



Awinja & 2 others v Awinja & 2 others (Environment and Land Appeal E008 of 2022) [2024] KEELC 9 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 9 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

E ASATI, J

JANUARY 18, 2024

BETWEEN

WYCLIFFE MUHUNYI AWINJA 1ST APPELLANT

WILBERFORCE MULAMBA AWINJA 2ND APPELLANT

JASS NYAMWANDA 3RD APPELLANT

AND

KENNEDY NEHEMIAH AWINJA 1ST RESPONDENT

VIHIGA COUNTY LAND REGISTRY 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the Judgement of the Senior Resident Magistrate's court at Vihiga and delivered on the 21st day of July 2022 by honourable R. M. Ndombi SRM in Vihiga Senior Principal Magistrate's Court ELC Case No. 50 of 2020)

JUDGMENT

Introduction

1. The Appellants herein were the 1st, 2nd and 3rd Defendants in Vihiga SPMC E&L CASE NO. 50 OF 2020 (the suit herein). The suit was commenced vide the plaint dated 12th August 2020 wherein the 1st Respondent sued the Appellants jointly with the Land Registrar, Vihiga as the 4th Defendant for:
 - a. An order restraining the Defendants either by themselves their agents, servants, employees or any person acting on their instructions from interfering with the Plaintiff's peaceful ownership of all that parcel of land known as West Bunyore/Ebutanyi/31



- b. An order restraining the 4th Defendant either by himself, agents, servants, employees or any other person acting on his/her instructions from cancelling, rectifying and/or in any way interfering with the Plaintiff's title to that parcel of land known as LR West Bunyore/Ebutanyi/31
 - c. Costs of the suit.
 - d. Any other relief that the court may deem fit and just to grant.
2. The 1st Respondent's case in the suit was that he was the registered owner of all that parcel of land known as West Bunyore/Ebutanyi/31 (the suit land herein) which he was gifted by his late father. That the Appellants and the Land Registrar, Vihiga had connived to take the suit land away from him. That the Land Registrar had, on the instructions of the Appellants, issued a notice to him to surrender his title deed in respect of the suit land to the Land Registrar for cancellation. He therefore sought the intervention of the court to stop the cancellation and interference.
3. The Appellants filed amended 1st, 2nd and 3rd Defendants' Defence and Counterclaim dated 16th April 2021 and denied that the 1st Respondent was gifted the suit land by their late father, Alfred Awinja Nyamwanda, Deceased. The Appellants contended that the 1st Respondent had acquired the suit land fraudulently and hence he was lawfully summoned by the Land Registrar pursuant to the provisions of section 79 (2) of the [Land Registration Act, 2012](#).
4. Through the counterclaim, the Appellants claimed and prayed for: -
 - a. A declaration to issue that the registration of Kennedy Nehemiah Awinja as the proprietor of title No. West Bunyore/Ebutanyi/31 on 28th November 2018 and title issued thereto were unlawfully acquired.
 - b. An order do issue directing the Land Registrar Vihiga to proceed under section 79(2) of the Land Registration Act to rectify the register for title No. West Bunyore/Ebutanyi/31 as per his letter of 18th June 2020.
 - c. In the alternative and without prejudice to prayer 2 above, an order do issue from the court for the rectification of the register of title No. West Bunyore/EButanyi/31 by cancelling the registration of Kennedy Nehemiah Awinja as the proprietor and the title issued thereto on 28th November 2018.
 - d. Further or other relief.
 - e. Costs of the counterclaim.
5. In the 1st Respondent's Reply to the amended Statement of defence and defence to counterclaim dated 29th April 2021, the 1st Respondent denied the allegations in the counterclaim and averred that the Appellants had no locus standi to file the counterclaim.
6. The record of appeal shows that the suit was heard by the trial court which vide its judgement dated 21st July 2022 found that the 1st Respondent had proved his case on a balance of probabilities that he was the rightful registered owner of the suit property and entered judgement in favour of the 1st Respondent. The counterclaim was dismissed with costs.
7. Aggrieved by the judgement, the Appellants filed the present appeal vide the Memorandum of Appeal dated 19th August 2022 on the grounds that:



