



Humanity Home for Children Trust v Agumba & another (Environment and Land Appeal E012 of 2019) [2023] KEELC 21241 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E012 OF 2019**

E ASATI, J

NOVEMBER 2, 2023

BETWEEN

HUMANITY HOME FOR CHILDREN TRUST APPELLANT

AND

PHYLIS AKINYI AGUMBA 1ST RESPONDENT

ATTORNEY GENERAL (SUED ON BEHALF OF LAND REGISTRAR

NYANDO) 2ND RESPONDENT

(Being an Appeal arising from the Judgement of the Senior Principal Magistrate's Court at Nyando ELC CASE NO.21 of 2018 delivered on dated 3rd May, 2019 by Hon. Patrick Olengo)

JUDGMENT

1. Vide the Memorandum of Appeal dated 9th May, 2019, the Appellant herein Humanity Home Of Children Trust appealed against the judgement of the Hon. Patrick Olengo (SPM) dated 3rd May, 2019 in Nyando E&L case no.21 of 2018 (the suit herein). The appellant sought for orders that the appeal be allowed the judgement of the lower court be set aside, an order be made dismissing the 1st Respondent's suit in the lower court, that the counterclaim be reinstated herein and give the land to the Respondent. That the appellant be granted costs of both the appeal and the court below.
2. The appellant was the 1st Defendant in the suit whereby it had been sued by the 1st Respondent claiming that she was at all material times the absolute registered owner of land parcel number Kisumu/Wawidhi 1 A/5247 (Wawidhi/Wawidhi 1 A/5247) and Kisumu/Wawidhi 1 A/5246 (Wawidhi/Wawidhi 1A/5246 measuring approximately 0.23Ha and 0.18Ha respectively. That the Defendants on 14th September, 2017 unlawfully registered a caution on the suit land thereby preventing the Plaintiff's enjoyment and rights to ownership of the suit land. She therefore sought for an order directing the Land Registrar to remove the caution and she also sought for costs of the suit.



3. The appellant denied the 1st Respondent's claim and vide the defence and counterclaim dated 11th April, 2018 claimed for refund of ksh 2,400,000/=, specific performance by transfer of the suit land to it (appellant) and costs.
4. The court record shows that the suit was heard before the trial court which *vide* the judgement dated 3rd May, 2019 found in favour of the 1st Respondent entered judgement in her favour for removal of the caution and costs. The trial court also struck out the appellant's counterclaim.
5. Dissatisfied with the judgement, the appellant filed this appeal on the grounds that: -
 - a. the learned trial Magistrate erred in law and in fact by saying that the 1st Defendant did not have locus yet they were sued and judgement had been entered against them.
 - b. the learned trial Magistrate erred in law and in fact by saying that the land belonged to the 1st Respondent even when there was no evidence.
 - c. the learned trial Magistrate erred in law and in fact by expunging relevant documents for not authenticating when the said document had been admitted in evidence.
 - d. the learned trial Magistrate erred in law and in fact by striking out the appellant's counterclaim after he had evidence on it and without reasonable justification.
 - e. the learned trial Magistrate erred in law and in fact in being biased in favour of the 1st Respondent without cogent evidence.
 - f. That there was weight of evidence against the 1st Respondent.
6. Direction were given on 16th March, 2023 that the appeal be argued by way of written submissions. Written submission dated 24th April, 2023 were filed on behalf of the appellant by the firm of Mwamu & Company Advocates while written submissions dated 31st May, 2023 were filed on behalf of the 1st Respondent by the firm of P. D. Onyango & Co. Advocates.

Determination

7. This being a first appeal, this court will be guided by the established principles of handling a first appeal. The court is under a duty to reconsider the evidence adduced and re-evaluate it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence adduced and the applicable law. See case of *Peter M. Kariuki v Attorney General* [2014] eKLR.
 In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. 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 this respect.”
8. Guided by the above stated principles, I proceed to determine the issues on the basis of the evidence adduced and the applicable law.
9. The first issue for determination as contained in ground 1 of the appeal is whether or not the trial court erred in holding that the appellant had no locus standi to bring the counterclaim in the suit. The



appellant described itself in paragraph 3 of the Defence and Counterclaim as a registered Trust under the Trustees Act.

10. In his submissions before the trial court, Counsel for the 1st Respondent submitted that the appellant lacked legal capacity to institute a suit. That the Trust Deed attached to the appellant's further list of documents did not state that the appellant had legal capacity and hence capable of suing. That there was no certificate of incorporation produced to show that the appellant was incorporated and hence had capacity and a right to file the counterclaim. Counsel relied on the provisions of Section 3 of the Trustees Act Cap.167 and the case of Erick Lumosi Asiligwa & another v Peter Felix Baungartner (2011)eKLR where it was held that a trust must have a certificate of incorporation issued to it for it to have legal capacity to sue.

11. In respect of this the trial court found that:

“the 1st Defendant produced a trust deed to prove its legal existence. It didn't produce a certificate of incorporation to make it a legal person capable of being sued or to sue only such a person can enter a caution. The caution was therefore entered by a person not known in law. The Trustees under that Trust Deed could only enter a caution in their own individual names”.

12. In this appeal, it was submitted on behalf of the 1st Respondent that it was the appellant who had placed the caution on the suit land in the year 2017 hence whether it was a legal person or not it had to be sued together with the 2nd Respondent (the Land Registrar) because it had refused to remove the caution. That in her Defence to counterclaim the 1st Respondent had raised substantive issues on the legality of the appellant.

13. Although the appellant framed the issue of *locus standi* as one of the grounds of appeal, it made no specific submissions on it.

14. The requirement for incorporation of Trustees who have been appointed is contained in the Trustees (Perpetual Succession) Act cap 164 Laws of Kenya. Section 3(1) provides that: -

“the Trustees who have been appointed by a body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the Trustees as a corporate body.”

