



**Mwangi v Mwangi & another (Environment and Land Appeal
E005 of 2020) [2023] KEELC 630 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E005 OF 2020**

YM ANGIMA, J

FEBRUARY 9, 2023

BETWEEN

NAOMI MUTHONI MWANGI APPELLANT

AND

JOHN NGONYOKU MWANGI 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. D. N. Sure (SRM) dated and delivered on 14.10.2020 in Engineer SPM's Court ELC No. 30 of 2018 *John Ngonyoku Mwangi v Naomi Muthoni Mwangi & the Hon. Attorney General*. By the said judgment, the trial court allowed the 1st Respondent's suit against the Appellant as prayed in the plaint together with costs. She did not, however, make any pronouncement on the Appellant's counterclaim. Being aggrieved by the said judgment the Appellant filed the instant appeal.

B. Background

2. The material on record shows that by a plaint dated 24.09.2018 the 1st Respondent sued the Appellant and the Hon. Attorney General seeking a declaration that he was the only legitimate proprietor of Title No. Nyandarua/Kitiri/1034 (the suit property) and that its purported transfer to the Appellant was illegal, null and void. The 1st Respondent also sought an order for revocation or cancellation of the title in the Appellant's name and for the Land Registrar to correct the land register accordingly.
3. The 1st Respondent pleaded that sometime in 1990 he purchased the suit property from the previous owner the late Gichohi Wahome (the deceased) for valuable consideration whereafter he was registered as proprietor thereof and issued with a title deed. He further pleaded that sometime in March, 2018



- he conducted a search on the suit property only to realize that it had been transferred to the Appellant without his knowledge or consent on 20.12.2017.
4. It was the 1st Respondent's case that the said transfer of the suit property to the Appellant was fraudulent since he had never sold nor transferred it to her and that he still held the original title deed which was issued to him in 1990. He pleaded several particulars of fraud against the Appellant and the Attorney General.
 5. The Appellant filed a defence to the suit and a counterclaim dated 07.11.2018 and amended on 05.08.2019. The Appellant denied the 1st Respondent's ownership of the suit property and put him to strict proof thereof. She asserted that she was the rightful and registered proprietor of the suit property. She further denied that she had acquired the suit property through fraudulent means as alleged by the 1st Respondent or at all and put him to strict proof thereof.
 6. By her counterclaim, she pleaded that she purchased the suit property in 2017 from the then registered owner called John Ngonyoku Mwangi who also held the original title for the suit property as well as his identification documents. The Appellant pleaded at the time of purchase she was represented by one, Joseph Theuri and that all the applicable procedures were followed in the sale transaction including procurement of the consent of the Land Control Board (LCB) after which a title deed was issued to her on 20.12.2017.
 7. The Appellant further pleaded that in spite of her registration, the 1st Respondent had wrongfully entered and trespassed upon the suit property by carrying out farming activities thereon thereby denying her the use and enjoyment of her property. The Appellant contended that she had suffered loss and damage as a result of the 1st Respondent's action.
 8. Consequently, the Appellant sought the following orders against the 1st Respondent in her counterclaim:
 - a. A permanent injunction restraining the plaintiff whether by himself or persons claiming through him, his servants and/or agents or otherwise howsoever, from occupying, trespassing on, leasing, letting, tilling, alienating or in any other manner dealing with the suit land known as land reference number Nyandarua/Kitiri/1034.
 - b. An award of damages for trespass and forcible detainer against the plaintiff.
 - c. An award of exemplary damages against the plaintiff.
 - d. An order directing the plaintiff to remove the caution registered against the 1st defendant's title number Nyandarua/Kiriti/1034 on or about 9th March, 2018 and in default, the 1st defendant through the 2nd defendant be at liberty to remove the same at the plaintiff's cost.
 - e. Costs of this suit and interest thereon at court rates.
 9. The Attorney General also filed a defence to the action dated 29.07.2019 in which he denied the 1st Respondent's claim in its entirety. The fraud pleaded by the 1st Respondent together with particulars thereof were vehemently denied and the 1st Respondent put to strict proof thereof. The Attorney General further pleaded that no notice of intention to sue had been served by the 1st Respondent in violation of the requirements of Section 13A of the *Government Proceedings Act* (Cap. 40). The court was consequently urged to dismiss the suit with costs.
 10. The record shows that the 1st Respondent filed a reply to defence and defence to the Appellant's counterclaim. By his reply to defence, the 1st Respondent joined issue upon the defence and reiterated



