



REPUBLIC OF KENYA



KENYA LAW
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**Njiru & another v Gatambuki & another (Environment and Land Appeal
17 of 2018) [2022] KEELC 2352 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 17 OF 2018**

**A KANIARU, J
JUNE 27, 2022**

BETWEEN

PASTOR DAVID NJUE NJIRU 1ST APPELLANT

PASTOR SYLVESTOR KAURIA 2ND APPELLANT

AND

JOHN NJIRU GATAMBUKI 1ST RESPONDENT

FELISINA MBEERE JOHNA 2ND RESPONDENT

*(Being an appeal against the Judgment of Hon. S.K. Mutai, Principal
Magistrate at Embu dated 14th August, 2018 in CMCC No. 22 of 2010)*

JUDGMENT

1. This appeal is essentially an escalation to this court of the lower court matter filed as CMCC No. 22 of 2010, Embu. The appellant – Pastor David Njue Njiru and Pastor Syvester Kauria Komu – had sued the respondents – JOhn Njiru Gatambuki and Felisina Mbeere Johna – claiming breach of an agreement to donate and transfer a portion of land from land parcel No. Gaturi/Kithimu/035, Embu District. The appellants had brought the suit in the lower court on their own behalf and on behalf of a church run or operated in the name and style of Promised Faithful Church Of Christ.
2. It appears clear that pursuant to the agreement, the church was put up on the land and it operated for a while. Then disagreements arose followed by open hostility. The respondents are even said to have destroyed church properties at some point.
3. In the lower court the appellants wanted the respondents and/or others at their behest restrained from evicting them from the land or trespassing, damaging, destroying, burning, disposing of, charging, selling or in any manner interfering with the church. They also wanted the respondents ordered to transfer Plot No. 035 to them. General damages plus costs of the suit and interests were also prayed for.



4. It appears clear that during the pendency of the suit, parcel No. 035 was subdivided into two parcels – specifically Gaturi/Kithimu/9041 and Gaturi/kithimu/9043 – and this necessitated the amendment of the plaint to reflect the new developments. The amended plaint was filed on 29/3/2012 and it is clear that the disputed portion fell into parcel No. 9041.
5. The respondents filed a defence dated 3/3/2010 denying the appellants entire claim. It would appear that the respondents did not deem it necessary to file an amended defence after the amended plaint was filed.
6. The matter proceeded in the lower court and vide a judgement delivered on 14/8/2018, the appellants suit was dismissed with costs. That outcome is what provoked this appeal, which is premised on eight (8) grounds as follows:
 1. The learned magistrate erred in law and fact in basing its (sic) judgement of 14th August, 2018 on speculation and mere conjecture.
 2. The learned magistrate erred in law and fact in finding that the appellants suit lacked merits.
 3. The learned magistrate erred in law and fact in failing to consider the averment, facts, grounds and evidence by the appellants.
 4. The learned magistrate erred in law and fact in failing to find that by failing to consider an agreement dated 15th March, 2004 entered into through a written agreement between the appellants and the respondents, their other family members to which, they agreed to donate to the said church, land premise known as plot Gaturi/Kithimu/9041, Embu District.
 5. The learned magistrate erred in law and fact in failing to find that upon execution of the said agreement, the appellants and the said church went into possession of the said plot and constructed a church there between 2004 and 2005 the respondents still being worshippers in the said church and that the respondents did not object to the construction and development of the church which cost the church over 340,000. The court failed to award these unchallenged damages thereof.
 6. The learned magistrate erred in law and fact in failing to adequately consider the appellants evidence and submissions thus occasioning the miscarriage of justice.
 7. The learned magistrate erred in law and fact in failing to apply the applicable principles in the circumstances of the case and was clearly wrong in the exercise of its (sic) discretion and as a result whereof there has been a miscarriage of justice.
 8. The learned magistrate erred in law and fact in acting bias (sic) against the appellants such a bias occasioning miscarriage of justice.
7. It is clear that the appellants want the lower court judgement to be set aside. They prayed that their appeal be allowed; that special damages be granted as asked for in the amended plaint; and that the costs of the appeal and of the lower court suit be awarded to them.
8. The appeal was canvassed by way of written submissions. The appellants submissions were filed on 9/12/2021. They gave an overview of their case in the lower court, then set out their grounds of appeal,



before delving into both statutory and decided case law that they intended to place reliance on. They concluded by pointing out that courts of law

“Must follow the facts, law and merits of each case” and “should not surmise, speculate, act on suspicion”. They urged the court to grant the prayers sought.

