Munguti v Ndonye (Civil Appeal 454 of 2019)
[2025] KECA 2114 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KECA 2114 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 454 OF 2019

K M'INOTI, AO MUCHELULE & GV ODUNGA, JJA

DECEMBER 5, 2025

BETWEEN

MUTHAMA MUNGUTI ..... APPELLANT

AND

KITALA MATIVO NDONYE ..... RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Makueni (Mbogo, J.) dated 12{{^th}} July 2019 in ELCC No. 270 of 2017)

JUDGMENT

1. The appellant, Muthama Munguti is aggrieved by the judgment and decree of the Environment & Land Court (ELC) at Makueni, (Mbogo, J.) dated 12th July 2019 by which the ELC held that the appellant is entitled to a portion of the property known as Kibauni/Malunda/541 situate in Makueni County (the suit property), as identified by the respondent, Kitala Mativo Ndonye.

2. The background to that judgment is that on or about 15th December 2016 the respondent sued the appellant in the ELC at Makueni for a declaration that he was the bona fide owner of the suit property and for a permanent injunction to retrain the appellant from interfering with his possession of the suit property.

3. The respondent pleaded that on or about 1988 he sold to the appellant a portion of the suit property for Kshs. 127,000, which the appellant completed paying in 1994. Subsequently, the appellant thwarted the respondent's efforts to transfer to him the purchased portion and instead claimed to have purchased the entire suit property. The appellant then trespassed on the suit property and wrongfully took possession.

4. The appellant delivered a defence dated 18th January 2017, which is a bit contradictory. On the one hand, he pleaded that he purchased the entire suit property from the respondent for Kshs 74,000.00

and that he started paying the purchase price from 23rd August 1988 until 1992, when the respondent disappeared. Due to the respondent's disappearance, the appellant averred that he was unable to complete paying the balance of the purchase price and obtain registration of the suit property in his name. Subsequently the respondent denied selling the entire suit property and demanded from the appellant Kshs 127,000.00.

5. On the other hand, he also pleaded that he paid the respondent in full for a portion of the suit property and that on 17th August 1994 the respondent demarcated the suit property and marked the boundary. The appellant then took possession, fenced his portion and developed the same.

6. At the hearing of the suit, Mr Kuria, leaned counsel for the respondent and Mr. Muthami, learned counsel for the appellant informed the court that they had narrowed down the issue for trial to one, namely, determination of the portion of the suit property sold by the respondent to the appellant. It was conceded that there was a sale of a portion of the suit property and payment of the purchase price. In acceding to the request by the parties, the learned judge stated:

> " Court: Arising from what I have heard, I agree with both counsel that the evidence should be confined to what portion of the suit land was sold now that parties are in agreement over the issue of sale agreement and money exchanging hands."

7. The respondent testified on his behalf and called one witness while the appellant also testified on his own behalf and called four witnesses. The learned judge visited the suit property where, among others, the respondent identified the portion of the suit property that he had sold to the appellant. After considering the evidence the learned judge concluded as follows on the issue in contention:

> " ...at the initial time of sale, only the plaintiff and the defendant were present. The two did not indicate the approximate size of the land that was the subject of sale. Based on the evidence on record, I am minded to take the evidence of the plaintiff as the one that is truthful due to the material contradictions in the evidence adduced by the defendant. In the circumstances therefore, based on the agreement arrived at on 30th October 2018, my finding is that the defendant is entitled to the portion of land of the plaintiff's land parcel known as Kabauni/Malunda/541 as shown by the plaintiff. Each party shall bear his own costs." (Emphasis added).

8. The appellant was aggrieved and preferred this appeal founded on seven grounds. Some of the grounds of appeal are overlapping and beyond the single issue submitted to the trial court for determination. Shorn of overlaps and repetition, the appellant contends that the ELC erred by:

   i. disregarding his defence and evidence;

   ii. holding that it was difficult to identify with precision the portion of the suit property that was sold to the appellant;

   iii. holding that his evidence was contradictory; and

   iv holding that the appellant's evidence was truthful.

9. In support of the appeal, the appellant relied on written submissions dated 21st July 2020 and submitted, on the first issue, that the ELC did not consider his defence and evidence which showed that he made the last payment to the respondent on 17th August 1994. He contended that the court also ignored the evidence of DW1, Onesmus Wambua Kyeke, the assistant chief who wrote and produced in evidence two booklets containing the agreement and a sketch map of the portion that was sold.

