



REPUBLIC OF KENYA



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**MW v Kimani & 2 others (Civil Appeal 286 of 2019)
[2025] KECA 506 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 506 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 286 OF 2019
DK MUSINGA, J MOHAMMED & GV ODUNGA, JJA
MARCH 21, 2025**

BETWEEN

MW APPELLANT

AND

ELIAS KIMANI 1ST RESPONDENT

STEPHEN WACHIRA 2ND RESPONDENT

LIVINGSTONE MAGANJO 3RD RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (E.O. Obaga, J.) delivered on 10th April 2019 in ELC Appeal No. 51 of 2017)

JUDGMENT

1. This is a second appeal from the judgment of Obaga, J. delivered on 10th April 2019 in the Environment and Land Court (ELC) Appeal No. 51 of 2017. The initial judgment was by D.O. Beja, Senior Resident Magistrate in Nairobi Milimani Commercial Courts Civil Case No. 10068 of 2007 delivered on 17th November 2017.
2. The appellant was the plaintiff in the initial suit. She stated that she was the proprietor of a property known as plot No. xxx which was a sub-division of LR. No. xxxx/x/x (the suit property) at Kasarani area, Nairobi, which she acquired on 14th December 1984. She alleged that she developed the suit property by erecting a permanent building thereon with five shops, which were rented to various tenants. She further averred that she engaged the late David Mwangi Muhia, the respondents' father, to be collecting rent on her behalf; that the deceased continued collecting rent and giving her until sometime in August 2009 when he passed away; that after his demise the respondents unlawfully entered the suit property and took possession of two shops and let out the other three, and have since been collecting the rents thereof.



3. The appellant sought a declaration that she was the owner of the suit property; an eviction order against the respondents; a permanent injunction to restrain the respondents from collecting rent in respect of the shops; and an order directing the respondents to account and pay to her the rents that they had collected.
4. In their joint statement of defence, the respondents denied the appellant's claim over the suit property; denied any knowledge of an agreement between the appellant and their late father, and stated that the appellant was their late father's concubine, and in that capacity she had been living in a part of the suit property with their late father; that the appellant separated with their father in 1997 after a bitter quarrel, and she had since been married by another man.
5. The respondents further contended that the suit property was developed by their late father without any contribution whatsoever from the appellant; that the suit property had 3 sub-plots namely No. xxx,xxx, and xxx; that the share certificate in respect of the suit property that was in the possession of the appellant was a forgery, the share certificate having been stolen when the appellant was cohabiting with their father and the incident having been reported to the police, and therefore, the appellant had no right over the suit property at all. They added that after the demise of their father, his estate passed on to their mother and therefore any claim over the suit property should have been directed to the administrator of the estate. To that extent, they were wrongfully sued, they stated.
6. After a full trial, the learned magistrate found in favour of the appellant and granted the orders as sought in the plaint. The respondents were aggrieved by the said decision and preferred an appeal to the ELC at Nairobi, to wit, ELC Appeal No. 51 of 2017.
7. The learned judge identified four (4) issues for determination which were as follows:
 - i. Whether the trial magistrate made the correct finding that the appellant was the owner of the suit property.
 - ii. Whether the suit ought to have been instituted against the respondents or the administrator of their late father's estate.
 - iii. Whether the respondents were trespassers to the suit property and liable to be evicted therefrom.
 - iv. Whether the respondents were liable to account for the rent they had collected since 1998.
8. The learned judge evaluated the evidence that was adduced by the parties before the trial court. It is important that we summarise the evidence that informed the findings of the first appellate court.
9. In her plaint, the appellant alleged that she acquired the suit property on 14th December 1984. In support of that averment, she produced a Share Certificate issued by Mukinye Enterprises Limited, and a letter dated 22nd February 2008 written by M/s King'ara & Company, the advocates for Mukinye Enterprises Limited, which was a land buying company which sold the property in dispute.
10. The respondents testified that they started living on the suit property in the early 80s, after their late father developed the property. Subsequently, their late father started cohabiting with the appellant and after their separation in 1997, their father discovered that the share certificate for the suit property was lost.

He made a report at Ruiru Police Station and was issued with a police abstract.
11. Although the appellant said that she acquired the suit property on 14th December 1984, the share certificate was issued on 29th December 1977. The appellant explained the anomaly by claiming that



the certificate was issued before she completed paying for the suit property and that is why the date thereon was shown as 14th December 1984.

