



Macharia & another (Administrators of the Estate of the Late Kariuki Macharia) v Gitau (Environment and Land Appeal E029 of 2022) [2024] KEELC 1822 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E029 OF 2022**

**BM EBOSO, J
MARCH 28, 2024**

BETWEEN

JOHN MACHARIA 1ST APPELLANT

EPHANTUS KARANJA 2ND APPELLANT

ADMINISTRATORS OF THE ESTATE OF THE LATE KARIUKI MACHARIA

AND

JOSEPH MUCHUGA GITAU RESPONDENT

(Being an Appeal against the Judgment of Hon H. M Ng'ang'a Senior Principal Magistrate, delivered on 23/3/2022 in Gatundu Senior Resident Magistrate Court MCL & E Case No. 63 of 1991)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered on 23/3/2022 by Hon H. M Ng'ang'a, Principal Magistrate, in Gatundu SPMC E & L Case No. 63 of 1991. The late Kariuki Macharia was the Plaintiff in the trial court. He died when the trial court was still seized of the dispute. The two appellants are administrators of the estate of the late Kariuki Macharia. They brought this appeal on behalf of the estate. The respondent was the defendant in the trial court. The dispute in the trial court revolved around the question as to whether the respondent was obligated to transfer to the estate of the late Kariuki Macharia a portion measuring 40 x 95 feet out of land parcel number Chania/Kanyoni/1248, a subdivision out of land parcel number Chania/ Kanyoni/1111. The trial court made a negative finding and dismissed the estate's claim.



2. Before I dispose the issues that fall for determination in this appeal, I will outline a brief background to the appeal; the grounds of appeal; and the parties' respective submissions. For convenience, I will refer to the 40 x 95 portion which is the subject matter of this appeal as "the portion". The whole of Chania/ Kanyoni/1248 will be referred to as "the suit land". The late Kariuki Macharia will be referred to as "the deceased".

Background

3. Through a plaint dated 14/11/1991 and amended on 13/9/2021, the appellants sought an order decreeing the respondent to transfer the portion to the estate of the deceased. They also sought costs of the suit. Their case was that the respondent sold the portion to the deceased in 1986 through a memorandum of agreement dated 7/7/1986 at a consideration of Kshs. 30,320/-.
4. The respondent contested the claim through a defence dated 30/10/1998. He denied entering into the alleged agreement, adding that the alleged contract was, in any event, void ab initio and unenforceable for lack of consent of the Land Control Board.
5. At the first instance, the deceased obtained an ex parte judgment against the respondent. The ex parte judgment was subsequently set aside in 1998. The respondent contended in the trial court that subsequent to that, the case was fully heard by the lower court and a Judgment was rendered in which the lower court dismissed the deceased's claim. There was, however, no consensus on this point. What was not contested was the fact that in 2009, the original court file was destroyed by a fire that razed down the entire Court Building at Gatundu.
6. On 24/10/2012, the respondent's application seeking a reconstruction of the Lower Court File was allowed. It was at the stage of reconstruction of the Lower Court File that the trial court was confronted with the question as to whether the appellant's suit had been fully heard and dismissed through a Judgment rendered on 31/8/2001 by Hon. Kebongo. Owing to the fact that the original court file had been destroyed and there was no conclusive record of the alleged trial and the alleged judgment, the trial court decided to conduct fresh trial and render a fresh judgment.
7. Upon conducting trial between September 2021 and October 2021, the trial court received written submissions from the parties and subsequently rendered the impugned Judgment on 23/3/2022. The trial court found that the appellants had failed to prove the estate's case on a balance of probabilities. The trial court dismissed the estate's claim with costs.

Appeal

8. Aggrieved by the Judgment of the trial court, the appellants brought this appeal, advancing the following eleven verbatim grounds:
 1. That the learned magistrate erred in law and fact by improperly reconstructing and/ or reconstituting the court file thereby relying on improper records to determine the matter before court.
 2. That the learned magistrate erred in law and fact by disregarding and/or dismissing all of the appellant's documentary evidence on record evidencing the fact of a sale between the parties.
 3. That the learned magistrate erred in law and fact by disregarding and/or ignoring evidence of consideration for the sale that was paid by the appellants.



4. That the learned magistrate erred in law and fact by not only disregarding the appellant's documentary evidence on record but also saddling the appellants with the onus of rebutting the said evidence by holding that the appellants had a duty to call a document examiner.
5. That the learned magistrate erred in law and fact in shifting the burden of proof to the plaintiffs contrary to the law.
6. That the learned magistrate erred in law and fact by failing to objectively consider all the evidence on record such as why there was a caution on the suit property and reasons it and the timing of placing it.
7. That the learned magistrate erred in law and fact by failing to appreciate the process of governing land board consent as applicable in this case.
8. That the learned magistrate erred in law and fact by relying on uncertified evidence.
9. That the learned magistrate erred in law and fact in failing to consider the facts on record.
10. That the learned magistrate erred in law by dismissing all the evidence of documentary evidence on record.
11. That the learned magistrate erred in law and fact by giving a different judgment indicating different parties resulting to an ambiguous judgment.

