



**Macharia v Mwangi & 2 others (Environment and Land Appeal
45 of 2023) [2024] KEELC 667 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 45 OF 2023**

YM ANGIMA, J

FEBRUARY 8, 2024

BETWEEN

KENNEDY MWANGI MACHARIA APPELLANT

AND

LILIAN WAMBUI MWANGI 1ST RESPONDENT

PAUL MAINA MUTHOGA 2ND RESPONDENT

TABITHA WANJIRA WAMAE 3RD RESPONDENT

*(An appeal against the judgment and decree of Hon. C Obulutsa
(CM) dated 16.12.2021 in Nyabururu CM ELC No. 357 of 2018)*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. C. Obulutsa (CM) dated 16.12.2021 in Nyahururu CM ELC No. 357 of 2018 – Kennedy Mwangi Macharia v Lilian Wambui Mwangi & 2 Others. By the said judgment, the trial court dismissed the Appellant’s claim for recovery of the suit property, Title No Nyandarua/Ol’Joro-Orok Salient/29xxx. The Appellant was also ordered to bear the costs of the suit.

B. Background

2. Vide a plaint dated 24.10.2018 the Appellant sued the Respondents seeking the following reliefs:
 - a. A declaration be issued that L.R. Nyandarua/Ol Joro Orok Salient/29xxx was matrimonial property which could not be lawfully disposed or transferred without the knowledge and consent of the plaintiff.



- b. A declaration that the plaintiff is the beneficial owner of L.R. Nyandarua/Ol Joro Orok Salient/29xxx.
 - c. An order cancelling title deed No. L.R. Nyandarua/Ol Joro Orok Salient/29xxx and further order that same be registered in favour of the plaintiff.
 - d. Alternatively, and without prejudice to (a) (b) (c) above, a current valuation of L.R. Nyandarua/Ol Joro Orok Salient/29xxx be taken and the defendants be ordered to pay the same to the plaintiff.
 - e. Costs of this suit.
 - f. Any further or other relief this court may deem just to grant.
3. The Appellant pleaded that at all the material times the 1st Respondent was his spouse and that sometime in 2017 they decided to purchase the suit property for the purpose of building their permanent matrimonial home. He pleaded that it was agreed that the sale agreement would be drawn between the 1st Respondent and the vendor, Esther Wanjiku Wachira, and that the purchase price would be paid into the bank account of the vendor's daughter one, Ann Njeri.
 4. The Appellant pleaded further that he paid the purchase price on 08.09.2017 as agreed by all the concerned parties and that as he was waiting for the suit property to be transferred into his name, the vendor instead transferred the suit property to the 1st Respondent on 11.07.2018 who fraudulently sold and transferred the same to the 2nd and 3rd Respondents. It was the Appellant's contention that all the Respondents had acted illegally and fraudulently in their dealings with the suit property. He enumerated 5 particulars of alleged fraud and illegality against the Respondents.
 5. It was the Appellant's case that despite issuance of a demand and notice of intention to sue the Respondents had failed to make good his claim hence the suit.
 6. The record shows that the 1st Respondent filed a statement of defence dated 12.02.2019 denying the Appellant's claim in its entirety. She denied being married to the Appellant and put him to strict proof thereof. She further denied that it was the Appellant who had purchased or paid for the suit property and put him to strict proof thereof. She pleaded that she had singlehandedly purchased the suit property and paid for it using proceeds from her potato business.
 7. It was the 1st Respondent's case that she was single at the material time hence the requirement of spousal consent was not applicable when she decided to sell the suit property to the 2nd and 3rd Respondents. It was her contention that the Appellant had no registerable or legal interest in the suit property and consequently prayed for dismissal of the suit.
 8. The 2nd and 3rd defendants filed a joint statement of defence dated 12.02.2019 denying liability for the Appellant's claim. They denied any fraud or illegality in their acquisition of the suit property and put the Appellant to strict proof thereof. It was their pleading that they purchased the suit property from the 1st Respondent via a sale agreement dated 07.07.2018 after conducting due diligence and being satisfied that she was the sole registered proprietor thereof.
 9. They further pleaded that the 1st Respondent had indicated to them at the time of purchase that she was unmarried hence spousal consent was not required. It was their contention that they were innocent purchasers for value without notice of any prior claim by the Appellant hence their title to the suit property was protected. As a result, they prayed for dismissal of the Appellant's suit with costs.



