



REPUBLIC OF KENYA



KENYA LAW
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**Mugo & another v Kathuni (Environment and Land Appeal
E007 of 2021) [2022] KEELC 2695 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E007 OF 2021**

CK YANO, J

MAY 9, 2022

BETWEEN

BASILIO MWIATHI MUGO 1ST APPELLANT

ORESTE NJOKA JULIUS 2ND APPELLANT

AND

MBAKA KATHUNI RESPONDENT

(Being an appeal from the Judgement of the Civil Case No. 165 of 2018 by Hon M. Sudi PM) (formerly Meru ELC NO.11 of 2012))

JUDGMENT

A. Introduction

1. The appellant Basilio Mwiathi Mugo & Oreste Njoka Julius filed this appeal against the Judgement of Hon M. Sudi. P. M delivered on the 29th July, 2021 in Chuka Chief Magistrate's Court Civil Case No. 165 of 2018 and set out the following 14 grounds of appeal:
 - i. That the learned trial magistrate erred in law and facts by finding that the Respondent had proved his case on a balance of probability against the evidence tabled and on record.
 - ii. That the learned trial magistrate erred in law and in facts by allowing a claim filed without a verifying affidavit contrary to the clear provision of the *Civil Procedure Act* and the authorities supplied.
 - iii. That the Learned trial Magistrate erred in Law and facts by formulating the respondents case and granting prayers not sought for in the plaint by finding that the Respondent was seeking to cancel title No.Karingani/muiru/3222 contrary to the clear prayers sought in the plaint.



- iv. That the Learned Trial Magistrate erred in Law and facts by condemning the 1st Appellant over Chuka Ldt No.23 of 2011 without taking cognizance that the 1st Appellant was not a party in the Ldt case.
 - v. That the learned trial magistrate erred in law and facts by disregarding the Appellant's evidence and more particularly rubbishing a court ruling produced as DEXH 4.
 - vi. That the learned trial magistrate erred in law and facts and misconstrued facts in favour of the Respondent by finding that the 1st Appellant had filed Chuka Civil Suit No. 17 of 2011 against the Respondent thereby arriving at a wrong conclusion.
 - vii. That the learned trial magistrate erred in law and facts by mistaking the appellants with Mbita Mutuoboro-Deceased and totally ignoring the Appellants evidence.
 - viii. That the learned trial magistrate erred in law and facts by finding and imposing the 1st Appellant as the legal representative of the estate of Mbita Mutuoboro.
 - ix. That the learned trial magistrate erred in law and facts by failing to find that the Respondent amended plaint was totally defective in form and substance.
 - x. That the learned trial magistrate erred in law and facts by ignoring facts raised by the appellants and more so that the prayers sought could not be issued without including a party as the legal representative of Mbita Mutuoboro-Deceased and the owners of land parcels No. Karingani/muiru/3218,3219,3220,3221 and 3222.
 - xi. That the learned trial magistrate erred in law and facts by cancelling a legitimate title without any prove of fraud on the part of the Appellant.
 - xii. That the learned trial magistrate erred in law and facts by failing to pronounce herself on the counter-claim by the 2nd Appellant.
 - xiii. That the trial magistrate erred in law and facts by issuing a judgement not supported by evidence and submissions of the parties.
 - xiv. That the trial magistrate erred in law and facts and showed outright bias by disregarding the appellant's submission and dismissing them as submission merely made from the bar thereby disregarding their gist thereof.
2. The Appellant prays for the appeal to be allowed and the Honourable court to proceed and set aside the judgement and decree and find that the Respondent should vacate the 2nd Appellant's land.