Section 3(2), (2A) and 2(B) details the process of incorporation. Section 3(3) provides

“The Trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and subject to the conditions and directions contained in the certificate to hold and acquire and by instrument under the common seal to convey, transfer, assign, charge, demise any movable or immovable property or any interest therein...”

Section 5 provides for how to apply for incorporation and issuance of certificate of incorporation. Section 7 provides that a certificate of incorporation so granted shall be conclusive evidence that all preliminary requirements of the act in respect of incorporation have been complied with and the date of incorporation mentioned in the certificate shall be deemed to be the date at which incorporation has taken place.



15. The record shows that no certificate of incorporation was produced by the appellant before the trial court. To date there is nothing on record to show that the appellant was ever incorporated so as to become a legal person capable of transacting and suing as required by law. I find that the appellant has not proved that it is a legal person with capacity to effect legal transactions and particularly to file a counterclaim.
16. The second ground of appeal raised the issue of whether or not the trial court erred in holding that the land belonged to 1st Respondent. The 1st Respondent came to court as the owner of the suit land and sought for removal of caution that had been lodged on the suit land. The record shows that the 1st Respondent produced documents of ownership of the suit property and how she acquired it. The evidence on record also shows that the appellant had not been registered by the time the suit property had been purchased. It was submitted on behalf of the appellant that the email documents expunged by the trial court contained the evidence of ownership of the suit land by the appellant. It was submitted on behalf of the 1st Respondent that even from the expunged document, there was no evidence that that the 1st Respondent had acquired the suit property on behalf of on behalf of the appellant.
17. The expunged documents are part of the record of appeal herein particularly on pages 50 and 52 of the record. I have read the said documents dated Friday Mar 3, 2017 and Wed, Mar 8, 2017. I find no evidence of ownership of the suit property by the appellant.
18. Ground 3 of the appeal raises the issue of whether or not the trial magistrate erred in expunging documents for not authenticating when the said documents had been admitted in evidence. Counsel for the appellant relied on the provisions of sections 78A of the *Evidence Act* on admissibility of electronic and digital evidence and the case of *Harleys Limited v Metro Pharmaceuticals Limited* [2015]eKLR to submit that the e mail print outs were admissible in evidence. That the 1st Respondent did not prove to the court that the appellant's email account had been tempered with hence the presumption that "the e mail message as having left the address of originator and having been received at the address of the receipt in the same form and content" should have prevailed. That e mail service are now allowed as a mode of communication. Counsel further relied on the case of *Abela & others v Baadarani* [2013] UKSC 44 (26 June 2013), [2013]4 All ER to support the submission.
19. On behalf of the 1st Respondent, it has been submitted herein that the documents though produced, their authenticity was attacked the 1st Respondent's submissions for lack of a certificate. Counsel relied on section 106B of the *Evidence Act* and the case of Kiambu High Court Criminal Revision 1 of 2016 *Republic v Mark Llyod Steveson* [2016]eKLR to submit that the admissibility of the said documents depended on the production of the certificate prescribed under the *evidence Act*.
20. In expunging the documents the trial court held that the court cannot therefore rely on documents that have not been authenticated by the production of a certificate contemplated under section 106A of the *Evidence Act* and proceeded to expunge the documents that were so not authenticated. Section 106A is couched in mandatory terms and the purpose of the certificate is to authenticate or confirm the documents. I find that the trial court did not err in its findings.
21. The 4th ground of appeal raises the issue of whether or not the trial court erred in striking out the counterclaim. The court has already found herein that the appellant had no *locus standi* to sue. Hence the counter claim was incompetent as it was brought by a party who had no legal capacity to do so.

It has been submitted that the counter claim was dismissed because it was not accompanied with a Verifying Affidavit. That while the rules of procedure are to be adhered to, courts are encouraged not to be salves to the said rules when faced with inadvertent transgression and unintentional omission by the parties. Counsel relied on the case of *Miscrosoft Corporation v Mitsuni Computer Garage Ltd and*



another, Nairobi Milimani HCCC no 810 of 2001 [2001]eKLR 470, [2001] 2 EA 460 to support this submission. Counsel submitted further that the suit was at an advanced stage where parties had given their evidence and it was unjust to strike out the counterclaim. That the ends of justice were not met.

22. A reading of the judgement reveals that the court struck out the counterclaim for lack of the accompanying Verifying Affidavit. The court relied on the case of *Prisca Onyango Ojwang & another v Henry Ojwang Nyabende* (2018)eKLR where the court struck out a counterclaim for not being accompanied with a verifying affidavit.

While lack of a Verifying Affidavit can always be cured by leave being granted to the party to file the Verifying Affidavit, such leave was not sought until judgement was delivered. So the counterclaim remained defective to the end. Secondly, even if the court had sustained the counterclaim, still it could have faced the challenge of being filed by a person who had no capacity to do so. I find that the court did not err in striking out the counterclaim.

23. The only relief granted in the judgement was removal of the caution and costs which are the prayers sought in the plaint. The record shows that the 1st Respondent produced evidence of ownership of the suit property and ordered removal of the caution. A caution is a temporary measure placed on land to protect certain interests in the interim while the cautioner takes steps to address the reasons for placing it. Where the cautioner takes no such steps and at the same time refuses to remove the caution, the court is empowered at the instance of the persons affected by the caution to make an order for its removal. A caution cannot remain in place in perpetuity.

24. I find no reason to interfere with the findings and decision of the trial court.

I find that the appeal lacks merit. Appeal is hereby dismissed.

Costs to the 1st Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Machuka h/b for Mwamu for the Appellant

Onyango for the 1st Respondent.

Tanui h/b for kajo for the 2nd Respondent.

