



Kiritu v Muhuri (Sued as the administrator & legal representative of the Estate of the Late Charles Muhuru Mureithi - Deceased) (Environment and Land Appeal 13 of 2023) [2024] KEELC 804 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 13 OF 2023
YM ANGIMA, J
FEBRUARY 15, 2024**

BETWEEN

DANIEL NJUGUNA KIRITU APPELLANT

AND

CHARITY GATHONI MUHURI (SUED AS THE ADMINISTRATOR & LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHARLES MUHURU MUREITHI - DECEASED) RESPONDENT

(An appeal against the judgment and decree of Hon. P. Gichohi (CM) (as she then was) dated 01.12.2023 and delivered by Hon. S. Mogute (SPM) on 25.01.2023 in Nyahururu CM ELC No. 179 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. P. Gichohi (CM) date 01.12.2022 and delivered by Hon. S. Mogute (SPM) on 25.01.2023 in Nyahururu CM ELC No. 179 of 2018 – Charity Gathoni Muhuri (Suing as the administrator and legal representative of the estate of the late Charles Muhuri Mureithi) -vs- Daniel Njuguna Kirithi. By the said judgment, the trial court allowed the Respondent’s suit for recovery of the suit property and also dismissed the Appellant’s counterclaim for specific performance of an agreement for the sale of the suit property.

B. Background

2. By a plaint dated 22.07.2017 the Respondent sued the Appellant before the trial court seeking the following reliefs:



- a. An order of eviction against the defendant and all his brothers and sisters residing in Nyandarua/Mawingo Salient/29.
 - b. An order of damages for lack of use of the land from the year 2007 up to date.
 - c. Costs of this suit.
3. The Respondent pleaded that she was the legal representative of the estate of her late husband Charles Muhuri Mureithi (the deceased) who was at all material times the registered owner of Title No. Nyandarua/Mawingo Salient/29 (the suit property). She pleaded that the deceased had during his lifetime sold a portion of 5 acres only out of the suit property to the Appellant's late father, Kiritu Ngochi (Ngochi) but the sale did not materialize and was never completed.
 4. The Respondent further pleaded that the late Ngochi had filed Nakuru HCCC No. 151 of 1996 against the deceased over the said sale transaction but the same was dismissed for want of prosecution in 2007. It was the Respondent's case that despite issuance of a demand and notice of intention to sue the Appellant had failed to vacate the suit property hence the suit.
 5. The record shows that the Appellant filed a defence and counterclaim dated 22.09.2017. By his defence he denied liability for the Respondent's claim. He denied all the allegations contained in the plaint and put the Respondent to strict proof thereof. It was contended that the Respondent had no reasonable cause of action against him and that the suit was incompetent and bad in law.
 6. By his counterclaim, the Appellant pleaded that he was the beneficial owner of the suit property which he contended his late father, Ngochi had purchased from the deceased in 1984. He pleaded that upon purchase the late Ngochi had taken possession and settled thereon together with his family members. He further pleaded that although the deceased had sold the suit property in 1984 he fraudulently caused himself to be issued with a title deed for it in 1990. The Appellant further pleaded that as a result of the foregoing the late Ngochi filed Nakuru HCCC No. 151 of 1996 against the deceased which suit was ultimately dismissed for want of prosecution.
 7. The Appellant pleaded that the deceased was in breach of the sale agreement of 1984 hence his legal representative should be compelled to render specific performance in addition to being restrained from causing sub-division of the suit property. Consequently, the Appellant sought the following reliefs in his counterclaim:
 - a. An order of specific performance compelling the plaintiff now defendant to execute all the relevant documents and transfer the title deed L.R. No. Nyandarua/Mawingo Salient/29 to the defendant now plaintiff's name as it is.
 - b. An injunction to restrain the defendant from causing the subdivision on the title deed L.R. No. Nyandarua/Mawingo Salient/29 and instead the same to be transferred to the defendant now plaintiff's name.
 - c. Costs of this suit and its incidental.
 - d. Any other relief of this honourable court that may deem fit and just to grant.
 8. The Respondent filed a reply to defence and defence to counterclaim dated 09.10.2017. By her reply to defence, the Respondent joined issue upon the Appellant's defence and reiterated the contents of the plaint. By her defence to counterclaim, she denied that the Appellant was the beneficial owner of the suit property. She pleaded that the late Ngochi had only bought a portion of 5 acres out of the suit property measuring about 7.6 ha and that the Appellant was wrongfully claiming the entire land.



