



**Kiboi v Waboi & another (Environment and Land Appeal 19 of 2019)
[2024] KEELC 1040 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1040 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 19 OF 2019
JO OLOLA, J
FEBRUARY 29, 2024**

BETWEEN

JOHN GITONGA KIBOI APPELLANT

AND

DANIEL MUNDIA WABOI 1ST RESPONDENT

JAMES GATHUA NDIRITU 2ND RESPONDENT

*(Honourable M. N. Munyendo, Senior Resident Magistrate as
delivered in Othaya SRM ELC No. 1 of 2019 on 10th May, 2019)*

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable M. N. Munyendo, Senior Resident Magistrate as delivered in Othaya SRM ELC No. 1 of 2019 on 10th May, 2019.
2. By a Complaint dated 8th January 2019, Daniel Mundia Waboi and James Gathua Ndiritu (the Respondents herein) had sought:
 - (a) A declaration that the 1st Defendant is only holding land parcel No. Othaya/Itemeini/1840 in trust for the Plaintiffs' and the larger Mwaniki family as described in the Complaint;
 - (b) An order for the determination of the trust and sub-division of the land parcel No. Othaya/Itemeini/1840 (into) four units of 0.8 acres (each) and transferred to the representatives of each family or their respective purchasers for value.
 - (c) Costs of the suit and interest thereon at Court rates; and
 - (d) Any other relief that the Honourable Court sees fit.



3. Those prayers arose from the Respondent's contention that John Gitonga Kiboi (the Appellant herein) who was the 1st Defendant in the suit and one King'ori Kiboi (deceased) were registered as the owners of 3.2 acres out of land parcel No. Othaya/Itemeini/744 which was originally 7.4 acres to hold in trust for the family of Mwaniki which consisted of four houses, namely:
 - (a) Kiboi's family;
 - (b) Mahuti's family;
 - (c) Waweru's family; and
 - (d) Waboi's family.
4. The Respondents contended that sometime after the death of the said King'ori Kiboi, the Appellant began making arrangements to dispose the suit land which they had always cultivated and occupied with their families.
5. The Appellant though served with pleadings did not file any response to the Respondent's claim. The Land Registrar Nyeri County who was sued as the 2nd Defendant in the suit filed a defence denying knowledge of the contents of the Plaint and asserted that the Respondents had not disclosed any cause of action against themselves. Both the Appellant and the 2nd Defendant did not however participate in the trial in the lower Court.
6. Upon hearing the Respondents' claim, the Learned Trial Magistrate was persuaded that the Respondents had proved their case to the required standard and entered Judgment in their favour as follows:
 - (a) The Court hereby decrees that the 1st Defendant is only holding the land parcel Othaya/Itemeini/1840 in trust for the Plaintiffs and the larger Mwaniki family;
 - (b) It is hereby ordered that the trust be determined and land parcel Othaya/Itemeini1840 be subdivided into four units of 0.8 acres and transferred to the representatives of each family and the 2nd Plaintiff herein;
 - (c) The Plaintiff(s) shall have the costs and interest thereon at Court rates from the date of this Judgment.
7. Aggrieved by the said determination, the Appellant moved to this Court and lodged a Memorandum of Appeal dated 10th June, 2019 and urged the Court to set aside the said Judgment and to have the matter heard on merit on the grounds:
 1. That the trial Magistrate erred in law and in fact by denying the Appellant a fair hearing of formal proof while the Appellant was in court as evidenced in the proceedings;
 2. That the trial Magistrate erred in law and in fact by denying the Appellant his natural right to be heard while she had not ascertained that there was proper service;
 3. That the trial Magistrate erred in law and in fact by deliberating on issues not pleaded in the Plaintiffs' pleadings;
 4. That the trial Magistrate erred in law and in fact by determining (the) trust in Othaya/Itemeini/1840 when dishing portions of land to unspecified persons who may disinherit their alleged families;



5. That the trial Court erred in law and in fact by not exercising its discretion to allow the Appellant who was in Court on 10th May 2019 leave to file and serve defence upon the Respondent;
6. That the trial Court erred in law and in fact in disregarding the responses by the Honourable Attorney General on behalf of the Land Registrar, Nyeri.
8. This being a first Appeal, this Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal. A first Appellate Court is empowered to subject the whole of the evidence adduced before the trial Court to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [*Selle & Another v Associated Motor Boat Company Limited & Others* (1986) EA 123].
9. Accordingly, I have carefully perused the Record of Appeal and the Supplementary Records of Appeal. I have similarly perused and considered the submissions and authorities placed before me by the Parties herein.
10. By the six (6) grounds of Appeal as captured in the Memorandum of Appeal dated 10th June 2019, the Appellant blames the trial Court for proceeding with the matter as a formal proof without giving him an opportunity to be heard. The trial Court is further blamed for deliberating on issues not pleaded in the Respondent's pleadings and dishing portions of the suit property to unspecified persons who may disinherit their families.
11. On the ground that the trial Court denied the Appellant natural justice by proceeding with the matter as a formal proof as raised in grounds 1, 2 and 5 of the Memorandum of Appeal, the Appellant submits that the Respondents filed the suit against him but failed to "properly serve" him and that the matter proceeded without him being heard even though he was in Court on the date of hearing after being tipped off about the same.
12. As it were, the burden of proof lies on the Party who asserts the truth of the facts or issue in dispute. If that Party adduces sufficient evidence to raise a presumption that what is stated is true, the burden passes to the other Party who will fail unless sufficient evidence is adduced to rebut the presumption.
13. A copy of the record of proceedings were annexed by the Appellant to the initial incomplete Record of Appeal dated 10th June 2019. A perusal of those proceedings reveals at Page 9 of the Record that as at 4th April, 2019 when the Respondents testified, the 1st Defendant had neither entered appearance nor was he present in Court. It was only on 10th May, 2019 when the matter came up for Judgment that the 1st Defendant is recorded to have appeared in person. That much is indeed captured in Ground 5 of his Appeal where he states he was in Court on that date.
14. The position in regard to the Appellant is captured at Paragraph 4 of the trial Court's Judgment thus:
 - “ 4. The 1st Defendant was served with the pleadings but failed to file any response. The 2nd Defendant filed a Defence denying the contents of Paragraphs 4 – 19 of the Plaint and further stated that the Plaintiffs have not disclosed a cause of action against them. They pray for the suit to be dismissed with costs. Both Defendants did not participate in the trial. The matter was heard by way of formal proof.”
15. As it were, the Appellant has not filed any Affidavit in these proceedings and it was unclear to the Court what he meant by the fact that he was not properly served as stated in his submissions. It follows that