the contents of his plaint. He also denied the contents of the counterclaim. In particular, he denied the Appellant's ownership of the suit property. He denied that he had ever sold the suit property to her and contended that she could have bought it from a fraudster who had no title to pass to her. The 1st Respondent also denied the allegations of trespass and the loss alleged to have been suffered by the Appellant and sought strict proof thereof.

C. The Decision of the Trial Court

11. The record shows that upon a full hearing of the suit, the trial court found and held that the 1st Respondent was the legitimate owner of the suit property. The court found that the 1st Respondent had never sold or transferred the suit property to her and that the Appellant was simply conned by a fraudster who had no title thereto. The trial court consequently entered judgment for the 1st Respondent as sought in the plaint but, regrettably, did not make any orders or determination of the Appellant's counterclaim.

D. The Grounds of Appeal

12. Being aggrieved by the judgment of the trial court the Appellant filed a memorandum of appeal dated 11.11.2020 raising the following 10 grounds of appeal:
- a. That the learned Honourable Magistrate erred in law and in fact in holding that the Appellant acquired title number Nyandarua/Kitiri/1034 through a known process on one hand and that the transaction was dubious on the other hand.
 - b. That the learned Honourable Magistrate erred in law and in fact in failing to find that:
 - i. The 1st Respondent did not produce evidence to confirm that he was the holder of national identity card number xxxx.
 - ii. The 1st Respondent did not produce evidence to confirm that he was the holder of Pin No. A011xxxxxK.
 - iii. The 1st Respondent did not demonstrate to the court how he became the registered proprietor of title number Nyandarua/Kitiri/1034, if at all.
 - iv. The 1st Respondent did not provide evidence to confirm that the title deed in his possession was an original and genuine title deed issued by the Land Registrar, Nyandarua.
 - c. That the learned Honourable Magistrate erred in law and in fact in finding that the 1st Respondent was the registered owner of title number Nyandarua/Kitiri/1034 until 20th December, 2017 when the Appellant was issued with a title deed.
 - d. That the learned Honourable Magistrate erred in law and in fact in holding that:
 - i. There was no proof that money changed hands despite finding that the Appellant had purchased the land.
 - ii. The burden of providing that the Appellant booked for land control board consent which sat and her transaction was approved by people who would have identified the seller shifted to the Appellant despite the fact that the claim that there was no land control board consent was made by the 1st Respondent.



