Nyagu (As personal representative of Mary Wangechi Nyagu - Deceased) v Munyi (Environment and Land Appeal 30 of 2023) [2024] KEELC 5251 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5251 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 30 OF 2023

YM ANGIMA, J

JULY 11, 2024

BETWEEN

JOSEPH WAMBUGU NYAGU (AS PERSONAL REPRESENTATIVE OF MARY WANGECHI NYAGU - DECEASED) ..... APPELLANT

AND

LOISE WACHUKA MUNYI ..... RESPONDENT

((Being an appeal against the judgment and decree of Hon. J. Wanjala (CM) dated 08.08.2018 in Nyahururu CM ELC No. 82 of 2008)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. J. Wanjala (CM) dated 08.08.2018 in Nyahururu CM ELC No. 82 of 2008 – Loise Wachuka Munyi -vs- Mary Wangechi Nyagu. By the said judgment, the trial court allowed the Respondent's suit and dismissed the Appellant's counterclaim. The Respondent was also awarded the costs.

****B. Background

2. The record shows that vide a plaint dated 17.04.2002 the Respondent sued Appellant's late mother, Mary Wangechi Nyagu (the deceased) seeking the following reliefs:

    a. An order of declaration that the plaintiff is the sole legal owner of Plot No. 203/605 Ol joro orok West Settlement Scheme or of that piece of land that she has occupied since 1965 by whatever reference number now.

b. An order that Title No. Nyandarua/Ol Joro Orok West/283 does not relate to Plot No. 203/605 Ol Joro Orok West Scheme and if it does the same must have been obtained through fraud by the defendant.

c. An order that Title No. Nyandarua/Ol Joro Orok West/283, if the same relates to Plot No. 203/605 Ol Joro Orok West Scheme, be cancelled and the same be issued in the name of those changes on the records and registers.

d. An order of perpetual injunction restraining the defendant by herself, her agents, servants, employees and/or others howsoever from evicting, harassing, or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the piece of land she has occupied since 1965 being Plot No. 203/605 Ol Joro Orok West Scheme or by whatever reference now called.

e. Costs and interest.

f. Any other or further orders that this court may deem appropriate to grant in the entire circumstances of this suit.

3. The Respondent pleaded that sometime in 1965 she was allocated Plot No. 203/605 (Plot 605) at Ol'Joro'Orok Settlement Scheme by the Settlement Fund Trustees (SFT) whereupon she took possession of the land and settled there with her family members. She pleaded that on 05.04.2002 the deceased invaded the said land, destroyed the houses thereon and evicted her family members therefrom on the basis of a court order or decree she had obtained against her husband, Charles Munyi Wambugu for his eviction from Title No. Nyandarua/Ol Joro Orok West/283 (Parcel 283).

4. The Respondent further pleaded that Parcel 283 did not exist on the ground and that the deceased had fraudulently obtained title thereto by, inter alia, impersonating her, giving false information to officers of the SFT, and failing to follow the applicable procedures in acquisition of the title deed.

5. The record shows that the deceased filed a defence and counterclaim dated 28.05.2002 in response to the Respondent's suit. By her defence, she denied the Respondent's claim in its entirety and put her to strict proof thereof. She denied that the Respondent was ever allocated Plot 605 and contended that the said plot was known as Parcel 283 and that she was the one who was allocated the same by the SFT in 1965.

6. The deceased further pleaded that the Respondent's family members were lawfully evicted from parcel 283 on the basis of a decree passed in Nyahururu PMCC No. 576 of 1993 which she had filed against Charles Munyi who was the Respondent's husband. She also pleaded that the criminal court in Nyahururu Cirminal Case No. 2291 of 1996 had found that Plot 605 was later on registered as Parcel 283.

7. It was the case of the deceased that Plot 605 did not exist on the ground since its number was changed to Parcel 283 and that as the first registered owner thereof, she had obtained an indefeasible title thereto. She also denied the fraud and particulars of fraud pleaded against her in the plaint and prayed for dismissal of the Respondent's suit.

8. By her counterclaim, the deceased reiterated the contents of her defence and pleaded that she was allocated the disputed land in 1965 under her nickname, Lucy Wachuka which name she later abandoned and assumed her real name Mary Wangechi Nyagu. It was pleaded that the Respondent's real name was Susan Wangechi Munyi and that she had assumed the name Loice Wachuka solely for

the purpose of grabbing the suit land from her. As a consequence, she sought the following prayers in her counter-claim:

a. That the Respondent and her family and dependants be forcibly evicted from Title No. Nyandarua/Ol'Joro'Orok West/283.

b. Costs and interest.

c. Any other relief the court may deem fit to grant.

