



REPUBLIC OF KENYA



**Mwangi & 2 others v Kai & another (Civil Appeal 166 of 2019)
[2025] KECA 389 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 389 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 166 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

**LUKA WAGANA 1ST APPELLANT
GODFREY MAINA MWANGI 2ND APPELLANT
JAMES WANGUO KANYI 3RD APPELLANT**

AND

**CHARLES ALEXANDER KIAI 1ST RESPONDENT
JOHN CIIRA GATHOGO 2ND RESPONDENT**

(Being an appeal from the Judgment of the Environment and Land Court at Nyeri (Waithaka, J.) delivered on 30th April, 2019 in E.L.C Case No.452 of 2014.)

JUDGMENT

1. This appeal arises from the judgment in Nyeri Environment and Land Court (hereinafter “ELC”) ELC No. 452 of 2014 where the appellant’s suit was dismissed.
2. Being a first appeal, our mandate was well stated in the case of *Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022)* [2024] KECA 434 (KLR) as follows:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & 8 Others [2013] eKLR where it was stated: “[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”



3. The appellants, Luka Wagana, Godfrey Maina Mwangi and James Wanguo Kanyi, were the plaintiffs in Nyeri ELC No. 452 of 2014 where they sued the respondents Charles Alexander Kiai and John Ciira Gathogo as defendants. The appellants' case was that the fathers to the 1st and 2nd appellant entered into a partnership agreement with the 3rd appellant and the 2nd respondent sometime in September 1987. The partnership included another person named Ngure Maingi and the partnership was known as Kiriaini Stage Timber Sales to which all the persons aforementioned were said to have contributed in equal shares. In October 1989, the partners entered into a sale agreement with one John Gathanga Mbogo to purchase a property known as LR Loc. No.14/KIRU/2836. The title was issued to the partners in May 1990 and the property was owned by the partnership.
4. The appellants accused the 1st respondent of wrongfully entering onto the property in January 1999 constructing thereon, refusing to vacate and also placing a caution on the property in his favour in order to delay his eviction. A dispute was heard at the Land Disputes Tribunal, Mathioya District, which held, on 20th April, 1999, that the disputed land belonged to the joint proprietors. This award was adopted as an order of the court on 12th May, 1999 in the Magistrates Court at Kangema.
5. Being aggrieved by this finding, the 1st respondent appealed to the Provincial Land Appeals Committee but his appeal failed and he was directed to compensate the proprietors by paying them Kshs.180,000 payable by 31st August, 2000, which he reportedly never did. The appellants stated that the 1st respondent continued to occupy the land illegally. The 1st respondent was accused of using the decision of the Appeals Committee to obtain an order for the property to be registered to his name when the decision of the committee had long expired and never been enforced.
6. The appellants sought in the ELC a declaration that the 1st respondent holds the property in trust for the appellants, that the title deed be revoked and be issued to the appellants, that the respondent pay rent accrued on the property since 1999 and he be condemned to pay general damages as well as costs of the suit.
7. The respondents' case was that indeed there was a partnership, which according to them, was dissolved. The 2nd respondent stated that after the initial partnership was dissolved, he, the appellants and the late Mwangi Kairuki began a new partnership but he was the only one who put up capital. The 2nd respondent also stated that he entered into the sale agreement on his own with John Gathanga Mbogo and the appellants were not party to the same. He said that he has been on the property since 1955 and that the same is ancestral land which he has developed since 1986. The 1st respondent herein stated that he was born and brought up on the land, further, that the Lands Tribunal had no jurisdiction to make a determination. He also states that the appellants were paid the directed compensation of Kshs.180,000 and had no claim on the property. The 1st respondent further stated that he had the property registered in his name through proper process.
8. The ELC gave judgment on 30th April, 2019 where it found in favour of the respondents. The court stated that the appellants never appealed to set aside the decision of the Lands Tribunal Appeals Committee which opened the path for registration of the 1st respondent as owner of the property. The court also stated that there was no evidence of collusion between the respondents and the 2nd respondent could bind the partnership with his actions. The court stated that the appellants should pursue their business partner through other channels rather than seek cancellation of the title deed which was obtained through legal process. The suit was dismissed with costs to the 1st respondent.
9. The appellants, being aggrieved with the decision of the ELC, filed the present appeal. The memorandum of appeal was lodged on 8th July, 2019 seeking to have the judgment set aside and the appellants suit allowed. The appellants' grounds of appeal are that the trial court erred in failing to



