Areri v Gwako & another (Civil Appeal 22 of 2020)
[2025] KECA 2300 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2300 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 22 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

DECEMBER 19, 2025

BETWEEN

SAMUEL NYANKANGA ARERI ..... APPELLANT

AND

FRANCIS OMUNDI GWAKO ..... 1ST RESPONDENT

NKURU GWAKO ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and decree of Environment and Land Court at Kisii (Mutungi J.) dated 14{{^th}} June, 2019 in ELC No. 1246 of 2016 Formerly Kisii HCC No. 134 of 2003)

JUDGMENT

1. This is a first appeal against the judgment and decree of the Environment and Land Court "the ELC" at Kisii (J.M. Mutungi, J.) delivered on 14th June 2019. By that judgment and decree the ELC dismissed both the suit and counterclaim lodged by the appellant and the respondents respectively.

2. The background heralding this appeal is that by way of a plaint dated 13th August 2003 and later amended on 28th February 2004, the appellant, in his capacity as the administrator of the estate of his late father, Areri Nyankanga, "the deceased", sued the respondents jointly and severally alleging that in 1960, the deceased sold a portion of his then parcel of land to the respondents for a consideration of 25 heads of cattle, but only 20 were paid, leaving a balance of 5 thereof; that following the deceased's death the respondents unlawfully had the entire parcel of land now known as LR No. Bassi/Bondonya/349, "the suit property", measuring approximately 1.5 hectares, transferred and registered in their names, and in doing so, appropriated an additional two acres "the appropriated acres" beyond what had been agreed upon. Consequently, he sought various declarations to wit that: the appropriated acres were held by the respondents in trust for the appellant; the original contract had been breached and was

therefore void; the respondents should transfer the appropriated acres back to him; injunctive reliefs; mesne profits and costs.

3. In response, the respondents, filed a joint statement of defence and counterclaim. They denied the appellant's allegations and averred that the appellant lacked the legal capacity to institute the suit, as there was no privity of contract between him and the respondents as well as want of a grant of letters of administration. They maintained that they fully paid the consideration for the purchase of the suit property to the deceased in 1960, whereupon they were put in possession thereof. They further contended that during the land adjudication process in 1967, the suit property was entered into the adjudication register in their names without any objections from any quarters including the appellant; and were subsequently registered as proprietors thereof in 1970, with a title deed issued to them on 16th August 2001. In their counterclaim, the respondents alleged that in March 2003, the appellant had unlawfully trespassed onto the suit property, committed acts of wastage by cutting crops, and obstructed them from harvesting tea therefrom. They sought special damages amounting to Kshs.329,870/= for the destruction of the crops and loss of tea harvest, general damages for trespass, costs of the suit, interest and any other relief that the court deemed fit to grant.

4. The appellant filed a Reply and defence to the Counterclaim on 11th September 2003 denying all allegations and describing the counterclaim as misplaced, ill-timed, and an abuse of the court process. He maintained that the respondents had unlawfully appropriated the acres that had not been sold to them by the deceased.

5. During the plenary hearing, the appellant testified that the suit property sold was a four-acre portion. He claimed the respondents began cultivating the appropriated acres in 1980. In 2002, he lodged a complaint regarding the appropriation with the area District Commissioner, who directed that the dispute be resolved by the local chief. At a hearing before the chief and local elders, the respondents allegedly admitted that the appropriated acres were not part of what was initially sold to them, and agreed to cede it back to the appellant with two cows as compensation. That despite this agreement, the appellant refused to vacate. Instead, they caused the appellant to be arrested and charged with trespass but the charges were later quashed by the High Court.

6. PW2, Dishon Ochioro Nyakanga, the deceased's brother, confirmed the sale and the exclusion of the appropriated acres thereof. He alleged that the respondents misled surveyors during the land adjudication process to include the appropriated acres which had never been cultivated by the respondents prior to the elders' decision.

7. PW3, Gerald Yamongo Ndege, a former Senior Chief of the area, testified that the respondents admitted that they did not purchase the appropriated acres and agreed to surrender them and compensate the appellant with two cows. However, when the appellant attempted to cultivate the portion, he was stopped by the respondents.

8. PW4, James Nyarumbe confirmed that the elders' meeting which was attended by representatives from both sides resulted in the demarcation of the appropriated acres in favour of the appellant.

