

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

CIVIL APPEAL No. 13 OF 2022

- 1. THE TRUSTEES PRESBETERIAN FOUNDATION**
2. LYDIA NGAHU SESSION CLERK TUMUTUMU WEST PARISH
3. REV J.M MBAE PARISH MINISTER TUMUTUMU WEST PARISH
4. COUNTY GOVERNMENT OF NYERI APPELLANTS

VERSUS

- GITHINJI GITEHI 1ST RESPONDENT**
NDERITU GUTHUA 2ND RESPONDENT
MBUTHIA KAMONJO 3RD RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling of Hon. Karen Njalale, P.M., delivered on 6th April 2021 in Karatina Principal Magistrate’s Court in Environment and Land Case No. E004 of 2021.
2. By an Amended Plaint dated 21st April 2021, the 3 Respondents herein sought judgment against the Appellants for:
- a) An order revoking and cancelling the title by the Presbyterian Foundation and reverting it back to the public, the residents of Kirimukuyu;**

b) An order restricting any further dealings on the land parcel Kirimukuyu/Kiria/792 pending the hearing and determination of the suit;

c) Costs of the suit with interest to be paid by the Defendants; and

d) Any other relief the court may deem mete and just.

3. The Respondents also filed a Notice of Motion application dated 10th February 2021 wherein they sought for orders as follows:

a) Spent;

b) That the Defendants his (sic) agents servants and or anyone claiming under him be restrained from occupying or taking possession, selling disposing and/or alienating parcel (of) land Kirimukuyu/Kiria/792 and or a restriction order do issue restraining any further dealings and/or registration of land Kirimukuyu/Kiria/792 in the interim pending the hearing and determination of this application and subsequently pending hearing and determination of the suit; and

c) That costs be provided for.

4. The said application was premised on the grounds that:-

a) The transfer of the parcel of land Kirimukuyu/Kiria/792 has been made without the necessary and proper and mandatory representation having been made; and

b) Any further registration and/or dealings will cause great harm to the residents of Kirimukuyu.

5. In response to the application, the Appellants herein filed a Notice of Preliminary Objection dated 1st March 2021 stating as follows:

“TAKE NOTICE that the 1st, 2nd and third Defendants shall at the hearing of the application dated 10th February 2021 raise a preliminary objection on the entire suit and pray that the entire plaint and suit be struck out with costs on the ground that the Plaintiffs’ claim set out in the Plaint seeking equitable relief in nature of a trust of property, recovery of land is statutory barred as it offends Section 4(1) (e), 17, 20(2) of the Limitation of Actions Act Cap 22, Laws of Kenya since the claim was brought/filed well in excess of 6

years, from the date of cause of action accrued in the year 1959 and/or 2014 (sic)."

6. Having heard submissions on the Preliminary Objection and in a brief Ruling delivered on 6th April 2022, the Learned Trial Magistrate held that the court lacked jurisdiction to handle the suit as the value of the subject property was Kshs. 34,600,000/= which amount was beyond the pecuniary jurisdiction of the court and proceeded to strike out the suit with no order as to costs.

7. Aggrieved and dissatisfied with the said determination, the Appellants who were the Defendants in the Lower Court proceedings moved to this Court on 28th April 2022 and lodged a Memorandum of Appeal dated 26th April 2022 urging this court to set aside the Ruling of the Lower Court on some four (4) grounds listed as follows:

1) The Learned Principal Magistrate erred in law in not awarding costs of the suit to the Appellants. A miscarriage of justice was thereby occasioned;

2) The learned Principal Magistrates erred in law in not holding that costs of any cause or other matter or

issue shall follow the event unless the Court or Judge shall for good reason order as provided in Section 27 of the Civil Procedure Act Cap 21. A miscarriage of justice was thereby occasioned;

3) In so far as no reason at all was given by the Learned Principal Magistrate for not awarding costs to the Appellants, the failure thereof is against the provisions of the law and the Learned Principal Magistrate erred in law in failing to make such an order. A miscarriage of justice was thereby occasioned; and

4) The Learned Principal Magistrate's failure to award costs to the Defendants without any reason is against the clear provisions of section 27 (1) Civil Procedure Act, Cap 21 Laws of Kenya. A miscarriage of justice was thereby occasioned.

8. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on the facts and the points of law and to come up with its own findings and

conclusions [*see Peters -vs- Sunday Post Limited (1958) E.A 424*].

9. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others (1968) 1 EA 123*, it was stated as follows:

“... 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 this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears that either he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

10. I have accordingly carefully perused and considered the Record of Appeal and the ruling delivered in the Lower Court. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties.

11. The gist of this Appeal turns on whether or not the trial Magistrate erred in her failure to award costs to the Appellants

after striking out the Respondents' suit for want of pecuniary jurisdiction.

12. In respect of costs, Section 27 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, provides as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2)”

13. Considering the issue of costs in ***Party of Independent Candidates of Kenya -vs- Mutula Kilonzo & 2 Others, HC EP. No. 6 of 2013***, cited with approval in the Court of Appeal decision in ***Punchline Limited -vs- Joseph Mugo Kibana & 10 Others (2018) eKLR***, the court stated as follows:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

14. In the matter herein, the Respondents had filed the suit seeking an order revoking and cancelling the title issued to the Appellants and to have the same reverted to the residents of Kirimukuyu village. In addition, the Respondents filed a Notice of Motion application dated 10th February 2021 seeking to have the Appellants restrained from occupying or taking possession

of the property described as Kirimukuyu/Kiria/792 pending the hearing and determination of the suit.