9. The appellants urged the court to allow the appeal and set aside the Judgment of the trial court rendered on 23/3/2022. The appellants further urged the Court to award costs of the appeal to them.

Appellants' Submissions

10. The appeal was canvassed through written submissions dated 21/11/2023, filed by M/s Arnold Otundo & Associates Advocates. Counsel for the appellants identified the following as the three issues that fell for determination in the appeal: (i) Whether the destroyed court file was properly reconstructed; (ii) Whether there was a valid land transaction that was frustrated; and (iii) Whether the counterclaim was valid (sic).
11. On whether the destroyed court file was properly reconstructed, counsel submitted that the court file was not properly reconstructed because the respondent failed to produce the records in his possession. On whether there was a valid land transaction that was frustrated by the respondent, counsel submitted that the deceased was a purchaser for value who properly acquired the portion of land, a fact which counsel contended was not denied. Counsel added that despite the deceased fulfilling his obligations under the agreement for sale, the respondent frustrated the sale after the land board consent had been issued.
12. On whether the counter-claim is valid (sic), counsel for the appellants submitted that "in the event the sale agreement is not approved, then the counterclaim stands and it's uncontroverted at all". Counsel added that the court order vacating the ex-parte Judgment did not have the effect of annulling the documents on record.

Respondent's Submissions

13. The respondent filed written submissions dated 8/01/2024



through M/s Armon Legacy Advocates & Associates. Counsel for the respondent identified the following as the four issues that fell for determination in the appeal: (i) Whether the court erred in relying on improper records and/or uncertified evidence; (ii) Whether the trial court properly analyzed the evidence; (iii) Whether the trial court improperly placed the burden of proof on the appellants; and (iv) Whether the appellants are entitled to special damages.

14. On whether the court erred in relying on improper records and or uncertified evidence, counsel submitted that the relevant ground of appeal was unmerited given that the trial court heard the matter afresh and only considered the evidence that was produced before it in arriving at its determination. Counsel added that the court categorically stated at paragraph 33 of the impugned Judgment that it neither considered extrinsic evidence nor the findings in the initial trial.
15. On whether the trial court properly analyzed the evidence on record, counsel submitted that an analysis of the evidence on the trial court record showed that there was no agreement to sell any land by the respondent to the deceased as alleged by the appellants. Counsel contended that the agreement dated 7/7/1986 was inauthentic and a forgery prepared as an afterthought. Counsel added that the advocate who was alleged to have prepared the agreement disowned it during the initial trial.
16. On whether the trial court improperly placed the burden of proof on the appellants, counsel for the appellants submitted that the estate uttered two different agreements, hence the trial court rightly held that the onus was on the appellant to prove which of the two agreements was authentic by subjecting them to forensic examination. Counsel added that only expert evidence would have been helpful. Counsel contended that the trial court's finding was sound for the following reasons: (i) the respondent had denied entering into an agreement for sale of land or at all with the deceased; (ii) the sale agreement which the deceased had produced in the initial trial (which the respondent produced in the subsequent trial) had been denied by its alleged author, C.K. Mwhia Advocate; and (iii) the agreement produced by the appellants during the second trial differed in material aspects with the agreement produced in the initial trial yet no explanation was given for the said variance. Counsel further contended that the appellants failed to discharge their burden of proving that there was a valid sale agreement between the deceased and the respondent.
17. On whether the appellants proved their claim for damages, counsel submitted that the appellants sought a total compensation of Kshs.7,850,320 in their submissions. Counsel added that the claim was not specifically pleaded, adding that the claim was raised for the first time in the submissions. Counsel argued that the respondent was neither put on notice that the claim had been made against him nor was he accorded an opportunity to respond to the claim. Counsel contended that parties were bound by their pleadings and any evidence that did not support the pleadings ought not to be admitted. Counsel relied on the decision of the Supreme Court of Kenya in the case of Raila Amolo Odinga & Another vs IEBC & 2 Others [2017]. Counsel submitted that the court was not obligated to give judgment on unpleaded issues. Counsel urged the Court to dismiss the appeal and award costs to the respondent.

