



REPUBLIC OF KENYA



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**Kemboi v Katuga (Civil Appeal E007 of 2021)
[2025] KEHC 2248 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL E007 OF 2021
JR KARANJA, J
FEBRUARY 19, 2025**

BETWEEN

NAUMY JEBIEGON KEMBOI APPELLANT

AND

JULIUS KATUGA RESPONDENT

(Being an appeal arising from the judgment of Honourable Jacinta A. Owiti, Senior Principal Magistrate in Kapsabet SPMCC Number 131 of 2017 delivered on 10th of May 2021)

JUDGMENT

1. The appeal arises from the judgment of the Senior Principal Magistrate at Kapsabet in SPMCC No. 131 of 2017 delivered on 10th May 2021.
2. The grounds of appeal are set out in the memorandum of appeal dated the 8th June 2021 as follows: -
 - (1) The Learned Trial Magistrate erred in law and fact in failing to award to the Appellant the sum of Kshs. 1,800,000/- being loss of rental income.
 - (2) The Learned Magistrate erred in law and fact in failing to find that the appellant had proved the claim for loss of rental income.
 - (3) The Learned Trial Magistrate erred in law and fact in failing to award the Appellant the sum of Kshs. 2,150,000/- being the cost of labour and materials.
 - (4) The Learned Trial Magistrate erred in law and fact in failing to find that the Appellant had proved the claim for loss of labour and material on a balance of probabilities despite evidence having been tendered to that effect.
 - (5) the Learned Trial Magistrate erred in law and fact in failing to award the Appellant the sum of Kshs 4,800,000/- being loss of time and interest on capital.



- (6) the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's evidence and submissions.
 - (7) The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's prayers in the plaint and misdirected herself in coming up with the finding on the loss suffered by the Appellant.
3. The Appellant therefore prayed that the Trial Court's judgment be set aside and that a fresh assessment of damages payable to the Appellant be done with orders that the Respondent pays the costs of the appeal.
- The hearing of the appeal was by written submissions. Which were filed on behalf of both the Appellant and Respondent by Kitiwa and Partners Advocates and Rotich, Langat/ Partners Advocates respectively.
4. The appeal, the supporting grounds and the rival submissions were given due consideration by this court whose obligation was to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witness.
 5. In a first appeal such as the present one, it is by way of a retrial as was held in *Selle & Another Vs. Associated Motor Boat Company Limited & Others* [1968] E.A 123 and the principles upon which a court acts in such an appeal are well settled in that the court must reconsider the evidence, evaluate it 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.
 6. Herein, as reflected in the pleadings, the Plaintiff/ Appellant's case was briefly that the Appellant was at the material time the legal or beneficial owner of a parcel of land described as Nandi/Kapsengere/1289 for which the Defendant/ Respondent using a title deed fraudulently secured by himself obtained an order of injunction in Eldoret High Court Civil Case No. 107 of 2009, restraining the Appellant from carrying on construction on this said parcel of land.
 7. As a result of his fraudulent acts, the Respondent was charged with several criminal offences at the Kapsabet Principal Magistrate's Court and was found guilty. The fraudulent title deed was subsequently revoked and annulled by the High Court in Kisumu Succession Case No. 502 of 2006 thereby resulting in the setting aside of the injunction order on the 19th March 2014 in Eldoret Environment & Land Case No. 531 of 2012.
 8. As at the time the injunction order was lifted, the Appellant had incurred loss and damages amounting to a total of Kshs 8,750,000/- being loss of income at Kshs. 1,800,000/- loss of cost of labour and materials at Kshs. 2,150,000/- and loss of time and interest on capital at Kshs. 4,800,000/-. In addition, the Appellant incurred an expense of Kshs. 50,000/- for valuation report.
 9. It was the Appellant's contention that the Respondent misled the Nandi Land Registry into believing that he was entitled to the material parcel of land and also misled the court at Kisumu that he was the beneficial owner of the land. Further, the Respondent misled the court to grant him an injunction based on a forged title-deed.
- The Appellant therefore prayed for judgment against the Respondent for the sum hereinabove mentioned totaling Kshs. 8,800,000/- together with costs until payment in full.
10. The Respondent's case was a denial of the Appellant's claim and a contention that the Appellant had never been registered as the owner of the material parcel of land and that at the time the Eldoret High Court Civil Case No. 107 of 2009 was filed. The Respondent held a valid title and therefore the



allegation that he obtained the title by fraud was not true. That, the title was obtained pursuant to succession proceedings in Kisumu Succession Case No. 502 of 2006 in which he [Respondent] was allocated 1½ acres of the original Parcel No. Nandi/Kapsengere/49, upon confirmation of the grant on 18th July 2008.

