd Respondent a proper party to aid the Court in adjudicating the dispute with regard to who he represented in the said transaction as the vendor of the suit property.
4. It is for this reason that the Appellant contends that the Learned Magistrate erred in the 2nd Respondent's application dated 26/06/2023 by expunging the 2nd Respondent's name from the trial because this infringed the Appellant's right to a fair trial.
5. It is on the basis of the foregoing, that the Appellant filed a memorandum of Appeal dated 7/12/2023 on the following grounds:
 1. That the learned trial magistrate erred in law and fact in finding that the 2nd Defendant therein was wrongly sued as a party in the suit. Consequently, the Learned Trial Magistrate ordered, the 2nd Respondent/Defendant's name be expunged in these proceedings.
 2. That the learned trial magistrate erred in law and fact in disregarding the Appellant's replying affidavits dated 6th July, 2023 & 11th September, 2023 respectively in response to the 2nd Defendant's Notice of Motion dated 26th June, 2023 seeking his removal from proceedings.
 3. That the Learned Trial Magistrate erred in law and in fact by completely disregarding the Appellant's Replying Affidavits dated 6th July, 2023, and 11th September, 2023, along with the evidence presented in those affidavits in those aforementioned and instead went on her own frolic to argue in her Ruling on why the 2nd Defendant/Respondent has been used as a wrongly party to this suit. Consequently, the learned magistrate proceeded to strike out the 2nd Defendant's name from proceedings.
 4. That the learned trial magistrate erred in law and fact by disregarding the crucial fact that the presence of the 2nd Defendant as a party is necessary for the Court to adjudicate on the real ownership of the property. There is no dispute that the 2nd Defendant served as the Advocate for the vendor (1st Defendant herein), drafted the sale agreement, attested to the execution of the said sale agreement by the 1st Defendant, and received consideration on his behalf.
 5. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that the matter at hand involves a land fraud transaction, including identity fraud. In this context, the 2nd Defendant is a proper party for clarifying the identity of the person on whose behalf he acted for in drafting, attesting, executing, and receiving considerations from the Appellant.
 6. That the Learned Trial Magistrate erred in law by Ruling against the weight of the evidence tendered to prove that the 2nd Defendant herein is a pivotal figure in adjudicating the dispute between the parties. His presence as a party having received and disbursed the consideration of suit property and to whom, is a matter of significant concern in these proceedings. These actions clearly indicate that the 2nd Defendant/Respondent was deeply involved in this syndicate aimed at defrauding the Appellant.
 7. That the Learned Trial Magistrate erred in law and in fact in consideration the merits of the suit at interlocutory stage thus compromising a fair trial of the case.
 8. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's application dated 15th June, 2023 which dismissal was unwarranted in the circumstances.



