



**Wangila (Legal and Personal Representative of the Estate of
Crescent W. Nachongali) v Bukhebi (Environment and Land Appeal
E015 of 2022) [2024] KEELC 3735 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

EC CHERONO, J

MAY 9, 2024

BETWEEN

**PHILIP MASINDE WANGILA APPELLANT
LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CRESENT
W. NACHONGALI**

AND

JOSEPH MAKOKHA BUKHEBI RESPONDENT

*(Being an appeal arising from the judgment and decree of Hon. CAS MUTAI
(SPM) delivered on 4th March, 2023 in Bungoma CM ELC Case no. 191 of 2019)*

JUDGMENT

1. This appeal arises from the judgment of the Senior Principal Magistrate Hon. CAS Mutai delivered on 4th March, 2023 in Bungoma Chief Magistrate Court ELC Case No.191 OF 2019.
2. The brief background of this case is that through a plaint dated 19th April, 2018, one Crescent W. Nachongali (deceased) and his Estate now represented by Philip Masinde Wangila as his legal and personal representative (the appellant herein) sought for judgment against the Defendant/Respondent for the following Orders;
 - a. An eviction order to forcefully eject the defendant either himself and/or acting through his agents, servants or family members from L.R No. E. Buksu/S.Kanduyi/6279.
 - b. Costs of this suit.
 - c. Interests on costs at Court rates
 - d. Any other or further relief this honourable Court mat deem fit.



3. It was the Plaintiff/Appellant's case that Crescent W. Nachongali was the absolute registered proprietor of L.R No. E. Buksu/S.Kanduyi/6279 (herein referred to as 'the suit land). He averred that the Defendant/Respondent, without any justifiable cause encroached into the suit property and constructed a semi-permanent structure and has since been utilizing the land without the Plaintiff/Appellant's consent.
4. The Defendant/Respondent filed a statement of defence dated 11th June, 2018 where he averred that he had not encroached the suit land. He argued that he had a rightful claim to the suit land as a beneficiary of his father's estate and has been occupying it accordingly. He averred that the appellant who was his step-father and who held the suit land in trust, illegally took up the suit land when he (the respondent) was young and started disposing off the same in breach of his fiduciary trust.
5. Upon hearing the matter to conclusion, the trial court struck out the suit with costs in its judgment delivered on 4th March, 2023. Being aggrieved by the court's judgment, the Appellant herein preferred an appeal vide a memorandum of appeal dated 30th March, 2023 on the following grounds;
 - a. The trial magistrate erred in law and in fact in striking out the applicant's case as against the overwhelming evidence on record.
 - b. The trial magistrate erred in law and in fact in failing to analyze the cogent evidence on record hence arriving at a wrong decision.
 - c. The trial magistrate erred in law and in fact in considering the respondents defence when the respondent did not participate in the proceedings hence arriving at a wrong decision.
 - d. The trial magistrate erred in law and in fact in making a finding that the appellant did not avail the witnesses when the evidence of the witnesses is on record hence arriving at a wrong finding.
 - e. The trial magistrate erred in law and in fact in striking out the appellants case on the basis that no exhibits were produced when the appellant produced 9 exhibits hence arriving at a wrong decision.
 - f. The trial magistrate erred in law and in fact in striking out the appellants case on the basis that the appellant held the suit land in trust for the respondent.
 - g. The trial magistrate erred in law and in fact in disregarding the appellant evidence on record hence arriving at a wrong finding.
 - h. The trial magistrate erred in law and in fact in striking out the appellants case without framing issues for determination hence arriving at a wrong decision.
6. The appellant therefore sought to have this appeal allowed and the judgment of the trial court set aside and substituted with an order allowing the Plaintiff/Appellant's former suit with costs. The Appellant also sought costs of this Appeal.
7. In his submissions in support of the appeal dated 2nd January, 2024, the Appellant submitted that he is the absolute registered owner of the suit land and therefore, has every right right to utilize the same as he pleases according to Section 26 of the *Land Registration Act*, 2012. Reliance was placed in the case of Okal Ongaro vs. James Owiyo Odipo (2015)e KLR.
8. The appellant also argued that the respondent failed to appear in court during the hearing and his case proceeded Ex-parte and as such, his claim (the appellant's) was uncontroverted. Reference was made to the above cited case law.



