Kamau (Appealing as the administratrix of the Estate of Clement Kamau Gitau - Deceased) v Ngatia (Civil Appeal 154 of 2018) [2025] KECA 432 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 432 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 154 OF 2018

PO KIAGE, LA ACHODE & WK KORIR, JJA

MARCH 7, 2025

BETWEEN

CECILIA WAITHIRA KAMAU (APPEALING AS THE ADMINISTRATRIX OF THE ESTATE OF CLEMENT KAMAU GITAU - DECEASED) ..... APPELLANT

AND

STEVENSON NGATIA ..... RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 25th January 2018 in ELC Case No. 3 of 2012)

JUDGMENT

1. The respondent, Stevenson Ngatia, obtained a judgment in his favour against the deceased appellant, Clement Kamau Gitau ("Clement"), in a case filed by the respondent over the ownership of land parcel number 12330/403 (previously known as Plot No. 491). Each of the parties had laid claim over Plot No. 491 ("suit property") in their respective pleadings before the Environment and Land Court at Nairobi. Being dissatisfied with the finding of K. Bor, J., Clement preferred this appeal, raising 2 grounds, which we do not find necessary to reproduce verbatim. In essence, Clement challenged the learned Judge's factual conclusions on the balloting process, shareholding, ownership and possession of the suit property. He also faulted the learned Judge for the manner in which she dealt with the issue of burden of proof and asserted that the learned Judge was biased in the manner in which she considered his evidence. Clement passed away during the pendency of the appeal, and on 3rd June 2024, this Court (Mativo, J.A), allowed the administratrix of his estate, Cecilia Waithera Kamau, to substitute him.

2. At the trial, the respondent testified that he held two shares in Thome Farmers 5 Ltd ("the company") under share certificate number 749 dated 29th July 1979. His evidence was that he joined the company in 1975, and balloting for plots took place in 1979, where he balloted for plot numbers 491 and 492 under entry number 435, having paid the survey fees for the two plots. His testimony was that he

balloted for one plot and was given the next plot since he had paid for two plots and that he did not need to ballot twice. His testimony was that initially he had balloted for plot number 021 and 022 but upon expressing his dissatisfaction with the plot which was in a swampy area, he was allowed to ballot for a different plot, which was the basis for the cancellation of his initial ballot. He produced a letter dated 10th September 1999 written by the company confirming that his plots were numbers 491 and 492 while Clement and his wife owned plot number 32. According to the respondent, Clement was allotted plot number 32 through entry numbers 295 and 673. The respondent produced copies of receipts issued by the company for the survey fees in which the plot numbers are altered from 021 and 022 to 491 and 492. He also stated that he discovered the Clement had trespassed into the suit land in 1994, and upon enquiry, Clement informed him that he had acquired the plot from two ladies. On 15th October 2014, the respondent informed the court that he had obtained the title for the suit property and produced a certified copy of the title. He testified that while processing the title, he learned that the actual owner of the suit land was Joreth Limited and that the company advised him to pay Joreth Limited so that his title could be processed. He paid Joreth Limited Kshs. 200,000 for each plot. He denied acting fraudulently by processing the title for the suit property during the pendency of the suit, asserting that before issuing him with the ownership document, Joreth Limited cross- checked the records and confirmed that he was indeed the owner of the suit property.

3. On his part, Clement testified that he first took possession of the plot in 1983 with the permission of the original co-owners, Margaret Njeri Mwaura and Anne Wambui Kaguru, and subsequently acquired the shares of Margaret Njeri Mwaura to the land for Kshs. 45,000 in 1998. The company transferred the portion to his wife after payment of the transfer fees. On 25th July 1988, a new share certificate number 874 in the names of his wife and Anne Wambui Kaguru was issued by the company. Later, in 1994, Anne Wambui sold her share to Clement for Kshs. 295,000, and he was issued share certificate number 1432. It was his evidence that, all this while, nobody had ever come to claim the suit property. It was only towards the end of 1998 that he learned that somebody had uprooted his fence, and he reported the matter to the police, who arrested the respondent's wife. He also testified that the respondent later took possession of the land pursuant to injunctive orders issued by court, which barred him from dealing with the suit property.