- iii. The seller could not have had an original title deed while the 1st Respondent still retained an original title deed contrary to the evidence by the 2nd Respondent and without any evidence to the contrary.
- e. That the learned Honourable Magistrate erred in law and in fact in purporting to uphold the allegation by the 2nd Respondent that the genuine title deed was in possession of the 1st Respondent and in so doing:
 - i. Made a conclusion without calling for evidence to support that allegation.
 - ii. Did not call for evidence or submissions on the factors taken into account to arrive at the said conclusion.
 - iii. Denied the Appellant the right to cross examine the 2nd Respondent on the veracity of the said allegation.
 - iv. Did not make an inquiry on the status of the title deed cancelled before the Appellant could be issued with a title deed on or about 20th December, 2017.
- f. That the learned Honourable Magistrate erred in law and in fact in ignoring the pleadings, evidence and submissions by the Appellant and giving more weight to the pleadings, evidence and submissions by the Respondents in relation to:
 - i. Who was the rightful holder of national identity card number xxxx.
 - ii. Who was the rightful holder of Pin number A011xxxxK.
 - iii. How the 1st Respondent became the registered proprietor of title number Nyandarua/|Kitiri/1034 prior to Appellant's registration as the proprietor thereof, if at all.
 - iv. The genuineness of title deed in possession of the 1st Respondent.
 - v. The conflicting claims by the 1st Respondent against the title in both the plaint and the caution lodged against the title.
 - vi. The purchase of title number Nyandarua/Kitiri/1034 by the Appellant and her registration as the absolute proprietor.
- g. That the learned Honourable Magistrate erred in law and in fact in demonstrating bias towards the Respondents' case instead of weighing both the Appellant's and the Respondents' case to arrive at a just determination on merits which bias is clearly demonstrated in the manner in which she purported to analyze the facts and the conclusion made.
- h. That the learned Honourable Magistrate erred both in law and fact in failing to analyze and make judgment on all the issues for determination and depended on the 1st Respondent's allegations to make the impugned judgment.
- i. That the learned Honourable Magistrate erred both in law and in fact in failing to analyze the Appellant's counterclaim, evidence, documents in support as well as submissions thereby leaving the matter without a judgment on the counterclaim.
- j. That the learned Honourable Magistrate erred both in law and in fact in acting in the manner she did thus this appeal.



E. The Issues for Determination

13. Although the Appellant raised 10 grounds of appeal in her memorandum of appeal the court is of the opinion that resolution of the following 3 issues shall effectively determine the appeal:
 - a. Whether the trial court erred in law and fact in allowing the 1st Respondent's suit.
 - b. Whether the trial court erred in law in failing to determine the Appellant's counterclaim.
 - c. Who shall bear costs of the appeal.

F. The Applicable Legal Principles

14. 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 p.126 as follows:

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion 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.”

15. 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”

16. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] AC 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 classes 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.”

G. Analysis and Determination

(a) Whether the trial court erred in law and fact in allowing the 1st Respondent’s claim

17. The court has considered the material and submissions on record on this issue. Whereas the 1st Respondent submitted that the trial court was right in holding that he had proved his case before the trial court to the required standard, the Appellant contended otherwise. The Appellant faulted the decision of the trial court in various ways. It was contended by the Appellant that there was no evidence before the trial court to demonstrate that the 1st Respondent’s title was the genuine one; that there was no evidence to confirm that the 1st Respondent was the holder of national identity card No. xxxxx or Pin No. 011xxxxK; that there was no evidence to show that spousal consent was not obtained; and that there was no evidence to show that the Appellant’s consent was obtained in a ‘special’ LCB meeting.
18. The court’s own evaluation of the evidence on record leads to the inevitable conclusion that the 1st Respondent was the legitimate owner of the suit property and that he had been in possession thereof for nearly 27 years prior to the Appellant’s registration on 20.12.2017. The evidence of the 1st Respondent was that he had only one wife, Alice Wahithe Ngonyoku and that Margaret Mworira who purported to grant spousal consent was unknown to him. The 1st Respondent’s son also testified before the trial court that his mother was called Alice Wahithe Ngonyoku and the trial court believed this evidence. The Appellant cannot, therefore, legitimately argue that there was no evidence to show that Margaret Mworira was not the land owner’s spouse.
19. The court is further satisfied that the material on record also leads to the conclusion that the Appellant’s consent for the transfer was what is popularly known as “special” consent which was not obtained in a regular meeting of the LCB. There is evidence on record from the investigating officer (PW2) who testified that when he requested for the application for consent from the Land Registrar he was given a letter booking for a “special board”. That evidence was never rebutted since the Appellant did not produce the statutory form for application of the LCB consent. What she produced was the consent itself which is the final product of the process.
20. The Appellant’s complaint regarding the holder of national identity card No. xxxxx and Pin No. A011xxxxxK is neither here nor there for that was not the only or even the determinant factor on the ownership of the suit property. There was clearly other evidence on the 1st Respondent’s purchase and occupation of the suit property from the 1990s. The evidence on record also clearly demonstrated that it was not the 1st Respondent who sold and transferred the suit property to the Appellant. In fact, the Appellant did not avail the vendor of the suit property before the trial court to demonstrate his interest in the suit property at the time he purported to sell it in 2017. The court is thus of the opinion that the trial court did not err in law or in fact in finding and holding that the 1st Respondent had proved his claim against the Appellant over ownership of the suit property.