- a. The learned trial Magistrate erred in law and in fact in deciding the case against the weight of the evidence on record.
 - b. The learned trial Magistrate erred in law and fact in failing to take into account material facts and taking into account matters that ought not to be considered thereby reaching a wrong decision in law.
 - c. The learned trial Magistrate erred in law and approach by failing to consider the Appellants' submissions and make proper findings thereon.
 - d. The learned trial Magistrate erred in law in failing to uphold the doctrine of precedent.
 - e. The learned trial Magistrate erred in law and in fact and further misdirected herself in failing to interrogate how the 1st Respondent acquired the title to the suit property in light of the fact that there was a subsisting valid title to the suit property as a result thereof there has been a miscarriage of justice.
 - f. The learned trial Magistrate erred in law and in fact by misapprehending the requirements of section 26 of the [Land Registration Act](#) by arriving at a wrong decision that the title deed to the suit property in the name of the 1st Respondent was valid whilst the same was acquired through an illegal and /or corrupt scheme.
 - g. The learned trial Magistrate erred in law and fact by misapprehending the legal principle that a parcel of land can only have one title and where there are two conflicting titles, a party cannot simply seek sanctity of the said title without proving the root of the title and thereby wrongly declared the 1st Respondent as the registered proprietor of the property.
 - h. The learned trial Magistrate erred in law and fact by making a wrong finding in granting the 1st Respondent an injunction against the appellant without the 1st Respondent meeting the required threshold.
 - i. The learned trial Magistrate erred in law and fact by misdirecting herself on the issues for determination- before her and failed to determine the issues before her properly thereby arriving at a wrong decision and dismissing the appellant's counterclaim.
8. The Appellants sought for orders that the appeal be allowed, the judgement, order and decree of the subordinate court delivered on 21st July 2022 be set aside and be substituted with an order dismissing the suit as against the appellants and allowing the appellants' counterclaim with costs, that the Respondents do pay costs of the appeal.

Submissions

9. The appeal was argued by way of written submissions.
10. Written submissions dated 23rd June 2023 were filed on behalf of the Appellants by the firm of Shumila Mudanyi Associates, Advocate. Counsel identified 3 issues for determination in the appeal, namely;
 - a. Whether or not the Respondent proved the root of his title
 - b. Whether the court had a duty to summon the Land Registrar suo moto
 - c. Whether the title in the possession of the Respondent is impeachable
 - d. Costs.



11. Written submissions dated 7th July 2023 were filed by the firm of Mukhool & Associates for the 1st Respondent. Counsel framed 3 issues for determination namely;
 - a. Whether the firm of Shumila Mudanyi Associates Advocate are properly on record.
 - b. Whether the appeal raises arguable grounds to overturn the judgement of the subordinate court.
 - c. Who should be awarded costs of the appeal.
12. From these and the grounds of appeal, I find that the issues for determination are:
 - a. Whether the firm of Shumila Mudanyi is properly on record for the Appellants.
 - b. Whether the trial court erred in not finding that the 1st Respondent obtained title by fraud.
 - c. Whether the trial court erred in dismissing the counterclaim
 - d. Who pays the costs of the appeal?

Analysis and Determination

13. This being a first appeal, this court has a duty to re-examine and re-analyse the evidence adduced before the trial court so as to come to an independent conclusion.
14. The first issue for determination is whether or not the firm of Shumila Mudanyi Associates Advocate are properly on record. This issue was raised on behalf of the 1st Respondent. Counsel for the 1st Respondent submitted that while the Appellants were represented in the suit by the firm of Nyandieka & Associates Advocates, no notice of appointment to act alongside or Notice of Change of Advocates was filed and or served upon the Respondents by the firm of Shumila Mudanyi Associates Advocate. That it is not clear how the current firm of advocates came on record without making a formal application since judgement had already been entered. Counsel relied on the provisions of Order 9 Rule 9 *Civil Procedure Rules* which requires that when there is a change of Advocate, or when a party decides to act in person having previously engaged an advocate after judgement has been passed such change or intention to act in person shall not be effected without an order of the court upon an application with notice to all parties or upon consent filed between the outgoing advocates and the proposed incoming Advocates or party intending to act in person as the case may be. Counsel submitted that the firm of Shumila Mudanyi Associates Advocate are improperly on record for failure to comply with the mandatory provisions of the law.
15. The Appellant's response to this was that the issue was res judicata as the court had made an order that the appellants furnish the 1st Respondent with the Notice of Change of Advocates.
16. Perusal of the record shows that indeed the Appellants were represented by the firm of Nyandieka & Associates Advocates in the lower court up to the time of delivery of the judgement and after. On 12/1/2023 after entry of judgement, the same firm of Nyandieka & Associates Advocate filed the Notice of Motion application dated 11th January 2023 seeking for change of the mode of execution of the decree.
17. The record shows further that the Memorandum of Appeal dated 19th August 2022 was filed by the firm of Nyandieka & Associates Advocates. I have not seen any document filed in compliance with Order 9 Rule 9 of the *Civil Procedure Rules*. Under Order 9 Rule 13, until the Advocate previously acting is replaced by way of Notice of Change of Advocate or has applied to cease acting and an order



has been made to that effect, the Advocate shall be considered the Advocate of the party to the final conclusion of the cause or matter including any review or appeal.

18. In the case of *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR while striking out an application filed by counsel post judgment in contravention of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, the court held that

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”

The court then proceeded to strike out the pleadings filed by the advocate who had not complied with Order 9 Rule 9 *Civil Procedure Rules*.