11. The Respondent also contended that the Criminal Case at the Kapsabet Magistrate's Court did not involve a charge under the Registered Land Act and that in any event, he was acquitted of the offence of forgery.

In admitting that the impugned grant in Kisumu Succession Cause No. 502 of 2006 was revoked and that the injunction order issued in Eldoret Civil Case No. 107 of 2009, was set aside, the Respondent nonetheless denied that the revocation of the grant and the lifting of the injunction order were as a result of any fraud on his part as alleged by the Appellant.

12. The Respondent contended that the revocation of the grant and the nullification of his title to the material property were on account of procedural technicalities and errors on the part of the actual beneficiaries of the subject estate and did not whatsoever emanate from his acts and/or omissions. He denied having occasioned the Appellant any loss or damage and contended that he exercised his constitutional rights and approached the court for a temporary injunction which was granted in order to preserve the suit property pending the hearing and final determination of the dispute at hand.
13. The Respondent contended that the subsequent lapse of the order of injunction was due to extraneous factors which arose in the course of the court proceedings and for which he was not liable and could not be visited on him.

Ultimately, the Respondent contended that the Appellant had no cause of action against him as there had been no privity of contract between themselves being only purchasers of the material property. That, the Appellant's claim was an abuse of the court process.

The Respondent therefore prayed for the dismissal of the Appellant's suit with costs.

14. Both parties being bound by their pleadings adduced necessary evidence in support of their respective rival positions. The trial court thus received the evidence through the Appellant [PW1] and her witnesses including a quantity surveyor, Elijah Mbori Oteko [PW2], a contractor, Moses Ongonga Sudhe [PW3] and a valuer, Dancan Mwangi Gichangi [PW4]. The Respondent [DW1] led evidence in defence and did not call any witness.
15. The trial court considered the entire evidence and framed three points for determination viz: -
 1. Whether the suit is res-judicata.
 2. Whether the Plaintiff is entitled to the relief sought.
 3. What relief is the Plaintiff entitled to?

Having found that the suit was not "res-judicata" the trial court proceeded to find that the Appellant was not entitled to loss of income, specifically loss of rental income.

In arriving at this finding, the trial court considered the evidence of the valuer [PW4] and the report that he tendered in court and noted that the report was prepared after completion of the building and not before. That, as at the year 2009 there was no tenant residing on the plot and paying rent to the Plaintiff [Appellant] when the impugned injunction order was issued.



16. The trial court also noted that the Plaintiff expected to earn rent from the structure she was putting up once completed, but that expectation did not amount to loss of rental income from 19th June 2009 to 19th March 2014.

The trial court thus concluded that the claim for loss of rental income was unsustainable for want of proof, meaning that the Appellant was not entitled to the sum of Kshs. 1,800,000/- for loss of income.

17. As for the sum of Kshs. 2,150,000/- for loss of material and labour costs, the trial court considered the Appellant's evidence together with that of the quantity surveyor [PW2], the Contractor [PW3] and the Valuer [PW4] and arrived at the conclusion that no relevant evidence was adduced by the Appellant in that regard.

Therefore, the claim for loss of material and labour was disallowed for want of merit.

18. The claimed amount of Kshs. 4,800,000/- was also disallowed by the trial court on the basis that the injunction order issued against the Appellant notwithstanding, she failed to move the court for a discharge of the order on expiry of twelve [12] months pursuant to Order 40 Rule 6 of the Civil Procedure Rules thereby failing to mitigate her loss. However, the trial court awarded unpleaded damages of Kshs. 300,000/- for hurt or injured feeling and special damages of Kshs. 50,000/- for the valuation report.

In essence, the Appellant's claim against the Respondent was partly and not fully successful before the trial court.

19. The opinion of this court after considering the evidence and the rival submissions raised at the trial and in this appeal is that the basic issue that arose for determination was whether the Appellant/ Plaintiff was the lawful or beneficial owner of the suit property being Land Parcel No. Nandi/Kapsengere/1289 as at the material time and if so, whether she suffered any loss or damage due to an injunction order obtained in respect of the suit property by the Respondent and to what extent.

20. The pleadings by both the Appellant and the Respondent made it very clear that the ownership of the property aforementioned was the primary factor in determining whether or not the Appellant was entitled to the claimed damages and loss from the Respondent.

Parties are bound by their pleadings. The decisions of the courts are always or mostly made on the basis of the issues arising from the pleadings and the evidence in support thereof.

21. The fact is readily acceptable by both sides as demonstrated by their respective citation of the relevant case law on the point. In that regard therefore, the Appellant/ Plaintiff was required to establish and prove by necessary and credible evidence that she was the lawful owner of the suit property as at the time or before the impugned injunction order was issued by a competent court at the behest of the Defendant/ Respondent.

