



**Nthiga v Nyaga (Civil Appeal 67 of 2023) [2024] KEHC 4512 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4512 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 67 OF 2023  
LM NJUGUNA, J  
APRIL 11, 2024**

**BETWEEN**

**JACQUELINE WANJIRA NTHIGA ..... APPELLANT**

**AND**

**FRANCIS NDWIGA NYAGA ..... RESPONDENT**

*(An appeal from the Judgment of Hon. H. Nyakweba SPM in  
Embu CMCC No. 172 of 2013 delivered on 29th November 2022)*

**JUDGMENT**

1. Vide Memorandum of appeal dated 13<sup>th</sup> November 2023, the appellant seeks orders that the judgment of the trial court be set aside. The appeal is premised on the grounds that the learned Magistrate erred in law and facts:
  - a. By basing his entire judgment on the provisions of the Forest Act (2005) which was repealed by section 76 of the *Forest Conservation and Management Act* No. 34 of 2016 and further without quoting the specific sections of the law he was relying on;
  - b. Failing to appreciate the fact that the trees felled were on private property and not in a public or private forest;
  - c. Dismissing the valuation report by the appellant's expert witness which established the value of the trees cut down by the respondent yet there was no evidence tendered to prove that he was not qualified to carry out such valuation;
  - d. Disregarding the evidence of the valuer (PW3) who testified that he was qualified to carry out the kind of valuation in respect of the suit herein;
  - e. Finding that the appellant had not proved her case on a balance of probabilities despite the court finding that the respondent had indeed cut down the trees on the appellant's land without authority of both the appellant and her agent; and



- f. Entering judgment against the appellant against the law and against the weight of evidence.
2. The appellant filed a plaint dated 11<sup>th</sup> July 2013 seeking judgment against the respondent for Kshs.612,600/=, costs and interests of the suit. It was the appellant's averment that she is the administratrix of the estate of the late Joseph Nthige Kagau who is the registered owner of land parcel number Gatari/Nembure/2096 upon which the respondent was a tenant. That the respondent logged down trees worth the claimed amount without the permission of the respondent.
  3. The respondent filed a defense dated 12<sup>th</sup> August 2013 denying the averments made in the plaint and putting the appellant to strict proof thereof. The matter proceeded to full hearing. PW1, the appellant, stated that she lives abroad and she took over the land through the estate of her late husband. That she leased the land to the respondent for a period of 3 years and at the time, there were coffee bushes and the boundary of the land was lined with gravellier and macadamia trees. That the lease was only in regards to the coffee trees but the respondent proceeded to cut down the other trees without her knowledge. That she wrote a demand letter to the respondent for the cost of the trees as determined by Epiconsults Ltd who carried out the valuation. On cross-examination, she stated that she was not aware of any complaint from her neighbor about the trees affecting her coffee. That the local chief wrote a letter to her sister about the neighbor's complaint and there was no resolution when her sister attended the meeting to attempt to resolve the issue.
  4. PW2 was Harriet Wangari Njue, sister of the appellant who stated that when her sister is abroad, she takes care of her property. That when the trees were felled, she reported the matter at Manyatta Police Station where she was advised to report to the area chief. That the chief convened a meeting where the respondent had agreed to pay Kshs.500/= per tree but she refused the amount because it was low. That she sought the services of a lawyer and issued a demand letter to the respondent demanding Kshs.612,600/= for the trees felled as per the valuation that was carried out by Epiconsults Ltd who valued the trees. That the neighbors had not complained about the trees before. That PW1 did not authorize the felling of the trees. That there were 29 stumps from mature trees and that she did not collect the offcuts from the land.
  5. PW3, Stephen Maina Warutere stated that he is a registered land valuer and that he assessed the damage of the trees. He stated that he took photos of the 27 stumps of large trees and 2 stumps of medium-size trees. That he based his monetary value estimate of the trees on the amount of timber the tree produced once logged. That his valuation was based on the information he got from 5 timber yards in Embu and the prices were more or less the same. He stated that he was not a forester but tree crops can be valued by foresters and land economists and the valuation is usually based on a schedule. That in his profession, he values land and everything that is on it including trees and crops.
  6. DW1 was the respondent who stated that he leased the land from PW1 but transacted with PW2. That at some point during his tenancy, the neighbors complained to him that the trees were affecting their crops. That he informed PW2 of the complaints and they went to the chief for a meeting to try and resolve it. That PW2 agreed that the trees should be cut but she asked him to facilitate the cutting because she did not have money and he assumed that she had the consent of PW1 to act on her behalf like all the other times. That according to him, the trees were small and were worth Kshs.1,400/= each and they could be sown into timber. That before cutting the trees he obtained a permit from the Department of Forests and consent from the owner of the land. That only the lower parts of the trees were sown into timber and not the whole tree.
  7. The trial magistrate found that the amount claimed was not substantiated and therefore dismissed the suit. He stated that the evidence of PW3 was not admissible as he was not a qualified forester and could not speak authoritatively on the value of the trees. He also stated that there is evidence to show