9. The Respondent further pleaded that the purported sale agreement between the deceased and the late Ngochi was void ab initio for want of consent of the Land Control Board (LCB) as required by law. She also denied the alleged fraud and breach of contract on the part of the deceased and put the Appellant to strict proof thereof. As a consequence, she prayed for dismissal of the Appellant's defence and counterclaim and for entry of judgment as prayed in the plaint.

C. Trial Court's Decision

10. The record shows that upon a full hearing of the suit the trial court found in favour of the Respondent and allowed her claim for recovery of the suit property. The trial court thereupon dismissed the Appellant's counterclaim. The court, however, disallowed the Respondent's claim for general damages for loss of user of the suit property. The trial court found that the deceased was the legitimate owner of the suit property and that there was no evidence to show that he obtained his title through fraudulent means. The court further held that the sale agreement of 1984 was void for lack of consent of the LCB under Section 6 of the Land Control Act hence there was no basis that granting specific performance.

D. Grounds of Appeal

11. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 09.02.2023 raising the following six (6) grounds of appeal:
 - a. That the learned magistrate erred in law and in fact in finding that Kiritu Ngochi Muhia did not purchase the entire L.R. No. Nyandarua/Mawingo Salient/29 from Charles Muhuri Mureithi.
 - b. That the learned magistrate erred in law and in fact in finding that there was no evidence to prove that Kiritu Ngochi Muhia paid a sum of Kshs.40,000/= to Charles Muhuri Mureithi and that failure to call the advocate who signed the sale agreement dated 17.04.1984 was fatal.
 - c. That the learned magistrate erred in law and in fact in finding that there was no proof tendered that L.R. No. Nyandarua/Mawingo Salient/29 was transferred to Kiritu Ngochi Muhia by the Settlement Fund Trustees.
 - d. That the learned magistrate erred in law and in fact in finding that the sale agreement dated 17.04.1984 was null and void for want of the Land Control Board's consent and in failing to consider the doctrine of constructive trust advanced by the Appellant.
 - e. That the learned trial magistrate erred in law and in fact in granting an eviction order against the Appellant and all his brothers and sisters persons who were not party to the suit and contrary to the evidence on record.
 - f. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's pleadings, evidence, documents and written submissions and in dismissing his counterclaim.
12. As a result, the Appellant sought the following reliefs in the appeal:
 - a. The judgment delivered on the 25.01.2023 be set aside in its entirety.
 - b. The suit filed in Nyahururu CMCC ELC 179 of 2018 vide plaint dated 22.07.2017 be dismissed with costs.
 - c. The Appellant's counterclaim dated 26.09.2017 be allowed with costs.
 - d. Any or further reliefs deemed fit and just to grant.



- e. Costs of the appeal.

E. Directions on Submissions

13. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Appellant's submissions were filed on or about 29.11.2023 whereas the Respondent's submissions were filed on 21.12.2023.

F. Issues for Determination

14. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the opinion that the same may be summarized as follows:
 - a. Whether the trial court erred in law and fact in holding that the Respondent had proved her suit on a balance of probabilities.
 - b. Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim.
 - c. Who shall bear costs of the appeal.

G. Applicable legal principles

15. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...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 nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

16. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

17. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use



English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

18. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:
 - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

- a. Whether the trial court erred in law and fact in holding that the Respondent had proved her suit on a balance of probabilities
19. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for several reasons. First, that it erred in finding that the late Ngochi did not purchase the entire suit property but only 5 acres thereof. Second, that it erred in finding that there was no evidence of full payment of purchase price. Third, that it erred in finding that there was no evidence of transfer of the suit property by the Settlement Fund Trustees (SFT). Fourth, that it erred in law in failing to consider the doctrine of constructive trust. Fifth, that it erred in making an order for the eviction of the Appellant’s siblings who were not parties to the suit.
 20. The court has examined the record of proceedings and noted that the sale agreement of 1984 provided for the sale of 5 acres and not 7.6 ha as claimed by the Appellant. The letters which were subsequently written by the deceased also referred to the sale of 5 acres as opposed to 7.6 ha. The Appellant’s explanation for the extra acreage is not credible since it was not supported by any documentary evidence by the contracting parties or the SFT.
 21. It is evident from the material on record that parties’ evidence on payment of the purchase price was contradictory. Whereas the Appellant asserted that the full purchase price of Kshs.40,000/= was