22. The question can also be whether as at the material time this suit was filed, the lawful ownership of the suit property was vested in the Appellant/ Plaintiff.

The material plaint dated 4th July 2015, was filed in court by the Appellant on 27th August 2015.

It is pleaded in paragraphs 3, 4, 5 and 6 of the plaint that at all material times to this suit the Plaintiff was the owner of Land Parcel known as Nandi/Kapsengere/1289 and on or about 18th June, 2009 the Defendant filed a suit at the High Court of Kenya Eldoret being Eldoret High Court Civil Case Number 107 of 2009 and sought orders of injunction restraining the Plaintiff, her servants or any other person acting under her from constructing on Land Parcel Number Nandi/Kapsengere/1289.



23. That the Defendant was accordingly issued with an order of injunction as prayed and as at the time of issuance of the orders by the court, the Plaintiff was already in the process of constructing a house on the aforesaid parcel of land.

The foregoing, indicated that all along before and from the time of the issuance of the impugned injunction order upto the time the suit was filed against the Defendant by the Plaintiff, the Plaintiff held herself as the lawful owner of the property to the exclusion of the Defendant.

24. The issuance of the injunction order appeared to the Plaintiff to be an affront on her proprietary rights and interest in the property by the Defendant such that when the actual status of the property was altered long after the injunction was issued by dint of a legal process and operation of the law, the Plaintiff deemed it fit to file the present suit.

25. It was evidence that the injunction order was issued in High Court Civil Suit No. 107 of 2009 at Eldoret in which the Respondent was the Plaintiff and the Appellant was the Defendant. The Respondent claimed ownership of the suit property just like the Appellant did in the present suit. The Respondent therefore sought for declaratory order against the Appellant to the effect that the Appellant was a trespasser on the suit property and an order that the Appellant be directed to demolish any building or structure erected on the property.

26. The Respondent also sought for a permanent injunction against the Appellant restraining her from constructing upon or trespassing into, alienating or in any other manner dealing with the suit property. The suit [ELD.HC.Civil Suit No. 107/09] was contemporaneously filed with an application for a temporary injunction order to issue against the Appellant [Defendant] and this was granted by the court on the same day of filing of the suit i.e. 18th June 2009 ex-parte the Appellant/Defendant.

27. Thus a temporary injunction order was issued against the Appellant restraining her by herself or servants/ agents and/or any other person acting under her from constructing upon or trespassing into the suit property LR.No. Landi/Kapsengere/1289 pending the hearing inter-parties of the application.

The record is not clear whether or not the application was ever heard inter-parties.

28. The order was in itself an ex-parte temporary injunction order made under Order 40 of the *Civil Procedure Rules*.

Rule 4[1] of the Order provides that: -

“where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex-parte.”

And, Rule 4[2] of the Order provides that: -

“an ex-parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.”

29. It is not clear herein whether the ex-parte injunction order was ever extended past the prescribed fourteen [14] days limit. However, it would appear that the order extended beyond the required fourteen day limit.

Be that as it may, the Appellant/Defendant filed a defence and counterclaim in the suit on the 7th July 2018 in which she made a claim to the same suit property, but part thereof measuring $\frac{1}{4}$ acres. She



pleaded that the suit property was originally Land Parcel No. Nandi/Kapsengere/49 for which the Respondent [Plaintiff] was entitled to part thereof measuring 1½ acres and for which he was registered as the owner under the new title of the suit property i.e. Nandi/Kapsengere/1289.

30. The Appellant contended that the new registration was undertaken mysteriously by the Respondent and was made to include the Appellant's ¼ acres of the property.

That, the transaction undertaken by the Respondent in obtaining the registration of the suit property in his name was illegal and in any event, the grant of letters of administration issued in Kisumu Succession Cause No. 502 of 2006 which the Respondent used to get registered as the owner of the suit property was nullified by the court.

31. In the ruling delivered on the 2nd November 2011 in the aforementioned succession cause it was stated that the issue for determination therein was the fate of the subject suit property and another property Nandi/Kapsengere/1288 in view of a Court Ruling made on 15th February 2011. In that regard, the court stated that: -

“The net effect of the court order effect was that the earlier grants were revoked meaning that any distribution under them were null and void, and therefore title numbers Nandi/Kapsengere/1288/1289 obtained vide the revoked cancelled and or [sic] grants had to be revoked. They must go with the revoked grant.

The effect of the said cancellation was to reinstate the title number Nandi/Kapsengere/49 and have it in the name of administrator as appointed on the 25th May 2010.....”