9. The appellant further contends that despite the trial court's assertion that they did not call any witnesses to support their case, there are indeed witnesses who testified as indicated in the abstract of the record of appeal. They submitted that the trial court made an error in arriving at that conclusion which has led to a misguided determination. Additionally, the appellant argued that the trial court's finding that they held the suit land in trust is incorrect since there was no iota of evidence to support such an assertion. The plaintiff argued that the respondent's defense, as recorded, was inconsequential because the defendant didn't participate during the hearing as the case proceeded Ex-parte. The appellant therefore urged the Honourable court to allow this appeal with costs.
10. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the appellant and the court record generally and identify the following as the issues that emerge for determination:
 - a. Whether the appellant is entitled to the orders sought.
 - b. Who bears the costs.
11. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment by the trial Judge and come up with its own independent judgment on whether or not to allow the appeal. It is trite that a first appeal court is empowered to subject the whole of the evidence adduced before the trial court to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* (1958)E.A page 424.
12. A first appeal court has jurisdiction to either reverse or affirm the findings of the trial court. The first appellate court's decision has to be decided on facts and the law. In a first appellate court, parties are to be heard on both questions of fact and law and the court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
13. The appellant in the plaint before the trial court had sought orders for inter alia, eviction and costs. The Respondent who was also the Defendant Entered Appearance and filed a statement of defence but failed to show up for the hearing of the suit despite being notified and the case proceeded ex-parte. The appellant called three witnesses in support of his claim namely; Philip Masinde Wangile (PW1), Joseph Masika Munyalla (PW2) and Micheal Wekesa Lusweti (PW3) In their testimony, the witnesses referred to their witness statements and sought to have them adopted as their testimony-in-chief. Their testimonies were consistent to the effect that the appellant subdivided LR No. E.Bukusu/S/Kanduyi/942 amongst his three brothers who subsequently shared among their respective children as beneficiaries. It was their testimony that the respondent's father did receive his share and he subsequently divided it amongst his children, the respondent being one of them.
14. They further stated that when the respondent's parents died, the clan resolved to have them buried in the appellants land L.R No. E.Bukusu/S. Kanduyi/6279 which is the appellants share of the ancestral land which the respondent now claims. According to the witnesses, after the appellant sold his share as inherited from his father, he purchased a parcel of land in Kisoyi being LR No.W.Bukusu/N.Mateka/1523 (P-Exhibit 2) and after the burial of his parents, the respondent did not return to the said land he had purchased in Kisoyi (W. Bukusu/N.Mateka/1523) but instead, he began asserting ownership over the suit land, claiming it belonged to his father. The appellant allegedly called for a clan meeting to address the issue, during which it was resolved to grant the Respondent a month to vacate the suit land. However, the Respondent declined to comply with this resolution.



15. In support of his case, the appellant produced into evidence nine (9) items as P-Exhibit 1-9. P-Exhibit 1 is a letter dated 9th April 2011 summoning the appellant to the area chief's office, P-Exhibit 2 is an agreement dated 14th December 2011 between the Respondent and the registered owner of Land parcel No. W.Bukusu/ N.Mateka/1523. P-Exhibit 3 a demand letter date 16th August, 2017 addressed to the appellant , P-Exhibit 4 a letter dated 7th March, 2018 summoning the appellant to the assistant county Commissioners office, P-Exhibit 5 are bank receipts, P-Exhibit 6 is a copy of a certificate of official search for L.R. No. W.Bukusu/N.Mateka/1523, P-Exhibit 7 are minutes of clan meeting dated 8th August, 2010, P-Exhibit 8 is a copy of title deed for L.R. No. E.Bukusu/N.Kanduyi/6279 and finally P-Exhibit 9 are mutation forms for L.R. No. E.Bukusu/N.Kanduyi/5986 which upon subdivision created 5 resultant parcels, amongst them the suit land.
16. Despite having duly entered appearance and filed a statement of Defence, the Respondent did not participate in the trial. As a result therefore, it failed to substantiate the allegations made in its defence or produce any evidence to counter the appellant's testimony. The appellant's evidence therefore remains uncontroverted and unchallenged. The defence on record remains mere allegations.
17. However, it is now settled that uncontroverted evidence is not automatic evidence. The burden of proof usually lies on the appellant to prove his case and that burden is in no way lessened because the respondent did not adduce any evidence. This was succinctly expressed by the Court of Appeal in the case of Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR where the Court held as follows:
- “The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...”While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”
18. As stated in the above cited case law, it is a requirement of law that he who alleges must prove and that standard in civil law must be on a balance of probabilities. Sections 107, 108 and 109 of the *Evidence Act* deals with burden of proof.
- Section 107 (i) “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 exists.
- 107(2) when a person is bound to prove the existence of any fact, it is said the burden of proof lies upon that person.
- 108; The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all was given on either side.”
19. Similarly, in Miller Vs. Minister of Pensions [1947] 2 ALL E.R. 372, Lord Denning said
- “It must carry a reasonable degree of probability not so high as required in criminal cases. If the evidence is such that the tribunal can say; 'We think it is more probable than not; the burden is discharged. But if the probabilities are equal then it is not.’”



20. The appellant produced as PExhibit 8 a copy of the title of the suit land registered in his name. Section 27(a) of the now repealed Registered Land Act (replica of Section 24 of the Land Registration Act) under which the suit land is registered provides that; the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Further, Section 28 of the now repealed Registered Land Act (replica of Section 25 of the Land Registration Act) provides that the registration of a party as the owner of land does not relieve him of his duty/obligation to which he is subject as a trustee.
21. With the appellant having produced a title of the suit land duly registered in his name, the burden to prove the existence of a trust lay on the respondent. A trust cannot be inferred and the alleging party must prove the same in evidence. The respondent was therefore required to satisfy the court requirements of Section 108 and 109 of the Evidence Act and to discharge his burden of proof on a balance of probabilities
22. Since the respondent did not participate in the hearing of the suit before the trial court, nothing was placed before the court in support of his case. As such, the appellant did prove his claim as an absolute proprietor of the suit land and was therefore entitled to the orders sought in the plaint dated 19th April, 2018.
23. Ultimately, I proceed to allow this appeal by setting aside the Judgment/decreed issued by the trial court and substitute it with an order granting the orders for eviction as sought in the plaint dated 19th April, 2018. Due to the nature of the relationship between the plaintiff/appellant and the respondent/defendant, I order each party to bear their own costs.
24. It is so ordered.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 09TH DAY OF MAY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wamalwa R for Appellant
2. Respondent/Advocate-absent
3. Bett C/A

