



**Kimani v Rugaita (Suing as the Legal Representative of the Estate of the Late Eliud Rugaita Murango - Deceased) (Environment and Land Appeal 11B of 2019) [2024] KEELC 824 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 824 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 11B OF 2019  
JM MUTUNGI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JOSEPH ALEXANDER KIMANI ..... APPELLANT**

**AND**

**JACINTA WAIRIMU RUGAITA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ELIUD RUGAITA MURANGO - DECEASED) ..... RESPONDENT**

*(An appeal from the Ruling of the Chief Magistrate's Court at Kerugoya ELC NO. 10 OF 2018, delivered by Honourable S.M.S Soita, Chief Magistrate on 24th April, 2019 in Kerugoya)*

**JUDGMENT**

1. This appeal is against the Ruling by Hon. S.M.S Soita –Chief Magistrate delivered in Kerugoya Chief Magistrate's Court ELC No. 10 of 2018 on 24<sup>th</sup> April, 2019. By the Ruling the Learned Trial Magistrate upheld a Preliminary Objection taken by the Respondent (Defendant in the Lower Court) and struck out the Appellant's (Plaintiff in the Lower Court) suit with costs to the Respondent.
2. The Respondent on 4<sup>th</sup> March 2019 gave Notice of Preliminary Objection on the following grounds:-
  1. The suit is statutory barred contrary to the provisions of Section 4(a) of *Limitation of Actions Act* Cap 22.
  2. There was no consent from the Land Control Board thus offends Section 6(1) of *Land Control Act*.
  3. Lack of consent of joint owner contrary to section 91(4) of *Land Registration Act* 2012.



3. The Preliminary Objection was argued by way of written submissions. The Learned Trial Magistrate after considering and evaluating the submissions and the applicable law upheld the Preliminary Objection and ordered the suit to be struck out with costs to the Respondent.
4. The Appellant was aggrieved and dissatisfied by the Ruling/decision of the Learned Trial Magistrate and has appealed to this Court and by the Memorandum of Appeal dated 24<sup>th</sup> May 2019 has set 6 grounds of Appeal as hereunder:-
  1. That the Learned Magistrate erred in law and in fact by failing to consider the relevant facts thus arriving at the wrong decision.
  2. That the Learned Magistrate erred in law and in fact in coming to conclusions in the Ruling he came to contrary to the Evidence, the Law and Submissions before him.
  3. That the Learned Magistrate erred in law and in fact in relying on an extraneous issue raised in the Preliminary Objection dated 4<sup>th</sup> March 2019 and upon such reliance struck out the suit with costs.
  4. That the Learned Magistrate erred in law and in fact in failing to appreciate that the issues urged before him by the Respondent could not be determined without evidence and as such the same were not pure points of law.
  5. That the Learned Magistrate erred in law and in fact in striking out the suit without hearing the merits of the case.
  6. That the Learned Magistrate erred in proceeding on the wrong principles of Law and placing reliance on erroneous considerations thus arriving at a wrong decision.
5. The Appellant prays that the appeal be allowed and the Ruling of the Hon. Chief Magistrate be set aside. Alternatively, the Appellant prays that the Court varies and/or substitutes the ruling with its own decision as it pleases. The Appellant further prays for the costs of the appeal and of the Court below.
6. The parties were directed by the Court to canvass the appeal by way of written submissions. The Appellant's submissions were filed on 31<sup>st</sup> August 2023 and those of the Respondent on 12<sup>th</sup> September 2023. I have perused and considered the record of appeal, the Memorandum of Appeal and the submissions made on behalf of the parties and the issue for determination is whether on the basis of the material placed before the Learned Trial Magistrate, the Respondent's Preliminary Objection ought to have been sustained on any of the grounds.
7. As is the norm and this being a first appeal the Court is under a duty indeed has an obligation to reconsider and re-evaluate the evidence and material that was placed before the Lower Court in order to determine whether the decision reached by the trial Court was justified. This is in keeping with the principle established by the Court of Appeal in the Case of *Selle & Another v East African Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated as follows:-