10. On the second issue, the appellant submitted that the ELC erred by holding that the portion sold to the appellant could not be identified with precision, yet the court visited the suit property and was shown by DW1 the portion that the respondent had sold to the appellant. He contended that the booklet that he produced contained signatures of the assistant chief, the witness and a sketch map showing clearly the portion he had purchased, whilst the respondent's booklet was incomplete, did not have any signature and had the sketch map plucked off.

11. On the third issue, the appellant contended that there was no contradiction in his evidence as held by the ELC and that the evidence of his four witnesses, namely DW1, DW2, DW3 and DW4 was consistent and showed that it was the appellant who was telling the truth.

12. On the last issue, the appellant submitted that from the evidence, it was the respondent who was not telling the truth, but the ELC erroneously accepted his evidence. He submitted that whilst the respondent denied that Kyeke was his witness during the writing of the booklets, the booklets showed otherwise, which was also confirmed by the respondent's witness, Alex Kingoo Ingui (PW1). Further, that although the respondent denied that the portion purchase by the appellant was beaconed after payment of the last instalment of the purchase price, the appellant's witness PW1 testified otherwise. The appellant also submitted that the respondent claimed that the final agreement was prepared by the appellant, yet the evidence showed that it was done by the assistant chief.

13. The respondent opposed the appeal vide written submission dated 24th March 2021 in which he contended, as regards the first issue, that the ELC properly consider and evaluated all the evidence, including the appellant's defence and correctly found the appellant's case to be full of gaps and contradictions. It was contended that from the judgment, the court considered all the evidence including that of the appellant and that there is no merit in the contention that the appellant's defence was ignored.

14. On identification of the portion of the suit property that was sold to the appellant, it was submitted that the agreement relied upon by the appellant did not indicate the exact portion that was sold. Further, that when the parties entered into the agreement in 1988, they both visited the suit property in the absence of any other person and that even DW1 testified that when he was drawing the agreement, both parties could not agree on the size of the portion that was sold. It was also the respondent's submission that the sketch drawn by DW1 was without his consent and that in any event, even that portion could not be identified with precision.

15. As regards the third issue, the respondent submitted that the ELC properly found the appellant's case contradictory. He contended that the appellant's case as pleaded was that he had purchased the entire suit property, but his own witnesses contracted that position and told the court that he purchased only a portion. The respondent further submitted that in the circumstances, the contradictions in the appellant's case were material and that the ELC properly found as such.

16. On the last issue, the respondent submitted that the contradictions, if any, in his evidence were not material and were attributable to the long period that had expired since the start of the transaction. The respondent cited the decision of this Court in *Philip Nzaka Watu v Republic* [2016] eKLR in support of the proposition that the court must determine whether contradictions and inconsistencies are minor or whether they are signifiant and go to the root of the case.

17. We have carefully considered this first appeal. Consistent with the duty of a first appellate court, we shall re- evaluate and reappraise the evidence to satisfy ourselves that the trial court came to the right conclusion on the evidence, but bearing in mind that we do not have the advantage that the trial court

had because it saw and heard the witnesses as they testified. (See *Abok James Odera v John Patrick Machira* [2013] eKLR).

18. As earlier pointed out, before commencement of the trial, the parties narrowed down the issue in dispute to determination of the portion that the respondent sold to the appellant. In this appeal, the parties cannot revisit other issues which they had agreed to dispense with, such as whether the appellant bought the entire suit property, or only a portion. In their submissions in this Court, the parties tended to lose sight of the clear issue in dispute, namely identification of the portion of the suit property that was sold.

19. In our perception, this appeal turns on whether the ELC erred in its holding as regards the portion of the suit property that the respondent sold to the appellant. Having carefully evaluated the evidence on record, we do not find substance in the contention that the ELC ignored the appellant's defence and evidence. The court considered the pleadings and all the evidence on record before accepting the respondent's case over that of the appellant. How else, we wonder, would the court have come to the conclusion that the appellants case was contradictory and unbelievable if it did not consider his defence and evidence?

20. Nor do we find any basis for faulting the trial court for opting to believe the respondent's case instead of that of the appellant. The reason for this will become clear in our consideration of the gravamen of the appeal, namely the portion that was sold to the appellant.

