



REPUBLIC OF KENYA



Wachira & another v Warothe & another (Environment and Land Appeal E023 of 2021) [2024] KEELC 1500 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E023 OF 2021**

**JO OLOLA, J
MARCH 20, 2024**

BETWEEN

JAMES NGATIA WACHIRA 1ST APPELLANT

ELIJAH MACHARIA WACHIRA 2ND APPELLANT

AND

TITUS MURAGURI WAROTHE 1ST RESPONDENT

LUCY WANJIRU CHEGE 2ND RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Nelly W. Kariuki, Principal Magistrate as delivered on 9th April, 2020 in Nyeri MCL&E Case No. 206 of 2018.
2. By their Complaint dated and filed in the Lower Court on 23rd March 2023, James Ngatia Wachira and Elijah Macharia Wachira (the Appellants) had sought for Judgment as against the two Respondents and urged the Court to issue an eviction order requiring the Respondents to vacate the parcel of land known as Nyeri/Mweiga/1186. The Appellants has also sought for general damages for trespass as well as the costs of the suit.
3. The basis for those prayers was the Appellants' contention that the Respondents had illegally and without their consent entered into the said parcel of land which was registered in the Appellants' name and had continued to commit acts of trespass thereon.
4. But in their Statement of Defence and Counter-claim dated and filed in Court on 2nd June 2016, Titus Muraguri Warothe and Lucy Wanjiru Chege (the Respondents) denied that the Appellants were the registered proprietors of the suit property and or that they had trespassed thereon. On the contrary, it was the Respondents case that they had purchased the said parcel of land from one Moses Wachira Kimotho and had paid the full purchase price but the vendor died before effecting the transfer.



5. The Respondents further asserted that they had respectively taken possession of their respective portions of the land in October, 1998 and February, 1999 with the consent of the vendor and that that fact was known to the Appellants.
6. By way of their Counterclaim, the Respondents averred that having been purchasers for value and having been in uninterrupted occupation since October, 1998 and February, 1999 respectively, they had acquired rights to the suit property and the Appellants interest to the same had been extinguished.
7. Accordingly, the Respondents sought orders for the Appellants suit to be dismissed and a declaration that they had acquired a good title to the suit property and hence the registration of the Appellants as the proprietors of the property ought to be cancelled. In the alternative, the respondents sought an order to the effect that they had acquired the property by adverse possession.
8. Having heard the dispute and in her Judgment delivered on 9th April 2020, the Learned Trial Magistrate arrived at the finding that neither Party merited any of the prayers sought in both the suit and the Counterclaim and proceeded to dismiss both with an order that each Party bear their own costs.
9. Aggrieved by the said determination, the Appellants lodged the Memorandum of Appeal dated 1st July, 2021 as amended on 5th May, 2022 urging this Court to set aside and/or vary the Judgment of the Lower Court on the grounds:
 1. That the Learned Trial Magistrate failed to address her mind to the pleadings on record and evidence by the Appellants particularly towards supporting the acquisition of the title through transmission;
 2. That the Learned Trial Magistrate erred in law and fact by failing to consider and evaluate the entire evidence as well as supporting documents presented by the Appellants;
 3. That the Learned Trial Magistrate erred in law and fact by failing to appreciate and consider the history of the suit land.
 4. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's case whereas the Appellants had tendered sufficient evidence to warrant the orders sought;
 5. That the Learned Trial Magistrate failed to comprehend the (Appellants') issues for determination and erroneously unjustifiably made findings on imaginary concerns; and
 6. That the Learned Trial Magistrate delved into matters clearly ultra vires to her mandate particularly by purporting to ouster the Appellants' proprietary rights over the suit land, occasioning a miscarriage of justice.
10. Being the first appellant Court, this Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123].
11. Accordingly, I have carefully perused and considered the Record of Appeal as well as the Judgment delivered by the trial Court. I have similarly perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.
12. By their Memorandum of Appeal herein dated 1st July, 2021 and as amended on 5th May 2022, the two Appellants have raised some six (6) grounds on the basis of which they fault the Judgment of the



Lower Court and urge this Court to set aside the same. In my considered view, all those grounds boil down to a single issue. That issue is whether or not the Learned Trial Magistrate erred in law and in fact by failing to consider and evaluate the entire evidence placed before her and whether or not as a result, there was a miscarriage of justice.