C. Trial Court's Decision

10. The material on record shows that upon a full hearing of the suit, the trial court concluded that the Appellant had failed to prove his claim on a balance of probabilities as required by law. In particular, the trial court held that the suit property was not matrimonial property hence spousal consent was not required. The court was also not satisfied that the Appellant had proved that he was the one who had paid the purchase price for the suit property and that the 1st Respondent was registered as proprietor on his behalf or in trust for him. As a consequence, the trial court dismissed the Appellant's suit with costs to the Respondents.

D. Grounds of Appeal

11. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 18.11.2022 raising the following six (6) grounds:
 - a. The learned magistrate erred in law and in fact by failing to find that the plaintiff had proved his case on a balance of probabilities.
 - b. The learned magistrate erred in fact and in law by failing to find that the suit property was purchased by the plaintiff and that the same was matrimonial property.
 - c. The learned magistrate erred in fact and in law in failing to find that the sale of the said property to the 2nd and 3rd defendants was fraudulent or tainted with illegality and therefore void in law.
 - d. The learned magistrate erred in and law fact in making findings that were not supported by the evidence and analysis of the evidence presented before the court.
 - e. The learned magistrate erred in and law fact in failing to uphold the plaintiff's claim despite the overwhelming evidence tendered in support thereto.
 - f. The learned magistrate erred in law and fact in misapplying the evidence tendered and coming to the wrong conclusion-thereby dismissed the plaintiff's claim.
12. As a result, the Appellant sought the following reliefs in the appeal:
 - a. That the appeal be allowed.
 - b. That the judgment of the trial court dated 16.12.2021 in Nyahururu CM ELC No. 357 of 2018 be set aside.
 - c. That the costs of the appeal be provided for.

E. Directions on Submissions

13. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on or about 16.10.2023 whereas the Respondents filed theirs on or about 15.11.2023.

F. Issues for Determination

14. Although the Appellant raised 6 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may be effectively resolved by determination of the following issues:
 - a. Whether the trial court erred in law and fact in dismissing the Appellant's claim.



- b. Whether the Appellant is entitled to the reliefs sought in the appeal.
- c. Who shall bear costs of the appeal.

G. Applicable legal principles

15. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

16. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

17. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony,



has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

18. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:
 - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in dismissing the Appellant’s claim

19. The court has considered the submissions and material on record on this issue. The Appellant submitted that the trial court erred in law in finding and holding that he had failed to prove his claim on a balance of probabilities. The court was also faulted, inter alia, for failing to find that the suit property was matrimonial property; for failing to find and hold that the Appellant had paid the purchase price for the suit property; and for failing to find and hold that the sale of the suit property to the 2nd and 3rd Respondents was tainted with fraud and illegality.
20. The court has re-evaluated the evidence which was tendered before the trial court. Whereas it was the Appellant’s case that the 1st Respondent was his wife, the latter disputed the marriage and conceded mere cohabitation and child-bearing. The material on record shows that the Appellant did not tender any credible evidence on the existence of the alleged marriage and payment of dowry under Kikuyu customary law. In the event, the trial court cannot be faulted for failing to find the existence of a valid marriage between the two.
21. On the question of whether or not the suit property was matrimonial property, the trial court held as follows:

