Kyalo v Mutio (Civil Appeal 609 of 2019) [2025] KECA 904 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 904 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 609 OF 2019

W KARANJA, LA ACHODE & GV ODUNGA, JJA

MAY 23, 2025

BETWEEN

JOHN NDETO KYALO ..... APPELLANT

AND

NTHENYA MUIA MUTIO ..... RESPONDENT

(Being an Appeal against the Judgment and Orders of the Environment and Land Court of Kenya at Machakos (Angote, J.) made on 29th September 2017 in ELC Case No. 73 of 2009)

JUDGMENT

1. This appeal arises from the judgement delivered by the Environment and Land Court ELC) at Machakos (Angote, J) on 29th September 2017 in *ELC Case No. 73 of 2009*. In the case, filed by the respondent, it was contended that the respondent was the registered proprietor of land known as Okia/Nzuuni/X1 (the suit land) which originally measured 2.54Ha; that the appellant fraudulently caused the suit land to be surveyed and a Title Deed issued in her favour showing that the respondent's land measured 1.15Ha instead; that the appellant fraudulently forged the sale agreement which indicated that she knew how to write yet she never sold the suit land to the appellant; that in November 2007, the appellant with his agents trespassed on the suit land and damaged her crops. The respondent, in her plaint, therefore sought orders for eviction of the appellant from the suit land.

2. On being cross-examined, the respondent stated: that the appellant was known to her but hailed from a different location; that Mr. Kiema, who testified as DW2, was his son-in-law who was linked to the death of her daughter; and that DW2 and her deceased daughter never witnessed her sign agreement of sale and asserted that DW2 was her enemy.

3. The respondent's evidence was supported by PW2, her daughter, who informed the court: that her mother's land initially measured 2.54Ha; that they had recently discovered that the appellant had fraudulently caused the suit land to be surveyed and a Title Deed issued in his name; that she never went to the Land Control Board; that the respondent was illiterate and could not have signed the purported

agreement; that when the respondent sold a portion of her land to a third party, she used her thumb print to sign the agreement; that although the land had been adjudicated, they only saw the Title Deed for the land for the first time when they sued the appellant; that they were not satisfied with the acreage that has been shown on their Title Deed; that her late sister never witnessed the respondent sign the agreement of sale since she was the one who lives with the respondent; that she did not know DW3, Mulunje Mwevia, although she had heard that he worked for the appellant while DW2 had married her sister; and that she never saw a surveyor on the land.

4. On his part, the respondent, testifying as DW1, informed the court: that he had known the respondent for many years as a fellow villager; that in 1980, the respondent sent his elder brother to inform him that she intended to sell her land; that the respondent sold to him the land in piecemeal for Kshs. X18,000; that by the time he entered into the agreement of sale with the respondent, the land did not have a Title Deed and it measured 3½ acres; that he paid the purchase price between 1980-1999 and that the last instalment he paid was in the form of a bull which was valued at Kshs. 9,000; that the agreement for sale was witnessed by the respondent's deceased daughter, the respondent's son in law (DW2) and DW3; that whenever he made payments, the respondent used to acknowledge the same by signing her name; that in the agreements entered into between the respondent and other third parties, the respondent also signed her name; that the respondent subsequently sold the remaining portion of her land to other buyers; that upon completion of the payment, he was given possession of the suit land in 1980; that it was him who pursued the two titles at the respondent's request; that the survey was done by a surveyor known as Kyalo and it was the respondent who pointed to the surveyor the portion that she had sold to the appellant; that both titles were issued the same day; that problems started in 2006 when the appellant retired and started cultivation when the respondent sued him before the District Officer but the case was decided in his favour; and that although the court had ordered that status quo be maintained, the appellant was evicted from his portion of the land.

5. DW2, the respondent's son-in-law, testified: that he got married to the respondent's late daughter in the year 1970 but his wife died in 1995 during child-birth; that in 1980, respondent sold land to the appellant and he, together with his late wife, witnessed the agreement for sale at the request of the respondent; that the agreement was also witnessed by DW3; that the appellant used the land for almost three seasons;

6. DW3, Mulunje wa Mwivia, also supported the appellant's case stating: that he knew both the appellant and the respondent who were from his village; that in the 1980's the respondent approached him twice to witness agreements between her and the appellant in which the respondent also acknowledged receipt of money; that other witnesses such as one Jackson were still alive; that he signed the agreement dated 1st January 1989; that whenever the respondent went to him, she used to be alone in the absence of her family members apart from her daughter, Wanza Kiamba, who with DW2, her husband, used to be called to witness the receipt of money by the respondent from the appellant; that after the transaction the appellant was given back the land and started using it; and that during the survey, the appellant involved the neighbours who were aware that the land belonged to the appellant.