13. By their Plaint before the trial Court, the two Appellants had sought an order of eviction against the two Respondents as well as an order for general damages on account of the fact that the Appellants were the registered proprietors of the parcel of land known as Nyeri/Mweiga/1186. The Appellants accused the Respondents of proceeding without their consent to illegally trespass upon the said parcel of land and of continuing to commit various act of trespass thereon.
14. On their part, the Respondents while admitting that they were in occupation of various portions of the suit property, denied any wrong doing. It was their case that prior to their occupation of their respective portions of the land, they had purchased the same from one Moses Wachira Kimotho who was then the registered proprietor of the suit property. The Respondents asserted that it was the vendor of the suit property who put them in possession of the land but that he passed away before effecting transfer into their names.
15. Having heard the parties and evaluated the evidence before her, the Learned Trial Magistrate was of the view that the matter raised three (3) issues for determination which issues she proceeded to list as follows:
 - (a) Have the Plaintiffs proved ownership of L.R Nyeri/Mweiga/1186?
 - (b) Have the Defendants acquired the title of L.R Nyeri/Mweiga/1186 by way of adverse possession?
 - (c) Are both Parties entitled to the prayers sought accordingly?
16. Having considered the material before her as regards the first issue, the Learned Trial Magistrate concluded as follows at Paragraph 10 of her Judgment:

“ 10. The Plaintiffs claim is that they acquired their joint title deed by way of transmission on the premise of the fresh proceedings instituted as directed by the Hon. Justice Makhandia’s decision of 22nd July, 2009. However, this Court is alive to the findings of Hon Justice Makhandia J (as he then was) in his decision of 10th February, 2009 in which he stated as follows:

“ As it is therefore, the grant was obtained fraudulently by making a false statement and/or concealment from Court of something material to the case. The Respondents knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her Petition of the Letters of Administration Intestate. She also ignored them completely when she applied for the confirmation of grant. In her distribution proposal, she completely ignored that part of the estate that was purchased by the Applicants yet she was aware of the purchase as she was present when the transactions were concluded ...”

To my understanding, the mother of the Plaintiffs herein as the Applicant in the Succession cause before the Honourable Judge was chastised for concealing the material fact that the respondents therein (the Defendants herein) had an interest in the estate of their late husband thus the revocation of



the grant. To my knowledge, this decision still stands unchallenged as no evidence had been presented by the Plaintiff to show otherwise. The Plaintiffs proceeded to apply the decision of 22nd July, 2009 by filing a fresh succession cause in full awareness of the Defendants interests in their father's estate and proceeded to lock them out for a second time. In my view, they blatantly disregarded the decision of the Honourable Judge. Consequently, the ownership of the Plaintiffs of the suit land is questionable as the process by which they acquired the title deed was marred by misrepresentation on their part as a result of ignoring the Honourable Judge's decision."