the ground of Appeal to the effect that he was denied natural justice when the matter proceeded was unsubstantiated and must fail. While indeed he is shown to have appeared in Court on 10th May 2019, that date had been fixed for Judgment which was ready and was read to the Parties. By then the Parties had been heard and the case was closed. The Learned Trial Magistrate cannot therefore be faulted for delivering the Judgment as was scheduled.

16. On the contention that the Learned Trial Magistrate had deliberated on issues not pleaded in the Plaintiffs' pleadings, it was again very difficult to discern what those issues were. I say so because there is nowhere in the Appellant's submissions where he touches on the issues that were allegedly not pleaded. From a perusal of the record, the trial Court delved into detail on the issues that were before the Court both in the pleadings and in the oral testimonies of the two Respondents together with their witness.
17. The Respondents had sued the Appellant for a declaration that he was holding the parcel No. Othaya/Itemeini/1840 (the suit property) in trust for the two Respondents and the larger Mwaniki family to which both the Appellant and the 1st Respondent belonged. It was the 2nd Respondent's case that he is a beneficiary of 0.4 acres out the suit property having purchased the same from one Githae Waweru (deceased) who was also said to belong to the family.
18. It was the 2nd Respondent's position that having purchased his portion of the land he took possession from the late Githae Waweru in 2003 when the land was still registered in the name of one Mathew Wahome. Upon the demise of the said Mathew Wahome, the administrators of the estate being his wife Beatrice Wambui Maina and his son Michael Gachanja filed a succession cause at the High Court at Nyeri after which they undertook to transfer the suit land to the Mwaniki family. It was the Respondent's case that it was at that time that the Appellant and one King'ori Kiboi presented themselves as representatives of the Mwaniki family and caused the land to be registered in their name to hold for the rest of the family.
19. Having considered the issues that were before her, the Learned Trial Magistrate concluded as follows at Paragraph 12 of the Judgment:

“ 12. Thus the onus was on the Plaintiffs to prove that a trust was created when the suit property was registered in the name of the 1st Defendant and another. The Plaintiffs have rendered a plausible explanation as to the circumstances by which the transfer of the suit property was done. The evidence as adduced by PW3, one of the administrators of the estate of Mathew Wahome has testified how the deceased had the intention of transferring ownership of 3.2 acres out of the suit property to the Mwaniki family. The 1st Defendant and one King'ori Kiboi were presented as the representatives of the Mwaniki family in the succession cause. Even though they were described as purchasers in the summons for confirmation of grant, there was no consideration that exchanged hands between the Wahome family and the 1st Defendant. I was thus satisfied that the 1st Defendant was not a purchaser of the suit property. The evidence on record remains uncontroverted and I find that the Plaintiffs have proved on a balance of probabilities that a trust was created in favour of the entire Mwaniki family when the property was transferred to the 1st Defendant and King'ori Kiboi.”

20. Considering the above conclusion, I was unable to find anywhere where the trial Court could be said to have deviated from the pleadings and evidence before her. As the trial Court rightfully noted in



that conclusion, the Appellant did not file any pleadings at the trial and the facts as presented by the Respondents remained uncontroverted.

21. While the trial Court was accused of disregarding the response by the Honourable the Attorney General on behalf of the Land Registrar, it was evident that the pleadings by the 2nd Defendant in the suit had been unsupported by any evidence as the 2nd Defendant, had like the Appellant, not participated at the trial or called any testimony in support thereof.
22. Having failed to call any testimony in support of their case, the 2nd Defendant's defence was not available for consideration by the Court. As was stated in *CMC Aviation Limited v Crusair Limited* No. 1 (1987) KLR 103:

“The Pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

23. In the circumstances herein, I was not persuaded that there was any merit in the Appeal. The same is dismissed in its entirety with costs to the Respondents.”

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 29TH DAY OF FEBRUARY, 2024.

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J. O. OLOLA

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the 1st Respondent

Mr. Mshila for the 2nd Respondent

Court assistant - Kendi