9. The record shows that the Respondent filed a reply to defence and defence to counterclaim dated 11.06.2002 in response to the defence and counterclaim. By her reply to defence she joined issue with the deceased upon her defence and reiterated the contents of her plaint. She denied that her real name was Susan Wangechi Munyi as alleged by the deceased. She denied that Plot 605 was the same as Parcel 283 and denied that the deceased was ever allocated either of them in 1965 or at all. The Respondent also denied that the criminal court had declared that the deceased was the owner of the suit land.

10. By her defence to counterclaim, the Respondent denied the contents of the counterclaim and put the deceased to strict proof thereof. She denied that the deceased was previously known as Lucy Wachuka and put her to strict proof thereof. She further denied that the deceased was ever allocated the suit land and denied that she was the first registered owner thereof or that her title was indefeasible. As a result, the Respondent prayed for dismissal of the counterclaim with costs.

C. Trial of the Action

11. The record shows that upon a full hearing of the suit the trial court was satisfied that the Respondent was the legitimate allottee of Plot 605 which was later on registered in the name of the deceased as Parcel 283. The trial court was not satisfied that the deceased was at any previous time known as Loice Wachuka to whom the SFT allocated Plot 605 in 1965. The trial court further found that it was the Respondent who had paid the SFT loan for the suit land and that she and her family had been in occupation since 1965. As a result, the court entered judgment for the Respondent as prayed in the plaint and proceeded to dismiss the counterclaim.

D. Grounds of Appeal

12. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 30.08.2018 challenging the same on the following grounds:

a. The learned trial magistrate erred in law and in fact in completely disregarding the forensic evidence adduced in Nyahururu P.M.C.C. No. 2291 of 1996 which proved that the suit land was acquired by Mary Wangechi Nyagu (deceased).

b. The learned trial magistrate erred in law and in fact in holding that the original allottee of Plot No. 203/605 was the Respondent contrary to clear evidence on record.

c. The learned trial magistrate erred in law and in fact in finding that Mary Wangechi Nyagu had no transfer documents.

d. The learned trial magistrate erred in law and in fact in finding that the Appellant did not prove that Mary Wangechi Nyagu was initially known as Loise Wacuka.

e. The learned trial magistrate erred in law and in fact in finding that the Appellant's title deed was issued through fraud whereas the Respondent had not proved fraud.

f. The learned trial magistrate erred in law and fact in finding that the Respondent has been in occupation of the suit property from 1965 and thus entitled to the suit land.

g. That the learned trial magistrate erred in law and in fat in finding that the title deed for the suit land was not acquired legally.

h. That the learned trial magistrate erred in law and in fact for disregarding the evidence and orders issued in Nyahururu PMCC No. 576 of 1993 and Nyahururu PMCR No. 2291 of 1996 in deciding the case.

i. That the learned trial magistrate erred for allowing the Respondent's suit and disallowing the Appellant's counterclaim.

13. As a result, the Appellant sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the Respondent's suit before the trial court be dismissed.

c. That judgment be entered for the Appellant as prayed in the counter-claim.

d. That the Appellant be awarded costs of the proceedings.

E. Directions on Submissions

14. When the appeal was listed for directions it was directed that it 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 filed submissions dated 03.06.2024 whereas the Respondent's submissions were dated 18.06.2024.

F. Issues for Determination

15. Although the Appellant raised 9 grounds in his memorandum of appeal, the court is of the view that the ensuing issues may be summarized as follows:

a. Whether the trial court erred in law and fact in allowing the Respondent's suit.

b. Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim.

c. 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 –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 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."

17. Similarly, in the case of Peters –vs- 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..."

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- 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."

19. In the case of Kapsiran Clan -vs- 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 allowing the Respondent's suit

20. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for finding and holding that the Respondent had proved that she was the legitimate allottee of Plot 605 which was later registered in the name of the deceased as Parcel 283. It was submitted that the trial court erred in ignoring or failing to take into account the prosecution evidence in the criminal case which demonstrated that the deceased was the original allottee of the suit land. The trial court was also faulted for failing to find that the Respondent was an imposter who had assumed the name Loice Wachuka for the purpose of defrauding the deceased of her land.

