Kirimania v Nguthari (Environment and Land Appeal 12 of 2023) [2025] KEELC 4888 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4888 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 12 OF 2023

JO MBOYA, J

JUNE 26, 2025

BETWEEN

JOHN GATOBU KIRIMANIA .... APPELLANT

AND

JACKSON GITONGA NGUTHARI .... RESPONDENT

JUDGMENT

1. The Judgement under reference [namely, the one appealed against] bring[s] to mind the epigram of Madan JA [as he then was] in the case of CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] KECA 9 (KLR) where the esteemed Learned Judge stated thus;

   > " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

2. In respect of the instant matter, there is no gainsaying that the respondent herein filed a statement of defence, but same did not attend court and, or adduce any evidence. Nevertheless, the learned trial magistrate in his wisdom proceeded to and made declarations, including declaring the respondent as a bona fide purchaser for value of the suit property albeit vacuum.

3. It is the said judgement and the various declarations made thereunder that underpin the instant appeal. No doubt, the instant appeal also brings to the fore instances bordering on [sic] abuse of Judicial office.

4. Back to the facts of the case. The Appellant herein filed the suit vide Plaint dated 5th August 2020 and wherein the Appellant sought various reliefs. The reliefs sought were as hereunder;

   a. A declaration that the Defendant is in breach of the agreement for sale.

b. A declaration that the Plaintiff is the rightful owner of the land known as Nyaki/Giaki-kibuine/604

c. Costs of the suit.

d. Any other relief this honourable court may deem fit and just to grant in the circumstances.

5. The Defendant duly entered appearance and thereafter filed a statement of defence dated 7th October 2020 and wherein the Defendant [now the Respondent] denied the claims at the foot of the Plaint. Suffice it to posit that the defendant did not file [sic] any counterclaim.

6. The suit before the subordinate court was heard and disposed of vide Judgement rendered on the 14th December 2022 and wherein the learned trial magistrate proceeded to and dismissed the appellant's suit. Furthermore, the learned trial magistrate while appreciating that the Respondent did not file a counterclaim and had not tendered any evidence before the court proceeded to and declared the Respondent as a Bonafide purchaser for value of the suit property. In addition, the learned trial magistrate also ventured forward and directed the appellant to transfer the suit property to the respondent, irrespective of the fact that the Respondent had not paid the full consideration.

7. Aggrieved and dissatisfied with the Judgement and the resultant decree, the appellant herein sought and obtained leave to appeal out of time and thereafter approached the court vide Memorandum of Appeal dated 27th July 2023; and wherein the appellant has highlighted the following grounds of appeal;

i. The trial court erred in law and fact by finding that the Appellant did not prove breach on the part of the Respondent in spite of overwhelming and unchallenged evidence that the Respondent had deliberately refused to pay the balance of the purchase price and therefore was in breach of the sale agreement.

ii. The trial court erred in law and fact by disregarding the evidence tendered by the Appellant which evidence was unchallenged in the guise that the Appellant was before the court with unclean hands and driven by avarice and thereby erroneously and unjustly dismissed the Appellant's suit.

iii. The trial court erred in law and fact by ordering the appellant to transfer the suit land to the respondent without any counter-claim by the Respondent or any evidence whatsoever from the Respondent which could have enabled the court to make such an order.

iv. The trial court fell into a grave error by stepping into arena of litigation in the guise of exercise of judicial power/discretion against the legal position that parties are bound by their pleadings.

v. The trial court erred in ordering the Appellant to first transfer the suit land to the Respondent before receipt of the balance of the purchase price contrary to the terms of the sale agreement thereby attempting to re-write the agreement between the parties.

vi. The decision of the trial court is against the law and weight of evidence on record.

8. The appeal before hand came up for directions on 7th April 2025; whereupon the advocates for the parties agreed to canvass and dispose of the appeal vide written submissions. To this end, the court ventured forward and issued directions pertaining to the hearing and disposal of the appeal. Furthermore, the court also circumscribed the timelines for the filing and exchange of the written submissions.

9. The appellant filed written submissions dated 24th March 2025 and wherein the appellant has raised two salient issues, namely; whether the appellant proved his case before the trial court; and whether the learned trial magistrate erred in law in granting reliefs that were neither sought nor pleaded.