9. The first respondent, testified that he and the second respondent purchased the suit property from the deceased for 25 cows, which were fully paid. He asserted that the purchased suit property included the appropriated acres and denied any encroachment. He acknowledged attending the elders' meeting but denied that there was any agreement.

10. In its determinations the ELC first addressed the issue of locus standi. Although the appellant presented a limited Grant of Letters of Administration Ad Colligenda Bona, as the basis of his filing of the suit, the ELC held that such a grant only permits collection and preservation of estate assets

and not litigation. Consequently, the appellant lacked capacity to sue, rendering the suit void ab initio. Further, the court found that the land adjudication process was concluded in 1968, whereupon, the respondents were registered as the proprietors of the suit property in 1970 and title issued in 2001. That no objections were raised by the appellant or any other party during adjudication process. Indeed, the appellant's family actively participated in the process. Further that the appellant's claim, initiated in 2003, was well beyond the 12-year limitation period under the *Limitation of Actions Act* and therefore the suit was time-barred.

11. Regarding the appropriated acres, the ELC found that no evidence of a constructive trust was led. The claim of trust was therefore unsubstantiated; that the sale agreement was unwritten, and the appellant, being only four years old at the time, could not attest to its terms; that the elders' decision if at all, lacked legal force and was made without jurisdiction and was therefore not binding on any of the parties.

12. On the other hand, the ELC held that the respondent's claim for special damages of Kshs.329,870 as well as general damages for trespass was not proved and consequently dismissed it. Ultimately, the ELC dismissed both the appellant's suit and the respondents' counterclaim, with each party bearing their own costs.

13. The appellant being aggrieved by the judgment and decree of the ELC launched this appeal contending that the ELC erred both in law and fact by: entering judgment in favour of the respondents despite the weight of contrary evidence tendered; failing to determine whether the respondents' omission to file a reply to the amended plaint amounted to an admission of the claim; wrongly dismissing a signed arbitration agreement reached before elders; failing to make a finding on the existence and terms of the original sale agreement; allowing the respondents to retain possession of the appropriated acres without any plea or proof of adverse possession, and in holding that the respondents had paid for the appropriated acres despite their own admission of partial payment and exclusion of the same from the sale; and finding that no trust was created and lastly, he challenges the court's conclusion that the minutes of the elders' meeting did not constitute a binding agreement, despite both parties having signed the document.

14. The appeal was heard by way of written submissions. When called out, the appellant was represented by Mr. Mokua, learned counsel. There was no appearance for the respondents, either in person or through their counsel though served with the day's hearing notice by court. Neither had they filed their written submissions.

15. Counsel for the appellant submitted that the ELC erred in disregarding the weight of evidence, including admissions by the respondents and signed minutes of an elders' meeting. He asserted that the agreement was void as it lacked the necessary consent from the Land Control Board for the area, and that the respondents' conduct thereafter gave rise to a constructive trust. In support of this submission, counsel cited the case of Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another [2015] KESC 28 (KLR), where the Supreme Court held that actual possession is not necessary to establish a customary trust. He also relied on the case of Arvind Shah & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others [2023] KESC 106 (KLR), in which the Supreme Court affirmed that constructive trusts may arise in land sale agreements to prevent unjust enrichment and therefore override registered title. Counsel also cited the case of Willy Kimutai Kitilit v Michael Kibet [2015] KEELC 478 (KLR), where this Court held that doctrines of constructive trust and proprietary estoppel may apply even where the *Land Control Act* would otherwise void the transaction. The court emphasized that equity, as a constitutional value under Article 10(2)(b), must inform judicial interpretation in the circumstances of this case.

16. Counsel further submitted that the respondents failed to file a defence to the amended plaint, which should be deemed as an admission under Order 6 Rule 9(1) of the Civil Procedure Rules. He cited

the case of Gulthamed Mohamedali Jivanji t/a Jivanji Agencies v Sanyo Electrical Company Ltd, Civil Appeal No. 225 of 2001, where this Court held that failure to deny a pleading amounts to admission and that such admissions may be relied upon by court to make findings of fact.

17. Counsel challenged the trial court's implicit recognition of the respondents' possession of the appropriated acres despite no claim of adverse possession having been pleaded or proved. He reiterated that the Supreme Court's position in Arvind Shah & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others (supra) emphasizing that adverse possession must be specifically pleaded and proved; and that this was not the case in the circumstances of this case.