17. As it were, from the material placed before the Court, the dispute herein commenced way back in the year 2002 when one Naomi Wanjiru Wachira, the mother to the Appellants initiated succession proceedings at the High Court at Nyeri following the death of her husband one Moses Wachira Kimotho. Following the death of Moses who was also the father to the two Appellants herein on 17th November 2000, their mother, the said Naomi Wanjiru Wachira instituted Nyeri High Court Succession Cause No. 122 of 2002 and proceeded to obtain Letters of Administration intestate of the estate of the deceased on 30th August, 2002. On 14th July 2003, she was issued with a confirmed Grant.
18. Upon learning of the Grant and by an application dated 7th January 2008, the two Respondents herein together with one James Muita Wang'ondy moved to Court on 11th January, 2008 seeking for the revocation and/or annulment of the grant of the Letters of Administration issued to the Appellants' mother. From a perusal of the Ruling on the application delivered by the Honourable Makhandia J (as he then was) on 10th February, 2009 (Dexh 3), the grant as issued to Naomi indicated that the suit premises were to be registered in the joint names of the two Appellants herein by way of transmission.
19. It was not in dispute that having considered the Respondent's application and in his Ruling rendered on 10th February, 2009 aforesaid, the Learned Judge allowed the same and revoked the grant on the ground that the same was obtained fraudulently by the making of a false statement and/or concealment from Court of something material to the cause.
20. In his recorded Statement filed in support of the case and dated 23rd March 2016, the 1st Appellant who testified on behalf of himself and his 2nd Appellant brother did admit that the land initially belonged to their late father and that it was registered in their names after conclusion of the succession proceedings.
21. Those succession proceedings could not have been those already referred to in Nyeri High Court Succession Cause No. 122 of 2002 aforesaid, for the grant issued to the Appellants' mother were revoked and annulled on 10th February, 2009. That much was conceded by the Appellants during cross-examination of the 1st Appellant on 6th August, 2019. The Record (Page 85) shows his testimony to the Court as follows:

"My father died in the year 2002. He owned the land originally. We did the Succession in 122 of 2002. My mother filed the Succession Case. The Defendants filed an objection. The Court allowed it. The Court revoked the grant. My mum filed a review of the Court's decision. The Court did not allow the application for review."

22. In re-examination by his Counsel (Page 86 of the Record) the 1st Appellant told the Court that this mother filed for a fresh grant thereafter and that the Respondents did not object to the same. I was however unable from a perusal of the Record to discern any evidence of a fresh application for a grant by the Appellants' mother. If indeed one was filed and it proceeded in the manner contended by the Appellants, then one cannot find any fault in the conclusion arrived at by the Trial Court.



23. As it were, there was already a finding on record to the effect that the Respondents were purchasers for value of a portion of the deceased estate comprised in the grant. At Page 11 of the Ruling delivered on 10th February 2009, the Learned Judge found as follows:

“There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land reference numbers Nyeri/Mweiga/943 and Nyeri/Mweiga/1186 to the Applicants respectively. He had been fully paid the purchase price and had indeed put each one of the Applicants in possession of their respective portions that they had purchased. The Applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The Respondent, who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the Applicants. The deceased pursuant to the Sale Agreements and as required by law made an application to Kieni West Divisional Land Control Board for the necessary consents to the subdivision of the said parcels of land and subsequent transfer to the Applicants of the portions they had purchased. However he passed on just before he could attend to Board meeting.

Yet the Respondent knowing very well the interest of the Applicants in the suit premises when she petitioned for the grant of Letters of Administration and later had the same confirmed, completely ignored that interest of the Applicants in the suit premises. Indeed in her application for the confirmation of the grant she proposed that land parcel Number Nyeri/Mweiga/1186 some portions whereof had been purchased by the 1st and 3rd Applicants be inherited by her sons, James Ngatia Wachira and Elijah Macharia, absolutely.”

24. In my considered view, that position as noted by the Court has never changed. Thus if any Court subsequently issued any grant to the Appellants’ mother in the terms stated by the Appellants, that was certainly done without the benefit of hearing from the Respondents. There was nowhere in which the Appellants contested the Respondents position that they were not served with any fresh Petition for Letters of Administration for the estate of the deceased. It was clear from the circumstances herein that had the Respondents been made aware of another application for confirmation of grant by being served, they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of the those interests.
25. Indeed where a new Petition was filed and the Appellants’ mother were forthright and candid and had included the Respondents as beneficiaries of a portion of the estate of the deceased as purchasers for value, the Court in confirming the grant would have taken into account their interest in the estate of the deceased. It follows that the fresh grant that was used to register the Appellants as proprietors of the suit property by way of transmission would only have been obtained fraudulently by making yet another false Statement and/or concealment from the Court of something material to the cause.
26. In regard to the second issue as to whether or not the Respondents had acquired the title for the suit property by adverse possession, the Learned Trial Magistrate concluded as follows at Paragraph 11 of her Judgment:

