



**Robe v Muira (Environment and Land Appeal E084 of 2022)
[2024] KEELC 74 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 74 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E084 OF 2022
OA ANGOTE, J
JANUARY 18, 2024**

BETWEEN

DAIGO KANE ROBE APPELLANT

AND

RUTH WANGUI MUIRA RESPONDENT

*(Being an Appeal against the Judgement delivered by Hon S.N Muchungi(Mrs)
SRM in Milimani Commercial Courts MCCC No 10186 of 2018)*

JUDGMENT

Background

1. Vide a Complaint dated 15th November, 2018 filed in the lower court, the Respondent(Plaintiff) sought as against the Appellant(Defendant), permanent injunctive orders restraining him or any person acting under him from evicting, trespassing or otherwise interfering with the property known as LR No NBI/BLK.Tassia-11-97/2091/2xxx(hereinafter the suit property). The Respondent also sought an order declaring her the absolute owner of the suit property.
2. The Respondent's case before the Trial Court was that she was at all material times the legitimate proprietor of the suit property having acquired it from its previous owner, Mr Samuel Wainaina Njoroge sometime on the 28th February, 2011.
3. The Respondent averred in the Complaint, and testified, that after acquiring the suit property, she enjoyed quiet possession thereof until sometime in 2018 when the Appellant trespassed onto the property and began fencing it; that upon realizing the aforesaid, she reported the matter at Embakasi Police Station and was issued with an OB and that she further made a formal complaint to the NSSF Board of Trustees.



4. The Respondent stated that while perusing the Deed File at the NSSF Building, she found a sale agreement allegedly signed by herself for the sale of the suit property to the Appellant; that she had never interacted with the Appellant and her signature, identification card, details and photographs as appeared on the Sale Agreement were strange to her and that the Appellant was guilty of fraud and trespass.
5. The Appellant filed a Defence and Counterclaim in which he denied the assertions as set out in the Plaint. It was his case vide the Counterclaim that on 26th November, 2013, he entered into an agreement with the Respondent for the purchase of the suit property and that he verified the ownership of the suit property when he met the Respondent who introduced herself, produced her identification and ownership documents and pointed out the suit property.
6. According to the Appellant, he verified the details of the ownership of the suit property with the officials of Kwa Ndege Self Help Group in Embakasi and conducted a search with the NSSF Board of Trustees and that the property's beacons were pointed out to him by a surveyor who was introduced to him by the NSSF Board of Trustees.
7. The Appellant maintained that the property was lawfully sold to him vide an Agreement duly executed by the parties and witnessed by their Counsel; that he paid the sum of Kshs Two Million, One Hundred Thousand which was duly acknowledged; that the property was sold with vacant possession and he took possession of the suit property immediately upon payment of the purchase price and that pursuant to the Agreement, he settled the outstanding land rents and rates and thereafter fenced off the property as the owner thereof.
8. It was the evidence of the Appellant in the lower court that sometime on 22nd July, 2019, the Respondent demolished the fence to the suit property, which actions were unlawful as he was at all material times the legitimate owner of the suit property and was in lawful possession thereof.
9. The Appellant sought to be declared the legitimate owner of the suit property, permanent injunctive orders restraining the Respondent or any person under her from interfering with the suit property, damages for trespass and general and exemplary damages against her.
10. The matter proceeded for hearing before the Trial Court which rendered its decision on 2nd September, 2022. The Court found that the Respondent had established that she was the absolute proprietor of the suit property and entered judgement in her favour. The Court made a declaration that the Respondent was the absolute proprietor of the suit property and issued permanent injunctive orders restraining the Appellant from any interference with the suit property. The Appellant's counterclaim was dismissed.
11. The aforesaid decision triggered the present Appeal. Vide the Memorandum of Appeal, the Appellant has set out eight Grounds of Appeal which are;
 - i. That the Learned Honourable Magistrate erred in law and in fact in holding that the true identity of Ruth Wangui Muira was that of the Respondent and in so doing;
 - a. Erred in law and in fact in purporting to rely on an alleged original identity card which copy had not been filed in Court in advance and which had not been subjected to examination by the Appellant and his Advocates.
 - b. Erred in law and in fact in purporting, to rely on a letter from National Registration Bureau which had expired.
 - c. Erred in law and in fact in finding the likeness of the person in the alleged National Identity card was that of the Respondent.