7. In his judgement, the learned Judge found, inter alia,: that it was not in dispute that by 1980, the Title Deed for the land which belonged to the respondent had not been issued; that the title documents in respect to Okia/Nzuuni/X1 and Okia/Nzuuni/1XX7 were issued on 6th May 2002, the registers having being opened on the same day; that the agreement of 4th December 1980 showed that the appellant purchased land from the respondent for Kshs. 27,300 and paid a deposit of Kshs. 5,000 leaving a balance of Kshs. 22,300 which was to be paid on 19th April 1981, 5th July 1982, 7th April 1984 and 13th October 1985; and that it was not clear from the agreement of April 1987 if the appellant had paid the balance of Kshs. 22,300 from the first agreement.

8. According to the learned Judge, several other pieces of purported agreements and acknowledgements which were purportedly entered into between the appellant and the respondent; that the confusion on what the appellant was buying from the respondent and for how much continued with further agreements; that some of the purported agreements included the agreement of 19th April 1981 stating that the appellant had paid for "the above piece of land whose price was Kshs. 5,000"; that other purported acknowledgements showed that the appellant paid the purchase price by giving the respondent a bag of maize in March 1989, cash of Kshs. 100 on 14th April, 1989 etc; and that the convoluted nature of the several pieces of papers which the appellant produced purporting to be agreements departed completely from the purported agreement of 4th December 1980 which was clear that the Defendant was to make a final settlement of Kshs. 9000 on 13th October 1985.

9. According to the learned Judge, having not defined or described the land that he was buying from the respondent, it was not surprising that the appellant went ahead to re-survey the original parcel of land belonging to the respondent resulting into two Title Deeds being issued on the same day in respect of parcel of land number Okia/Nzuuni/X1 and Okia/Nzuuni/1XX7 in the respondent's name and his name respectively; that having not denied that parcel of land known as Okia/Nzuuni/1XX7 originally belonged to the respondent, and that the said land measured 1.39Ha (approximately 3.47 acres), the appellant did not explain to the court how he arrived at those acreages while re-surveying the respondent's land; that whereas the numerous pieces of unclear and ambiguous agreements produced by the appellant were said to have been signed by the respondent, who was illiterate and old, by way of writing her name, the copies of the agreements between the respondent and the other parties showed that the respondent always signed documents using her thumb print, and not by writing her name.

10. The learned Judge held: that the appellant took advantage of the respondent's illiteracy and old age to carve out of the original land, parcel of land number Okia/Nzuuni/1XX7 measuring 1.39Ha; that there was no evidence to show that there was a valid Sale Agreement between the appellant and the respondent in respect of Plot No. 1XX7; and that the Title Deed for parcel of land known as Okia/Nzuuni/1XX7 was fraudulently created from parcel of land number Okia/Nzuuni/X1.

11. Accordingly, the learned Judge allowed the respondent's claim and issued an order cancelling the register and the Title Deed in respect of parcel of land number Okia/Nzuuni/1XX7. He directed the Land Registrar to rectify the register and the Title Deed in respect of land parcel number Okia/Nzuuni/X1 by consolidating Land parcel Okia/Nzuuni/1XX7 and Okia/Nzuuni/X1 and issuing to the respondent one Title Deed for the consolidated parcel of land. Each party was directed to bear own costs.

12. Dissatisfied with that decision the appellant appealed to this Court on the grounds: that the learned Judge erred in law and fact by: failing to make a finding that the suit, as filed by the respondent and the prayers sought, was defective in substance and incompetent to warrant the orders sought; by misdirecting and prejudicing the appellant's case in considering only the respondent's case while not commenting on appellant's case; failing to point out issues for determination, analysis, decision and reasons for the decision; that the learned Judge relied on his own surmises, conjectures, presuppositions and theories as to how the suit property LR No. Okia/Nzuuni/X1 became LR No. Okia/Nzuuni/1XX7; that the learned Judge erred and misdirected himself in law by selectively interpreting the law by requiring the appellant to produce a Land Control Board consent to establish the legality in occupying the land yet failing to ask the respondent for the Land Control Board consent allowing him to partition the original LR No. Okia/Nzuuni/X1 to become LR No. Okia/Nzuuni/1XX7; that the learned Judge erred by granting orders that were not prayed for by the respondent; and that the learned Judge failed to make a finding that the respondent confirmed having

sold the suit property, received the entire purchase price and put the appellant in possession of the same thereby creating constructive trust in favour of the appellant.

13. When the appeal was called out for plenary hearing on 25th February 2025, the appellant was represented by learned counsel, Mr Tamata, while the respondent appeared in person.

The parties relied entirely on their written submissions.

14. It was submitted on behalf of the appellant: that the case before the learned Judge was for encroachment on LR No. Okia/Nzuuni/X1; that the trial court instead of awarding the orders sought, ordered for cancellation of appellant's title when forgery, fraud and cancellation of title were not pleaded in the plaint but only raised for the first time in the submissions and in the judgement; and that the issues of illegality and lack of Land Control Board were not pleaded before trial court. In support of the submissions, the appellant relied on; *Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another* (2014) eKLR; *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* [2015] eKLR; *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UG CA 6; *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR; and *Jones v National Coal Board* [1957] 2 QB 55 on the proposition that parties are bound by their pleadings.