12. The learned judge observed that the share certificate had hand written alterations, but the trial magistrate did not address his mind to the same; that the appellant had not produced any receipt to show that she made any payments towards the purchase of the suit property; that on the other hand, the respondents produced documents to show that their late father had three (3) plots in the area which he had purchased from Mukinye Enterprises Limited; that the respondents' father had receipts from the County Council of Ruiru in respect of rates for the suit property that were issued to him; that shortly after the appellant and the respondents' deceased father parted, their father realised that the share certificate was missing and made an appropriate report to the police; that the appellant did not lay any claim to the suit property during the life time of the respondents' deceased father; that there was no evidence that the respondents' deceased father was collecting any rent for and on behalf of the appellant; that there was also no evidence that the respondents forcefully moved into the suit property after the demise of their father and therefore they could not be termed as trespassers; and that in view of all the above findings, the learned trial magistrate erred in finding for the appellant in the impugned judgment.
13. In view of the foregoing, the learned judge allowed the appeal and set aside the trial court's judgment.
14. Aggrieved by the judgment of Obaga, J., the appellant preferred this appeal. The memorandum of appeal raises three grounds which are as follows:
 - i. The learned judge erred in law by allowing the appeal and dismissing the suit filed in the lower court despite the appellant having proved her case on a balance of probabilities.
 - ii. The learned judge erred in law in holding that the appellant was not the legal owner of Plot No. 109 on LR. No. 3811/8/4 at Karasani despite overwhelming evidence to prove her ownership.
 - iii. The learned judge erred in law by failing to appreciate that the respondents herein were trespassers on plot No. xxx on LR. No. xxxx/x/x in Kasarani.
15. The appellant urged this Court to allow the appeal, set aside the judgment by the Environment and Land Court and reinstate the trial court's judgment.
16. This being a second appeal, it must be confined to issues of law only. In *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment)*, this Court held:

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR*, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse.”
17. When the appeal came up for hearing, Mr. D. M. Wambua advocate appeared for the appellant, and Mr. Mureithi Ndirangu for the respondents. Parties had not filed any submissions and therefore their respective advocates made brief oral submissions in support of their respective clients' arguments. Mr. Wambua submitted that the appellant produced ownership documents in respect of the suit property, and explained her relationship with the deceased. He faulted the learned judge's analysis of the evidence that was adduced before the trial court.



18. On the other hand, Mr. Ndirangu supported the findings by Obaga, J., stating that there was overwhelming evidence that the respondents' deceased father purchased and developed the suit property before he started cohabiting with the appellant, and that the appellant unlawfully acquired the share certificate that she was relying on to prove her ownership of the suit property, which in any event, had some unexplained alterations.
19. Counsel further submitted that the appellant did not produce any evidence of purchase of the suit property or development of the same, whereas the respondents' deceased father had receipts for payment of land rates for the suit property long before he started his cohabitation with the appellant. He further submitted that there was no evidence that the respondents or their deceased father was paying any rent to the appellant or that the respondents' father was collecting rent for and on behalf of the appellant.
20. Having carefully considered the entire record of appeal, and the brief submissions by counsel, we see no basis of faulting the findings arrived at by the first appellate court. From the memorandum of appeal, the central issue for determination in this appeal is whether the learned judge erred in law in holding that the appellant was not the legal owner of the suit property. The determination of that issue disposes of the contention as to whether the respondents were trespassers thereon.
21. In her testimony before the trial court, the appellant alleged that she bought the suit property from Mukinye Enterprises Limited, but she had no document to prove that she had made any payment for the same. She neither adduced any evidence for payment of any land rent or rates, or development of the suit property. The appellant did not also prove that the respondents' father was collecting any rent on her behalf in his lifetime. Further, the appellant did not explain why she did not institute any claim against the respondents' father in his life time.
22. On the other hand, the respondents adduced evidence as to how their father acquired the suit property long before he started cohabiting with the appellant. They were able to show how the father subdivided the property by producing the sub-division plan. They further produced correspondence between their late father and Mukinye Enterprises Limited, dating back to 1984. They testified about the loss of the share certificate and a report having been made by their father at Ruiru police station, and also testified that they had all along lived on the suit property with their late father long before he started cohabiting with the appellant.
23. Considering the totality of the evidence on record, there can be no basis of faulting the judgment arrived at by the first appellate court. We find this appeal devoid of merit and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL JAMILA MOHAMMED

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