4. Clement further testified that he was familiar with the process of obtaining the title for a plot in Thome because he had another plot there and had gotten a title for that plot. He confirmed that one would go to Joreth Limited and pay Kshs. 200,000, together with survey fees, after which Joreth Limited would process the title. According to Clement, if one had paid for three plots, they had to pick three ballot papers, and each ballot had a plot number. It was also his evidence that receipts issued by the company were never cancelled, and if they were, then the purchase price was refunded, and the company repossessed the plots. He urged the court to cancel the respondent's title. Clement produced a copy of an agreement in respect of the sale of plot number 491 registered under certificate number 035 showing entry numbers 295 and 673. He also produced a copy of certificate number 874 issued to his wife and Anne Wambui Kaguru on 25th July 1988. He produced a copy of the receipt issued by the company dated 25th July 1988. Additionally, he produced a memorandum of agreement dated 28th June 1994 through which he acquired the shares of Anne Wambui Kaguru and share certificate number 1432 dated 8th August 1994 issued by the company in his name and that of his wife.

5. Clement also called DW2 Margaret Njeri Mwaura, who testified that she had applied for a plot with the company and was required to pay Kshs. 15,000. Unable to meet the selling price, she got a partner, and they each raised Kshs. 5,000 and the balance of Kshs. 5,000 was cleared later, after which they balloted and picked Plot No. 491. She was shown the plot. She testified that she sold her share to Clement to raise school fees for her son. She confirmed that she knew the co-shareholder, who had died after selling

her portion to Clement. On cross- examination, she stated that she could not remember when she became a member of the company and also could not remember her share certificate number. She could only remember queuing and balloting for the plot. She also stated that she surrendered her certificate to Clement and his wife on 22nd July 1988 and was paid the sum of Kshs. 45,000.

6. In her judgment, the learned Judge held that Clement had failed to demonstrate how the suit property was allocated to Margaret Njeri Mwaura and Anne Kaguru. The learned Judge preferred the evidence of the respondent whose share certificates confirmed he was allocated the suit property and was in occupation. The learned Judge also believed the letter from the company confirming that the respondent was allocated Plot No. 491 while Clement purchased Plot No. 32 from Anne Kaguru and Margaret Mwaura. In disposing of the matter, the learned Judge found that Clement had failed to prove his counterclaim and entered judgment in favour of the respondent with costs.

7. This appeal came up for hearing on 4th November 2024 when learned counsel Mr. Gichachi appeared for the appellant, whereas learned counsel Mr. Omuganda was present for the respondent. Counsel had filed their written submissions, which they sought to rely on, albeit with brief oral highlights of the same.

8. Through the submissions dated 8th November 2018, learned counsel Mr. Gichachi urged the Court to allow the appeal. Counsel restated the evidence and analyzed it before submitting that the evidence on record did not support the learned Judge's finding that the respondent was allocated the suit property. Counsel submitted that the evidence tendered by the respondent defeated the very essence of balloting, which, according to him, was to ensure each allottee takes only that which they balloted for, with no alteration. According to counsel, the evidence tendered by the respondent fell short of establishing his ownership of the suit property. Mr. Gichachi also submitted that the respondent could not have balloted for two plots using one ballot and that the documents adduced by the respondent were not genuine because they were cancelled and altered.

9. Learned counsel also faulted the learned Judge for what he termed as differential treatment of evidence of similar nature and character. According to counsel, the learned Judge erred and was biased in believing the evidence adduced by the respondent while rejecting Clement's evidence despite the same having similar defects and characteristics. Counsel additionally contended that the learned Judge erred by failing to appreciate that Clement had occupied the suit property since 1988 as opposed to the respondent, who occupied the suit property as of 1999. It was also submitted that the trial court erred in relying on exhibits not produced in court, as well as a letter from the company. Counsel urged the Court to allow the appeal, quash the respondent's title, and reverse the holding that Clement ought to have pursued his claim with Joreth Ltd.

10. On his part, learned counsel Mr. Omuganda for the respondent through the submissions dated 21st February 2024, urged us to uphold the impugned judgment. Counsel restated the evidence and argued that, as opposed to the Clement, the respondent proved his case of ownership of the suit property. Regarding the question of possession, counsel urged that the learned Judge rightly concluded that the respondent owned the suit property and that it was not until 1988 that Clement sought to enter the suit property. Counsel also urged that the letter from the company was admitted as an exhibit with no objection from Clement and that its authenticity cannot be challenged on appeal. Counsel further submitted that the question of the acquisition of title while the suit was pending was dispensed with through a ruling that was not reviewed or appealed. According to counsel, that is the ruling that reopened the case to allow the respondent to amend the plaint and produce the title as an exhibit, and the trial court rightly relied on and affirmed the title. Ultimately, counsel urged us to dismiss the appeal in its entirety.

