



REPUBLIC OF KENYA



KENYA LAW

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**Njagi & another v Njoka (Environment and Land Appeal E10 of 2022)
[2024] KEELC 3536 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E10 OF 2022**

A KANIARU, J

FEBRUARY 15, 2024

BETWEEN

NJIRU NJAGI 1ST APPELLANT

JAMES NJOKA 2ND APPELLANT

AND

SILVESTER NJIRU NJOKA RESPONDENT

(Being an appeal against the judgement delivered on 5th April 2022 by the Hon. J.W. GICHIMU Senior Principal Magistrate at Runyenjes in ELC Case No. 28 of 2018)

JUDGMENT

1. This appeal arose from the Judgement of the lower court in Runyenjes in ELC Case No. 28 of 2018, Silvester Njiru Njoka as v Njiru Njagi & James Njoka as delivered by Hon J.W Gichimu, Senior Principal Magistrate on April 5, 2022. The 1st and 2nd Appellants – Njiru Njagi and James Njoka – were the 1st and 2nd defendants in lower court suit while the Respondent – Silvester Njiru Njoka – was the plaintiff.
2. To appreciate the issues between the parties herein I find it fitting to give a brief history of this case. From the material before me, the Respondent is said to have been the registered proprietor of the suit land, - Kagaari/Kigaa/4086 - and title was issued to him on 2/8/1994. The said title was however cancelled and the parcel of land was registered in the name of the 2nd appellant through a court order issued by the Resident Magistrate court in Civil case No. 115 of 1985. The Respondent is said not to have been a party to the suit when the same was instituted but he joined the suit later as a third party. Being dissatisfied by the lower court's decision in the said case, the Respondent appealed against the decision at the High Court of Meru in Civil Appeal No. 28 of 1995. The court allowed the appeal, set aside the lower courts judgment, and directed that the matter be retried by a magistrate of competent



jurisdiction at Embu Law Courts. The matter has never been retried and the judgment of the court at Meru has never been appealed against.

3. On the basis of that judgment, I understand that the Respondent approached the Land Registrar seeking to be registered as the proprietor of the suit land but he was informed that he could only be registered upon retrial as ordered by the High Court at Meru or if there was no such retrial upon an order from the court directing registration of the land parcel in his name.
4. Consequently, it is said that the Respondent filed an application in Embu HCCA No. 17 of 2006 seeking registration of the said parcel in his name. Now, there is an Order in the record of Appeal by the High Court at Embu in a Civil Appeal 17 of 2006 issued by the Honourable Mrs J. Khaminwa on 22nd January 2007 which I understand was made pursuant to an application by the Respondent made on 29th July 2003. I have not had a chance of seeing the said application or even understanding under what circumstances the application was made. I have also not seen the proceedings in the said HCCA No. 17 of 2006 as the same are not part of the record of appeal. However, the said order seems to be directed to the Land Registrar, Embu District, to cancel the names of James Njoka- the 2nd Appellant herein, and insert the names of Silvester Njiru Njoka – the Respondent, in the register for land parcel Kagaari/Kigaa/4086. It is also ordered that all the inhibitions and/or cautions in respect of the said land be removed so as to effect the change. It is further ordered that the Executive Officer of the court signs all documents to effect transfer of the said land to the respondent and that costs be in the cause.
5. I further understand that during the pendency of the application that resulted in the issuance of the above orders, the 2nd appellant transferred the suit land to the 1st appellant without the knowledge of the Respondent. So by the time the Respondent was obtaining the same, the suit land had already been transferred to a 3rd party, who is 1st appellant here, thereby defeating the said Orders.
6. As a result of the above, he learnt that he had to now obtain other orders directing the lands office to cancel the name of the 1st appellant. It is on this basis that he filed ELC Case No. 311 of 2015 as the plaintiff against the 1st and 2nd appellants as the 1st and 2nd defendants and whose judgment is the subject of this Appeal. The Respondent instituted the said suit by way of a plaint dated 15th June 2015 seeking a declaration that; the 2nd appellant did not have any title capable of being passed to the 1st appellant and that the subsequent transfer of the suit land being Kagaari/Kigaa/4086 by the 2nd appellant to the 1st appellant was fraudulent, irregular and un-procedural and therefore null and void; orders to the Land Registrar to rectify the register held by him in respect of the suit land above cancelling and/or deleting the name of the 1st appellant and the same be registered in the name of the Respondent; and finally orders of eviction to remove the 1st appellant from the suit land.
7. The lower court heard the respondents case and in its judgment found in favour of the respondent. That is what provoked this appeal.
8. A memorandum of appeal was filed on 12th July 2022 whose substance is as follows;
 1. The learned magistrate erred in law and fact when he found that the transfer of the suit land from the 2nd Appellant to the 1st Appellant was done in bad faith and meant to defeat the application whereas there was no order restraining the 2nd appellant from transferring land to the 1st Appellant or to any other person.
 2. The learned magistrate erred in law and fact when he found that the 2nd Appellant did not have a clean title to pass to the 1st appellant and termed the transfer as irregular.