21. In his evidence before the trial court, the respondent told the court that he sold a portion of the suit property to the appellant and showed him the portion in 1988, when they were the two of them only. The initial purchase price was 74,000 but it was varied to 127,000 due to the appellant's delay in completing the transaction. The respondent was to transfer the portion to the appellant after the later completed paying the purchase price, which he did not do until 17th August 1994, in the presence of witnesses at Kalawa. It was the respondent's evidence that the persons present were intended to witness payment of the last instalment to him and that the portion in dispute was not beaconed that time.

22. The evidence of PW1, as can be gleaned from his witness statement, evidence in chief, cross-examination and re- examination, was that he was present on 17th August 1994 when the appellant paid to the respondent the last instalment of the purchase price at Kalawa and that the portion in dispute was not beaconed on that day but had been beaconed earlier. He denied having signed any document on 20th August 1994.

23. The appellant's evidence was that he purchase the entire suit property from the respondent in 1988 for Kshs 74,000 but on 17th August 1994 when they met at the Kalawa Chief's office, the respondent changed positions and demanded Kshs 127,000 for a portion of the suit property, which the appellant acceded to for fear of losing the entire land. Thereafter, in the company of witnesses and the chief, they went to the suit property and beaconed the portion he had purchased and he fenced it.

24. DW1, John Mutune Mwambu, the senior assistant chief, Mulunda Sub-location told the court that on 17th August 1994, the appellant and the respondent, with their witnesses met him over a dispute where the appellant was alleging to have bought the entire suit property while the respondent claimed to have sold only a portion. The respondent showed them the portion that he had sold to the respondent and that the witness drew a sketch map of the portion. The evidence of DW2, DW3 and DW4 were more or less along the same lines.

25. Whilst the respondent maintained that he had shown the respondent the portion he was purchasing after they entered into the agreement and that they did not visit the suit property after the meeting on 17th August 1994, the appellant and his witnesses contended that they visited the suit property

after that meeting when the respondent showed the appellant the sold portion. We find it highly unbelievable that the respondent had been paying for a portion of the suit property from 1988 without the slightest clue about the portion he was buying, until he paid the final instalment six years later. Moreover, the appellant's evidence on how the sketch map came into being is not without problems because, in one breath, the witness who drew the sketch claimed that he was shown the portion by the appellant and in the next, that he was shown by the elders.

26. Having heard and seen the witnesses as they testified, the learned judge believed the evidence of the respondent to that of the appellant. He did not believe the evidence of the appellant with his insistence that he was buying the entire sit property whilst the other witnesses, including his own witnesses insisted he was buying only a portion. On questions of credibility of witness, this Court will defer to the conclusion of the trial court, unless it is demonstrated that the conclusion is fanciful or manifestly wrong and out of sync with the evidence. In Susan Munyi v Keshar Shiani CA. No. 38 of 2002 this Court explained as follows:

> "As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them." (Emphasis added).

27. Similarly, in *Muiruri v Kimemia* [2002] 2 KLR 677 the Court sounded its reluctance to disturb findings of the trial court on the credibility of witnesses. The Court reasoned as follows:

> "In this appeal we are being asked to interfere with the learned judge's findings of facts. This Court would rarely interfere with findings of fact made by a trial judge who had the advantage of seeing and hearing the witnesses, unless it is satisfied that there was a misapprehension of the facts on the part of the trial judge or that he/she overlooked some evidence having a bearing upon the case. It does not appear to us that this is a case in which this court would be justified in reversing the decision of the trial judge founded on the judge's opinion of the credibility of witnesses formed after seeing and hearing their evidence." Emphasis added.

28. For the foregoing reasons, we do not find any basis for interfering with the conclusion of the ELC regarding the portion of the suit property that the respondent sold to the appellant.

29. The main problem, however, still remains the uncertainty of the actual portion on the ground that was sold. This is a problem that can only be cured by a surveyor identifying on the ground the portion of the suit property that was identified by the appellant and accepted by the ELC. To bring this matter to an end, the order that best commends itself to us is to remit this matter back to the ELC for purposes of ensuring that the portion of the suit property identified by the respondent is properly demarcated on the ground by a qualified surveyor.

30. Ultimately, our final orders are as follows:

i. the appellant's appeal succeeds only to the limited extent that this matter is remitted back to the ELC to ensure that the sold portion as identified by the respondent is demarcated on the ground; and

ii. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025.

K. M'INOTI

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

.....

G. v ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.