“ 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 his 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 nor heard the witnesses and should make due allowance in this respect.”
8. The Respondent in her defence under paragraphs 13 and 14 had properly intimated that she would raise a Preliminary Objection. The objection taken by the Respondent were on points of law and in



that regard satisfied the criteria established in the Case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as to what Constitutes a Preliminary Objection where the Court held as per Charles Newhold, P as follows:-

“A Preliminary Objection in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. The Learned Trial Magistrate disallowed the Respondents Preliminary Objection on the 1<sup>st</sup> and 2<sup>nd</sup> ground but upheld the objection on the 3<sup>rd</sup> ground that the Respondent having been a joint owner of the suit property was not involved and had not given a consent to the transactions.
10. It was contested that the sale agreements the Appellant relied on to support his transactions were only entered into between himself and Eliud Rugaita Murango (deceased). The agreements are exhibited at pages 17 to 22 of the record of Appeal. They all relate to land parcel Mwea/Tebere/B275 from which the various portions were to be excised. Equally it was not contested that land parcel Number Mwea/Tebere/B/275 was registered jointly in the names of Eliud Rugaita W. Murango and Jacinta Wairimu Rugaita who it is admitted were husband and wife.
11. The Appellant entered into the sale agreements with Eliud Rugaita Murango(deceased) in 2003 and out of the consideration of Kshs 710,000/- paid a total of Kshs 580,000/- leaving a balance of Kshs 130,000/- which he stated he was willing to pay but the Respondent refused to accept following the death of her husband. The Respondent simply stated she was not privy to the agreements and as a joint owner, to the extent that the agreements were not signed by her and she had not consented to the transactions, the agreements were a nullity.
12. The Appellant contend that the deceased and the Respondent were husband and wife and were practising together in the same Law Firm under the Firm of M/s Rugaita & Company Advocates and the payments were made through the Firm and thus the Respondent must have been aware of the sale transactions.
13. Without doubt, the Appellants suit was founded on the contracts of sale and all the Appellant sought was To have the contracts enforced upon him paying the balance of Kshs 130,000/- that remained unpaid. The Appellant’s cause of action therefore arose from the sales contracts he had entered into with the deceased. In the submissions made before the Lower Court and in this appeal by the Appellant, the Appellant sought to rely on the Case of *Macharia Mwangi Maina & 87 others v Davison Mwangi Kagiri* (2014) eKLR where the Court of Appeal held that where a party enters into a sale agreement, pays the purchase price and takes possession of the land, a constructive trust arises and the contract would be held to be enforceable notwithstanding no consent of the Land Control Board was obtained.
14. In the instant matter the Appellant was not basing his claim on constructive trust and had not pleaded trust. Even if he had pleaded trust, the chances of succeeding in my view would be limited as the Appellant had not completed paying the purchase price as he still had a balance of Kshs 130,000/- to pay. As I understand it, the doctrine of constructive trust as applied by the Court of Appeal in the Case of *Macharia Mwangi Maina & 87 others v Davison Kagiri* (supra) which the same Court in the later Case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR cited with approval, is that the doctrine of constructive trust would be available where a purchaser pursuant to a sale agreement, pays the full purchase price and is let into possession. In such circumstances Section 6(1) (a) of the *Land Control Act*, Cap 302 Laws of Kenya would be held to be inapplicable.