18. To reinforce the need for appellate intervention, counsel invoked the case of Geoffrey M. Asanyo & 3 Others v Attorney General [2018] KESC 15 (KLR), where the Supreme Court affirmed its inherent jurisdiction to correct errors committed by lower courts in the execution of their constitutional mandates. The appellant argued that the trial court failed to do substantive justice and urged this Court to, allow the appeal, and grant the reliefs sought in the original suit by the appellant with costs.

19. Sitting as the first appellate court, we are alive to our duty which is to reconsider the evidence, evaluate it and draw our own conclusions though we should always bear in mind that we neither saw nor heard the witness as they testified, the advantage which the ELC as the trial court, had and make due allowance in that respect. See Selle v Associated Motor Boat Company [1968] EA 123.

20. Having reviewed the record, the pleadings, and the submissions and the law, we deem that this appeal really turns on one issue, whether the appellant had the legal standing to institute the suit in the ELC. We note that though the issue was the cornerstone of the ELC's determination, the appellant deliberately failed to raise it as a ground of appeal. He also deliberately avoided to address the issue in his submissions. Does this mean therefore that he agrees with the ELC's finding that he did not have the locus standi to institute the suit? If that be the case, then the fate of this appeal is sealed.

21. It is not in dispute that the appellant relied on a limited Grant of Letters of Administration ad colligenda Bona to institute the suit. Section 67 of the *Law of Succession Act* governs the issuance of grants of representation and provides for limited grants, including those for collection and preservation of estate assets which is ad colligenda bona and ad litem which a party can use to commence court proceedings. The relevant provision with regard to letters of administration ad colligenda bona provides that:

> " Section 67(1): "No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published a notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired."

22. This provision distinguishes the limited grant for collection and preservation of assets, commonly referred to as ad colligenda bona, from full grants of representation. The primary purpose of a grant ad colligenda bona is limited to the collection and preservation of the deceased's assets that may otherwise go to waste due to urgency or delay in obtaining full grant representation. The powers usually do not extend to commencing a full suit or distributing the estate. Further clarity is provided in Paragraph 14 of the Fifth Schedule to the *Law of Succession Act*, which deals with a grant of letters of administration ad litem. It provides interlia "…. When it is necessary that the representative of the deceased person be made a party to a pending suit, and the executor or a person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for purposes representing the deceased in the said suit, or in any other cause or suit which may

be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, until a final decree shall be made therein, and carried into complete execution."

23. This grant, as it can be seen is to provide a temporary, limited authority to an individual to represent a deceased person's estate in a specific civic lawsuit. The effect is to provide a formal legal representative for the estate, allowing the case to proceed, particularly when a general administrator is unavailable or unwilling to act. However, the appointee cannot distribute the estate or perform any actions beyond the scope of the specified proceedings.

24. This position was well articulated in the case of Morjaria v Abdalla [1984] KLR 490, where this Court interlia held that; the purpose of a grant of letters of administration ad colligenda bona is to collect the property of the deceased person where it is of perishable and precarious nature and where regular probate and administration cannot be granted at once; the appointment of a person as an administrator ad colligenda bona in respect of the estate of the deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is a specific provision for that purpose in paragraph 14 of the Fifth Schedule to the *Law of Succession Act*. In its own words:

> "...However, we do not think that the appointment of a person "ad colligenda bona" can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb "colligere" means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for purpose of representation in a suit or in an appeal."

25. The appellant did not obtain a grant of letters of administration ad litem under paragraph 14 of the Fifth Schedule to the Act, which is the proper authority for instituting suits. In the premises, the appellant lacked capacity, wherewithal and or locus standi to institute the suit, the precursor to this appeal. Indeed, where a party has no locus standi a court of law will not entertain or hear him on his suit and cannot grant any reliefs in his favour as the suit would be fatally defective, null, void abnitio and incompetent.

26. Accordingly, we are satisfied just like the trial court that the suit was incompetent on account of the appellant's lack of the requisite locus standi to institute it. The suit ought then to have been struck out at that stage. However, the ELC embarked on the consideration of other issues raised by the appellant in the pleadings and submissions, such as, the failure by the respondents to file a defence to the amended plaint; whether the suit was time-barred; adverse possession and the validity of the sale agreement. To our mind, this was wholly unnecessary having reached the conclusion that the suit was incompetent. We shall not fall in the same trap. Accordingly, having reached the conclusion that we have, it is sufficient to dispose of the appeal.

27. In the ultimate, we find no merit in the appeal which we accordingly dismiss with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR