



Mbau v Gitice (As the legal representative of the estate of Lawrence Gakuna Mbau – Deceased) (Environment and Land Appeal 42 of 2023) [2023] KEELC 21508 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 42 OF 2023
YM ANGIMA, J
NOVEMBER 2, 2023**

BETWEEN

LAWRENCE WACHIRA MBAU APPELLANT

AND

SAMUEL MBAU GITICE RESPONDENT

**AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE
GAKUNA MBAU – DECEASED**

(An appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 13.10.2021 in Nyabururu CM ELC No. 343 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 13.10.2021 in Nyabururu CM ELC No. 343 of 2018 – *Lawrence Wachira Mbau v Lawrence Gakuna Mbau*. By the said judgment, the trial court dismissed the Appellant’s suit and allowed the Respondent’s counter-claim. The Respondent was also awarded the costs of the proceedings.

B. Background

2. By a plaint dated 19.09.2018 the Appellant sued the Respondent seeking the following reliefs against him:
 - a. A declaration that the Plaintiff is the legal owner of all that property known as Subukia/ Subukia Block 9/4 (Chinga).



- b. An order of permanent injunction restraining the Defendant either by himself, agents, servants and/or any other persons authorized by the Defendant from trespassing, constructing, erecting structures or otherwise dealing in any way with the Plaintiff's land known as Subukia/Subukia Block 9/4 (Chinga).
 - c. An order of eviction, against the Defendant, his agents and/or employees from the Plaintiff's parcel of land Subukia/Subukia Block 9/4 (Chinga).
 - d. Costs of the suit and interest of the suit.
3. The Appellant pleaded that he was the registered proprietor of Title No. Subukia/Subukia Block 9/4 (Chinga) (the suit property) measuring about 2.71 ha. He pleaded that the Respondent had without any lawful justification trespassed upon the suit property by, inter alia, erecting structures thereon, planting trees and crops thereon and putting up a fence on suit property. It was further pleaded that despite issuance of a demand and notice of intention to sue, the Respondent had failed to make good the Appellant's claim hence the suit.
4. The record shows that the Respondent filed a defence and counterclaim dated 06.05.2019 in response to the Appellant's suit. By his defence, the Respondent denied the Appellant's claim in its entirety and put him to strict proof thereof. It was denied that the Appellant was the owner of the suit property.
5. The Respondent pleaded that the suit property was allocated to his mother Rose Wairimu Mbau (Rose) in 1968 whereupon she took possession thereof, constructed house and settled thereon until her demise and that her remains were buried thereon. The Respondent further pleaded that if the Appellant was the owner of the suit property then he must have obtained registration through dubious, illegal and fraudulent means. He pleaded several particulars of alleged fraud and illegality in his defence.
6. The Respondent further pleaded that there was a pending case being Nakuru High Court Succession Cause No. 83 of 2006 (the Succession Cause) whereby one of the issues for determination was the true ownership of the suit property. The court was consequently urged to dismiss the Appellant's suit.
7. By his counterclaim, the Respondent reiterated the contents of his statement of defence and pleaded that Rose was allocated the suit property by virtue of being a shareholder of Chinga Farm Company (the company). He stated that he resided with Rose on the suit property from 1968 until her demise whereupon he continued in occupation as a beneficiary. The Respondent further pleaded that the Appellant was all along aware of the material facts on ownership and occupation of the suit property but he went ahead to obtain its registration through illegal and fraudulent means.
8. The Appellant filed a reply to defence and defence to counterclaim dated 15.05.2019. He joined issue upon the Respondent's defence. He denied that he had obtained registration of the suit property through fraudulent or illegal means. He also denied all the particulars of fraud and illegality pleaded against him and put the Respondent to strict proof thereof. The Appellant denied that Rose was a shareholder of the company and that she was ever allocated the suit property and put the Respondent to strict proof thereof. He further denied that there was any pending suit in court over the suit property and required strict proof from the Respondent.
9. As a result, the Respondent sought the following reliefs against the Appellant in his counterclaim:
 - a. A declaration that the registration of the suit property in the name of the Plaintiff now Defendant is null and void and should be cancelled.



- b. An order of permanent injunction restraining the Plaintiff now Defendant from using, trespassing, entering, occupying and/or interfering with the Plaintiff now Defendant's quiet possession of the suit land Subukia/Subukia block 9/4 (Chinga) in any manner whatsoever.
- c. Costs of the suit.
- d. Any other relief that this Honourable Court may deem fit.

C. Trial Court's Decision

10. The record shows that upon a full hearing of the suit and counterclaim, the trial court found and held that the Appellant had failed to prove his claim to the required standard and proceeded to dismiss his claim. The trial court further found and held that the Respondent had proved his counterclaim and proceeded to allow the same together with an order for rectification of the register.
11. The trial court was of the opinion that the suit property was solely the property of Rose who was allocated the same by the company. As a consequence, the court held that the same could not form part of the estate the late father of the parties (the late Giticha). The trial court further held that there was material non-disclosure by the Appellant and his mother (Susan) in the Succession Cause as a consequence whereof she obtained the suit property.

D. Grounds of Appeal

12. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 03.11.2021 raising the following five (5) grounds of appeal:
 - a. The learned magistrate erred in fact and law by failing to carefully examine the weighty evidence tendered by the Appellant thus arriving at erroneous finding.
 - b. The learned magistrate erred in law and fact by failing to consider the ruling of Honourable Justice D.K. Maraga (as he then was) delivered on 2nd July, 2010 in Nakuru High Court Succession Cause 83 of 2006 where the Honourable Judge cancelled registration of parcel of land known as Subukia/Subukia Block 9/4 and Subukia/Subulia Block 9/8 in the name of Rose Wairimu Mbau and directed the same be distributed to heirs of the estate of Stephen Mbau.
 - c. The learned magistrate erred in law and fact by making a finding that the Plaintiff obtained title of parcel of land known as Subukia/Subukia Block 9/4 (Chinga) fraudulently and through misrepresentation despite the Plaintiff being gifted the said parcel by Susan Nduruki Mbau who had been issued with the said parcel through a certificate of confirmation of grant dated 23.02.2009 in Nakuru High Court Succession Cause 83 of 2006.
 - d. The learned magistrate erred in fact and law by making a finding that the Defendant had proven his counterclaim on a balance of probabilities.
 - e. The learned magistrate erred in facts and law by issuing conflicting orders to those of issued in Nakuru High Court Succession Cause 83 of 2006.
13. As a result, the Appellant sought the following reliefs in the appeal:
 - a. That this court is hereby pleased to allow this appeal.



- b. That the orders of the subordinate court issued on 13th October, 2021 in Nyahururu CMCC ELC 343 of 2018 – *Lawrence Wachira Mbau v Lawrence Gakuna Mbau* be vacated and/or set aside and be substituted with an order of this honourable court.
- c. The costs of the appeal be borne by the Respondent.

E. Directions on Submissions

14. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant’s submissions were filed on 25.08.2023 whereas the Respondent’s submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

15. Although the Appellant raised 5 grounds of appeal, the court is of the opinion that the same may be summarized into the following 3 grounds:
 - a. Whether the trial court erred in law and fact in dismissing the Appellant’s suit.
 - b. Whether the trial court erred in law and fact in allowing the Respondent’s counterclaim.
 - c. Who shall bear costs of the appeal.

G. Applicable legal principles

16. As a first appellate court, this 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 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 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...”



18. 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 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 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 dismissing the Appellant's suit

20. The court has considered the material and submissions on record on this issue. The Appellant submitted that the trial court erred in law in finding and holding that he had failed to prove his claim on a balance of probabilities in spite of overwhelming evidence to the contrary. The trial court was also faulted for holding that the Appellant had acquired the suit property through illegal and fraudulent means whereas there was no evidence of such impropriety or evidence of misrepresentation or non-disclosure of material facts on the part of the Appellant. The trial court was also faulted for making a decision which contradicted the decision of the High Court in the Succession Cause where the issue of ownership of the suit property was settled and an order for its distribution as part of the estate of the late Giticha made.



21. The court has considered the evidence and documents tendered before the trial court. The record shows that the suit property was the subject of a dispute in the Succession Cause. It was listed by Susan as part of the estate of the late Giticha but Rose filed an objection contending that it was not part of the estate. The record shows that Rose was accorded an opportunity to call viva voce evidence on that issue but apparently she did not call oral evidence in support of her claim as absolute owner. Although the succession court considered the affidavit filed by Rose, the court, nevertheless, dismissed her protest and confirmed the grant allowing for equal distribution of all the properties of the late Giticha between his two widows.
22. The material on record further shows that by the time of confirmation of grant, Rose was already the registered proprietor of the suit property. As a consequence, Susan filed a chamber summons dated 08.06.2009 seeking cancellation of the registration of Rose as the proprietor of the suit property as well as another property known as Subukia/Subukia Block 9/8. The record shows that Rose filed a replying affidavit in opposition to the said application asserting that the suit property did not belong to the estate of the late Giticha. The High Court did not believe her hence it allowed the application for cancellation of her registration on 02.07.2010. The High Court further directed that the suit property should be distributed to the heirs of the late Giticha in accordance with the certificate of confirmation of grant dated 23.02.2009.
23. There is no evidence on record to demonstrate that Rose ever appealed the decision of the High Court dismissing her protest or the decision cancelling her registration as proprietor of the suit property. There is also no evidence on record to show that Rose ever applied for revocation of the certificate of confirmation of grant. The material on record only shows that she opted for a review of the order dated 02.07.2010 cancelling her title which application was dismissed by the High Court in 2011.
24. The court is of the opinion that the issue of the ownership of the suit property and whether or not it formed part of the estate of the late Giticha was conclusively resolved by the High Court in the Succession Cause. The certificate of confirmation of grant on record indicates that the estate of the late Giticha was distributed equally between his two households. Once that was done, none of the beneficiaries could re-litigate the issue of distribution before the civil court or the environment and land court.
25. The court is further of the opinion that Rose was accorded at least two opportunities in the Succession Cause to prove her claim to absolute ownership of the suit property. The first chance was during the hearing of her protest. The second was during the application for cancellation of her registration as proprietor of the suit property. In both instances, she failed to convince the Succession Court that she was the absolute owner of the suit property and that it was not part of the estate of the late Giticha. The Respondent's evidence which was tendered before the trial court ought to have been presented to the High Court at the opportune time. The Respondent was not at liberty to tender such evidence before the subordinate court in order to overturn the decision of the High Court.
26. The Respondent must have been aware that the issue of whether or not Rose was the absolute owner of the suit property was to be determined in the Succession Cause. He must have been aware that the issue of whether or not the suit property was part of the estate of the late Giticha was also to be determined in the Succession Cause. In paragraph 9 of his defence, the Respondent pleaded as follows:

“In response to paragraph 10 of the plaint, the Defendant avers that there is a pending Succession Cause No. 83 of 2006 which the Plaintiff is aware of and which the suit parcel herein is among the issues for determination and which determination will establish the true owner of the property.”



27. The court does not agree with the finding of the trial court that there was any misrepresentation or non-disclosure of material facts in the Succession Cause by either the Appellant or Susan. It could not be said that they failed to “disclose” to the High Court that the late Giticha was not the legitimate owner of the suit property. The material on record shows that Rose was given at least two opportunities to persuade the High Court that she was the absolute owner of the suit property and that it did not form part of the estate of the late Giticha. She failed to persuade the High Court in that respect.
28. The material on record shows that the Appellant obtained registration of the suit property through his mother Susan who in turn obtained the same through the succession court. In the premises, there was no evidence of either illegality or fraud on the part of either the Appellant or Susan. In the premises, there was no legitimate basis to impeach the Appellant’s title to the suit property. The root of his title was clearly traceable to the succession cause whose certificate of confirmation of grant had not been successfully challenged by the Respondent or his mother.
29. For the foregoing reasons, the court is persuaded that the trial court erred in law and fact in holding that the Appellant had failed to prove his claim to the suit property on a balance of probabilities. The court also agrees with the Appellant’s contention that the trial court erred in law and fact in holding that he had obtained registration of the suit property through illegal and fraudulent means whereas there was no evidence of such impropriety.
30. The court does not agree with the trial court’s finding that there was no evidence on record to show that the Appellant was gifted the suit property by his mother. It is not clear how this became an issue for determination when it was not raised in the pleadings of either of the parties. Be that as it may, the court takes the view that once the assets of the estate were distributed as per the confirmed grant, it was not the business of one household to know how the other dealt with their assets thereafter. There was no complaint by the Appellant’s mother that she had never transferred the suit property to him either by gift or otherwise. It was, therefore, not necessary for the Appellant to prove that the conveyance was completed by his mother.

(b) Whether the trial court erred in law and fact in allowing the Respondent’s counterclaim

31. It is evident from the pleadings and material on record that the Appellant’s claim and the Respondent’s counterclaim were mutually exclusive. The Appellant was seeking to assert his rights over the suit property on the basis that he was the registered proprietor thereof. The Respondent, on the other hand, was seeking cancellation or nullification of the Appellant’s title over the suit property on the basis that he had obtained registration through illegal and fraudulent means.
32. The court has already found that the material on record adequately demonstrated that the Appellant was the registered proprietor of the suit property. The court has also found that there was no evidence of fraud or illegality in the Appellant’s acquisition of the suit property. It would, therefore, follow that in the absence of evidence of fraud or illegality on the part of the Appellant the Respondent could not successfully impeach the Appellant’s title. The court is therefore satisfied that the trial court erred in law and fact in allowing the Respondent’s counter-claim.

(c). Who shall bear costs of the appeal

33. 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 material on record shows that the parties are close relatives who were fighting over



the property of their deceased father. The court is of the opinion that the appropriate order to make in the circumstances is for each party to bear his own costs of the appeal. The court is also inclined to make the same order on the proceedings before the trial court.

I. Conclusion and Disposal Orders

34. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. As a consequence, the court makes the following order for disposal thereof:
- a. The appeal be and is hereby allowed.
 - b. The judgment of the trial court in Nyahururu CM ELC No. 343 of 2018 is hereby set aside in its entirety and substituted with the following orders:
 - (i) Judgment be and is hereby entered for the Appellant in terms of prayers (a), (b) and (c) of the plaint dated 19.09.2018.
 - (ii) The Respondent's counterclaim dated 06.05.2019 be and is hereby dismissed in its entirety.
 - (iii) Each party shall bear his own costs of both the suit and counterclaim.
 - c. Each party shall bear his own costs of the appeal.
 - d. Since the suit property is located in Subukia and the appeal emanated from Nyahururu, the file is hereby transferred to the ELC of Nyahururu for custody.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 2ND DAY OF NOVEMBER, 2023.

In the presence of:

Mr. Njoroge for the Appellant

Ms. Owuor holding brief for Mrs. Ndeda for the Respondent

C/A - Nyaga

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Y. M. ANGIMA

JUDGE

