



Macharia & another v Macharia (Suinh as the widow and legal representation of the Estate of the Late Francis Macharia Kanyi (Deceased) (Environment and Land Appeal E002 of 2023) [2024] KEELC 4053 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

YM ANGIMA, J

MAY 2, 2024

BETWEEN

MARY WAITHERA MACHARIA 1ST APPELLANT

EDITH WANGUI MACHARIA 2ND APPELLANT

AND

TABITHA WANJIRU MACHARIA (SUINH AS THE WIDOW AND LEGAL REPRESENTATION OF THE ESTATE OF THE LATE FRANCIS MACHARIA KANYI (DECEASED)) RESPONDENT

(Being an appeal against the judgment and decree of Hon. E. Wanjala (PM) dated 31.10.2023 in Engineer CM ELC No. E041 of 2023)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. E. Wanjala (PM) dated 31.10.2023 in Engineer CMCC ELC No. E041 of 2023 – Tabitha Wanjiru Macharia (suing as the legal representative of the estate of the late Francis Macharia Kanyi) v Mary Waithira Macharia & Another. By the said judgment, the trial court allowed the Respondent’s suit against the Appellants and consequently granted a permanent injunction restraining them from burying the remnants of Mary Waithera Wangui (the deceased) on Title No. Nyandarua/Njabini/532 (the suit property).

B. Background

2. Vide a plaint dated 19.10.2023 the Respondent sued the Appellants before the trial court seeking an order of injunction restraining the Respondents by themselves, their servants, employees or agents



from burying the remains of the deceased on the suit property. The Respondent also sought costs of the suit and any other relief the court may deem fit to grant.

3. The Respondent pleaded that she was the legitimate owner of the suit property after her late husband reserved the same for her upon gifting various parcels of land to his dependants during his lifetime. It was her case that she was beneficially entitled to the suit property because she had been in occupation and use thereof for over 40 years.
4. It was further pleaded that the Appellants were openly opposed to her occupation of the suit property and had even attempted to forcibly evict the Respondent therefrom. It was also pleaded that the Appellants were intending to bury the remains of the deceased on the property in a bid to dispossess and disinherit the Respondent. It was further pleaded that despite issuance of a demand and notice of intention to sue the Appellants had failed to oblige thus rendering the suit necessary.
5. The record shows that the Appellants filed a joint statement of defence dated 23.10.2023 denying liability for the Respondent's claim. They pleaded that at all material times the Respondent was resident at her matrimonial house at Njabini and had only recently relocated to the suit property. The 1st Appellant pleaded that prior to the demise of her husband (who was also the Respondent's husband) he had subdivided and distributed the suit property and mutations had been prepared for registration.
6. The 1st Appellant further pleaded that she was also utilizing part of the suit property where she had built a mud walled house for her farm workers. The Appellants denied the rest of the contents of the plaint and put the Respondent to strict proof thereof.

C. Trial Court's Decision

7. The record shows that upon a full hearing of the suit the trial court found for the Respondent and consequently granted an injunction restraining the Appellants from burying the remains of the deceased on the suit property and advised the Appellants to consider burying the remains on some other parcels of land which seemed to be uncontested. The trial court was of the view that the nature of the land dispute among the parties could not be effectively resolved in the civil proceedings before her.

D. Grounds of Appeal

8. Being aggrieved by the said judgment the Appellants filed a memorandum of appeal dated 17.11.2023 challenging the same on the following 13 grounds:
 - a. That the learned trial magistrate erred in law and fact by granting injunctive reliefs to the plaintiff who did not lay any legal threshold requirement for granting such reliefs.
 - b. That the learned trial magistrate erred in law and in fact by failing to consider the defendants' defence witnesses and documents.
 - c. That the learned trial magistrate erred in law in failing to consider the issues in dispute and addressing them separately and giving reasons for her finding on all of the issues.
 - d. That the learned trial magistrate erred in law and facts by failing to consider that the estate of the late Francis Macharia Kanyi was fully distributed as per the mutation forms provided.
 - e. That the learned magistrate erred in law in failing to consider and make a determination on who were the occupants of Nyandarua/Njabini/523.