- find fraud in the transfer of the property and erred in failing to find that the respondents conduct was fraudulent as the 1st respondent knew the property was held by a partnership involving the 1st appellant.
10. The respondents have filed a Preliminary Objection (hereinafter “PO”) dated 20th April, 2023 as well as submissions dated 5th May, 2023 in support of the PO. The gist of the PO is that the appeal is incompetent for reason that the notice of appeal was not prepared in the required format and was not filed and served within the timelines provided under the Rules. They urge the court to dismiss the appeal. The respondents also filed further submissions dated 29th May, 2023 in support of their PO.
 11. The appellants filed grounds of opposition dated 11th May, 2023 and submission dated 17th May, 2023 in response to the PO. The appellants state that the PO is vexatious as they have complied with all rules of procedure required by the court. They term the PO as an illegitimate attempt to delay finalization of the issues and ask the court to strike out the PO with costs.
 12. The legal representative of the deceased 3rd appellant filed a replying affidavit sworn on 11th May, 2023 in opposition to the PO terming it as an abuse of court process and asking the court to strike it out.
 13. We have considered the record of appeal, the PO and the submissions filed in this appeal. Our mandate involves an analysis of facts as well as law.
 14. We shall first tackle the issue of the PO by the respondent. The PO largely raises an issue that the notice of appeal and the record of appeal should be struck out for reason that the notice of appeal was filed and served outside the required timelines. The respondent states that the notice of appeal was served on 12th July, 2019 nearly 2 and a half months after being filed. The respondents submit that this makes the entire appeal incompetent.
 15. Rule 75(2) of the Court of Appeal Rules 2010, previously in force at the material time, provided that a notice of appeal shall be filed within 14 days of a decision sought to be appealed against. According to rule 77(1), that notice of appeal should then be served within 7 days of filing. In the instant matter, the notice of appeal is dated 7th May, 2019 and was filed on 8th May, 2019, one day out of time. Nonetheless, rule 84 of the previous 2010 Rules of this Court, provided that an application to strike out a notice of appeal on such grounds ought to be brought within 30 days of service of the offending document. The PO filed is for all intents and purposes an application to strike out the appeal and is filed out of time as the respondents were served with the notice of appeal on 12th July, 2019, meaning that they should have applied to strike out the document on or before 12th August, 2019. They did not do so. For this reason, the PO fails and is dismissed as it does not accord with the law.
 16. The appellants also state that they unsuccessfully continued to attempt to evict the 2nd respondent and were dissatisfied with the decision of the Provincial Appeals Committee and informed the 2nd respondent that the Appeals Committee never had jurisdiction to handle the matter. We note that from the record, the decision of the Provincial Appeals Committee was not appealed. The procedure governing appeals in such a matter is provided under the Land Disputes Tribunal Act.
 17. Section 8(8) of the Land Disputes Tribunal Act provides that the decision of the Appeals Committee shall be final on issues of fact. Section 8(9) of that Act states that any party may appeal to the High Court on a point of law, within 60 days of the decision of the Provincial Appeals Committee.
 18. The record shows that the 1st respondent obtained orders for execution of the award of the Appeals Committee and using those orders had the suit property transferred to himself. Those orders of the Committee were not appealed to the High Court or set aside. The trial Judge considered the issue for



her determination to be whether the appellants had proved that there was fraud in the transfer of the suit property to the 1st respondent. She held on that issue:

“...being of the view that the plaintiff ought to have applied for setting aside of those orders on the grounds urged in this suit, which application they did not do, I find the plaintiff’s claim to be unsustainable on that ground. If anything, the evidence addressed in this suit shows that the 2nd defendant who was a partner of the plaintiffs, participated in the proceedings. There being no evidence of collusion between the 1st defendant and the 2nd defendant in effecting the impugned transfer and being of the view that the action of the 2nd defendant as a partner of the plaintiffs could bind the partners, I find and hold that the plaintiffs have not made up a case for interference with the title held by the 1st defendant.”

We agree with this finding.

19. There was a procedure set out in law on how to challenge the decision of the Appeals Committee. That procedure was binding on the parties before the ELC. The appellants did not challenge the decision of the Appeals Committee and were therefore bound by that decision. They instead filed the suit at the ELC 8 years after. Having failed to avail themselves of the procedure set out in the Act the suit before the ELC was bad in law and the Judge was right to dismiss it.
20. We find this appeal to have no merit and we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