3. The learned magistrate erred in law and fact by entering judgement against the Appellants whereas the order for retrial in Meru HHCA 28 of 1995 was never complied with and therefore Embu Civil Case No. 115 of 1985 is pending retrial as per the said orders.
 4. The learned magistrate erred in law and fact by failing to find that orders issued in Civil Appeal No. 17 of 2006 on January 22, 2007 were issued in vain as the same had already been overtaken by events and couldn't be applied retrospectively.
 5. That the learned trial magistrate erred in law and in fact by failing to find that the 1st Appellant was not a party to Civil Appeal No. 17 of 2006 and was not subject to the orders issued thereon and therefore by revoking his registration condemned him unheard.
 6. The learned trial magistrate erred in law and in fact by failing to find there were no orders that were issued against the 1st Appellant herein and therefore the applicability of orders issued in HCCA 17 of 2006 was erroneous.
 7. The learned magistrate erred in law and fact by finding that the Respondents had proved his case against the Appellants and entered judgment in favour of the Respondent whereas this was not the case.
9. The appellants then made the following prayers;
- a. That the judgement in Runyenjes ELC case No. 28 of 2018 be set aside.
 - b. That this appeal be allowed in entirety.
 - c. That costs of this appeal and costs of the lower court be awarded to the appellants.
10. The appeal was canvassed by way of written submissions. The appellants submissions were filed on August 1, 2023. In their submissions, the appellants highlighted the background to this appeal and gave an analysis of the issues for determination. According to the Appellants, there was no court order barring the 2nd Appellant as the registered owner of the suit land from transferring the said land to the 1st Appellant or to any other person during the pendency of proceedings in Embu High Court Civil Appeal No. 17 of 2006. That the Embu High Court did not have jurisdiction to render itself on the ownership of the suit land in Appeal No. 17 of 2006 while the issue had been determined on merit by Meru High Court and orders for re-trial issued. That upon delivery of judgment by Meru High Court, the High Court became functus officio and could not again adjudicate the issue of ownership of the suit land on merit. That since there was no review or setting aside of the orders issued by the Meru High Court, Embu High Court lacked jurisdiction to sit on appeal against the decision of the Meru High Court and therefore the decision of the Embu High Court which the learned trial magistrate relied upon was void. They submit that the said order in Embu High Court Civil Appeal No. 17 of 2006 ought not to be relied upon and ask this court to find so.
11. They further submit that the 1st Appellant was not party to Embu High Court Civil Appeal No. 17 of 2006 and therefore at the time of purchasing the said land he was not aware of any proceedings in respect to the suit land; that no encumbrances were noted on the register of the suit land and at the time of purchasing the same, the 1st Appellant was purchasing a clean title from the 2nd appellant and therefore he is a bonafide purchaser for value without notice; that revocation of the 1st Appellants title on account of the order issued in Embu High Court Civil Appeal No. 17 of 2006 which appeal the 1st Appellant had no knowledge of and which appeal he was not a part of amounted to condemning the 1st Appellant unheard. On these grounds they urge the court to allow the appeal and set aside the lower courts judgement.



They cited the cases of *LWN v PLM & 3 others* (2021) eKLR, *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5,4 & 3 of 2013) (2013) KESC 8 (KLR) (Civ)(24th October 2013) (Ruling), *Telkom Kenya Ltd v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd)*(2014) eKLR, *Mohamed v Duba & Another* (Civil Appeal 83 of 2019)(2022)KECA 442 (KLR)(18th March 2022) (Judgment), *Fanikiwa Limited v Sirikwa Squatters Group & 17 others* (Civil Appeal 45 & 44 of 2017 (Consolidated)(2022) KECA 1286(KLR)(18 November 2022)(Judgment) to support their position.

12. The Respondent's submissions were filed on August 30, 2023. He gave his version of the background to this appeal. He further submitted that while the High Court ordered for a retrial, he had no business pursuing it since he was never a party to the initial suit and that it was the responsibility of 2nd Appellant since he had been the Plaintiff in Civil Suit No. 115 of 1985 to pursue the same, which he never did. He further submitted that the 2nd Appellant did not appeal against the decision in Meru HCCA No. 28 of 1995 and that the decision stands to date. That on the Appellants allegations that he had not inhibited the suit property to restrain the 2nd Appellant from dealing with the property, it was his submission that he on October 18, 2002 served the Land Registrar with the order issued in Meru High Court setting aside the order that had caused the 2nd Appellant to be registered as proprietor of the suit land; that this was done with the expectation that the Land Registrar would act on it and reinstate the Respondent as the proprietor; that it would then not have made sense for him to inhibit dealings with the said parcel of land.
13. That the 2nd Appellant caused the suit land to be transferred to a third party, meaning the 1st appellant, yet he was aware that his ownership had been cancelled by the court; that this act was clearly unlawful and in bad faith. That the 2nd Appellant was the plaintiff in Civil case No. 115 of 1985 and had the responsibility of having his case re-heard and also that the said decision was never appealed against; that this court does not have jurisdiction to interfere with the said decision. That it was clear that the 2nd Appellant did not have any interests over the suit property capable of being transferred to the 1st Appellant; that the Respondent was in occupation and utilizing the suit property at the time the same was transferred to the 1st Appellant, a fact that 1st Appellant was aware of and therefore in the circumstances, he cannot be referred to as an innocent purchaser for value without notice. He urges the court to dismiss the Appeal with costs to the Respondent. He has cited the cases of *Muntu Maina v Hiram Gathiba Maina* (2013) eKLR to support his position.
14. I have considered the appeal as filed, the rival submissions, and the contested judgment. This is a first appeal and as the first appellate court, the task ahead is as spelt out in the case of *Mbogo & Another v Shah* [1968] EA that;

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

Further guidance is to be found in the case of *Selle v Associated Motor Boat Co* (1968) E.A 123 where the court expressed itself thus:

“an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that the court must reconsider the evidence, evaluate it itself and



draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's finding 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 based on the demeanor of the witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohammed Sholan* (1955) 22 EA 270)"

15. In my view the issue for determination herein is whether the Appeal herein has merit.
16. The Appellants' complaint is that the trial court erred in upholding the orders issued by the High Court in Embu Civil Appeal No. 17 of 2006. They are of the view that at the time that the High Court issued the said orders, it lacked jurisdiction on account of being *functus - officio* on the issue of ownership of the suit land since the issue had already been determined in the High Court of Meru. They also faulted the trial court's finding that the transfer of the suit land by the 2nd Appellant to the 1st Appellant was done in bad faith and meant to defeat the application in Embu Civil Appeal No. 17 of 2006 whereas there was no order restraining the 2nd Appellant from transferring land to any person; also that the trial court erred by entering judgment against the Appellants whereas the order for retrial in Meru was never complied with and therefore Embu Civil Case No. 115 of 1985 is pending retrial.
17. In my view, a competent court of equal status as this one gave orders directing that the Respondent be registered as the proprietor of the suit land herein. As I have said above, I have not been given the chance to understand the circumstances under which the said orders were issued. And given that I do not have the capacity or power to confer on myself jurisdiction to criticize or review or sit on appeal against a decision of court of equal jurisdiction as mine, my hands are as equally tied as those of the trial court to invalidate the court's orders directing that the Respondent be registered as the proprietor of the suit land. In my view, the Appellants are raising the issue of the court's jurisdiction to issue the orders it did in Embu Civil Appeal No. 17 of 2006 too late in the day. The issue of jurisdiction should have been raised before determination of the said application. After the application was determined, the only remedy that was available to the 2nd Appellant was to file an appeal against that Order. That having not been done means that the said decision remains unchallenged and therefore valid. In my view, the trial court cannot be faulted for upholding the decision of a higher court that remains unchallenged.
18. On the issue of whether the trial court erred in finding that the transfer of the suit land from the 2nd Appellant to the 1st Appellant was done in bad faith and meant to defeat the application in Embu Civil Appeal No. 17 of 2006, the trial court held "Although the transfer of the suit land was effected before the order dated 1/2/2007 was issued, it is clear that the same was done in bad faith. The application to have the 2nd defendant's registration cancelled was filed in 2003. The 2nd defendant filed a replying affidavit dated 14/10/2003. The defendant therefore knew that there was an application seeking to cancel his registration. Although there was no order prohibiting him from transferring the suit land, the transfer which was effected appears to have been calculated to defeat the said application. The 2nd defendant's registration having been cancelled, he had no title capable of being transferred to the 1st Defendant. The transfer was therefore irregular and should be cancelled." In my view, there is no good reason to interfere with the trial court's findings on this issue. The reasons given by the court are straight forward and satisfactory to me and therefore I uphold the same.
19. Again, and in addition to the above, whether the 2nd Appellant had a good title that could be transferred to the 1st Appellant, the High Court of Meru in Civil Appeal No. 28 of 1995 set aside the judgment that cancelled the Respondent's title to the suit land and granting the same to the 2nd Appellant. In



my opinion, the implication of that was that the status of ownership of the suit land was to remain in favour of the Respondent unless that status was changed upon retrial. The fact that a retrial never took place to me means that the Respondent's title still is the one that is valid. Therefore at the time the 2nd Appellant was transferring the suit land to the 1st appellant, he did not have a good title to pass to the 1st Appellant.

20. The upshot of the above is that I find no merit in the appeal and I hereby dismiss it. Costs to be borne by the Appellants.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF FEBRUARY, 2024.

In the presence of 1st appellant, Njeru Ithiga for Muthoni Ndeke for appellant, Rose Njeru for respondent and Leadys – Court Assistant.

ANTONY KANIARU

JUDGE- ELC, EMBU

FEBRUARY 15, 2024