- f. That the learned trial magistrate erred in law and fact by issuing an injunction restraining the 2nd defendant from burying the remains of her daughter on the suit property which was rightfully given to her by her late father.
 - g. That the learned trial magistrate erred in law and fact by failing to consider the evidence of all witnesses that each child was bequeathed his share of the estate.
 - h. That the learned trial magistrate erred in law and fact by ordering the body of the deceased to be interred in either Nyandarua/Karate/345, Nyandarua/Karate/245 or Nyandarua/Tulaga/86 which land is still contested and whose searches/status were not produced in court.
 - i. That the learned magistrate erred in fact and in law in finding that the Respondent herein had proved her case against the Appellants.
 - j. That the learned magistrate erred in law and fact and misdirected herself that the deceased patrich had fully distributed his estate.
 - k. That the learned magistrate erred in law and fact and misdirected herself by grabbling alternative burial sites yet the entire estate is contested.
 - l. That the learned magistrate erred in law and fact by failing to note that the Respondent had registered caution on all the properties of the deceased.
 - m. That the learned magistrate erred in law and fact by failing to provide reasons as to why she never considered the Appellant witness testimonies.
9. As a result, the Appellants sought the following reliefs in the appeal:
- a. That the judgment of the trial court dated 31.10.2023 in Engineer PM ELC No. E041 of 2023 be reviewed or set aside.
 - b. That the Appellants be awarded costs of the appeal.

E. Directions on Submissions

10. 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 Respondent filed written submissions dated 02.03.2021 whereas the Appellants' submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

11. The court has considered the pleadings, evidence and submissions on record. The court has also considered the Appellants' 13 grounds of appeal. The court is of the opinion that there are only two key issues for determination herein namely:
- a. Whether the trial court erred in law and fact in granting an injunction against the Appellants.
 - b. Who shall bear costs of the appeal.

A. Applicable legal principles

1. This court as a first appellate 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 page 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.”

13. 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...”

14. 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.”

15. 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 granting an injunction against the Appellants

- 16. The court has considered the material and submissions on record. Whereas the Appellants submitted that the trial court erred in law and fact in allowing the Respondent's claim, the Respondent fully supported the decision of the trial court. It is evident from the evidence tendered before the trial court that whereas the Respondent tried to demonstrate her entitlement to the suit property on account of longevity of her occupation, the Appellants also tried to demonstrate that they were allocated some portions of land within the suit property by the registered owner during his lifetime.
- 17. The evidence before the trial court shows that the owner of the suit property was the husband of the 1st Appellant and the Respondent and that he died intestate. It would appear that he had initiated the process of distributing his earthly possessions during his lifetime but he died before completion of the process. The material on record shows that although some mutation forms were signed during his lifetime there was no evidence of their registration. There was also no evidence to demonstrate that the relevant consents of the Land Control Board were obtained and that the relevant transfer forms were signed by the owner before his demise.
- 18. The court is thus of the opinion that the dispute before the trial court was in reality a succession dispute which was disguised as a burial dispute. Indeed, the entire evidence tendered by the parties and their witnesses was typical evidence in succession proceedings. The parties were thus giving their evidence on entitlement to the suit property to the wrong court. The court is of the view that the dispute among the parties could only be effectively resolved in succession proceedings. The court takes the view that it is only upon the succession court undertaking distribution of the net intestate estate that the beneficiaries would be legally able to assert their rights to particular parcels of land.
- 19. In the circumstances of this case, neither the Respondent nor the Appellants could assert any valid property rights over the suit property in the absence of a certificate of confirmation of grant entitling them to particular portions of the land. They would, however, be entitled to occupy and use the portions of land they were occupying prior to the demise of the owner. That does not mean that one beneficiary can seek to injunct another beneficiary from making ordinary use of a portion of land belonging to an estate which has not been distributed. The court is thus of the opinion that the trial court erred in law in granting an injunction against a potential beneficiary of an intestate estate against another potential beneficiary. The court is thus inclined to allow the appeal and set aside the injunction.

b. Who shall bear costs of the appeal

- 20. 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 -v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has noted that the trial court did not award any party costs of the suit most probably because the parties were close relatives. This court is not inclined to award the Appellants any



costs for the same reason. The court is further of the opinion that the parties are better off spending their resources in succession proceedings so that the intestate estate they are fighting over may be administered and distributed under the Law of Succession Act (Cap.160).

I. Conclusion and Disposal Orders

21. The upshot of the foregoing is that the court finds and holds that the trial court erred in granting an injunction against the Appellants who were potential beneficiaries of the intestate estate. As a result, the court makes the following orders for disposal of the appeal:
- a. The appeal be and is hereby allowed.
 - b. The judgment of the trial court dated 31.10.2023 in Engineer CMCC ELC No. E041 of 2023 is hereby set aside. However, the order of the trial court on costs shall be retained.
 - c. There shall be no orders as to costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 2ND DAY OF MAY, 2024.

In the presence of:

Mr. Gachagua holding brief for J.K. Karanja Advocate for the Appellants

Mr. Paul Njihia for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