- d. Erred in law and in fact in purporting to make a distinction between Ruth Wangui Muira who sold the suit property to the Appellant from Respondent.
- e. Erred in law and in fact in making a finding that the Appellant dealt with a person in the purchase of the suit property other than the Respondent.
- f. Erred in law and in fact in being a respecter of persons instead of applying the law
- ii. Erred in law and in fact in making a conclusive determination on the Respondent's signature based on the Respondent's assertion without any forensic evidence and in ignorance of the Appellant's evidence.
- iii. Erred in law and in fact in making a finding that the person who sold the suit property to the Appellant was an imposter and used forged documents and in so doing;
 - a. Erred in law and in fact in failing to describe the documents that were purportedly forged.
 - b. Erred in law and in fact in failing to make a distinction on the alleged forged documents and the alleged authentic documents.
 - c. Erred in law and in fact in failing to make a finding on who had purportedly forged the alleged documents if at all.
- iv. That the Learned Honourable Magistrate erred in law and in fact in making a declaration that the Respondent was the absolute proprietor of the suit property in that;
 - a. The nature of the title in relation to the suit property does not warrant a declaration of the Respondent as the absolute proprietor of the suit land.
 - b. The Court did not examine or fault the Appellant's acquisition of the suit land to arrive at the lopsided conclusion of the Respondent's ownership of the suit land.
 - c. The title to the suit land was at all material times held by NSSF and the evidence held by NSSF confirmed that the Appellant was the owner of the suit land having followed the right procedure in the purchase of the suit property.
 - d. The Respondent did not challenge the registration of the Appellant as the owner of the suit property with NSSF despite knowing and having reason to know that the Appellant had duly purchased the suit property and the purchase was confirmed by NSSF.
 - e. The NSSF duly confirmed through various records produced by the Appellant in Court that he was the owner of the plot which evidence was ignored by the Court.
- v. That the Learned Honourable Magistrate erred both in law and in fact in that despite the Respondent not opposing the Counterclaim, the Court dismissed the same.
- vi. That the Learned Honourable Magistrate erred in law and in fact in failing to analyse the Appellant's Counterclaim, evidence, documents in support as well as submissions thereby dismissing the Counterclaim with costs and as a result;
 - a. Ignored the evidence by the Appellant on how he learnt of the sale of the suit property.
 - b. Ignored evidence on how the Appellant carried out due diligence prior to the purchase of the suit property.



- c. Ignored the evidence on how, after confirming that the vendor was the owner of the suit property, NSSF instructed its surveyors to point out the beacons to the Appellant in readiness for the purchase.
 - d. Disregarded the evidence by the Appellant on how he entered into an Agreement for sale and paid for the suit property.
 - e. Disregarded the process followed by the Appellant in having the suit property transferred to himself.
 - f. Ignoring the evidence by the Appellant that he had fulfilled all his obligations in relation to the ownership of the suit property including payment of land rates and rents.
- vii. That the Learned Honourable Magistrate erred both in law and in fact in failing to find that despite claiming ownership of the suit property, the Respondent had failed to fulfil the obligations of the owner of the suit property to wit, taking possession, protecting the same from trespassers by fencing, payment of the land rates and rent which obligations had been fulfilled by the Appellant as the owner thereof.
- viii. That the Learned Honourable Magistrate erred both in law and in fact in framing her own issues, answering them in favour of the Respondent, ignoring the pleadings, evidence and submissions by the Appellant, dismissing the Counterclaim with costs, awarding costs to the Respondent and acting in the manner she did thus this Appeal.

Submissions

12. The Appellant, through Counsel, submitted that the Court, without any forensic or expert evidence, concluded that the identity card held by the Respondent was the genuine identity card and in so doing purported to rely on an expired letter dated 9th January 2019 which was authored without the maker thereof having the benefit of examining both identity cards.
13. Counsel submitted that the Court could not assume the role of an expert in determining which identity card was genuine; that there having been no verification under the National Integrated Identity Management System under section 9A of the *Registration of Persons Act* and no expert witness having testified, the question of the genuineness of the national identity card was not proved or disproved.
14. It was submitted that no verification was made on the documents used by the vendor; that there was no basis for the Court's finding that the same were forgeries and that the root of title for any proprietorship is vital in determining the ownership thereof.
15. The Respondent's counsel submitted that the Appellant has not demonstrated any wrong doing on the part of the Magistrate; that a certified copy of the Respondent's identity card was filed in Court prior to the hearing and that the Appellant had an opportunity to examine the same.
16. Counsel submitted that at the hearing, the Respondent adduced the original copy of her identity card for examination by the Court; that pursuant to Section 65 of the *Evidence Act*, primary evidence refers to the original document produced for inspection and that the Court in *Miriam Wairimu Wambugu (Suing on behalf of the Estate of the late Jacob Juma) & 2 others vs Jane Wanja Njiru & Another* [2022] eKLR affirmed that primary evidence is the best evidence.
17. Counsel for the Respondent submitted that the Magistrate considered the Respondent's signature as per the Respondent's handwritten letter to NSSF dated 14th July, 2012 requesting for a Certificate of