6. The Appellant prayed that the Appeal be allowed and the orders given by Hon. A.J Agonda on the 8th November 2023 in MCELC E107 of 2023 in expunging the 2nd Defendant's name from the proceedings be set aside in terms of the grounds enumerated, an order of temporary injunction as prayed in the Plaintiff's Application dated 15th June 2023 be granted and that costs be provided for.
7. The Appeal is not opposed despite the 1st and 2nd Respondents being served on 30/04/2025 they did not file any response.
8. The Appellant filed their submissions dated 20/02/2025. Despite the Counsel for the Appellant being an Advocate of the High Court of Kenya he incessantly referred to the Hon. Agonda as Hon. Lady Justice JA Agonda and I was at a loss how a Counsel of his stature could not understand that Appeal from a Judge lay with the Court of Appeal and not a Court of equal status. Mistakes such as these makes one wonder what is going on with the legal training where an Advocate who is an officer of the Court does not understand the various Judicial Officers who preside over our Courts. This is just a by the way and I hope the Advocate will take time to school himself.
9. Back to the issue at hand, the Appellant itemized two issues for determination:
 - a. Whether the trial magistrate erred in finding that the 2nd Respondent was wrongly sued and in expunging out their name from this proceeding?
 - b. Whether the trial magistrate erred in disregarding the Appellant's Replying Affidavits and evidence, and improperly considered the merits of the case at an interlocutory stage, thereby compromising a fair trial.
10. It was the submissions of the Appellant that the Learned Trial Magistrate erred in law and fact by finding that the 2nd Respondent was improperly joined as a party to this suit and by ordering the expungement of their name from the proceedings.
11. They further submitted that it is imperative to note that the 2nd Respondent's involvement in this conveyancing transaction was central to determining key questions, including whom he represented as the vendor, who appeared before him as the legal proprietor to execute the sale agreement pursuant to Section 44, as read with Section 45, of the Land Registration Act, and how he disbursed the balance of the purchase price to the vendor without holding it in trust until the transfer and registration of interest from the vendor to the purchaser as the standard procedure for conveyancing. He therefore stated that this conduct indicates that he acted in collusion with the vendor to defraud purchaser. The Appellant relied on the case of Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR,
12. He also referred to the case of Joseph Njau Kingori vs. Robert Maina Chege & 3 Others [2002] eKLR, where the Court distilled the guiding principles for determining the proper party in a suit as follow:
 - a. He must be a necessary party
 - b. He must be a proper party.
 - c. In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.
 - d. The ultimate order or decree cannot be enforced without his presence in the matter.
 - e. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit."



13. The Appellant therefore submits that the 2nd Respondent is a crucial party in the suit since he needs to attest to whether the person who appeared before him for the sale of the suit property was the real Peter Samuel Kuria Mwangi the registered proprietor of the suit property.
14. Additionally the Appellant submitted that in a conveyancing transaction the 2nd Respondent was under ethical and legal obligation that the person who sold, conveyed the suit property to the Appellant appeared before him in executing the sale agreement and transfer documents pursuant to Section 44, as read with Section 45, of the *Land Registration Act* was the real Peter Samuel Kuria Mwangi, the registered proprietor of the suit property, land parcel number L.R RUIRU/RUIRUEAST BLOCK 3/2089 thereby creating legitimate expectation that the Appellant was dealing with the rightful owner of the suit Property.
15. To espouse the issue of legitimate expectation he relied on the Supreme Court case of Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others [2014]KESC 53 (KLR) (Par 265), Benjamin v Safaricom PLC & two Others; Consumers Federation of Kenya (COFEK) & Another (Interested Parties) [2024] KEHC 14762 (KLR).
16. To further buttress the necessity of having the 2nd Respondent as a party to the suit the Appellant referred to the Court of Appeal decision in Gateway Insurance Company Limited now Sanlam General Insurance Limited v Joseph Ngethe & Another (Intended Defendant) (Suing as the administrators of the Estate of the Late Peter Kagwima Kimani) [2024]KEHC 61 (KLR) which addressed the issue of joinder.
17. It is the contention of the Appellant that by expunging the name of the 2nd Respondent from the trial at the interlocutory stage, the Trial Learned Magistrate in her Ruling prematurely considered substantive issues, including the role of the 2nd Respondent in the particular transaction, at an interlocutory stage. That the Trial Magistrate's decision undermined the Appellant's ability to present their case and compromised the principle of a fair trial which he submits permeates our entire justice system. He relied on the case of Little Sisters of St. Therese of the Child Jesus - Registered Trustees v China National Aero - Technology International Engineering Corporation Limited & 2 Others [2019] eKLR.
18. It is the Appellant's submission that the Court sets aside the order of the Trial Magistrate expunging the 2nd Respondent from the proceedings and reinstating them as a necessary party to the suit to ensure justice is served.
19. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions. The Court has however to bear in mind that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: "... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions."
20. In the case of Bwire Vs. Wayo & Sailoki [2022] KEHC 7 (KLR) in discussing the role of an Appellate Court stated that the Appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage.
21. Kneller JA in the Court of Appeal case of Ephantus Mwangi & Another Vs. Duncan Wambugu [1984] eKLR had this to say on the duty of an Appellate Court; a member of an Appellate Court, is not bound to accept the Learned Judge's findings of fact, if it appears either that, (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of



the evidence, or, (b) if the impression based on the demeanour of a witness, is inconsistent with the evidence in the case generally.