15. In response to the suit, the Appellants filed a Notice of Preliminary Objection seeking to have the suit struck out with costs on the ground that the same was statutorily barred as it offended Section 4(1) (e), 17 and 20(2) of the Limitation of Actions Act. In addition, the Appellants contended that the claim had been brought well in excess of six years from the date the cause of action occurred which they contended was either the year 1959 or 2014.
16. Having heard and considered the submissions by the parties, the Hon. A.M. Mwangi, P.M. seized of the matter then came to the following conclusion at Page 4 of the Ruling delivered on 24th June 2021:

“I am in agreement with the Plaintiffs’ submissions that the Plaintiffs’ claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. I would wish to point out further recovery of

land, under Section 7 of the Limitation of Actions Act the Plaintiff had 12 years to file their suit. They have done so on the 7th year.

The notice of preliminary objection has no legal basis. It is dismissed with costs to the Plaintiffs.”

17. That being the case, it was clear that in essence, the Appellants’ Preliminary Objection was dismissed in its entirety. It was however apparent that in response to the application filed by the Respondents, the Appellants had filed a Replying Affidavit contending that the court had no jurisdiction to try and determine the matter as the value of the property was in excess of Kshs. 40 Million. In that regard, the court directed as follows at the very end of her Ruling:

“I however noted the contents of paragraph 6 of the replying affidavit dated 2nd March 2021 by Japson Micheni Mbae alleging that the court has no jurisdiction to try and determine this suit as the suit land measuring 17.3 acres has a value of more than 40 million. I have not considered this issue because of lack of a valuation report. Before the suit is set down for hearing, the parties to confirm the value of the suit (property) as it

touches on the court's pecuniary jurisdiction to hear the case."

18. Subsequent to the said directions by the court, the Appellants requested the Nyeri County Valuer to have the suit property valued. The County Valuer prepared a Report dated 2nd September 2021 and filed in court on 14th September 2021. The said Report estimated the current market value of the suit property at Kshs. 34,600,000/=.
19. Thereafter, the matter came up for mention before the Honourable K.M. Njalale, P.M. on 26th January 2022. The Learned Principal Magistrate having heard the representations of counsel for the Appellants on the issue of jurisdiction then held as follows:

"Court: This Court is new to this matter. I will give a date for my ruling on the issue of jurisdiction and further directions. Mention will be on 6/4/22."

20. On the said 6th day of April 2022, the record (Page 120) captures the proceedings as follows:

"6/4/22

I had a chance to familiarize myself with the file, read through the proceedings as well as the courts' ruling of 24/6/21. In her order, the Hon. Magistrate ordered for a valuation report to ascertain the value of the suit land thus jurisdiction. I wish now to pick it from there. The report was filed. It has been prepared and signed by the Nyeri County Valuer, the property was valued at 34,600 Million (sic). The report was not controverted. On pecuniary jurisdiction, the subject to Article 169 (2) of the C.K. (sic), the Magistrate appointed under Section (3) shall have jurisdiction and power to handle.

- a)**
- b) Matters of Civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates Court Act.**

Moving on, this value of the said property is above pecuniary jurisdiction of this court. This court lacks jurisdiction to entertain the suit. Without further ado, I proceed to consequently down my tools."

Mr. Wahome: I seek that the suit be struck out with costs to the defendants.

RULING

I proceed to strike out the suit. No order as to costs.”

21. By their submissions before the court, the Appellants assert that the Learned Principal Magistrate did not explain why she denied the Appellants their costs and that in the absence of any such explanation, the court erred in denying them the costs.

22. As the Court of Appeal stated in the case of ***Supermarine Handling Services Ltd -vs- Kenya Revenue Authority (2010) eKLR:***

“... where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule.”

23. Given the circumstances of this case, I did not think it was entirely true to state that the court had failed to give reasons

for the denial of costs. The court had stated that it had familiarized itself with the file, the proceedings as well as the Ruling by her predecessor which had dismissed the Preliminary Objection filed by the Appellants. The court had noted that it was the court that had asked for a valuation report after the Appellants had claimed the suit property had a value of over Kshs. 40 Million.

24. It was evident from a perusal of the Plaint dated 10th February 2021 that the Respondents had instituted the suit in their capacity as residents of Kianjogu, Thaithi and Kirimukuyu villages. The orders sought among others was for the revocation and cancellation of the title issued to the Presbyterian Foundation and to have the same revert to the public. Arising from the foregoing, it was evident to me that the suit herein was in the nature of a public interest litigation.

25. As the Supreme Court stated in the case of ***Jashir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others (2014)*** ***eKLR***:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the

event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

26. In the premises, I find and hold that the matter before the trial court was in the domain of a public interest litigation and that the trial court exercised her discretion rightfully in striking out the suit with no order as to costs.
27. This Appeal is accordingly dismissed.
28. I make no order as to costs.

Judgment dated, signed and delivered in open court and virtually at Mombasa this 13th day of November, 2025

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Njuguna holding brief for Wahome Gikonyo Advocate for the Appellants
- c) Ms. Ngugi holding brief for Kahiga Advocate for the Respondents

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