Analysis and Determination

18. I have read and considered the entire original record of the trial court; the record of appeal; the original and amended memorandum of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellants itemized eleven (11) grounds of appeal. In their subsequent written submissions, the appellants identified three issues and invited the court to dispose the appeal by determining the three identified issues. The three issues which the appellants identified read as follows: (i) Was the destroyed



- court file properly reconstructed? (ii) Was there a valid land transaction that was frustrated? and (iii) Is the counter-claim valid?
19. Taking into account the grounds of appeal and the submissions that were tendered, the key issue that falls for determination in this appeal is whether the estate of the late Kariuki Macharia proved its case to the required standard of proof. Before I analyze and dispose the above key issue, I will briefly dispose the first and the third issues which the appellant invited this court to determine.
 20. The first issue which the appellant invited this court to determine is whether the destroyed court file was properly reconstructed. During trial, the estate of the deceased plaintiff [represented by the appellants] did not object to nor raise any issue relating to the reconstructed file. As a matter of record, it was the position of the respondent that the case of the deceased had previously been fully heard and determined on merits through a Judgment rendered by Hon Kebongo in August 2001. The respondent contended that the Hon Kebongo dismissed the deceased's case for lack of merit. Owing to the fact that both the proceedings and the alleged Judgment were not available and were presumed to have been destroyed by the fire that gutted down the Gatundu Law Court Building in 2009, the trial court decided to conduct a fresh trial and render a fresh determination. The appellant fully participated in the fresh trial without raising any issue relating to the adequacy or inadequacy of the reconstructed court file. Indeed, in their final written submissions to the trial court dated 31/1/2022, the appellants did not raise any issue relating to the reconstructed file. Secondly, the appellants had the opportunity to place before the trial court any document(s) they felt had been excluded from the reconstructed court file. They did not raise any issue relating to any alleged missing document(s). Similarly, even in their submissions before this court, they did not identify any particular document which was omitted from the reconstructed court file of the trial court.
 21. For the above reasons, it is clear to this court that the ground of appeal relating to the alleged improper reconstruction of the destroyed court file of the trial court is wholly an afterthought. It has absolutely no merit. It is rejected wholly.
 22. The third issue which the appellants invited the court to determine is whether the counterclaim is valid. It is not clear where this particular issue is derived from. This is an appeal. There was no counterclaim in the trial court. This court is not seized of any counterclaim. Only the appellants and their counsel know about the counterclaim they alluded to in their written submissions dated 21/11/2023. I will say no more on this issue.
 23. Did the estate of the late Kariuki Macharia prove its case to the required standard? The claim of the estate was civil in nature. The standard of proof which the estate was required to discharge was that of "balance of probabilities". Secondly, the respondent did not have a counterclaim. Under Sections 107 to 109 of the *Evidence Act*, the burden of proof was on the estate.
 24. The respondent filed a defence and a witness statement in which he denied executing the agreement which the estate was relying on. The respondent also denied receiving purchase price from the deceased. Lastly, the respondent contended that in any event, the alleged agreement was void ab initio due to lack of consent of the Land Control Board. Given the above defence and witness statement, the estate was expected to lead evidence establishing that: (i) indeed the respondent executed the agreement which the estate was relying on; (ii) indeed the respondent received the alleged purchase price from the deceased; and (iii) the agreement relied on was enforceable.
 25. The estate led evidence by two sons of the deceased. They testified as PW1 and PW2. Neither of them was privy to the agreement the estate was relying on. Whereas the agreement was expressed as having been witnessed by an advocate by the name J W M Njore, the said advocate was not called as a witness to tender evidence relating to execution of the contested agreement. No effort was made to



subject the contested agreement to a forensic examination to establish whether or not the respondent indeed executed it. Lastly, no witness was presented to tender evidence relating to payment or receipt of purchase price.

26. On the issue of consent of the Land Control Board, it is clear from the record of the trial court that the estate attempted to mislead the trial court into believing that there was a consent of the Land Control Board. The trial court properly observed that the consent which the estate had uttered was obtained subsequent to and in pursuance of the initial ex-parte Judgment which the deceased had obtained against the respondent. The trial court noted that the said judgment was subsequently set aside. The trial court correctly observed that the purported consent was not a consent which the respondent and the deceased had mutually procured in furtherance of the alleged agreement.
27. In the above circumstances, the estate of the late Kariuki Macharia cannot be said to have discharged its burden of proof under the law. In my view, the trial court properly found that the estate had failed to prove its case on the balance of probabilities. That is my finding on the key issue in this appeal.
28. The result is that this appeal has no merit. The appeal is dismissed for lack of merit. In tandem with the general principle in Section 27 of the *Civil Procedure Act*, the estate of the late Kariuki Macharia shall bear costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of: -

Nkomejimana for the Respondent

Court Assistant: Hinga