Background of the Appeal

3. The gist of the case in a nutshell is that the Respondent in this matter filed a plaint dated 2nd October, 2012 and which was amended on the 9th of March, 2016 in which he claimed for an order for the cancellation of title Nos. Karingani/muiru/3218, 3219, 3220, 3221 and 3222 to enable 2 acres be extracted from the original title and costs and interests. The Respondent's case was that he had sued one Mbita Mutuoboro (now deceased) in Land Disputes Tribunal for division of Land Parcel No. Karingani/muiru/24 for him to be given 2 acres which the Respondent stated he was entitled to for having been in occupation of since early 1970s and has extensive development thereon. The Respondent pleaded that the matter was heard and he was granted the 2 acres on 14th March, 2011 vide Ldt Case No. CKA/01/2011 and the award was filed in Chuka PM's Court Case No. 23/2011 and confirmed as judgment of the court on 22.6.2011. The Respondent further pleaded that the



- Defendant in that case employed tactics to out manoeuvre the Respondent by filing Chuka CC 17 of 2011 and proceeded ex-parte and obtained orders to evict the Respondent and at the same time subdivided and transferred the portions of the subject herein. The Respondent stated that the eviction order was however set aside by the court and that he is in occupation of Plot No. 3222 measuring 2 acres but registered in the names of the Appellants. He contended that the subdivision and transfer was fraudulent and intended to preempt the execution of the aforesaid award. That on 31st December, 2015 the 1st Appellant unlawfully sold and transferred land parcel No. Karingani/muiru/3222 to the 2nd Appellant who issued notice to the Respondent to vacate therefrom and in default he be evicted.
4. The 1st Appellant filed statement of defence dated 4th June, 2019 in which he denied the Respondent's claim. The 1st Appellant specifically pleaded that he was not a party to the proceedings between the Respondent and one Bitu Mutuoboro (deceased), adding that a court of competent jurisdiction issued orders of eviction against the Respondent who did not appeal nor review the said orders, hence such orders still stand. It was the 1st Appellant's contention that the transfer by sale of parcel number Karingani/muiru/3222 to his name and further to the 2nd Appellant's name was legal and above board, adding that the Respondent sold off his land parcel number Karingani/muiru/1368 to one Julius Elias Mutegi and therefore could not allege that he was landless and destitute.
 5. On his part, the 2nd Appellant filed a statement of defence and counterclaim also dated 4th June, 2019. His case was that he was an innocent purchaser for value and the registered proprietor of the property known as Karingani/muiru/3222 having purchased the same from the 1st Appellant at a consideration of Kenya Shillings One million Kshs. 1,000,000/=) only after conducting due diligence and established that the 1st Appellant was the registered proprietor. That at the time of purchase, the said property had no encumbrances and/or restrictions on the green card. The 2nd Appellant contended that the Respondent has trespassed on the said land and refused to grant the 2nd Appellant vacant possession. The 2nd Appellant prayed for the eviction of the Respondent from the said land.
 6. After considering the pleadings, the evidence and the submissions of the parties, the learned trial magistrate found that the Respondent had on a balance of probabilities proved that he was the rightful owner of the suit land as per the Land Disputes Tribunal decision in Ldt 23/2011 which award was adopted as an order of court and was never challenged. The trial magistrate further found fraud had been proved as the 1st Appellant circumvented the court order and used short cuts to defeat the course of justice by selling the land to the 2nd Appellant. The trial court found that the Respondent was entitled to the use, enjoyment and occupation of the suit Land No. Karingani/muiru/3222 as hived off from Karingani/muiru/24 and proceeded to order for the cancellation of Title No. Karingani/muiru/3222, and that is what has provoked the appeal herein.
 7. The appeal was canvassed by way of written submissions which were duly filed by both parties.

The Appellants' Submissions

8. The Appellants submitted that the plaint filed by the Respondent was fatally defective for lack of a verifying affidavit verifying the correctness of the facts. The Appellants counsel cited the provisions of Order 4 rules 2 and 6 of the [Civil Procedure Rules](#) and contended that the same is drafted in mandatory terms and that the Respondent had no option other than to attach a verifying affidavit to his pleadings. The Appellants faulted the trial court for arguing that the Appellants ought to have raised the issue earlier but not in their submissions. The Appellants relied on the case of Priska Onyango Ojwang & Another –vs- Henry Ojwang Nyabede[2010] eKLR where the court opined that a counterclaim that was not accompanied by a verifying affidavit as required by the Civil Procedure Rules was defective



and irregularly before the court, and should be struck off with costs for failing to comply with the mandatory provisions of order 4 rules 1 and 2 of the [Civil Procedure Rules](#).