9. The respondents’ submissions were filed on 17/3/2022. According to the respondents, the appellants did not show that the court based its judgement on speculation or conjecture or even how it erred in the various other ways alleged by them. It was pointed out that there was no legal agreement capable of execution and the parties themselves were said to lack capacity to enter into an agreement concerning the disputed land. Further, it submitted that the appellants failed to prove their case in the lower court.
10. The respondents further submitted that in the lower court, the appellants didn’t prove the existence of land parcel No. 035 and/or that the respondents were its registered owners. The appellants were also said to have failed to demonstrate that the respondents had capacity to transact over the disputed land. Noting that the alleged agreement was said to involve the respondents and their family members, the respondents wondered why the other family members were not made part of the case. It was further observed that the original parcel of land was subdivided, with the result being creation of two new land parcels – Parcels Nos 9041 and 9043. The disputed portion was said to have become part of parcel No. 9041. The appellants were faulted for not showing who the registered owner of that parcel was or whether the respondents themselves are the ones who became its registered owner.
11. The respondents also took issue with the fact that the measurements of the portion of land said to have been donated by them were stated to be 124 x 93 x 73 x 66 ft which is much smaller than the entire parcel 9041 the whole of which the appellants want transferred to them. It was pointed out that parcel No. 9041 is registered in the name of one Anna Wanjira Gatambuki who is not a party to this matter. It appears clear that that Anna Wanjira even transferred the land to another party. The respondents were faulted for failing to seek joinder of these parties to the suit. A crucial observation appears near the end of the respondents submissions. It is as follows: “The law of succession is very clear that no immovable property can be sold until a grant has been confirmed.”
12. I have considered the appeal as filed, submissions of both learned counsel on record, and the lower court record generally. This is a first appeal and there are legal imperatives to be adhered to while handling it. These imperatives arise both from statutory requirements and judicial pronouncements in decided cases. As regards statutory requirements, section 78 of *Civil Procedure Act* (cap 21) is instructive. It states as follows:

Section 78

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power

- a. to determine a case finally;
- b. to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial



- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted there in
13. Judicial pronouncements are to be found in many cases including *Selle v Associated Motor Boat Company* [1968] EA 123, *Peter M. Kariuki v Attorney General* [2014] eKLR and *Kilonzo David T/ a Silver Bullet Bus Company v Kyalo Kiliku & another* [2018] eKLR. From these and other judicial pronouncements, what emerges is that the first appellate court will not normally interfere with the finding of fact by the trial court unless it is based on no evidence or on a mis-apprehension of evidence or where the trial court is found demonstrably to have acted on wrong principles in making its findings. The appellate court is required to appreciate and give due weight to the fact that the trial court acted from the vantage point of seeing and hearing the witness which is a benefit that the appellate court lacks.
14. In this matter however, crucial legal considerations impel me to take a different approach. It is clear to me that the approach required by both the statutory provision cited herein and the judicial pronouncements in the decided case are both premised on the fact that the appeal filed is based on a sound legal foundation. This foundation is what seems to be lacking in this case. It is necessary to explain. And I hereby do so:
15. At the time the parties were transacting over land parcel No. Gaturi/Githimu/035 its registered owner was one Gatambuki Gitii who was deceased. It is clear that the respondents were not the duly appointed legal representatives of the late Gatambuki Gitii. section 82 (b) (ii) of the *Succession Act* (cap 160) states as follows:
- “No immovable property shall be sold before confirmation of grant.”
- Further, section 45 (1) of the same Act says
- “Except so far as expressly authorized by this Act, or by any written Law or by grant of representation under this Act no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”
16. In *Daniel Gituma Marete v Frankline Mutwiri*: HCC Succession Cause No. 716 of 2011, MERU, F Gikonyo J. expressed himself thus:
- “Acquisition of land before confirmation of grant is unlawful and does not enjoy the property rights under the *Constitution*.”
- Further, in *Kanini Kakua & another v Kenneth Onsare Maina & another*: HCC: Succession Cause No 54 of 2010, Machakos, D. Kemei J observed:
- “The property of the deceased should not be distributed to non-beneficiaries especially when those persons had not purchased the land from the deceased himself and further had purported to have bought the land from beneficiaries before the grant was confirmed.”
17. It is clear from all the foregoing that the only person who can sell the property of a deceased person or otherwise deal or transact over it is one who has the requisite grant from a competent court of law. Section 45 (1) of the *Succession Act* is clear that such dealing and/or transaction amounts to intermeddling with the estate of the deceased. Subsection (2) of the same section is clear that such



unwarranted and/or unauthorized interference is an offence punishable with a fine whose upper limit is 10,000/- or one year imprisonment or to both.

18. When both the respondents and the appellants entered into the agreement they referred to in this matter, followed by vesting of possession of a portion of the land in the appellant's and/or their church, they were intermeddling with the estate of a deceased person. Such agreement and the subsequent possession that followed were all wrong and wanting in legality. A suit based on such agreement is also wanting in legality and it is not one that a competent court of law can allow. That was the kind of suit before the lower court. It is the same suit that is before me now on appeal. The foundational aspects of the case are therefore wrong because they lack a sound legal premise. That is why I have observed that it may not be necessary to start considering the possible merits of the case based on the evidence adduced. This, alone, is enough to dispose of the entire appeal.
19. But may be it is necessary to point out that had the appeal even proceeded from a sound legal footing, the appellants seems to have committed some other serious blunders. One such blunder is to ask for transfer of the entire parcel No. 9041 to them. It is clear that the portion allegedly donated to them had clear measurements. That portion is only part of parcel No. 9041. Why then do they seek to have the entire parcel No. 9041 transferred to them? Another blunder is failure to seek joinder of the person registered as owner of parcel No. 9041 in the suit. The respondents are evidently not its registered owners. How then can they transfer land which they don't own? And if the court agrees to grant the order of transfer as sought by the appellants, will it not be condemning the current registered owner of that parcel of land unheard? These and other blunders would have made it difficult or even impossible for the court to allow the appeal.
20. It is also necessary to say something about the submissions filed by the appellants. In the submissions, one does not see persuasive articulation of the applicable law. The submissions essentially re-state what is already on record. To be more specific, they state the prayers in the appeal, the appellants pleadings in the lower court and the evidence, and the grounds of appeal. No effort was made to explain and justify each or at least some of the grounds of Appeal. They then cited sections 122 and 123 of the now repealed *Transfer of Property Act*, which provisions define a gift and what would constitute its validity. Nothing is said in the submissions to justify the damages that were being sought in the lower court. Some two decided cases – *Purple Rose Trading Company v Bhanoo Shashikant Jai* [2014] eKLR and *Aniina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] eKLR – were cited but they were not made available to the court and their relevance or usefulness was also not explained. The point I am making here is that the submissions are essentially a jumbled and disjunctive exercise that does not persuade or convince. In my considered view, this entire appeal is a misplaced and misguided adventure. The appellants are wrong to think that they acquired any legal rights from the transaction they had with the respondents.
21. When all is considered therefore, the appeal before this court is one that must fail. I hereby dismiss it and order the appellants to pay costs of this appeal and also the costs of the suit in the lower court.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 27TH DAY OF JUNE, 2022.

In the presence of the 1st appellant and in the absence of the rest of the parties.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

27.06.2022