32. From all the foregoing it was clear and undisputed that at the material time before and after the issuance of the impugned injunction order the impugned suit property was never registered in the name of the Appellant as the lawful and/ or beneficial owner thereof. On the contrary, as at the time the injunction order was obtained the suit property was registered in the name of the Respondent who was not precluded from enforcing his proprietary rights against the Appellant or any other person who may have interfered with those rights. This state of affairs laid the foundation for High Court Civil Suit No. 107 of 2009 at Eldoret in which the impugned injunction order was issued.

33. The Respondent could not be blamed for the issuance of the order which for all intents and purposes was a valid court order and had to be obeyed whether or not it was wrongly issued. Having not been the actual or legal or beneficial owner of the suit property, the Appellant did not have a valid cause of action against the Respondent on the basis of her alleged proprietary interest in the suit property or even on the basis of a valid temporary injunction order issued by a competent court.

34. In this court's opinion, the trial court failed and/or ignored the issue pertaining to proprietorship of the suit property and/or treated it casually such that it ended up arriving at a decision which was erroneous inasmuch as the Appellant was awarded Kshs. 50,000/- being the cost of a valuation report and 300,000/- being damages for hurt/ injured feelings and which were in the first place not pleaded by the Appellant.

35. However, the trial court was correct in dismissing the claim for loss of rental income, labour and material cost as well as time/ interest on capital for want of proof. In any event, the claim did not lie as the suit property was not lawfully the property of the Appellant at the material and was in fact non-existent at the time this suit was filed on 27th August 2015, by dint of the Court's ruling in Eldoret Environment & Land Case No. 531 of 2012 formerly Eldoret HCC No. 107 of 2009 made on 19th March 2014.



36. It was therein ruled that the suit property Parcel No. Nandi/Kapsengere/1289 did not exist. The court in so ruling stated as follows: -

“It is apparent from the documents adduced that the original parcel number was Nandi/Kapsengere/49 which was registered in the name of Sellah Jebiegon Murera [deceased]. After the demise of Sellah, two succession causes were filed, being Kisumu High Court Succession Cause No. 506 of 2006 and Eldoret High Court Succession Cause No. 16 of 2008. The Petitioner in the two cases were different sons of the deceased and each raised objection in the other’s cause. The two suits were later consolidated into the Kisumu matter on 27th May 2010. Before the two suits were consolidated, the Petitioners in Kisumu Succession Cause No. 506 had already obtained a grant of letter of administration which was confirmed on 29th June 2007. The confirmed grant alongside the grant obtained in the Eldoret matter was annulled in a ruling made on 27th May 2010.

37. The court stated further that: -

“It is apparent therefore, that the Land Parcel Nandi/Kapsengere/1289 which is the subject matter of this suit does not exist.

I have also seen that the original Land Parcel Nandi/Kapsengere/49 was distributed in the Succession Cause.

The court held that the Plaintiff ought to get 1 ½ acres out of that land and the Defendant to get ¼ of the land. It is also apparent that new titles for these portions have not been issued. The Applicant has displayed her title now Nandi/Kapsengere/1338 for ¼ acre.

It seems to me, given the above scenario that there is nothing to go for trial. The suit land Nandi/Kapsengere/1289 no longer exists and since it does not exist, one cannot continue a case of non-existent land.

The issues between the parties herein appear to me to have been determined with finality in the succession case and in the Criminal matter. The Defendant had counterclaimed for ¼ acres, but it can be seen that through the succession cause, she has obtained title to what she wanted. It is in my view unnecessary to have this matter proceed for hearing as the subject matter has been destroyed.”

38. This court cannot agree more, the scenario in this case was the same scenario in the aforementioned case. It was just a matter of transferring the scenario between two cases. In that way, the issue of res-judicata came into the fore, but was wrongly determined by the trial court in favour of the Appellant.

39. For all the reasons foregoing it is the finding of this court that the Appellant was not the legal or beneficial owner of the suit property at the material time and if she suffered any loss and damage as a result of the injunction order, then it was self-inflicted and cannot be held against the Respondent who was a victim just like the Appellant of a succession case or cases between the family members of the original owner of the suit property whose description at the time was Parcel No. Nandi/Kapsengere/49.

40. The Respondent was therefore not liable to the Appellant in loss and damages to the extent claimed by the Appellant or any other extent. The Appellant’s suit against the Respondent was underserving and ought to have been dismissed by the trial court in its entirety.



41. In that regard, the judgment of the trial court delivered on 10th May 2021 be and is hereby set aside and substituted for a judgment dismissing the Appellant's claim against the Respondent in its entirety with costs.

The Respondent shall have the costs of the appeal.

Ordered accordingly.

DELIVERED AND DATED THIS 19TH DAY OF FEBRUARY, 2025.

HON. J. R. KARANJAH,

JUDGE