- that PW2 knew about the complaint by the neighbors about the trees and she acted on behalf of the appellant.
8. The appeal was disposed of by way of written submissions.
  9. The appellant submitted that the trial magistrate did not state which provisions of the law he relied on in his judgment. That the trees were marking the boundary between the appellant and her neighbors and the trees were not a forest under the *Forest Conservation and Management Act* No. 34 of 2016. That PW3 was a credible witness, being well qualified in the field of land valuation and economics but the trial magistrate failed to acknowledge his testimony yet he was well qualified to testify on the issue.
  10. The respondent submitted that PW2 represented PW1 in all transactions including the tenancy agreement. That PW2 was well informed of the complaint by the neighbors and she even attended the meeting convened by the chief for the purpose of resolving the conflict. That PW2 permitted the respondent to cut the trees because she did not have money to pay for the logging. That PW2 stated in her testimony that she permitted removal of the offcuts because she knew about the logging of the trees. That the valuation report has no evidentiary value in the matter as the witness was not qualified to testify on the subject. It was his submission that the case should be determined on a balance of probabilities as was stated in the case of *Palace Investments Limited v. Geoffrey Kariuki & Another* (2015) eKLR and in sections 107 and 108 of the *Evidence Act*. Further reliance was placed on the case of *Dobblin Mutiso Ndolo v. Kenya Electricity Transmission Company Limited* (2020) eKLR where the testimony of an Agricultural officer was rejected by the court since the officer had not specialized in the area of crop specialization according to the Ministry of Agriculture and the Kenya Forest Service. That the value of the trees was based on the market and not on the schedule provided by the Kenya Forest Service.
  11. In this appeal, the issues for determination are:
    - a. Whether there was an agency relationship between the appellant and PW2; and
    - b. Whether the respondent owes the appellant the sum pleaded.
  12. It is the duty of the first appellate court to re-examine the evidence adduced at trial and make its own finding. This was held in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”
  13. The appellant testified before the trial court that she lives in the United Kingdom and she is the owner of the land which she inherited from her deceased husband. That while she is away, her sister, PW2, takes charge of her property and in this case, she entered into a tenancy agreement on her behalf. It was also the testimony of PW2 and the respondent that the appellant transacted through PW2 when she was leasing the land. It was the respondent’s testimony that when an issue arose with some neighbors,



he informed PW2 and she visited the land and was involved in resolving the same at the chief's meeting where it was agreed that the trees were to be cut down and PW2 authorized the respondent to proceed. PW2 also stated as much.

14. From the evidence on record, PW2 is an agent of PW1 impliedly so. According to Halsbury's Law of England 4th Edition Volume 1(2) para 19 and 20 a principal/agent relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties.
15. Similarly, according to Cheshire and Fifoot, the Law of Contract, 5th Edition page 386-394, agency can be created in various ways. These include agency by Estoppel. The quote therein by Lord Cransworth is important in demonstrating how this form of agency is created:

“No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him... this proposition, however, is not at variance with the doctrine that where one has acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that the other person is about to act on that behalf, then unless he interposes, he will in general be stopped from disputing the agency, though in fact no agency really existed....”

16. It is not possible that PW2, not being the owner of the land, would bring in the respondent as a tenant on behalf of PW1 without her knowledge. There indeed existed an agency relationship between the appellant and PW2. The behavior of PW2 when the neighbors raised a complaint, emphasizes this agency relationship. Furthermore, PW2 stated that she allowed the respondent to cut down the trees in order to settle the conflict. That she couldn't cut the trees because it would cost her money which she did not have at the time. PW1 stated that she was aware that the chief wrote a letter to PW2 about the conflict that the trees were causing with the neighbors. On a balance of probabilities, I find that there existed an implied principal/agent relationship between the appellant and PW2.
17. It is my view that since the appellant allowed PW2 to execute the tenancy agreement on her behalf and also resolve the issues arising between the tenant and the neighbors, under the equitable principle of agency by estoppel, the appellant is estopped from disrupting this agency relationship at the point where she feels it convenient. It is right to presume that the appellant gave PW2 the power to operate and make decisions on her behalf and in her absence. In the event that PW2 did acts that defeated the interests of her principal, the appellant, there is recourse to be sought as between them, excluding the respondent as a third party.
18. As to whether the respondent owes the appellant the monies pleaded, given that there was an implied agency relationship between the appellant and PW2, the decision to cut down the trees arose from the same relationship. The essence of an agency relationship is that the agent binds the principal to a third party, in this case, through implied authority. Therefore, it is unconscionable for this court to allow the appellant to continue her quest for damages only when the agency relationship disfavors her.
19. From the evidence on record, I am convinced that PW2 was aware that the respondent was cutting the trees and they both colluded to do so. No wonder PW2 is said to have collected the firewood and off-cuts from the land on 14<sup>th</sup> March 2013. The suit herein was filed on 11<sup>th</sup> July 2013 and all that time



PW2 kept mum and did not tell the appellant that the respondent has cut down the trees. I do not believe that PW2 is as innocent as she claims and I dismiss her evidence in her assertion that she did not authorize the respondent to cut down the trees. In fact, she is on record as having allowed him to cut the same at his own expense. Therefore, the appellant's cause of action, if any, should be directed to her agent, PW2 and not the respondent.

20. That being said, it is my view that it is immaterial as to whether or not the testimony of PW3 was admissible. This court has re-examined the evidence and taken a different path from the trial magistrate, but both courts have ended up at the same destination. The trial magistrate may not have cited the laws behind his findings but he followed the evidence and ended up dismissing the suit. As for this court, on account of the equitable principle of agency by estoppel, I reach a similar conclusion.
21. Therefore, I find that the appeal lacks merit and it is hereby dismissed with no order as to costs.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