ownership in comparison with the signature in the Appellant's Sale Agreement dated 26th November, 2013.

18. Counsel submitted that it is apparent from the foregoing that the Magistrate relied upon the secondary evidence produced as exhibits by both parties herein in arriving at her decision and that forensic evidence was not necessary in the circumstances.
19. With respect to the allegation that the Magistrate failed to distinguish the forged documents from the authentic documents, it was submitted that during trial, the Appellant testified that he had never met the Respondent herein and that further, the Defence did not call any witness to affirm that the true identity of Ruth Muira was the person who appeared on the copy of the National Identity card attached to the Sale Agreement dated 26th November, 2013.
20. According to Counsel, the Appellant did not take any steps towards prosecuting the Counterclaim and as such, the Court was within its right to dismiss the same.

Analysis and Determination

21. The Court has considered the Memorandum of Appeal and the submissions in support and against thereof. As the first Appellate Court, this Court is alive to the fact that in determining whether or not the Trial Magistrate was justified in reaching the decision that it did, it is obligated and indeed under a duty to re-evaluate the evidence and materials that were placed before the subordinate court.
22. This Court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court of Appeal stated thus;

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 or heard the witnesses and should make due allowance in this respect.”
23. As to the circumstances in which this Court can interfere with the decision of the subordinate court, the Court of Appeal in *Khalid Salim Abdulsheikh vs Swaleh Omar Said* [2019] eKLR expressed itself as follows:

“We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”
24. In re-evaluating and re-assessing the evidence as aforesaid, the Court remains mindful of the requisite standard and burden of proof as laid out in Sections 107, 109 and 112 of the *Evidence Act*.
25. The dispute before the Trial Court revolved around ownership of the suit property which both parties lay claim to. According to the Respondent, she purchased the suit property from one Mr Samuel Wainaina, its previous owner, and was enjoying vacant possession thereof until the Appellant trespassed thereon.



26. The Respondent adduced into evidence a copy of the ID Card for Antony Kariuki, the letter dated 19th September, 2008 from NSSF to Antony Kariuki affirming he had fully purchased Nairobi/Block/21190/00/1xx and the letter of relocation to plot 97/2091/2xx(suit property) dated 16th January, 2009, plot identification certificate and the letter dated 15th July, 2009 indicating a transfer to Samuel Wainaina.
27. The Respondent also produced in evidence the funds transfer receipts indicating payment of Kshs 850,000 by Samuel W Njoroge to Antony Kariuki, ID Card for Samuel W Njoroge, land rates and rents receipt payment for the suit property from Samuel Wainaina, Sale Agreement between the Respondent and Samuel Wainaina Njoroge dated 28th February, 2011 and the letter of an even date communicating the transfer to NSSF.
28. She also adduced into evidence copies of NSSF letter dated 27th July, 2012 affirming the sale of the suit property to herself and the full payment of the purchase price, NSSF account statements for Samuel W Njoroge, letter from Ministry of Interior and Co-ordination dated the 9th January, 2019 confirming the Respondent as the legal holder of the ID Card-8846924, the fingerprints identification; the NSSF tenant purchase scheme in her name and a certified copy of her ID Card.
29. On his part, the Appellant's case was that he purchased the suit property from the Respondent after which he took possession thereof sometime in 2013; that he thereafter fenced off the property and that sometime in 2019, the Respondent demolished the fence interfering with his proprietorship of the suit property.
30. The Appellant adduced into evidence copies of the purported Sale Agreement between himself and the Respondent dated 20th November, 2013, ID Card in the name Ruth Wangui Muira- 8846924 and letters from the NSSF.
31. In rendering its decision, the Court set out the main issue of contention as being whether the suit property still belonged to the Respondent or had been transferred from the Respondent to the Appellant. In doing so, the Trial Court first set about determining whether the Respondent did indeed sale the suit property to the Appellant.
32. The Court found that after having set out her acquisition of the property from its original owner, the Respondent set out to show that she did not transfer the property to the Appellant and that in so doing, she adduced her original identification card and a report from the National Registration Bureau affirming she was the legal owner thereof.
33. The trial court held that having seen the Respondent, it was apparent that her likeness was what appeared in the original identity card and not in the ID Card used to transfer the property; and that apart from the differences in the ID Card, the signatures in documents produced by herself vis the documents produced by the Appellant allegedly authored by her were clearly different.
34. The Court further stated that it was apparent that the Appellant did not transact with the Respondent and that indeed the Appellant never met the person who sold him the suit property after the transaction. The Court concluded that the Appellant had transacted with an imposter who had no title to pass to him and subsequently his claim for the suit property failed.
35. The Appellant asserts that the Magistrates determination aforesaid was erroneous on several fronts, which I have enumerated above. As aforesaid, the dispute between the parties was with respect to ownership of the property.