9. The Appellants further submitted that the Respondent sought orders of cancellation against land parcels No. Karingani/Muiru/3218, 3219, 3220, 3221 and 3222 to enable 2 acres to be extracted from the original title plus costs and interest. The Appellants submitted that the learned trial magistrate formulated a plaint for the Respondent and argued that the only affected portion was land parcel No. Karingani/Muiru/3222. That this was intended to defeat the Appellants argument that the owners of land parcel Numbers Karingani/Muiru/3218, 3219, 3220 and 3221 should have been enjoined (sic) as parties to the suit by the Respondent. It was the Appellants' submissions that a title cannot be cancelled without the registered owner being sued and notified. That by formulating the Respondent's case, the trial court was biased against the Appellants.
10. The Appellants further submitted that the trial magistrate erred in law and in facts by cancelling the 2nd Appellant's title without any prove of fraud as correctly opined and observed in the impugned judgment. That the trial magistrate erred in law and facts and confused the 1st Appellant with his uncle Mbita Mutuoboro thereby arriving at a wrong conclusion. It was further submitted that the 1st Appellant was not a party in the proceedings of Civil Suit No. 17 of 2011 between Mbita Mutuobo (deceased) and Mbaka Kathuni. The Appellants further faulted the trial court for failing to note that the Appellants were not parties in Chuka Ldt 1 of 2011 and Chuka 17 of 2011 and for rubbishing one court order over another issued by courts of equal jurisdiction. That if anything, the Ldt determination was illegal null and void for lack of jurisdiction. The Appellants' counsel relied on the case of [Paul Rono V William Rono Langat](#) Eldoret HCCA No. 169 of 2009. The Appellants submitted that the subdivision and transfer was done by Mbita Mutuoboro (deceased), and that if any fraud was committed during the transfer, his legal representatives should have been called to explain the same. The Appellants urged the court to allow the appeal and set aside the decision of the trial court and have the Respondent evicted as prayed in the counterclaim.

The Respondent's Submissions

11. The Respondent submitted that from the proceedings, the issue of missing verifying affidavit was never raised at the trial stage and or at the earliest opportunity, adding that the same was an oversight and an issue of technicality. It was further submitted that order 4 rule (1) 6 uses the word "may", giving the court the discretion on whether or not to strike out plaint which is non-compliant. The Respondent's counsel relied on the case of [Agricultural Finance Corporation & Another -vs- Drive-in Estate Development Ltd](#) [2006] eKLR. The Respondent's submissions is that the function of the courts is not to instill discipline to erring counsel but to administer justice to litigants and others who seek their services. The Respondent also relied on the case of [Microsoft Corporation -vs- Mitsumi Computer Garage Ltd & Another](#) [2001] 2EA 460.
12. The Respondent further submitted that the issue of the counter-claim was clearly addressed in the judgment where the trial court found that the 1st Appellant had paid Kshs.300,000/= and the balance after eviction, but the eviction was yet to be done. That there was no proof and the advocate never received the cash and therefore the court could not order eviction of the Respondent from the suit land. Further, that the 2nd Appellant could not be pronounced as a bonafide purchaser for value. It was further submitted that from the proceedings, it was clear that the Respondent has been in occupation of the suit land since early 1970's, the same granted to him on 14.3.2011 vide Ldt Case No. CKA/01/2011 and confirmed as judgement of the court in Chuka PM's Court No. 23 of 2011 only for the 1st Appellant to employ tactics to outmaneuver the Respondent and filed Chuka CC No. 17 of 2011, proceeded ex-parte and got orders to evict the Respondent and at the same time fraudulently