15. The appellant further submitted: that the documents produced by the appellant, such as the Report of District Commissioner dated 18th October 2007, the ruling dated 16th January 2012 and the Sale Agreement between respondent and Joseph Mbithi dated 25th November 1984 and 4th August 985 indicating that the respondent knew how to write, were all ignored; and that the learned Judge distorted the facts to aid the the respondent's case.

16. In light of the developments that had taken place since the delivery of the judgement, the appellant urged that the appeal be allowed and that the following orders be granted: appellant's title No. Okia/Nzuuni/1XX7 be reinstated forthwith; the respondent or purported buyers be evicted therefrom; the appellant be issued with original green card; and costs of the appeal.

17. The respondent, on the other hand, submitted: that the appellant fraudulently excised plot no. 1XX7 which was part of the LR No. Okia/Nzuuni/X1, thus the learned Judge rightly ordered cancellation of the title; that the appellant failed to show that he obtained the consent of the Land Control Board to subdivide LR No. Okia/Nzuuni/X1 and transfer the land in his favour; that if indeed LR No. Okia/Nzuuni/1XX7 was excised from the mother title parcel of land no. X1, then the mother title deed ought to have been extinguished and new title deed numbers issued to reflect subdivision; and that the judgment was properly arrived at as required by law.

18. We have considered the foregoing and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in Rule 31(1) a of the *Court of Appeal rules* which requires this Court sitting as a first appellate court to re- evaluate, reassess and reanalyse the record of the trial court in its entirety and draw its own conclusions. These provisions have been underscored in numerous decisions of the

Superior Courts among them Pe*ters v Sunday Post Limited* [1958] EA 424, where the predecessor to this Court expressed itself as follows:

> " Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. ...'

19. From submissions made, the broad issue that falls for our determination is whether the respondent proved her case against the appellant on a balance of probability.

20. The respondent's case, as pleaded, was that the appellant, with her consent, caused the suit property to be resurveyed and subdivided giving rise to two parcels of land. It was her case that she was not aware of the transaction that gave rise to the said subdivision as she never entered into any agreement for sale with the appellant. Her case was that she was illiterate and her mode of execution of agreements was by way of thumb printing. She called, as PW2, her daughter who supported her case.

21. On the other hand, the appellant's case was that he was informed by his brother that the respondent was selling part of the suit land. Accordingly, an agreement was reached between himself and the respondent in which part of the said land was sold to him in the sum of Kshs X18,000 after which he went into possession thereof. The said agreement was witnessed by DW2, who was the respondent's son in law, DW2's wife and DW3.

22. As regards the exact size of the land sold to the appellant, the learned Judge noted that:

> " The Agreement of 4th December, 1980 does not state the acreage of the land that the Defendant was purchasing from the Plaintiff. The parties are said to have entered into another agreement of 30th April, 1987 in which the Plaintiff purportedly added the Defendant "another portion from her land in order to make boundary take proper shape." The Agreement was purportedly witnessed by DW2 and DW3. Again, the Agreement of 30th April, 1987 does not state the acreage that the Plaintiff had agreed to sell to the Defendant in addition to the initial land."

23. It is true that there was no single document in which the acreage of the portion of land being sold was indicated. At the end of the day, the learned Judge held that:

> " The convoluted nature of the several pieces of papers which the Defendant produced purporting to be agreements departed completely from the purported agreement of 4th December, 1980 which was clear that the Defendant was to make a final settlement of Kshs. 9000 on 13th October, 1985."

24. The learned Judge cannot therefore be faulted for concluding that:

> " Having not defined or described the land that he was buying from the Plaintiff, it is not surprising that the Defendant went ahead to re-survey the original parcel of land belonging

to the Plaintiff and having two Title Deeds issued on the same day in respect of parcel of land number Okia/Nzuuni/X1 and Okia/Nzuuni/1XX7 in the Plaintiff's name and his name respectively. Having not denied that parcel of land known as Okia/Nzuuni/1XX7 originally belonged to the Plaintiff, and that the said land measures 1.39Ha (approximately 3.47 acres), the Defendant did not inform the court how he arrived at those acreages while re-surveying the Plaintiff's land."

25. Apart from lack of clarity on the exact acreage of the land that was the subject of the transaction, it is not clear what the agreed mode of payment for the land was and whether the whole consideration was paid by the appellant. In his evidence, the appellant stated that:

> " The last payment was in terms of a bull which was valued at Kshs 9,000/= That was the last payment I made."

26. It is not clear at what point the parties, who were transacting in cash, opted for barter system of payment. No evidence was adduced as to how the parties arrived at the valuation of the bull in question and who were present when the agreement was being made.

27. Having re-evaluated the evidence presented before the learned Judge we agree with the learned Judge's conclusion that:

> " ...there is no evidence before me to show that there was a valid Sale Agreement between the Plaintiff and the Defendant in respect of Plot No. 1XX7."

28. Accordingly, we find no merit in this appeal which we hereby dismiss but considering reliefs granted vis-à-vis the pleadings, we direct each party to bear own costs of the appeal.

29. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

W. KARANJA

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

G.V. ODUNGA

JUDGE OF APPEAL