10. The Respondent also filed written submissions and wherein same highlighted one key issue, namely; that the learned trial magistrate was right in making orders that same made and in particular in declaring the respondent as a bona fide purchaser for value. To this end, learned counsel for the respondent implored the court to find and hold that the appeal before hand is devoid of merits.

11. Having reviewed the entire record of appeal; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by and on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, namely; whether the appellant tendered plausible evidence before the trial court and thus proved his case to the requisite standard of proof or otherwise; and whether the reliefs granted by the trial court are lawful or otherwise.

12. Before venturing to analyse the thematic issues highlighted in the preceding paragraph, it is imperative to observe that what is before me is a first appeal from the subordinate court.

13. Being a first appeal, this court is vested with the jurisdiction to undertake exhaustive review, appraisal, re-evaluation and scrutiny of the entirety of the evidence tendered before the court and thereafter to form an independent conclusion arising out of the evidence on record. Nevertheless, it is imperative to observe that even though this court has the jurisdiction to depart from the factual conclusions and finding[s] of the trial court, such departure must only be undertaken when it is evident that the trial court either acted on a misapprehension of evidence on record; acted on no evidence; where the finding is perverse to the evidence on record, or where it is shown that there exist a demonstrable error of principle, which vitiates the finding of the trial court.

14. The Jurisdictional remit of the first appellate court while entertaining and adjudicating upon the first appeal has been addressed in various judicial decisions. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) the Court of Appeal reviewed a number of decisions on the point and thereafter stated as hereunder;

> " We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.
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> This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which

> the powers of the Court of Appeal are limited to deciding a question of law an appellate court has 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 really is 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 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.
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> 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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...
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> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

15. Bearing in mind the ratio decidendi espoused in the decision [supra], I am now well disposed to revert to the subject matter and to discern whether the impugned judgement accords with the established principles of the law, including the tenets of the adversarial system. Suffice it to state that in an adversarial system, parties are bound by their pleadings and that there is no room for any other business [AOB].

16. Back to the issues. Regarding the first issue, it is imperative to recall that the appellant herein testified before the learned trial magistrate and gave an account of the transaction between himself and the respondent. In particular, the appellant herein testified that he entered into a sale agreement with the respondent pertaining to and concerning the sale of the suit property.

17. Furthermore, the appellant testified that the consideration was agreed in the sum of Kshs. 280,000 only. It was the further testimony of the appellant that sum of Kshs. 200,000 only, [being the stakeholder sum] was paid leaving a balance of Kshs. 80,000 which was to be paid on completion.

18. Additionally, the appellant testified that the respondent failed to pay the balance of the purchase price. For good measure, the appellant averred that same endeavoured to have the balance of the purchase price paid but the respondent failed to adhere to the demand. To this end, it was posited that the respondent breached the terms of the contract/agreement.

19. Arising from the foregoing, the appellant averred that same was constrained to and indeed issued a demand notice. Suffice it to state that the demand notice was tendered and produced asPlaintiff's Exhibit P4.

20. It is instructive to underscore that the evidence by the appellant was not subjected to cross-examination. To this end, it suffices to observe that the evidence by the appellant was not controverted. [See the holding in the case of Ismail Rahimtullah Trustees Registered and Another versus Joint Administrators-Spencom Kenya Limited [Under Administration] and 2 Others [2024]KEELC 5586 [KLR].

21. To the extent that the appellant's evidence was not controverted, the question that comes to the fore is whether the said evidence suffices to demonstrate that the appellant had indeed proved his case to the requisite standard. Suffice it to state that proof in a civil matter is on a balance of probabilities or better still, on a preponderance of probabilities.

22. The law as pertains to the burden and standard of proof applicable in civil matters was delineated by the Court of Appeal in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR where the court explained the standard as hereunder;

> " The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows: -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

23. The Supreme Court of Kenya [the apex court] has also elaborated on the scope of the standard of proof and how same is to be discerned. In the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), the court stated thus;

> " Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person

who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. This Court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

24. Elsewhere hereinbefore, I have pointed out that the testimony by the appellant was not controverted. In this regard, there is no gainsaying that the evidence on record remains exclusively the one tendered by the appellant. To this end, a court of law cannot by and of itself proceed to ignore and or disregard the evidence on record. Suffice it to state that judicial decisions are predicated on the basis of pleadings, evidence and the law. Instructively, there is no room for conjecture; sympathy; empathy; and or judicial craft. Simply put, the evidence that was on record was credible and uncontroverted. [See the holding in Peter Ngigi vs Thomas Ondiki Oduor & Another 2019 eklr].