21. The Respondent, on her part, fully supported the decision of the trial court. It was submitted that she was the real Loice Wachuka to whom the SFT allocated the suit land in 1965 and that her national identity card confirmed her identity. It was submitted that she was the one who settled the SFT loan and that she had been issued with a discharge of charge and transfer by the SFT. It was further submitted that it was the deceased who had fraudulently obtained a title deed in her name even though all the allocation documents in the SFT file bore the Respondent's name. It was further submitted that the deceased's application for change of name in 1987 was rejected by the SFT.

22. It is evident that the trial court was faced with contradictory evidence by the warring parties on the identity of the allottee, Loice Wachuka. The court was not impressed or persuaded by Mary Wangechi's claim to be the real Loice Wachuka. The trial court resolved the issue as follows:

> " The question is if she was nicknamed Wachuka how did she get the name Loice? DW1 did not explain how she acquired the name Loice. The plaintiff stated that she was called Loice Wachuka from birth and when she married her husband she acquired the third name Munyi. When identity cards were issued she got ID. No.2933204 under the name Loice Munyi. That is the ID. Number found in the lands [office] for the original allottee of the suit land as per the evidence of PW2."

23. The court finds no fault with the trial court's finding on the issue of the identity of the allottee of the suit land. The court is unable to agree with the Appellant's submission that the trial court ought to have relied on the proceedings and evidence in the criminal case. It must be remembered that the criminal case concerned a charge of forcible detainer whereby the Respondent was acquitted of the charge. The court does not agree with the Appellant's suggestion that the Respondent ought to have appealed on the various findings and pronouncements by the criminal court on who was the original allottee of the suit land. The bottom-line was that the Respondent was acquitted under Section 215 of the Criminal Procedure Code (Cap.75) hence she had no business appealing against her own acquittal.

24. It is pertinent to note that although the prosecution called opinion evidence from a fingerprints expert, no such expert testified in the civil suit before the trial court. There is no provision of law allowing any wholesale importation of evidence tendered in a criminal trial into civil proceedings without calling

the concerned witnesses unless the same falls within the exceptions provided for under the *Evidence Act*. Section 34 (1) of the *Evidence Act* (Cap.80) which were cited by the Appellant does not support the Appellant's proposition. The only Section of the *Evidence Act* which would probably have been of assistance to the Appellant was Section 47A and only if the Respondent had been convicted in the criminal case.

25. Section 34 of the *Evidence Act* stipulates as follows:

> 1. Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances: -
>
> a. where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;
>
> and where, in the case of a subsequent proceeding
>
> b. the proceeding is between the same parties or their representatives in interest; and
>
> c. the adverse party in the first proceeding had the right and opportunity to cross-examine; and
>
> d. the questions in issue were substantially the same in the first as in the second proceeding.
>
> 2. For the purposes of this section: -
>
> a. the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
>
> b. a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused."

26. It is evident that the criminal proceedings referred to were not between the deceased and the Respondent. The deceased was just a complainant and a state witness. In fact, the law specifically declares that such proceedings are deemed to be proceedings between the accused and the prosecutor. In the premises, the court finds no justification to interfere with the decision of the trial court in finding and holding that the Respondent was the legitimate allottee of Plot 605 and that she had proved her claim against the deceased on a balance of probabilities. The court also finds no fault with the finding of the trial court that the deceased must have obtained a title deed fraudulently since the same was not supported by the allocation file held by the SFT. It is evident from the material on record that the SFT records indicated Loice Wachuka as the allottee and that the discharge of charge and transfer documents were in the name of Loice Wachuka. The material on record also shows that a request by the deceased to change her name from "Loice Wachuka" to Mary Wangechi Nyagu was not approved by the SFT since there were 2 different identity card numbers in the relevant file. The only conclusion which

could be drawn in the circumstances is that the deceased obtained a title in her own name through fraudulent means.

b. Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim

27. It is evident from the material on record that the Appellant's counter-claim and the Respondent's claim were mutually exclusive so that if one claim succeeded then the other would automatically fail. Since the court has already found that the trial court was right in allowing the Respondent's suit, then the counterclaim was for dismissal. As such, the trial court was right in dismissing the Appellant's counterclaim.

c. 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 to depart from the general rule. As a result, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

29. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a consequence, the court makes the following orders for disposal thereof:

a. The appeal be and is hereby dismissed in its entirety.

b. The Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 11TH DAY OF JULY, 2024.

In the presence of

N/A for the Appellant

Mr. Gakuhi Chege for the Respondent

C/A - Carol

.....

Y. M. ANGIMA

JUDGE