(b) Whether the trial court erred in law in failing to determine the Appellant's counterclaim

21. The Appellant faulted the trial court for failing to determine her counterclaim. It was further submitted that the trial court was biased and that the failure to make a pronouncement on the counterclaim was evidence of such bias. It was also submitted that the trial court had completely ignored the Appellant's evidence and submissions in the judgment.
22. It is evident from the pleadings and material on record that the Appellant's and the 1st Respondent's respective claims were mutually exclusive. They had competing claims over the same property. So, if one party succeeded then the other party would automatically fail. There is no way both parties could have succeeded in their bids to vindicate their perceived rights over the same property.
23. It is evident from the record that the trial court having found that the 1st Respondent had proved his claim to the required standard it did not go further to pronounce itself on the Appellant's counterclaim. So, the judgment of the trial court was incomplete in a sense since the counterclaim was left undetermined. The court agrees with the Appellant that the said omission on the part of the trial court was an error of law. The trial court ought to have made an order dismissing the Appellant's counterclaim.
24. Since the court is legally obligated to re-evaluate the evidence on record and draw its own conclusions, it has considered the same. The court is of the opinion that the Appellant's evidence before the trial court fell far below the threshold for establishing title to the suit property. The 1st Respondent was able to establish his title from the previous owner who sold the suit property to him in 1990. The Appellant was unable to demonstrate that she lawfully acquired the suit property from the 1st Respondent. She did not even avail the vendor who purported to sell the suit property to her to demonstrate his interest in the suit property at the time of sale. The material on record indicates that both the Appellant and his agent in the sale transaction, Joseph Theuri did not deal with the 1st Respondent at all but a different Ngonyoku. In the premises, the Appellant's counterclaim was inevitably for dismissal.
25. The court is thus of the opinion that even though the trial court erred in law in failing to make a pronouncement on the counterclaim, the error did not occasion a miscarriage of justice. The trial court's omission to make a specific order dismissing the Appellant's counterclaim did not occasion her any injustice. The court is empowered to make such an order as an appellate court under Order 42 rule 32 of the *Civil Procedure Rules*, 2010.

(c) Who shall bear costs of the appeal

26. 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 finds no good reason why the successful party should be deprived of costs of the appeal. Accordingly, the 1st Respondent shall be awarded costs of the appeal.

H. Conclusion and Disposal Order

27. The upshot of the foregoing is that the court finds and holds that the trial court did not err in law in allowing the 1st Respondent's claim over the suit property. The court also finds and holds that the trial court's omission to dismiss the Appellant's counterclaim did not occasion any failure of justice. Accordingly, the court makes the following orders for disposal of the appeal:



- a) The Appellant’s appeal be and is hereby dismissed in its entirety.
- b) The trial court’s judgment in favor of the 1st Respondent over the suit property is hereby affirmed.
- c) The Appellant’s counterclaim before the trial court is hereby dismissed with costs to the 1st Respondent.
- d) The 1st Respondent is hereby awarded costs of the appeal to be borne by the Appellant.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 9TH DAY OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Chepkemai for the Appellants

Mr. Mshindi holding brief for Mr. Wandaka for the 1st Respondent

N/A for the Attorney General for the 2nd Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

