



REPUBLIC OF KENYA



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**M’Mibuari v M’Mibuari (Environment and Land Appeal 34 of 2019)
[2022] KEELC 13480 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 34 OF 2019**

CK NZILI, J

OCTOBER 12, 2022

BETWEEN

M’IGWETA MUCOMBA M’MIBUARI APPELLANT

AND

PETER MUGAMBI M’MIBUARI RESPONDENT

(An appeal from the judgment of the Senior Resident Magistrate at Maua (Hon. A.G Munene) made and delivered on 28/12/2018 in Maua CMCC Case No.227 of 2009)

JUDGMENT

A. The Grounds of Appeal

1. This appeal relates to a judgment of the lower court delivered on 28.12.2018 dismissing the suit. The appellant who was the plaintiff in the lower court complains that:- his suit was dismissed despite overwhelming evidence tendered which was not controverted by the respondent; that due process was not followed in the transfer of the suitland; it failed to take into consideration his long occupation and possession of the land of twenty years; it did not consider the applicable principles of law over the issues in contention; it failed to consider and evaluate the respective evidence by both parties and it arrived at wrong conclusion hence leading to miscarriage of justice.
2. This being a first appeal the duty of this court is to subject the whole evidence to a fresh and exhaustive scrutiny and make its conclusion about it, bearing in mind the trial court had occasion to see and hear the witnesses first hand. This duty was well stated in *Selle & Another vs Associated Motor Boat Co. Ltd and others* (1968) E.A 123.
3. Briefly this court must reconsider the evidence, evaluate it and draw its own conclusions though bearing in mind that it has neither seen nor heard the witnesses.



B. The Pleadings

4. By a plaint dated 23.11.2009, the appellant as the administrator of the estate of the late M'Mibuari M'Liluni (deceased) and registered owner of Parcel No. 1144 Athiru/Ruujine Adjudication Section (hereinafter the suit land) sued the respondent, a cousin, for fraudulently and secretly transferring the suit land to his name despite lack of letters of administration. He sought for the cancellation of the registration and a reversion of the suit property to the name of the deceased and permanent injunction restraining the respondent from interfering with the suit land. The appellant attached a consent to issue sue on 3.9.2009 by the Land Adjudication and Settlement Officer Igembe District and a list of witnesses' statements.
5. The respondent filed a defence dated 5.1.2010 in which he averred that prior to the demise of the appellant's father, he had in 1992 subdivided his land and awarded the appellant his share of 2 ½ acres and transferred the balance of 1.0 acres to him, which he has extensively developed by dividing a shamba and putting up a semi-permanent house.
6. Further, the respondent averred that his late father had three wives and was a member of the third house while the appellant represented the first house, both of them being first born sons. The respondent relied on a list of witness, witnesses' statements and documents dated 23.12.2011.
7. Following the death of the initial plaintiff, the court made an order dated 31.10.2014 for a substitution with John Mithika Mucomba. Orders for the maintenance of status quo till the hearing and determination of the suit were also issued.

C. Testimony

8. The appellant told the court that P. No 1144 Athiru/Ruujine Adjudication Section belonged to his late father and measured one acre in which he was currently occupying was planted with 400 miraa trees, five mango trees and some indigenous trees. He said he had built on and was living on the land with his family since childhood.
9. He testified that he went to check on its registration only to find out that his cousin the defendant was the registered owner but could not tell how this came about given his father at the time was dead and no letters of administration had been sought and issued as he possessed all the relevant documents. He said the letter for the transfer purportedly used was not dated and he could not tell the author. He produced it as P MFI No. (2). The appellant further denied that the respondent was his brother but confirmed he had another parcel of land measuring two acres given to him by his late father whereas his other brother one Silas Kinyua had three acres. None had been given to the respondent. He produced the consent to sue as P. Exh No. (3) and the succession proceedings as P. Exh No. (4).
10. The appellant denied the allegations that his late father had three wives, for according to him the wife was one Jeniffer Ciamanoo.
11. The appellant insisted he has been on the land since 1979 and that the respondent had never stepped therein.
12. PW 2 told the court that the deceased father used to live on the suit land before he died where had planted over 400 miraa plants. He also confirmed the respondent was not a brother to the deceased. Since the deceased's late father had only one wife whose land was Parcel. No. 829 bordering their land which he had no right to interfere with.



13. DW1 adopted his witness statement dated 17.1.2012 as his evidence in chief. He testified that he acquired the land from his father measuring one acre. He said his other brother was Silas Kinyua who was given 3 acres which is P. No. 2741 while the appellant was given P. No. 2408 measuring 2 acres.
14. The respondent testified that the appellant invaded his land after he filed the suit. Further, he told the court he was born on the land and that the subdivision was done by his late father since they belong to different mothers with the appellant.
15. In cross examination, the respondent said he became a recorded owner in 2009 but was currently living on his other parcel of land. He denied the alleged fraud or impropriety in acquiring the suit land.