Section 6(1)(a) of the *Land Control Act* provides as follows:-

- 6(1) Each of the following transaction that is to say:
- a. the sale, transfer, lease, mortgages, exchange, partition or other disposal of a dealing with any agricultural land which is situated within a Land Control area.
  - b. -----
  - c. -----
- is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

15. In the present matter the Appellant in effect sought specific performance of the contracts of sale yet he had not fully performed the terms of the contracts by paying the full purchase price. In the circumstances my view is the provisions of the *Land Control Act*, Section 6(1)(a) would be held to be applicable and to the extent that no consent of the Land Control Board was sought and obtained within the prescribed period, the agreements of sale entered into between the Appellant and the deceased were null and void and incapable of being enforced. The Learned Trial Magistrate having agreed no consent of the Land Control Board was obtained as required under Section 6(1) of the *Land Control Act*, should have upheld the Preliminary Objection on the second ground as well.
16. Respecting the first ground that the suit was statutory barred by limitation by virtue of Section 4(1) of the *Limitation of Actions Act*, it is evident since around 2010 up to the time the Appellant instituted the present action, the Appellant was actively involved in litigation with the Respondent. However by 2010 when the Appellant instituted a case before the Land Disputes Tribunal, the period of 6 years had lapsed from the time he entered the last of the agreements on 7<sup>th</sup> November, 2003. The period of Limitation expired on 6<sup>th</sup> November 2009 and quite clearly the suit filed herein on 19<sup>th</sup> October 2017, without any extension of time was filed out of time and was unsustainable. The Learned Trial Magistrate equally should have upheld the Preliminary Objection on this ground.
17. On the last ground of the Preliminary Objection the Learned Trial Magistrate was spot on that the Respondent having been a joint owner of the parcel of land, the parcel of land could not have been sold without her involvement. In the event of a transfer of any interest in any property that is jointly owned and registered, the joint owners would be required to execute any instrument that disposes of any interest in such land. Section 91(1) of the *Land Registration Act*, 2012 defines Co-tenancy as the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

Section 91(4) of the *Land Registration Act*, 2012 provides as follows:-

- 91(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—
- (a) dispositions may be made only by all the joint tenants;
  - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or
  - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.



Land parcel number Mwea/Tebere/B/275 was registered in the joint names of the Respondent and her deceased husband. Only the deceased husband of the Respondent entered into the agreements with the Appellant. The Respondent as a joint owner of the property was not a party to the agreements and never signed them. The agreements having been entered into in 2003 were subject to the provisions of the repealed Registered Land Act, Cap 300 Laws of Kenya. Under the Transitional and Saving provisions 106, and 107 of the Land Registration Act, 2012 all rights, obligations, liabilities and remedies accrued under the repealed Act were to continue to be governed by the Law applicable immediately prior to the commencement of the new Act. Section 106 (3) (a) of the Land Registration Act provides as follows:-

(3) For the avoidance of doubt:-

- (a) any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration under this Act:

Section 107(1) provides as follows:-

1. Unless the contrary is specifically provided for in this Act any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the Law applicable to it immediately prior to the commencement of this Act.”

18. Under the repealed Registered Land Act, Section 102, which effectively was replaced by Section 91 of the Land Registration Act, 2012, provided how joint ownership was to be regulated. Section 102(1) of the Act provided as follows:-

102(1) Where the Land, lease or charge is owned jointly no proprietor is entitled to any separate share in the land and consequently:-

- a. Dispositions may be made only by all the joint proprietors; and  
b. On the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.

19. In my view it matters not that the Respondent may have been in partnership in the Law Firm and the sale proceeds were paid through the Law Firm. The Law required that the Respondent had to be a party to any disposal of any interest in the land she was registered as a joint owner. To the extent that she was not a party to the sale agreements between the Appellant and her deceased husband which related to land which her and the husband were jointly registered, the said agreements were null and void abinitio and could therefore not be enforced. The Appellant ought to have carried out due diligence and would have easily discovered the land was jointly owned and hence the agreements required to be executed by both joint owners. He took the risk and that has come back to haunt him and he has to bear the consequences.

20. I therefore on a full consideration and evaluation of the matter, find that the Preliminary Objection was merited and the Learned Trial Magistrate rightly held the suit was not sustainable. For the reasons that I have advanced I find no merit in the Appeal and dismiss the same with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**J. M. MUTUNGI**