19. In this matter, since the firm of Shumila Mudanyi Associates, Advocate has not complied with the provisions of Order 9 Rule 9 and the firm of Nyandieka & Associates Advocates has not ceased acting for the Appellants in accordance with Order 9 Rule 13 *Civil Procedure Rules*, I find that the firm of Shumila Mudanyi is not properly on record in this matter for the appellants. That the firm of Nyandieka & Co. Advocates who filed the appeal are the Advocates for the appellants herein. On the basis of this finding the documents filed by Shumila Mudanyi Associates Advocate are improperly on record and are hereby expunged from the record. This finding however does not affect the appeal the same having been filed by the advocates properly on record for the Appellants.
20. The next issue for determination is whether the trial court erred in not finding that the 1st Respondent obtained his title to the suit land by fraud. It was submitted on behalf of the 1st Respondent that while the Appellants argue that the trial court ought to have interrogated how the 1st Respondent acquired title to the suit land considering the fact that there was a subsisting title to the said property, the subsisting title claimed by the Appellants was never produced in court. That secondly the allegation by the appellants that the 1st Respondent never surrendered the original title deed to the Land Registrar in order to be issued with a fresh one was unsubstantiated. That these allegations were never proved before the trial court. Further that the Appellants’ allegations that the 1st Respondent obtained the title through fraud was never proved.
21. The record shows that the 1st Respondent testified in the suit as PW1 and stated that the land originally belonged to his father who is now deceased. That his father gave him the land as a gift as he (the father) had also given his other sons land as well. That the 1st Respondent gave his father his (1st Respondent’s) documents and his father gave him a transfer form which he signed and processed the title deed.
22. The evidence of the Appellants on this consisted of the testimonies of the 1st and 2nd Appellants who testified as DW1 and DW2 respectively and the documents that they produced as exhibits. The 1st Appellant, testified that the 1st Respondent was his step-brother. That the 1st Respondent was not given land by their father, that the 1st Respondent did not have a transfer form signed by their father, a Land Control Board Consent and evidence of payment of stamp duty. That it was on that basis that he reported to the police and to the Land Registrar. That the Land Registrar requested the 1st Respondent to return the title deed. That the parties’ father was still alive when the 1st Respondent was summoned by the Land Registrar.
23. According to the Appellants, the 1st Respondent obtained title by fraud because the 1st Respondent did not show the requisite documents for transfer, procured transfer of the suit land using documents not verified in accordance with section 45 of the *Land Registration Act*, obtained title without compliance



- with section 13 (2) of the *Land Registration Act* and procured registration of a bigger acreage than the property being transferred. These were the particulars of fraud pleaded in the counterclaim.
24. The 1st Respondent produced title deed dated 28th November 2018 in his name. It showed that the land was registered in the 1st Respondent's name on 28th November, 2018. The 1st Respondent also produced certificate of death No. 0806510 in respect of his father Wilfred Awinja Nyamwanda, deceased. It showed that the deceased died on 27th July 2019 which was more than one year after transfer of the suit land in favour of the 1st Respondent. There was no evidence that the father in his lifetime protested the transfer.
25. The trial court considered the evidence before it and held that
- “ this court takes the title deed issued to the plaintiff as prima facie evidence as proprietor and absolute owner as per section 26 of the *Registered Land Act*.”
26. I have considered the evidence adduced. The 4th Defendant did not testify in the matter to substantiate on the transfer and registration of the suit land in favour of the 1st Respondent and the contents of the letter dated 18th June, 2020 requiring the 1st Respondent to surrender the title. From the particulars of fraud pleaded it is not clear whether the appellants' complaint was that the 1st Respondent was not entitled to the suit land or that he got a bigger acreage than what was due to him. No evidence was adduced to prove the particulars of fraud pleaded. The original title in the name of the deceased was not produced. There was no evidence that the 1st Respondent got more acreage than what was to be transferred.
27. The standard of proof required for claims based on fraud is higher than in the ordinary civil cases. In *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “ When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
28. For the foregoing reasons I find that the trial court was justified to find that fraud had not been proved and to rely on the provisions of section 26 of the *Land Registration Act* for its decision.
29. The next issue for determination is whether the trial court was justified to dismiss the counterclaim. In the 1st Respondent's Reply to defence and Defence to counterclaim the 1st Respondent raised the issue of locus standi on the part of the Appellants. The counterclaim is for recovery and/or preservation of land belonging to a deceased person. There is no evidence that as at the time of filing the suit the Appellant had taken out letters of administration in respect of the estate of the deceased. In the circumstances the Appellants lacked capacity and the counterclaim filed without capacity was incompetent.
30. Regarding costs, the parties herein being close family members let each party bear own costs.
31. On the basis of the holdings herein namely; that the firm of Shumila Mudanyi Associates Advocates was not properly on record, that the trial court did not err in not finding that the 1st Respondent obtained his title to the suit land by fraud as fraud was not proved, that the trial court was justified to dismiss the counterclaim as it was incompetent, I find that the appeal lacks merit and is hereby dismissed. Each party to bear own costs.

Orders accordingly.



JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 18TH DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:-

Patricia: Court Assistant

Shumila for the Appellants.

Mukhooli for the 1st Respondent.

No appearance for the 2nd Respondent.