“As to whether the plot is matrimonial property, when cross-examined, the plaintiff admitted that the property was not matrimonial. That being so, the requirement for spousal consent does not arise.”
22. The court has perused the record of the trial court and it is evident at page 62 of the record of appeal that the Appellant conceded before the trial court that the suit property was not matrimonial property. In the circumstances, the Appellant is not at liberty to canvass the same issue before this court.
23. It is evident from the judgment of the trial court that it was not satisfied that the Appellant was the one who paid the purchase price for the suit property. The person to whom the money was paid on



behalf of the vendor was not called as a witness at the trial. The trial court also found some unexplained inconsistencies in the Appellant's claim and observed as follows:

“The court has seen the agreement dated 08.09.2017. It is between Esther Wanjiku as the seller and Lilian Wambui Mwangi as the purchaser. The purchase price is indicated as having been paid in cash at the time the agreement was signed. The agreement does not mention that the money was to be paid to one Ann Njeri, daughter of the seller, as alleged by the plaintiff. If he says he deposited the money into her account, was it for the purchase of the land yet the 1st defendant had already paid in cash? It was expected that the plaintiff would call Esther as a witness to confirm if indeed she directed the plaintiff to pay the money to her daughter. In cross examination he said he would call Ann as a witness. At the close of his case he failed to call her. She would have confirmed if indeed her mother had directed her to receive the purchase price on her behalf. The transfer documents from the bank confirm that funds were transferred to her account. What was this for if the 1st defendant had already paid cash to the seller?”

24. The court is satisfied that faced with the contradictory evidence on record the trial court was entitled to hold that the Appellant had failed to prove his claim to the required legal standard. There was no credible evidence to link the money which the Appellant may have paid to Ann Njeri to the suit property. The trial court having seen and heard the witnesses was better placed to assess who as between the Appellant and the 1st Respondent was telling the truth.
25. The Appellant has faulted the trial court for failing to find that the Respondents were guilty of fraud and illegality in the manner in which they dealt with the suit property. It is evident from the material on record that the reason why the Appellant attributed fraud and illegality to the Respondents was because he believed that he had a legal or equitable interest in the suit property which he had lost through improper and wrongful means. It was his contention that he had been deprived of the suit property through fraudulent and illegal means. The court having found that the Appellant has failed to demonstrate his claim to the suit property then it would follow that the 1st Respondent was entitled to deal with it in any manner she deemed fit. It was not the business of the Appellant to know why and how she dealt with the property. Thus, the Appellant cannot complain of fraudulent or illegal dealings with property in which he has no legal or equitable interest.
26. Finally, the court finds no credible evidence of the particulars of the alleged fraud and illegality. The plaint shows that the Appellant lumped together particulars of the alleged fraud and alleged illegality. It is not easy to distinguish which particulars relate to fraud and which ones relate to illegality. Such serious allegations require a high degree of particularity. The alleged particulars of fraud should have been distinctly and separately set out. The alleged particulars of illegality should also have been out in a similar manner. The court does not approve of the omnibus manner of pleading particulars of fraud and illegality.

b. Whether the Appellant is entitled to the reliefs sought in the appeal

27. The court has found that the Appellant has failed to demonstrate his grounds of appeal. The court has found and held that the trial court was entitled to find and hold that the Appellant had failed to prove his claim on a balance of probabilities. It would, therefore, follow that the Appellant is not entitled to the reliefs sought in the appeal.



d. Who shall bear costs of the appeal

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. As a consequence, the court is inclined to award the Respondents costs of the appeal.

I. Conclusion and Disposal Order

29. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. Consequently, the court makes the following orders for disposal of the appeal:
- a. The appeal be and is hereby dismissed.
 - b. The decision of the trial court in Nyahururu CM ELC. No. 357 of 2018 be and is hereby affirmed.
 - c. The Respondents are hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 8TH DAY OF FEBRUARY, 2024.

In the presence of:

Mr. David Kaburu for the Appellant

Mr. Waichungo for the Respondents

C/A - Nyaga

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Y. M. ANGIMA

JUDGE

