



REPUBLIC OF KENYA



**Kiptoo & another v Jepleting (Environment and Land Appeal 12 of 2021)
[2022] KEELC 14918 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 12 OF 2021**

**MN MWANYALE, J
NOVEMBER 17, 2022**

BETWEEN

JOHNAH KIPTOO 1ST APPELLANT

EMILY KORIR 2ND APPELLANT

AND

ROSE JEPLETING RESPONDENT

Need for review and amendment of the Civil Procedure Act to empower courts to dismiss records of appeal filed out of time after a long delay by their own motion

The instant appeal arose out a dispute as to the ownership of the suit property. The record of appeal in the appeal was filed almost 8 years after the memorandum of appeal. The court pointed out that the requirement of spousal consent in the sale of land came in with the enactment of the Land Registration Act which came in force on May 2, 2012. The court thus held the provisions of the Land Registration Act could not apply retrospectively to a sale commenced on May 6, 2011 and title issued on March 28, 2012. The court proposed to the Kenya Law Reform and the Rules Committee, to review and propose an amendment to the Civil Procedure Act, to empower courts to dismiss records of appeal filed out of time after a long delay without the necessity of the respondents moving the court.

Reported by Kakai Toili

Land Law - sale of land - requirement of spousal consent before the sale of land - claim that the sale of land was concluded under the repealed Registered Land Act - where the requirement of spousal consent was introduced with the enactment of the - whether the requirement of spousal consent before the sale of land was applicable to a transaction concluded under the repealed Registered Land Act.

Civil Practice and Procedure - appeals - records of appeal - dismissal of record of appeals filed out of time - whether courts could, by their own motion, dismiss records of appeal filed out of time after a long delay.

Brief facts

At the trial court, the respondent sought orders of permanent injunction to restrain the appellants, their agents, and/or servants, from entering, claiming ownership or in any manner dealing with the suit property. It was



the respondent's case before the trial court that she was the registered owner of the suit property and that the appellants had refused to give vacant possession of her land. In their defence before the trial court, the appellants claimed the suit property as of their right with 2nd appellant claiming the same as matrimonial property, and thus had overriding interests. The trial court entered judgment against the appellants. Aggrieved, the appellants lodged the instant appeal.

The appeal was based on among other grounds that; the trial court erred in law and in fact in failing to make a finding in her judgement that the respondent was not the legal owner of the suit property and the trial court erred in law and in fact in failing to appreciate that the appellants were the occupants of the suit property and therefore they had overriding interests over the land as against the respondent.

The trial court's judgment was delivered on August 25, 2014 and the memorandum of appeal was filed on September 25, 2014; however, the record of appeal was filed on July 13, 2022 approximately 8 years after the memorandum of appeal had been filed. There was no certificate for delay to explain the delay in filing the record of appeal, there was equally no application before court for leave to admit the record of appeal out of time.

Issues

- i. Whether the requirement of spousal consent before the sale of land was applicable to a transaction concluded under the repealed Registered Land Act.
- ii. Whether courts could, by their own motion, dismiss records of appeal filed out of time after a long delay.

Held

1. PW2, indicated that the 1st and 2nd appellant were to be settled on another parcel of land since he had sold the suit property. Similarly, the 2nd appellants testimony indicated that she was not landless. It followed therefrom that the impugned judgment was arrived at on the basis of the evidence on record. The ground that the judgment was arrived at on extraneous circumstances thus failed.
2. The agreement for sale therein was prepared and signed on May 6, 2011 the applicable law then was the repealed Registered Land Act; the requirement of spousal consent came in with the enactment of the which came in force on May 2, 2012 and transfer therein was registered on March 28, 2012 and title issued on the same day. It followed therefrom that the provisions of the could not apply retrospectively to a sale commenced on May 6, 2011 and title issued on March 28, 2012. Consequently, the issue of spousal consent was not applicable before the trial court as well as in the appeal.
3. The trial court was right to enter judgment in favour of the respondent as the title deed was conclusive evidence of proprietorship as per section 26(1) of the ; and the interests conferred on registration under section 24 and 25 of the Act ought to be benefit the registered proprietor. The respondent proved ownership of the suit property and the trial court was right to affirm her as the registered owner.
4. The record of appeal in the appeal was filed almost 8 years after the memorandum of appeal, and since the respondent did not move to strike out the record of appeal, the appeal had to be heard on its merits, the court proposed to the Kenya Law Reform and the Rules Committee, to review and propose an amendment to the , to empower courts to dismiss records of appeal filed out of time after a long delay without the necessity of the respondents moving the court.

Appeal dismissed with costs to the respondents.

Orders

- i. *For avoidance of doubt, the court affirmed the judgment of the trial court delivered on August 25, 2014 in Kapsabet Civil Suit No 190/2012, and the appellants were to give vacant possession to the respondent.*

Citations

Cases

1. Mkutano, Kadzo v Kadosho, Mukutano Mwamboje, Anthony Charo Kahindi & Kaingu Ngune (? 233 of 2013; [2016] KEELC 566 (KLR)[2016] eKLR) — Explained



Statutes

1. Civil Procedure Act (cap 21) — Section 79(G) — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 sub leg) — Order 42; Rule 13 — Interpreted
3. Constitution of Kenya, 2010 — In general — Cited
4. Land Registration Act (act no 3 of 2012) — Section 26(1),28,93(2) — Interpreted
5. Matrimonial Property Act (act no 49 of 2013) — Section 2 — Interpreted

Advocates

Mr. Kogo for Appellants

Mr. Tallam for Respondents

JUDGMENT

1. The appellants Johana Kiptoo and Emily Korir filed their memorandum of appeal dated September 14, 2014 on September 25, 2014, against the judgment and decree of Honourable G Adhiambo Acting Senior Resident Magistrate, in Kapsabet Civil Suit No 190 of 2012 between *Rose Jepleting v Johana Kiptoo and Emily Korir*.
2. The appeal was initially filed before the Environment and Land Court at Eldoret and was given the number Civil Appeal No 9 of 2014.
3. Upon establishment of this court at Kapsabet, the appeal was transferred here, for hearing and determination, and assigned the present number.
4. An application to dismiss the appeal for want of prosecution was filed on June 29, 2022 but was thereafter withdrawn after the appellant filed the record of appeal on July 14, 2022.
5. Parties were directed to file their submissions.
6. In their appeal the appellants have penned 5 grounds of appeal, to wit;
 - i. That the learned trial magistrate erred in law and in fact in relying on extraneous evidence and delivery judgment in favour of the respondent.
 - ii. That the learned trial magistrate erred in law and in fact in failing to establish that the plaintiff had not proved the suit on a balance of probability.
 - iii. That the learned trial magistrate erred in law and in failing to make a finding in her judgement that the respondent was not the legal owner of Land Parcel Nandi/kamoywa 2390.
 - iv. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant are the occupants of land parcel Nandi/kamoywa/2390 and therefore they had overriding interests over the land as against the respondent.
 - v. That the learned trial magistrate erred in law and in fact to appreciate the provisions of *Land Registration Act*, *Land Act*, the *Constitution* and the present *Matrimonial Property Act*, and the law on acquisition of title.
7. On the strength of the above grounds the appellant urged the court to allow the appeal in its entirety, and the judgment of Kapsabet PMCC No 190/2012 be set aside, and the said be dismissed with costs.
8. In her plaint before the Kapsabet Magistrates Court, the respondent, as a plaintiff therein had sought, orders of permanent injunction to restrain the defendants her agents, and/or servants, from



entering, claiming ownership or in any manner dealing with land parcel Nandi/Kamaiywo/2390. It was the respondent's case before the Magistrate Court, that she was the registered owner of Nandi/Kamoywo/2390 and that the appellants who were defendants in the lower court matter had refused to give vacant possession of her land.

9. In their defence before the Magistrate's Court, the appellants as defendants therein, claimed Nandi/Kamoywo/2390 as of their right with 2nd defendant claiming the same as matrimonial property, and thus had overriding interests.
10. From the proceedings, the suit proceeded to full hearing, with judgment being entered against the appellants as defendants in the lower court.
11. It is against the decision that the appellants have lodged the present appeal. Under section 79(G) of the Civil Procedure Act, an appeal ought to be filed within 30 days from the date of the decree appealed from. The judgment in this case was delivered on August 25, 2014 and the memorandum of appeal was filed on September 25, 2014, however the record of appeal was filed on July 13, 2022 approximately 8 years after the memorandum of appeal had been filed.
12. There is no certificate for delay to explain the delay in filing the record of appeal, there is equally no application before court for leave to admit the record of appeal out of time.
13. The respondent had taken out a motion to dismiss the appeal for want of prosecution, but before the motion could be heard, the appellant filed the record of appeal, hence the application dated June 27, 2022 seeking dismissal of the appeal was marked as withdrawn and the directions under order 42 rule 13 were thus issued.
14. The directions issued under order 42 rule 13 included the directions for disposal of appeal by way of filing written submissions.
15. Pursuant to the said directions, the appellant filed their submissions on October 17, 2022, while the respondents submissions on October 12, 2022.

Appellants Submissions: -

16. The appellants in their submissions have framed and submitted on 3 issues for determination, namely;
 - i. Whether the suit property is matrimonial property, if the answer is in the affirmative, whether the sale and subsequent transfer to the respondent by the 2nd appellants husband was unlawful.
 - ii. Whether the trial court erred in law and in fact in granting the orders sought by the respondent (if answer is in the affirmative, whether the said judgment and decree should be set aside in its entirety)
 - iii. Who should pay costs of the appeal?
17. On issue number 1, it is the appellants submission that the sale of the parcel of land took place on May 6, 2011 between the 1st respondent and the 2nd appellant's husband. It was her submissions that she resisted the sale because it is their matrimonial property and that she did not give the spousal consent as required under the law. In support of this submissions the appellant place reliance on section 93 (2) of the Land Registration Act No 3 of 2012, to the effect that the sale was a nullity for want of spousal consent.
18. The appellant further submits that the property is a matrimonial property which should be protected as it was fell under the definition of matrimonial property under section 2 of the Matrimonial Property



Act, which under section 28 of the Land Registration Act was recognised spousal rights as overriding interest.

19. To buttress this point the appellant placed reliance in the decision in the case of Kadzo Mkutano v Mukutano Mwambonje Kadosho & 2 Others [2016] eKLR, where spousal rights were deemed to be overriding interests.
20. On issue number 2, the appellant submits that the Land Registrar testified in the matter and noted the official records with regard to the transfer process were missing.
21. It was her testimony as submitted by the appellant that whereas the transfer was registered on March 28, 2012 the presentation book on the material day, no such transfer was registered and there was no evidence of stamp duty paid; and the Land Registrar could not confirm the original title deed for Nandi/Kamoywa/2390; that in absence of the entry in the presentation book and fees paid, the title was acquired fraudulently.
22. On the strength of the above issues, the appellant submit that the purported transfer was irregular and unlawful and that the lower court relied on extraneous issues, and urges the court to revert the title to the family of the 2nd appellant.

Respondents Submission: -

23. The respondent did not frame any issues for determination but submitted on each of the five grounds of appeal.
24. On ground 1 of the appeal, it is the respondents case, that the decision of the trial court was based on the evidence on record, both documentary as well as the oral evidence of the witnesses and not any extraneous evidence.
25. On issue number 2, the respondent submit that the respondent had a more convincing case, and she ought to be granted the right to peaceful enjoyment and use of the land parcel Nandi/Kamoywo/2390.
26. On issue number 3, the respondent submit that she is the rightful legal owner of that parcel of land Nandi/Kamoywa/2390 as she purchased the same from the previous registered owner; and that her title ought to be protected under section 26 of the Land Registration Act.

Analysis and Determination: -

27. Ground 1 of appeal, is that the learned magistrate erred in law and in fact in relying on extraneous evidence and delivering judgment in favour of the respondent. I have analysed the impugned judgment as well as the proceedings in the lower court, as is required of me in a first appeal.
28. The impugned judgement appears from pages 80 to 93 of the record of appeal. At page 92, the learned magistrate framed issues for determination as whether the 1st and 2nd defendants (now appellants) will be rendered destitute if the plaintiff now respondent is granted vacant possession, whether the plaintiff did acquire the title of Nandi/Kamoywa/2390 and whether in the said acquisition the plaintiff acquired the title deed of Nandi/Kamoywo/2390 fraudulently. The above were the issues framed by the learned Magistrate from the pleadings, the evidence adduced and submissions on record.
29. On issue number 1, the learned Magistrate in her judgment found that the 2nd defendant admitted before court that the sale of land parcel Nandi/Kamoywo/2390 would not render her landless; and that the 1st defendant was not aware of the fact that his father had sold the property.