36. It is not in dispute that the suit property is a sub-lease of land belonging to NSSF. It is further not disputed that the suit property was purchased by one Antony Kariuki who thereafter sold it to Samuel W Njoroge, who sold it to the Respondent.
37. Indeed, the Appellant's claim to the suit property was founded on having purchased it from the Respondent, a claim which the Respondent vehemently denied.
38. In support of his claim that he purchased the suit property from the Respondent, the Appellant adduced into evidence a copy of the sale agreement and a copy of an ID Card in the name of Ruth Wangui Muira, ID No 8846924, being the identity of the person who sold to him the suit property. During his testimony, the Appellant did not point to the Respondent (physically) as the person who sold him the suit property.
39. The Respondent on her part produced as part of her evidence a copy of her ID Card. She produced the original ID Card during testimony, having filed a copy of the same in court. The Trial Court observed that the ID card she produced bore her likeness. The Court also made reference to the report from the National Registration Bureau.
40. Having been present in Court and produced her original Identification Card, which the Trial Court considered, this Court is convinced that the Respondent established her identity on a balance of probabilities. At that point, the burden shifted to the Appellant to prove that the Respondent was not who she claimed to be and that the vendor was the "real" Ruth Wangui. This, the Appellant was unable to do.
41. In the same vein, while the report from the National Registration Bureau sets out its validity as three months from its issuance, and may well have been invalid as at the time of the hearing, it was not alleged that the same did not originate from the National Registration Bureau, or that there was a change in the circumstances after the 3-months period indicated in the letter. This Court therefore finds no fault in the Trial Court's reliance on the letter.
42. As regards the question of whether or not the Respondent signed the sale agreement and other documents alluded to by the Appellant, the burden was on the Appellant to prove the same. It was not upon the Respondent, who denied signing the said document to prove that the signature was not hers.
43. This position is in line with Section 109 of the *Evidence Act* which provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.
44. The burden having shifted to the Appellant as aforesaid, and considering that the Appellant did indeed file a counter claim, it was his duty to call evidence to prove that the Respondent signed the sale agreement and received the monies from the sale. None was adduced.
45. The Appellant having failed to prove that he purchased the suit property from the Respondent, or in the alternative that the Respondent was not the owner of the suit property, it follows that he could only have purchased the suit property from a person holding out to be its owner.
46. What arises from the foregoing is that whatever title the said "Ruth Muira," the vendor, held was illegitimate and was incapable of being passed on to another party. This encompasses the principle of *nemo dat quod non habet* which is a general principle that one cannot pass a better title than one has.
47. Whereas the principle was initially with respect to sale of goods, the same has been given recognition in property law. The Court of Appeal in the case of *Arthi Highway Developers Ltd vs West End Butchery*



§ 6 Others[2015]eKLR expressed it best, when, in dealing with a fraudulent title which had been subdivided and sold off to unsuspecting purchasers stated as follows:

“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

48. Ultimately, the Court agrees with the Trial Court’s finding that no title passed to the Appellant. Having found that no title passed to the Appellant, it follows that any subsequent transaction, to wit, the registration of the suit property in his name is void. In similar vein, paying land rates and rent cannot sanitize an otherwise unlawful acquisition of land.
49. In the end, the Court finds the Appeal to be unmerited and proceeds to dismiss it in its entirety. The Appellant shall bear the costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kariuki for Appellant

Ms. Mukoli holding brief for Wachira for Respondent