D. Written Submissions

16. The appellant has submitted that he produced exhibits and called witnesses who corroborated his testimony that the suit land formed part of the deceased estate. However, despite efforts to call the District Land Adjudication & Settlement Officer, he did not show up in court to shed light on the issue of the transfer and the changes to the suitland, in favour of the respondent.
17. The appellant submitted that it was not disputed that the deceased grandfather passed on in 1997 and no letters of administration were taken out until the limited grant issued in 2009.
18. Given the foregoing, the appellant's question was how the suit property of the deceased could pass to the respondent without a confirmed grant. Reliance was placed on *Zachariah Wambugu Gathiru & another vs John Ndungu Maina* (2019) eKLR on the proposition that without letters of administration under Section 55 of the *Law of Succession Act*, dealing otherwise with a deceased property amounts to a nullity.
19. The appellant submitted that P. Exh. No (2) was undated, it was authored by the respondent, which exhibit was enough to prove illegality, unprocedural transfer and fraud since he was not an administrator of the estate of the deceased under Section 26 (1) (b) of the *Land Registration Act*.

D. Issues for Determination

20. Having gone through the record of the lower court, the grounds of appeal and the submissions by the parties; the issues for determination are:
 - i. If the appellant proved his claim in the lower court.
 - ii. Whether the appeal has merits.

E. Determination

21. The appellant had pleaded that Parcel No. 1144 Athiru/Ruujine Adjudication Section was owned by the deceased M'Mibuari M'Lihuni who passed on 22.2.1997 and as the first born he took over the possession and caused several developments therein up to September 2009, when his cousin the respondent without letters of administration, fraudulently, illegally and unprocedurally procured registration of the land under his name. He prayed for the cancellation of the registration so that the land could revert to the deceased estate and for a permanent injunction restraining the respondents from interfering with the suit land.
22. The respondent on the other land, denied the claim and averred before his father passed on, he had subdivided and awarded the land to his sons and the appellant included hence he was a genuine owner of the suit land.



23. It is trite law parties are bound by their pleadings and issues flow from the pleadings. See *Stephen Mutinda Mule vs IEBC* (2014) eKLR.
24. Looking at the pleadings the appellant based his claim on fraudulent/illegal/unprocedural subdivision and transfer of Parcel No. 1144 Athiru/Ruujine Adjudication section from the initial owner, the late M'Mibuari M'liluni said to have passed on 22.2.1997 to the respondent who had no letters of administration over the estate of the deceased.
25. Fraud or illegality under the law must not only be pleaded but proved to the required standards. See *Virjay Morjaria vs Nansingh Madhusingh Darbar & another* (2000) eKLR & *Arithi Highway Developers vs West End Butchery* (2015) eKLR.
26. The appellant produced a consent to sue as P. Exh. No. (3) by the District Land Adjudication & Settlement Officer issued under Section 8 (1) of the [Land Consolidation Act](#) Cap 283 and dated 3.9.2009. At the time of filing the suit the land was still under an adjudication process.
27. The evidence of the appellant was that the land belonged to his late father before he passed on where he had built and was living with his family. That he realized in 2009 that the property was no longer under his later father's name but in the name of the respondent through an undated transfer letter allegedly signed by the respondent who was not his step brother as he alleged or at all. The record of appeal indicates on 6.6.2012 the matter was stood over to 29.8.2012 for the District Land Adjudication & Settlement Officer (DLASO) to come and produce the documents marked for identification as P MFI No. (2). The DLASO was summoned, attended court on 29.8.2012 but could not testify for reasons that Mr. Omayo advocate had become a state counsel who was then representing the respondent.
28. On 11.9.2013, the DLASO attended court but once again he did not testify and summons were extended for 20.11.2013. It appears, PW 1 testified again on 9.7.2014 and an adjournment was sought for to call the District Land Adjudication Officer to produce the marked document.
29. On 4.1.2015, the matter came before a third judicial officer to hear the matter and parties agreed that proceedings to be typed and directions on the way forward to follow. The case was fixed for hearing on 22.8.2018 and 5.12.2018 when the trial court ordered the matter to proceed for hearing. The appellant proceeded to close his case while the respondent proceeded to offer his defence.
30. After giving his testimony in chief, the record indicates that counsel for the appellant withdrew from acting for him and the appellant conducted the cross examination in person. The defence closed their case and a judgment date was issued for 13.12.2018.
31. Section 18 [Civil Procedure Act](#) and Order 18 Rule (8) [Civil Procedure Rules](#) deals with evidence taken before a previous court or judicial officer.
32. In [Hussein Khalid & 16 others vs A.G & 2 others](#) (2020) eKLR, the Supreme Court of Kenya took the view that once a judicial officer ceases to exercise judicial authority over a matter during pendency of trial, either through transfer or other circumstances his or her successor in jurisdiction, has to give the parties right to elect on how to proceed, either from where the hearing had reached with the previous judicial officer or start de novo.
33. The court held it was for good reasons so that a party is not prejudiced by the successor in jurisdiction who never had the opportunity to appreciate the evidence of the witnesses by observing their demeanor, credibility, emotion and the like.
34. This in the view of the Supreme Court of Kenya touches on fair hearing under Article 50 of [the Constitution](#).