30. I have looked at the proceedings, and in the testimony of PW2 appearing at pages 43 and 44, PW2, indicated that the 1st and 2nd appellants were to be settled on Nandi/Kamaoywa/2391, since he had sold Nandi/Kamaoywa 2390.
31. Similarly the 2nd appellants testimony appearing on 59 of the record indicated that she was not land less. It follows therefrom that the impugned judgment was arrived at on the basis of the evidence on record. The ground that the judgment was arrived at on extraneous circumstances thus fails.
32. Similarly on issue number 1 as framed by the appellants in their submissions as to whether the suit property was matrimonial, the appellant submit that the 2nd appellant ought to have given the spousal consent at the property was matrimonial.
33. The agreement for sale herein was prepared and signed on May 6, 2011 the applicable Law then was now repealed Registered Land Act; the requirement of spousal consent came in with the enactment of the Land Registration Act which came in force on 2nd May 2012 and transfer herein was registered on March 28, 2012 and title issued on the same day.
34. It follows therefrom that the provisions of the Land Registration Act could not apply retrospectively to a sale commenced on May 6, 2011 and title issued on March 28, 2012. The court of decisions of the Court of Appeal in the cases of Fredrick Choge Ndogo vs Bernard Njoroge Mbugua & another (2016) eKLR, as well as Florence Asami Agoro and 5 others v Samuel Oyindi Agoro & 2 others [2019] eKLR all buttress this point that there was no legal requirement for spousal consent on matrimonial property for transfer to be affected before the enactment of the Land Registration Act; in 2012.
35. Consequently the court finds that the issue of spousal consent was not applicable before the trial court as well as in this appeal.
36. Having found that the transaction was concluded before the coming into force of the Land Registration Act, the court finds that ground 4 and 5 of the appeal have not been proved and the same fail.
37. Ground 2 and 3 of the Appeal are intertwined, the agreement for sale on a portion measuring 4.0 acres on Nandi/Kamoywo 2196 entered between Joseph Kibiegen Korir and the respondent for the sale and purchase of the suit property was produced before the court a consent to transfer for 4.0 acres in Nandi/Kamoywo/2390, as well as the title in respect of Nandi/Kamaoywo/2390 were all exhibited.
38. The original owner and the vendor Mr Joseph Kibiegen Korir (PW2) equally testified as to the sale of his property. With the above the learned magistrate was right to enter judgment in favour of the respondent as the title deed is conclusive evidence of proprietorship as per section 26(1) of the Land Registration Act; and the interests conferred on registration under section 24 and 25 of the Act ought to be benefit the registered proprietor. I find no merit in grounds 2 and 3 of the appeal, as the respondent proved ownership of Nandi/Kamaoywo/2390 and the court was right to affirm her as the registered owner.
39. In conclusion, all the grounds of appeal raised by the appellant have all failed, the appeal therefore lacks merit and it is hereby dismissed with costs to the respondents. For avoidance of doubt, this court affirms the judgment of Hon GA Odhiambo delivered on August 25, 2014 in Kapsabet Civil Suit No 190/2012, and the appellants are to give vacant possession to the respondent herein.
40. As noted elsewhere in the judgment the record of appeal in this appeal was filed almost 8 years after the memorandum of appeal, and since the respondent did not move to struck out the record of appeal, the appeal had to be heard on its merits, the court proposes to the Kenya Law Reform and the Rules



Committee, to review and propose an amendment to the *Civil Procedure Act*, to empower courts to dismiss, records of appeal filed out of time, after a long delay without the necessity of the respondents moving the court.

Judgment accordingly.

DATED AT KAPSABET THIS 17TH DAY OF NOVEMBER 2022.

HON. JUSTICE M. N. MWANYALE

JUDGE.

In the presence of;

Mr. Kogo for the Appellants

Mr. Tallam for the Respondents