22. In the case of Chief Justice and President of the Supreme Court of Kenya & Another Vs. Khaemba [2021] KECA 322 (KLR), the Court of Appeal held that it is possible for an Appellate Court to depart from the findings of the trial Court if it is apparent that such findings are not supported by evidence on record, or where the trial Court is shown to have acted on wrong principles of law, as held in Jabane Vs. Olenja [1986] KLR 661.
23. Having considered the Record of Appeal, the submissions and all the material placed before this Court, I will consider Ground 1 and 2 together. This is whether the Learned Trial Magistrate erred in law and fact in finding that the 2nd Defendant therein was wrongly sued as a party in the suit. Consequently, the Learned Trial Magistrate ordered, the 2nd Respondent/Defendant's name be expunged in these proceedings. And whether the Court erred in law and fact in disregarding the Appellant's Replying Affidavits dated 6th July, 2023 & 11th September, 2023 respectively in response to the 2nd Defendant's Notice of Motion dated 26th June, 2023 seeking his removal from proceedings.
24. It has been emphasized in various decisions including Meme v Republic, [2004] 1 EA 124 and JMK vs MWM & Another [2015] e KLR, that the main factor that determines if one is a necessary party or not in a cause of action, is that a question in the said action cannot be effectually and completely settled unless the party is joined, and that this factor should be interpreted liberally, and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication.
25. From the foregoing, can it be deduced that the 2nd Respondent is a necessary party to the suit? The suit emanates from the Agreement for Sale of 21st December 2022 that was entered into as between the Appellant and 1st Respondent facilitated through the 2nd Respondent as the Advocate of the 1st Respondent. Is the 2nd Respondent, therefore, an essential and necessary party to the suit and should he be added as a Defendant in this suit in which the Appellant seeks to have the suit premises transferred into his name? In the case of *Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others Nairobi (Milimani) H.C.C.C No. 2363 of 1998* (UR), Ringera, J (as he was then) observed that;

“The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR’S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-

 1. There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.
 2. It should not be possible to pass an effective decree in the absence of such a party.”
26. My reading of the prayers made in the plaint point to having the 2nd Respondent being a party to the suit. The process leading to the transfer was undertaken by the 2nd Respondent. Money meant for purchase of the suit property was paid through the 2nd Respondent and if the Court were to make a declaration for compensation it would have to be through the 2nd Respondent who received the money. I therefore agree with the observations made by Ringera J (as he then was).



27. In determining who is a necessary party to a suit, Devlin, J in *Amon v Raphael Tuck & Sons Ltd* (1956) 1 All E. R. 273 in which it was held at p. 286-287 that:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the Court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” (Again underlining mine).

28. The cause of action in this suit emanates from the Agreement for Sale of 8th November 2023 entered into by the Appellant and 1st Respondent on the one hand and the 2nd Respondent was the Advocate for the 1st Respondent. The Plaintiff seeks prayers as against the Defendants for issuance of Title Deed in the alternative for refund of the money paid for the purchase of the suit property and for permanent injunction against the 1st Defendant and his servants, agents or workers.
29. In my opinion, no effectual or complete settlement of the suit can be made in the absence of the 2nd Respondent as such he should not be expunged from the trial.
30. The Court in the case of *Deported Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55 held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

31. Quite obviously, the Plaintiff herein as drawn seeks orders as against the Defendants solely for the benefit of the Plaintiff.

Disposition

32. The upshot of my findings is that this Appeal has merit and the same is allowed in the following terms:-



1. The Ruling delivered on 8th November 2023 in MCELC E107 of 2023 by Hon. J. A. Agonda Senior Principal Magistrate be and is hereby set aside and substituted with an order dismissing the same.
2. The costs of the suit in the lower Court and this Court shall be borne by each party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF APRIL 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Mr. Garat for the Appellant

Mrs. Njihia for the 1st Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