25. In a nutshell, I conclude that the evidence that was tendered by the appellant and which evidence was not controverted, proved the appellant's claim to the requisite standard.Consequently, and in this regard, the learned trial magistrate committed a serious error of law in disregarding and or ignoring the uncontroverted evidence.

26. Turning to the next issue, namely; whether the reliefs granted by the learned trial magistrate accorded with the established principles of the law. To start with, it is imperative to underscore that Kenya subscribes to the common law jurisdiction, which espouses the adversarial system. The key tenets of the adversarial legal system includes that parties are bound by their pleadings; a party cannot canvass a case outside the four corners of the pleadings filed; the court are equally bound by the pleadings filed by the parties; and that the judgement of the court must be in consonance with the pleadings of the parties and not otherwise.[See the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010]

27. Moreover, the adversarial system also prohibits a judge or a judicial officer from degenerating into the arena of controversy. To this end, it suffices to observe that a Judge/Judicial officer cannot call for evidence in an endeavour to buttress a party's case. [See the holding of the Court of Appeal in the case of Stanley Mombo Amuti vs Kenya Anti-Corruption Commission [2019] EKLR].

28. The scope of the adversarial legal system was enunciated and aptly espoused by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment) where the court stated thus;

" As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without

due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.

Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

29. With the foregoing in mind, it now apposite to consider whether the learned trial magistrate could make the declaration that the respondent was a Bonafide purchaser for value as pertains to the suit property, where the said respondent had neither mounted a counterclaim nor tendered any evidence before the court.

30. Suffice it to state that the plea of Bonafide purchaser for value can only arise where the claimant has been able to tender and produce evidence establishing the seven key ingredients that were highlighted in the case of Katende -vs- Haridar & Company Ltd (2008) 2 E A 173. [See also the holding in the case of Mwangi James Njehia versus Jannetta Wanjiru James and Another [2012] eklr].

31. Furthermore, it is not lost on me that the law as pertains to bona fide purchaser for value has now been settled in a number of decisions. [See the Supreme Court decision in Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)] [Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)]; and [Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment)].

32. On the face of the evidence by the appellant that the respondent did not pay the full purchase price, there is no basis upon which the learned trial magistrate could decree and proclaim the respondent as a bona fide purchaser for value. [See the decision of the Court of Appeal in Said v Shume & 2 others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) (26 July 2024) (Judgment); where it was held that the plea of bona fide purchaser for value can only arise where the claimant has accrued a valid title and has paid the agreed consideration.

33. To my mind, the proclamation by the learned trial magistrate in the absence of a counterclaim and similarly in the absence of evidence by the respondent, were made in vacuum. I hasten to state that I am at pains to appreciate the legal basis deployed by the learned trial magistrate in coming to the impugned conclusion. However, I am afraid that the learned trial magistrate did not correctly address his judicial mind to the law.

34. The foregoing paragraph takes me back to the preamble of this judgement and particularly the epigram of Madan JA [as he then was]. Simply put, a court of law can only make proclamations on the basis of evidence tendered by the parties and not otherwise. [See the provisions of Section 3 of the *Evidence Act*, Chapter 80, Laws of Kenya]. For good measure, no judge or judicial officer should supplant own thinking; sympathy or empathy in place of evidence.

Final Disposition:

35. Flowing from the analysis highlighted in the body of the Judgement and considering the principles enunciated in the case of Mwanasokoni vs Kenya Bus Services Limited 1985 EKLR, I conclude that the appeal before hand is meritorious. In the premises, the appeal is hereby allowed.

36. Consequently, and in the premises, final orders of the court are as hereunder;

    i. The Judgement of the learned trial magistrate dated 14th December 2022; be and is hereby set aside.

    ii. The said Judgement is hereby substituted with an order allowing the appellant's suit vide plaint dated 5th August 2020.

    iii. The Appellant be and is hereby awarded costs of the appeal.

    iv. The Appellant is similarly awarded costs of the suit in the subordinate court.

    v. Costs in terms of Clause [iii] and [iv] shall be borne by the Respondent.

37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE.

In the presence of:

Mutuma – Court Assistant

Mr. Kariuki for the Appellant

No Appearance for the Respondent