subdivided and transferred the subdivisions to third parties, among them the 2nd Appellant herein who is alleged to have purchased Karingani/Muuiru/3222 belonging to the Respondent where he has been living for the part of his life and had extensively developed the land. It was submitted that the 2nd Appellant did not carry out due diligence and this puts to question the innocence of the purchaser without notice. The Respondent submitted that the 2nd Appellant was not a bona fide purchaser for value since he did not purchase the property in good faith as he was very much aware that the Respondent was in occupation and had been there for a very long time. That it seemed that the 2nd Appellant had knowledge of fraud and or was party to it and therefore could not rely on the bona fide doctrine and hence the counterclaim automatically failed. The Respondent pointed out that this suit was filed against the 1st Appellant in the year 2012 who was then the registered owner, and that there were temporary orders of injunction issued on 8th October, 2012 against any sale or dealings, but the 1st Appellant circumvented the court orders by selling the land to the 2nd Appellant, hence fraud had been proved. The Respondent's counsel submitted that there was no need of including the legal representative of Mbita Mutuoboro as a party since at the time the suit was instituted in the year 2012, the suit property was already in the name of the 1st Appellant herein. That the trial magistrate did not err in cancelling title No. Karingani/Muiru/3222 as it was the only parcel the Respondent was claiming and in the name of the 2nd Appellant. That it would not have been in the interest of justice to cancel the other titles still in the name of the 1st Appellant and which did not affect the Respondent herein. The Respondent urged the court to find that the appeal herein lacks merit, is frivolous and have the same dismissed with costs to the Respondent.

Analysis and Determination

13. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are:
 - i. Whether the trial magistrate wrongly exercised her discretion in allowing a claim filed without a verifying affidavit.
 - ii. Whether the decision of the trial magistrate was against the weight of the evidence.
14. The Appellants submitted that the Respondent's claim was fatally defective and ought to have been struck out since the amended plaint was not accompanied by a verifying affidavit verifying the correctness of the facts pleaded as required by order 4 rule 1 and 2 of the *Civil Procedure Rules*. From the proceedings, it is clear that the issue of the verifying affidavit was only raised in submissions. As correctly observed by the trial magistrate, this was an issue that should have been raised in the pleadings and at the earliest opportunity. It cannot be gainsaid that striking out of pleadings is a draconian measure that can only be applied when a pleading is a complete sham and hopeless that it plainly and obviously beyond redemption and incurable by amendment. In *D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & another* (1980) eKLR Madan JA noted thus:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. A suit ought not to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it



ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

15. Further, the court now has wider power and will not automatically strike out pleadings but will before doing so, look at available alternatives. Moreover, order 4 rule 1 (6) gives the court discretion where it comes to striking out based on such omission. Additionally, the court in exercising such discretion on whether or not to order striking out of any pleading that is non-compliant with the rules ought to be alive to its obligations under Article 159 of *the constitution* of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities. Consequently, I find the decision of the trial court to be proper in the circumstance.
16. On whether the decision of the trial magistrate was against the weight of the evidence, I note that the Respondent in this matter filed the amended plaint dated 9th March, 2016 claiming cancellation of the suit titles to enable 2 acres be extracted from the original title. The suit was instituted in the year 2012 against the 1st Appellant, who by then was the registered owner of the title No. 3222 measuring 2 acres the Respondent was claiming. From the evidence adduced, it was clear that the Respondent was in possession and had occupied the said portion measuring 2 acres since 1970s. The evidence on record further shows that the Respondent was awarded the two acres by the Land Disputes Tribunal in its finding in LDT 23 of 2011 which was duly adopted as judgment of the court. The judgment of the Tribunal was that the two acres be exercised from Karingani/Muiru/24 and be registered in the name of the Respondent. It was therefore suspect that the 1st Appellant subdivided parcel No. Karingani/Muiru/24 and transferred parcel No. 3222 measuring 2 acres to the 2nd Appellant.
17. No appeal or review was filed against the decision of the Land Dispute Tribunal and the decision remains in force. In my view, and as rightly observed by the trial magistrate, the 1st Appellant circumvented the said decision and the court order then in place to sell the 2 acres of land to the 2nd Appellant fraudulently. Section 26 of the *Land Registration Act* is categorical that a certificate of title can be challenged where the same has been acquired fraudulently, unprocedurally or through a corrupt scheme. No doubt, the counterclaim had no merit and the same is dismissed.
18. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The finding and holding of the learned trial magistrate were well founded and I find no basis to interfere with it.
19. In the result, I find no merit in the Appellants appeal and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF MAY, 2022 IN THE PRESENCE OF:

CA: Martha

Ms. Kijaru for Appellants

Wanyange h/b for Mr. Otieno for the Respondent

C. K. YANO,

JUDGE.