35. In this suit, PW 1 & 2 gave their testimonies on 6.6.2012 before Hon. R. Makungu, PM now the Registrar Environment and Land Courts who issued witness summons to the District Land Adjudication & Settlement Officer.
36. The matter was taken over by Hon. D.A Okunda SPM, later Hon Mannan SPM who extended the witness summons for Dlasoto 20.11.2013.
37. On 9.7.2014 the matter proceeded ex-parte before Hon. C.M Maundu with PW 3. The record is silent whether Order 18 Rule 8 Civil Procedure Rules was complied with and directions issued. Be that as it may, none of the parties raised the issue before this court. The appellant has not said he was in any way prejudiced by this oversight.
38. Witness summons were extended to the Dlasofor 13.8.2014. Eventually, the matter was taken over by Hon. A.G Munene SRM who heard the evidence of DW 1 without either taking directions and or causing the plaintiff to file a notice to act in person if at all he now wished to conduct the suit in person.
39. Having the above in mind the appellant failed to avail the letter of transfer marked allegedly as P MFI No. 2 signed by the respondent since it was merely marked for identification and summons issued for the Dlasoto attend court and to produce it.
40. Evidence based on a document marked for identification has no probative value.
41. In *Kenneth Nyaga Mwige vs Austin Kiguta & 2 others* (2015) eKLR, the Court of Appeal held that a document forms part of judicial record after it produced as an exhibit by a party or is admitted by the court as evidence and proved.
42. Further, the court held that the marking of a document was only for purposes of identification and not proof of the contents of the document, a witness must produce it as an exhibit and lay foundation for its authenticity or relevance to the facts of the case.
43. In this matter, the District Land Adjudication & Settlement Officer was not called to testify, lay basis for the document and have it produced as part of the court record. It therefore remained hearsay, untested and an unauthenticated account of whether or not the suit land was as at 2.2.1997 in the name of the deceased. Therefore, the appellant cannot be said to have proved the facts as pleaded over the manner the respondent allegedly fraudulently, unprocedurally and or illegally caused to be transferred to himself the suit land while belonging to a deceased person contrary to Section 55 of the *Law of Succession Act*.
44. Additionally, the appellant had a duty to produce the adjudication register or record to verify as a matter of fact, that the entire parcel of land before subdivision into Parcel. No.'s 1148 and 2408 was one number and hence was irregularly subdivided and or transferred to the respondents.
45. Further, it appears also that DW 1 did not avail or produce any list of documents yet they were filed before the trial court especially the letter dated 3.12.2009 stating that Parcel No. 2408 was a product of Parcel No. 1144. Coming to the 2nd prayer for permanent injunction in *KPLC Ltd vs Sherrif Molana Habib* (2018) eKLR a permanent injunction was defined as a perpetual injunction granted upon hearing of the suit by determining fully the rights of the parties based on the merits of the suit, restraining the commission of an act so as to protect the rights of the plaintiff.
46. The appellant had the burden to prove that his land rights had been infringed by the respondent for the trial court to determine and issue a permanent injunction to restrain the respondent from interfering with them.



47. The plaint did not mention Parcel No. 2408 and Parcel No.1148 as separate. The appellant did not produce anything to show that he had been recorded as a beneficiary of Parcel No. 1148 or any of its subdivisions as an administrator of the estate of the late M'Mibuari M'Liluni.
48. The appellant did not produce any photographic evidence or adjudication record showing the nature to his developments on the suit land.
49. If there was any subdivision of the suit land, the appellant did not produce any evidence to show what was the actual position on the ground or perhaps a notice to vacate issued by the respondents threatening his rights to occupation of the suit land.
50. As indicated above, the appellant was given more than enough time to avail the Dlasoto clarify the issue of the subdivision and the transfer of the deceased land to the respondent.
51. The appellant offered no reply to the defence by specifically denying that the respondent was not his close relative.
52. Similarly, when the appellant took charge of the suit, he did not specifically raise any issues as to the alleged relationship as step brother and or the manner the subdivision and the transfer was done with the participation of the respondent.
53. Additionally, there was no evidence tendered on whether the appellant had lodged a formal complaint and or objection with the District Land Adjudication and Settlement Officer and the police as to the alleged illegal or fraudulent subdivision, transfer, and registration.
54. In absence of all these evidence and material, my findings are that the trial court did not err in fact and in law in reaching the conclusion that the appellant had failed to tender enough evidence to support his claims to the required standards.
55. The upshot is that this appeal lacks merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 12TH DAY OF OCTOBER, 2022.

In presence of:

Kirimi for appellant

Respondent in person

Court Assistant: Kananu

HON. C.K. NZILI

ELC JUDGE