“In this instance, the Defendants pleaded that they bought land from the late Moses Wachira Kimotho, paid the purchase price and were put in possession of the suit land before he passed on just before completing of the sale transaction by obtaining consent from the Land control Board. In my view, the true owner of the suit land as it were, was in the process of relinquishing his rights to the land before his untimely demise. By granting the Defendants actual possession of the suit land before the completion of the sale, he manifested his



intentions to transfer his rights to them therefore it cannot be said that their possession of (the) suit land was not permissible. The Honourable Lady Justice Kemei in addressing the Kinya Case supra cited the case of *Samuel Miki Waweru -vs- Jane Njeru Richu*, Civil Appeal No. 122 of 2001, where the Court of Appeal held that:

“... it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”

27. As it were, Section 6(1) of the *Land Control Act* provides as follows:

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.”

28. In the matter before the trial Court, I did not hear the Appellants deny that their late father had sold the portions of the suit land occupied by the Respondents to the Respondents. While they accused the Respondents of trespass, the Appellants conceded that the Respondents had built structures on portions of the suit land from as far back as the year 2000 when their father died.

29. As the Honourable Makhandia J (as he then was) found in his Ruling of 10th February 2009, the deceased as required by law had made an application to the Kieni West Divisional Land Control Board for the necessary consents to the subdivision of the suit property and subsequent transfer to the Respondents of the portions they had purchased. He however passed on before he could attend the Board meeting.

30. In my view, from the time the Respondents entered their respective portions of the suit property, a constructive trust in their favour was created in respect of the land. Considering a near similar situation in *Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri* (2014) eKLR: the Court of Appeal held as follows:

“18. The other critical issue for our consideration is the lack of consent of the Land Control Board. The trial Court held that the suit property being agricultural land was subject to the *Land Control Act*, Chapter 302, Laws of Kenya. Section 6(1) of the said *Land Control Act* required the Land Control Board consent to be obtained in respect of the sale transactions, the failure of such consent made the said agreements void and unenforceable against the respondent. It is our considered view that the Honourable Judge erred in failing to appreciate the evidence given by the Respondents as to how he had intended to complete the sale transaction. The Respondent testified that he did not obtain the Land Control Board consent for the sale transactions because he preferred obtaining the consent once he had sold all the 240 plots.

19. Pending the sale of all 240 plots by the Respondent, the question that comes to mind is, what was to be the legal status and relationship between the Respondent and the Appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots.”

31. Applying the above principles to the matter before me, it was clear to me that as at the time of his death in the year 2000, the Appellants' father had created an implied or constructive trust in favour of the



Respondents herein. Such a trust as was again found in the *Macharia Mwangi Maina case* (*supra*), became an overriding interest over the suit land.

32. Accordingly, it is my finding that the Learned Trial Magistrate misdirected herself on the issue in arriving at the conclusion that the Respondents had not proved their entitlement to their respective portions of the suit property.
33. In the premises I was not persuaded that there was any merit in the Appellants' Appeal herein. Accordingly I hereby dismiss the Appeal but set aside the orders of the trial Court dismissing the Respondents' Counterclaim and hereby substitute the same with a declaration that the Respondents have acquired good title to their respective portions of Title No. Nyeri/Mweiga/1186. The Appellants registration as the proprietors of the said portions should henceforth be cancelled.
34. The Respondents shall have the costs of both their Counterclaim in the Lower Court as well as the costs in this Appeal.
35. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 20TH DAY OF MARCH, 2024.

In the presence of:

Ms Nanjala holding brief for Ombongi for the Appellant

No appearance for the Respondents

Court assistant - Kendi

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J. O. Olola

JUDGE