11. This being a first appeal, our role is that of a retrial. As was elaborated in Selle vs. Associated Motor Boat Co. [1968] EA 123, the Court is called upon to reconsider the evidence, evaluate it, and draw its own independent conclusions. In exercising the said mandate, the Court is also guided by the holding in Makube vs. Nyamuro [1983] eKLR that:

> " However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. I therefore now turn to the criticisms made in the memorandum of appeal that he so misdirected himself in material respects that the decision ought not to stand."

12. The foregoing are the ground rules upon which this appeal shall be determined. Having read the record of appeal and the submissions by counsel, the germane issue for determination is who balloted for Plot No. 491 and, therefore, owned the suit property.

13. In this case, certain uncontested facts need to be restated. There is no doubt that Plot No. 491 was among the plots enlisted for balloting by members of the company. From the evidence on record, Clement, the respondent, and DW2 were all members of the company. Additionally, it is evident that at one point, payment for the plots was made to Joreth Ltd to enable the transfer and processing of the title deeds. The point of departure between the parties is in relation to the balloting process and who exactly picked the ballot for Plot No. 491.

14. The balloting for the plots was, according to the respondent, conducted in 1979. It was the respondent's evidence that he initially picked ballot number 021, and having two shares, he was entitled to the following plot, which was 022. However, he testified that he was dissatisfied with the plots because they were located in a swampy area, which occasioned the cancellation of his ballot. Instead, the rejected plots were replaced with plots 491 and 492. On the other hand, Clement testified that during balloting, there was no room for alteration of the plots balloted and that even those with two shares would ballot twice as each plot was allocated a specific ballot number. No further evidence was adduced to establish precisely the balloting process.

15. Section 107 of the *Evidence Act* requires that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The standard of proof in civil disputes is on a balance of probability. In explaining the meaning of "balance of probability", the Court in Mwasambu & Another (Appealing as the administrators of Masumbuko Jambo Mwasambu (Deceased)) vs. Kenga [2024] KECA 357 (KLR) relied on the definition provided by Lord Denning in Miller vs. Minister of Pension [1947] ALL ER 373 thus:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

16. In this case, despite both parties being members of the company, the respondent had two shares, while it is unclear how many shares Clement held. Therefore, the respondent's evidence would be more believable regarding how he balloted for the two plots.

From the ballot produced by the respondent, it is clear that the alterations were made on the backdrop of two plots balloted under one ballot paper. Clement did not challenge the respondent's evidence that he was entitled to two plots by virtue of having two shares in the company. Even though Clement's counsel urged the Court to inquire into the balloting procedure, the evidence adduced at the trial cannot assist the Court in making any meaningful determination on that issue. As was pointed out by the trial court, the evidence of an official of the company would have been crucial to establish how the balloting was done. The assertions and submissions of Clement's counsel, though persuasive as to how balloting should be done, do not amount to evidence. Even though the intention of balloting is to make the procedure determinable and the outcome fair, the procedure as to how it is done, is not cast in stone. It is subject to change from one entity to another. Without evidence of how the company conducted its balloting or even the by-laws that governed it, the Court cannot impose the dictates asserted by Clement's counsel. It was incumbent upon Clement to produce evidence on how the balloting was done in order for the trial court to find that the respondent's evidence was unbelievable. On a balance of probability, we are inclined to believe, as did the trial court, the respondent's assertion on how he balloted for two plots using one ballot paper. Indeed, Clement admitted that the respondent's other plot was next to Plot No. 491 and this gives credence to the respondent's testimony as to how balloting was done for a member who was entitled to more than one plot.

17. Turning to the germane issue of who owns the suit property, there was an extract of a register purportedly issued by Mrs. Kamau of the company to the respondent. The extract was marked as MFI8 but was never produced as an exhibit. Counsel for the appellant faults the learned Judge for relying on that document to conclude that the suit property belonged to the respondent. From the evidence of Clement and the cross- examination of the respondent, it is apparent that this document was the subject of discussions before the trial court. However, the place of a document marked for identification but not produced was summarized by the Court in Kenneth Nyaga Mwige vs. Austin Kiguta, Bedan Mbugua & The People Limited [2015] KECA 334 (KLR) thus:

> "Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

18. It remains a rule of thumb that documents to be relied on by a party must be produced to be considered as exhibits, even though in the current practice where documentary exhibits are annexed to the statements of the witnesses, the unproduced documents remain on the court's record. We must agree with the submission by counsel for the appellant that the trial court erred in relying on a document that was marked for identification and not produced as an exhibit.