- paid the Respondent disputed the payment. The sale agreement dated 17.04.1984 indicated that the deceased had acknowledged full payment of the purchase price. Although the advocate who drew the sale agreement was not called as a witness, there was no evidence that the deceased had during his lifetime disputed payment or demanded any balance from the late Ngochi. The court is satisfied on a balance of probabilities that the purchase price was paid in full. The Appellant was not required to prove payment of the purchase price beyond reasonable doubt.
22. On the issue of transfer of the suit property to the late Ngochi at the SFT offices, the court finds no credible evidence on record to demonstrate such transfer. There was no evidence from the SFT to that effect. There was also no evidence on record to demonstrate the source of the charge document in the name of the late Ngochi. The material on record shows that vide a letter dated 24.02.1992 the Director of Land Adjudication and Settlement confirmed that the deceased was the legitimate allottee of the suit property and that he had been issued with a title deed. The court, therefore, finds no fault with the trial court's finding on this aspect.
23. The trial court was also faulted for holding that the sale agreement was void for lack of the consent of the LCB and for failing to consider the application of constructive trust. There is no doubt from the provisions of the *Land Control Act* and case law that lack of consent of the LCB makes a sale transaction void. However, that does not necessarily exclude the application of the equitable doctrine of constructive trust as enunciated in the case of Willy Kimutai Kitilit -vs- Michael Kibet [2018] eKLR. It must, however, be noted that it is upon the party intending to rely upon such trust to bring it out in his pleading and evidence. It is not enough for a party to wait until submissions stage in order to raise it thereby denying his opponent the opportunity of responding to the issue adequately.
24. It is evident from the material on record that the issue of constructive trust was not raised by the Appellant either in his defence, counterclaim or evidence. It was raised for the first time during submissions. Although a court is not precluded from considering a constructive trust, it is always desirable that such matter be raised at the earliest possible opportunity so that it may also be canvassed by the adverse party. In view of the fact that the Appellant has since filed a separate claim for adverse possession of the suit property and obtained a favourable judgment in Nyandarua ELCOS No. 23 of 2023 – Daniel Njuguna Kiritu & Another -vs- Charity Gathoni Muturi it is not necessary for now to make a determination on whether or not the Appellant is entitled to the suit property on account of the doctrine of constructive trust.
25. The court is thus of the opinion that even though the trial court may have erred in holding that there was no evidence of payment of the purchase price, such a finding did not occasion a miscarriage of justice in view of the fact that payment of the purchase price by itself could not have enabled the Appellant to successfully defend the suit. It would have required him to demonstrate additional matters such as limitation of actions or constructive trust which matters were not pleaded or canvassed at the hearing.
26. The court is thus of the opinion that the trial court was right in the overall decision of finding that the Respondent had proved her suit on a balance of probabilities on the basis of the pleadings and evidence on record. A different finding on the question of payment of the purchase price would not have altered the ultimate decision by the trial court.
- (b) Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim
27. It is evident from the material on record that the Appellant's counterclaim was based upon purchase of the suit by the late Ngochi and the alleged fraud and breach of contract on his part. As the trial court found, and rightly so, the sale transaction relied upon the Appellant was not sanctioned by the relevant LCB hence void. The Appellant did not in his counterclaim plead the doctrine of constructive



trust and neither did he canvass it at the trial. There was no evidence of fraud or breach of contract by the deceased or the Respondent in the circumstances. The Appellant's claim was not proved to the required standard hence it was for dismissal.

28. The court has noted from the record that the Appellant did not plead the defence of limitation against the Respondent and neither did he plead adverse possession in his defence and counterclaim. He opted to file a separate originating summons later on in which he relied on the *Limitation of Actions Act* (Cap.22) and the doctrine of adverse possession. In the premises, the trial court was not at liberty to consider the question of limitation and adverse possession since the same was not properly placed before it. The trial court cannot be faulted for dismissing the Appellant's counterclaim.

d. Who shall bear costs of the appeal

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has noted that in its judgment the trial court directed that each party shall bear his own costs. The court is inclined to make a similar order since the outcome of the trial court shall remain the same.

I. Conclusion and Disposal Orders

30. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a consequence, the same is hereby dismissed in its entirety. Each party shall bear his own costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 15TH DAY OF FEBRUARY, 2024.

Y. M. ANGIMA

.....

JUDGE

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Waichungo for the Appellant

Ms. Nancy Njoroge for the Respondent

C/A - Carol

