



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Njuguna (Environment and Land Appeal 50 of 2021)  
[2022] KEELC 3268 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3268 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 50 OF 2021**

**BM EBOSO, J**

**JULY 14, 2022**

**BETWEEN**

**JULIUS NJOROGE NJUGUNA ..... APPELLANT**

**AND**

**DANIEL KAGO NJUGUNA ..... RESPONDENT**

*(Being an Appeal against the Judgment and Decree of Hon B. Ojoo (SPM) delivered at Githunguri Senior Principal Magistrate Court on 6/5/2021 in Civil Case No 59 of 2019)*

**JUDGMENT**

**Background**

1. This appeal challenged the Judgment rendered in Githunguri SPMC Civil Case Number 59 of 2019 by Hon B. Ojoo SPM. The appellant and the respondent are step-brothers. There was common ground that the suit property, Plot Number 1057, belonged to the late Joseph Njoroge Njuguna alias Njuguna Njoroge alias Njuguna Njoroge “B” [the deceased]. By dint of the certificate of confirmation of grant dated 8/2/2013, relating to the estate of the deceased, the suit property devolved to the respondent. The suit property was denoted by Share Certificate Number 10675 held in the name of the deceased in Embakasi Ranching Company Limited. The plot is situated in Ruai. The two parties to this appeal succeeded their respective mothers as co-administrators of the estate of the deceased. They are still co-administrators of the estate.
2. Through a plaint dated 29/7/2019, the respondent sued the appellant, contending that the appellant had declined to surrender to him the share certificate relating to the plot; had encroached on the plot; was committing acts of waste on it by growing subsistence crops on it. He added that the appellant had blocked access to the plot. Consequently, he sought, among other reliefs, an order directing the appellant to surrender share certificate number 10675 to him; an order directing Embakasi Ranching Company Limited to dispense with the production of the appellant’s identification documents; an



order directing the appellant to unblock the access to the plot; and an injunction restraining the appellant against blocking access to the plot, cultivating the plot or interfering with his rights over the plot.

3. The appellant responded to the claim through a defence and counterclaim dated 25/9/2019. He admitted that the respondent was the lawful beneficial owner of the suit property but added that the suit property together with bonus plot number 1057B shared the same share certificate, number 10675. It was his case that whereas the principal plot [the suit property] devolved to the respondent, the bonus plot, number 1057B, devolved to their other sibling, Stephen Gichuki Njuguna. He further contended that he had all along been ready and willing to effect a transfer of the suit property to the respondent but the respondent had “blatantly refused to avail himself and cater for the transfer charges”. He further averred that it was the deceased who instructed him to cultivate the suit property to wade off trespassers.
4. In the counterclaim, the appellant contended that he had incurred expenses relating to the suit property from the year 1993. He claimed a refund of the sum of Kshs 300,000 as expenses incurred by him in protecting and preserving the suit property, including surveyor’s fees; clearing and fencing of the suit property; and attendance of shareholders’ meetings and contributions. The respondent contested the counterclaim through a defence to counterclaim dated 11/10/2019.
5. At trial, the respondent testified as PW1 and called two siblings who testified as PW2 and PW3, respectively. The two siblings are biological and step-brothers to the two parties to this appeal, respectively. The appellant testified as DW1 and called a biological brother [Stephen Gichuki Njuguna] who testified as DW2. Upon considering the parties’ evidence and submissions, the trial court found that the respondent had proved his case against the appellant. The trial court further found that the appellant had failed to prove his counterclaim against the respondent. Consequently, the trial court granted the respondent the reliefs sought in the plaint and dismissed the appellant’s counterclaim. The trial court awarded the respondent costs of the suit.

## Appeal

6. Aggrieved by the Judgment of the trial court, the appellant brought this appeal through a memorandum of appeal dated 20/5/2021. He contended that the trial court erred in:
  - i. failing to consider his counterclaim through which he sought Kshs 300,000 being expenses incurred in safeguarding and preserving the suit property;
  - ii. dismissing the fact that he had paid all requisite fees required to obtain a certificate of title relating to the suit property, including the surveyor’s fees, clearing and fencing fees and “other considerations” relating to the suit property;
  - iii. failing to appreciate that he had been preserving, safeguarding and maintaining the suit property by fencing, cultivating, and attending shareholders’ meetings;
  - iv. failing to appreciate that he had expended money, time and resources to safeguard and preserve the suit property;
  - v. failing to consider that he had been preserving the suit property for the respondent in good faith and he had no ill-motive against the respondent;
  - vi. failing to appreciate that he had always been willing and ready to effect transfer of the suit property but the respondent had blatantly refused to avail himself and cater for the transfer charges;



- vii. failing to take into account the testimony of Stephen Gachuki Njuguna [DW2] who conceded that he too owed him monies due to his diligence in safeguarding and protecting his interest in the bonus plot, 1057 B;
  - viii. in directing the appellant to provide his national identity card and all relevant documents to facilitate transfer of the suit property to the respondent;
  - ix. failing to order the respondent to pay him the sum of Kshs 300,000 being the amount spent in safeguarding and preserving the suit property;
  - x. failing to consider the evidence “in form of exhibits provided” by him; and
  - xi. selectively applying evidence and relying on the respondent’s malicious evidence, hence arriving at an erroneous decision.
7. The appellant urged the court to allow the appeal, set aside the Judgment of the trial court; allow the counterclaim; and award him costs of the appeal.

### Submissions

8. The appeal was canvassed through written submissions dated 25/1/2022, filed through the firm of Mburu Machu & Co Advocates. Although the appellant itemized the above eleven (11) grounds of appeal, his counsel identified the following as the two issues that fell for determination in the appeal: (i) Whether or not the Judgment of the trial court should be upset; and (ii) Who should bear costs of this appeal.
9. Counsel for the appellant submitted that the trial court failed to consider the sum of Kshs 300,000 which the appellant had expended in taking care of the respondent’s property and which the respondent ought to have refunded him. Counsel added that all the other siblings of the appellant had refunded him his expenses, contending that this was as per the instructions of the deceased. Counsel argued that his evidence in this regard had been corroborated by DW2 who was also a beneficiary of the same estate. It was the position of the appellant that the trial court mis-apprehended the applicable law by failing to consider the above evidence. Relying on the decision in *Selle v Associated Motor Boat Co* [1968] EA 123, counsel urged the court to allow the appeal.
10. The respondent opposed the appeal through written submissions dated 24/2/2022, filed through the firm of G K Gatere & Co Advocates. Counsel for the respondent submitted that the appellant’s role as co-administrator of the deceased’s estate was simply to administer the estate and part of his duty was to transmit the suit property to the respondent. Counsel contended that the appellant had failed to discharge his legal duty as a co-administrator and had instead decided to benefit from his own illegality by utilizing the suit property. Counsel added that the appellant failed to discharge his burden under Section 107 of the [Evidence Act](#) which required him to prove his counterclaim for Kshs 300,000. Counsel added that the appellant’s counterclaim for Kshs 300,000 was an afterthought crafted to disinherit the respondent of his rightful share of the deceased’s estate.
11. Counsel added that the [Law of Succession Act](#) did not envisage payment of fees by beneficiaries in relation to services rendered by administrators of estates. Counsel urged the court to dismiss the appeal.

### Analysis and Determination

12. I have considered the entire record of the trial court; the grounds of appeal; and the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellant itemized eleven grounds of appeal. In his subsequent submissions, his advocates condensed the eleven



grounds of appeal into two issues: (i) Whether or not the Judgment of the trial court should be upset; and (ii) Who should bear the costs of this appeal. I will analyse the two issues and make brief pronouncements on them in the above order.

13. This is a first appeal. The principles upon which a first appellate court exercises jurisdictions are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [Susan Munyi v Kesbar Shiani](#) (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

14. The above principle was similarly outlined in [Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates](#) [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.*”

15. The appellant does not contest the fact that the suit property belongs to the respondent. He does not also contest the fact that the respondent is entitled to the suit property. His gravamen relates to the trial court’s finding to the effect that he had failed to prove his counterclaim of Kshs 300,000.

16. The law on evidential burden of proof is codified and is contained in the [Evidence Act](#). It is well-settled. Sections 107, 108 and 109 of the [Evidence Act](#) contain the following relevant framework:

“Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

17. Did the appellant discharge the above burden of proof in relation to his counterclaim of Kshs 300,000? The appellant and the respondent are co-administrators of the estate of the late Joseph Njoroge Njuguna. They both succeeded their respective biological mothers as administrators of the estate. The certificate of confirmation of grant was issued on 19/4/2012. The [Law of Succession Act](#) required the two administrators to immediately distribute the estate and cede the assets of the estate to the respective



beneficiaries upon issuance of the certificate of confirmation of grant. That is not what the appellant did. He instead decided to keep the title documents relating to the respondent's plot. He also decided not to cede the plot to the respondent. His evidence during trial was that he wanted the respondent to pay him Kshs 300,000 as expenses incurred by him in protecting and preserving the suit property from 1993. He contended that the above sum was inclusive of the surveyor's fees; costs of clearing and fencing the suit property; costs of attending shareholders meetings; and what he described as "contributions".

18. Did the appellant specifically plead and prove the claim for Kshs 300,000? Other than praying for Kshs 300,000, the appellant did not particularize the counterclaim to demonstrate how he arrived at the aggregate of Kshs 300,000. Secondly, he did not lead any evidence relating to specific amounts spent as expenses on specific items. No single document was produced to support the alleged expenses. Indeed, the appellant's List of Documents dated 25/9/2019 contained only one document, the certificate of confirmation of grant. During his evidence-in-chief, he said he had receipts relating to the alleged expenses but he did not tender the receipts as exhibits.
19. This court cannot, in the circumstances, fault the trial court for finding that the appellant had not proved his counterclaim. In my view, the trial court properly considered the appellant's counterclaim and correctly observed that expenses relating to the administration of the estate were a charge against the estate of the deceased. If any expenses subsisted at the time of initiation of succession proceedings or at the time of confirmation of the grant, the appellant ought to have placed the expenses before the succession court and asked the succession court to make provision for those expenses.
20. The trial court, similarly, correctly observed that administration of an estate ought to be concluded expeditiously through release of the assets to the confirmed beneficiaries. If the appellant had incurred any post-confirmation expenses that he felt the respondent was liable to re-imburse him, he was expected to write to the respondent and furnish the respondent with the supporting evidence. No evidence was tendered by the appellant to suggest that any post-confirmation expenses were legitimately incurred by him and that he made a demand to the respondent for re-imburement of the expenses. The appellant only brought the unsupported counterclaim as an answer to the respondent's legitimate claim seeking that the appellant releases the suit property to him. In the absence of evidence proving the counterclaim, the trial court made a proper finding to the effect that the appellant had not proved his counterclaim. The result is that I do not find any merit in this appeal.
21. On costs, Section 27 of the *Civil Procedure Act* sets out the principle that guides this court when disposing questions relating to costs. The principle is that costs follow the event, meaning that the successful party is entitled to the costs of prosecuting or defending a suit. The appellant will, in the circumstances, bear costs of this appeal.
22. In the end, this appeal is rejected for lack of merit. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Gatere for the Respondent

Court Assistant: Ms Lucy Muthoni