19. Be that as it may, based on the other evidence on record, can it be said that the respondent established his case of ownership of the suit land? The answer is in the affirmative. Clement testified that he acquired the suit property by purchasing shares from Ms. Margaret Njeri Mwaura and Ms. Ann Wambui Gakuru in 1988 and 1994, respectively. This acquisition is evidenced by the sale agreements adduced as evidence, which, unlike the trial court, we find were duly dated. DW2 produced a ballot paper for entry numbers 295 and 673, where the plot balloted was indicated as number 491. On the flip side, the respondent asserted that he balloted for Plot No. 491. He produced a ballot paper and receipts for payment of survey fees and shares acquisition. Both the receipt and the ballot were cancelled, and

Plot No. 022 was deleted and in its place, plots numbers 491 and 492 were inserted. It is important to point out that whereas the dates on some of the receipts were ineligible, the date indicated on Receipt No. 0138 was 24th January 1977. This appeared to be earlier than the first contact of Clement with the plot, which was in 1988. The appellant's wife, Cecilia Waithera Kamau, acquired shares with respect to entry numbers 295 and 673 on 25th July 1988. It is unfortunate that none of the parties found it necessary to call a witness from the company. However, the respondent produced a letter dated 10th September 1999 as exhibit 11. The production of this letter was not challenged, nor was its veracity or contents impeached on cross-examination. This letter confirmed that, according to the records of the company, the suit property belonged to the respondent and not to Clement.

20. It is also important to point out that it became clear that Joreth Ltd commenced processing titles in 2005. The circumstances leading to the title reverting to Joreth Ltd from the company are not clear, and neither are they of concern to us in this appeal. The appellant and the respondent did indeed agree that, for some reason, payments were being made to Joreth Limited before titles could be processed. Be that as it may, it is appreciated that the respondent presented his documents to Joreth Limited, which must have tallied with the records of the company and paid the requisite fees prior to being issued with the title to the suit property. Cumulatively, the respondent produced receipts for entry into the company, survey fees, and purchase of shares. He also tendered a plausible explanation on how he bade for two plots, by virtue of having two shares, using one ballot paper. Additionally, despite the receipts being cancelled, the respondent offered an explanation which was not controverted by Clement. It is also relevant to point out that the cancellation and alteration of the plot number was uniform across all the respondent's documents. The letter from the company also gave credence to the respondent's case of ownership of the suit property. On the other hand, other than the ballot paper of Margaret Njeri Mwaura, Clement produced no other document to establish that, indeed, Plot No. 491 belonged to Margaret Njeri Mwaura and Anne Wambui Kaguru. The respondent's case was more believable in the circumstances and based on the evidence on record. We, therefore, do not find any misapprehension of the evidence by the learned Judge in finding that the respondent had established his case of ownership of the suit land. In agreeing with the learned Judge, we appreciate that the role of this Court on a first appeal is as was as held in Kiruga vs. Kiruga & Another [1988] KLR 348, and cited in Francis Gicharu Kariri vs. Peter Njoroge Mairu [2005] eKLR, that:

> "2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.
>
> 3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.
>
> 4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."

[Emphasis ours]

From the record, we are not convinced by the appellant, and we find no reason for disturbing the conclusions of the learned trial Judge.

21. Before we conclude, we observe that Clement had filed a counterclaim based on fraud. As was held in Pamba Ong'weno Amila vs. John Juma Kutolo [2015] KECA 867 (KLR), where fraud is alleged, the facts must be set out and evidence led thereon to prove fraudulent intent. It was also held in Kagina vs. Kagina & 2 Others [2021] KECA 242 (KLR) that fraud must be proved as a fact by evidence whose

standard is beyond a balance of probabilities but not as high as that of beyond reasonable doubt, which is applicable in criminal proceedings.

22. The particulars of fraud pleaded by Clement revolved around the cancellation and alteration of receipts and plot numbers in the documents produced by the respondent and the acquisition of title by the respondent during the pendency of the suit. As pointed out earlier, the respondent tendered an explanation of what occasioned the alterations. He also produced a letter from the company indicating that Plot No. 491 belonged to him. On the other hand, Clement did not adduce any evidence to counter or dislodge the respondent's strong defence to the allegations of fraud as pleaded. In the circumstances, Clement failed to surmount the hurdle of establishing fraudulent or dishonest activity by the respondent, and the learned Judge cannot be faulted for dismissing his counterclaim.

23. Another contestation raised by the appellant is that the respondent defied court orders and secured a title to the suit property during the pendency of the suit. Having found that the trial Judge correctly determined the claim in favour of the respondent, we find no reason to address this issue as it will not change our determination of the appeal.

24. In the circumstances, we find no merit in this appeal, and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR