Mucheke v Arithi (Civil Appeal 173 of 2018)
[2025] KECA 1145 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1145 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 173 OF 2018

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JUNE 20, 2025

BETWEEN

ANGELA GATUMI MUCHEKE ..... APPELLANT

AND

ELIPHAS MBAE ARITHI ..... RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Meru (L. Mbugua, J.) delivered on 24th January, 2018 in E.L.C. Appeal No. 35 of 2015)

JUDGMENT

1. This is a second appeal the original dispute having been filed at the subordinate court at Nkubu by the appellant Angela Gatumi Mucheke against the respondent Eliphas Mbae Arithi. Our mandate in a second appeal like this one was recognized by this Court in the case of Charles Kipkoech Leting vs. Express (K) Limited & Another [2018] eKLR as follows:

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or

first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. The case by the appellant before the subordinate court was captured in a plaint filed in that court and in witness statements filed in the case. It was that she was the widow of the late Lawrence Kinoti Zakayo who died in 2007. He was the original registered owner of a parcel of land LR No. Nkuene/ Mitunguu/861 ('the suit land'). Upon his death she applied for and obtained Grant of Letters of Administration and the parcel of land was transferred to her through the succession proceedings. According to her and her witnesses the respondent had settled on the land as a tenant where he had built a semi- permanent house and planted crops on the land in the year 2009. She prayed for an order of eviction of the respondent from the land and costs of the suit.

3. The respondent filed a defence and counterclaim where he denied the appellant's claims pleading without prejudice or in the alternative that in the year 2005 he bought 1 acre out of the suit land from the original owner the said Lawrence Kinoti Zakayo in consideration of purchase price paid leaving a balance of Kshs.20,000 which he was to pay on transfer. He further stated that he was put in possession by the original owner in the year 2005 and had moved to the suit land and developed it; that Zakayo died before completing the transaction and he accused the appellant of fraudulently and secretly filing succession proceedings and having the suit land registered in her name. As particulars of fraud he alleged that the appellant had not disclosed to the court his rights as an innocent purchaser for value and not disclosing that he was in possession of the suit land. In particulars of breach of trust he stated that the appellant had refused to transfer the 1 acre to him; that she had hidden from the court his rights on the suit land and that she had not been candid to the court and had hid the truth. He therefore counterclaimed for 1 acre to be excised from the suit land.

4. The matter was heard and in a judgment delivered by the Principal Magistrate on 1st July, 2015 the magistrate questioned the authenticity of an acknowledgement receipt that had been produced by the respondent as part of the evidence; held that the counterclaim had not been proved and the same was dismissed. The appellant's case succeeded and was allowed.

5. The respondent was dissatisfied with those findings and filed an appeal at the High Court of Kenya at Meru which appeal was heard by Njuguna, J. and in a judgment delivered on 24th January, 2018 the appeal was found to have merit and was allowed. Those findings provoked this appeal through Memorandum of Appeal drawn for the appellant by her lawyers M/s B. G. Kariuki & Company Advocates where 8 grounds of appeal are set out. The appellant says that the Judge erred in law and in fact in holding that the issues for trial as framed by the trial magistrate were properly done; that the Judge erred in law and in fact in holding that the appellant was holding the 1 acre of land in trust for the respondent; that the Judge erred in law and in fact in failing to notice and to hold that the appellant obtained the suit land in Succession Cause No. 277 of 2008 Meru and further failed to hold that the respondent's only possible remedy was to file an objection or a protest to claim 1 acre of land from the estate of the deceased; that the Judge erred in law and in fact in deciding the suit against the appellant who had not been appointed as a legal representative of her deceased's husband estate and who lacked locus standi to swear in respect of an alleged sale she knew nothing about; that the Judge erred in law and in fact in awarding the respondent 1 acre of land from the suit land in what amounted to specific performance of contract wherein the appellant was not a party and where the respondent had not paid the sum of Kshs.20,000 to qualify for the equitable remedy of the specific performance.

6. In the next ground the Judge is faulted for ordering the appellant to give to the respondent vacant possession of one acre of the suit land; and in the penultimate ground the Judge is faulted for relying on Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 of 2011, Macharia Mwangi

Maina & 87 Others vs. Davidson Mwangi Kagiri [2014] eKLR, when it was not the appellant who had put the respondent in possession. The appellant says in the last ground that the judgment was against the weight of the evidence and the law. We are asked to allow the appeal with costs to the appellant When the appeal came up for hearing before us on 3rd March, 2025 on a virtual platform, learned counsel Miss Susan Mbumbuya appeared for the appellant. There was no appearance for the respondent who we were satisfied had been served with a hearing notice on 20th February, 2025 at B. G Kariuki, bgkariuki@gmail.com, Maitai Rimita, maitairimita@yahoo.com. Both sides had filed written submissions which we have perused and considered.

7. After giving a history of the case the appellant in written submissions submits that since no objection was raised in Meru High Court Succession Cause No. 277 of 2008 the respondent was not entitled to be awarded 1 acre to the suit land. It is submitted that there was no evidence to support trust the appellant taking the position that the late Zakayo held the suit land absolutely with all rights and privileges appurtenant thereto. It is submitted that the Judge was wrong in not finding that the appellant had no locus standi to appear in the suit. We observe here that this is an interesting submission considering that it was the appellant who was the plaintiff in the case and she is the one who had approached the trial court for a remedy and it is therefore surprising that she can raise an issue regarding locus. It is further submitted that the respondent was not entitled to any orders as he had not paid the balance of the purchase price.

8. It is submitted on behalf of the respondent that the respondent had taken possession of 1 acre of land from the suit land and had been put in possession by the original owner. That the appellant applied for grant of letters of administration, received a grant and therefore obtained the necessary locus standi enabling her to sue on behalf of her late husband's estate. It is submitted that from the documents produced before the trial court it was obvious that a buyer-seller relationship existed between the respondent and the deceased out of which the respondent was put in possession. The case of Mwangi Maina & 87 Others (supra) is cited where it was held:

> " We find that the Respondent having put the Appellant in possession of the suit property created an overriding interest in favour of the appellant.., it is our considered view that the Respondent created and implied or constructive trust in favour of those who had paid the purchase price..."

9. The Court went on to say in that case:

> " We do find that the possession and occupation by the Appellant of the suit property is an overriding interest attached to the suit property. ..."

10. We have considered the whole record, submissions made and the law.

11. As we have already stated our mandate in a second appeal like this one is confined to matters of law only.

12. There was evidence before the trial court that the respondent had settled on the suit land in 2005 when the deceased (original owner) was alive and occupied part of the suit land. It is the deceased who put the respondent in possession of the land. In testimony before the subordinate court the appellant stated:

> "the defendant was a lessee of the land from my husband. I did not see the lessee. I had registered a caution on the land during the life of my husband to prevent him disposing it off since he was a drunkard. The defendant acquired occupation in 2005..."

13. In cross examination the appellant confirmed that the respondent had been in occupation of the suit land since 2005 and that her husband died in 2007:

> " the defendant has bananas and horticultural crops there. He has two wooden houses there. He has no animals there. All these development he started in 2005..."

14. The deceased's own relatives including his own mother Elizabeth Mukoru (DW2) confirmed that her son the deceased had sold land to the respondent and that the respondent resided on the land and had planted crops on the same. The deceased's brother Patrick Kaguru M'Ibari (DW3) testified that his deceased brother had sold 1 acre of land to the respondent and that the land had been sub-divided by a surveyor and that the respondent resided on the land and had planted crops on the same. This was reconfirmed by the deceased's sister Everline Naitore Zakayo (DW4). So there was overwhelming evidence about occupation of the land by the respondent.

15. The Judge on first appeal considered the holding in Mwangi Maina & 87 Others (supra) and the provisions of section 28(b) of the *Land Registration Act* which provides:

> " Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
>
> a. ...
>
> b. trust including customary trust."

16. The Judge also considered the provisions of section 27 of the same Act which is to the effect that:

> "(1) A proprietor who has acquired land, a lease or a charge by transfer without valuable consideration holds it subject to-
>
> a. any unregistered rights or interests subject to which the transferor held it; and
>
> b. the provisions of the *Insolvency Act* (Cap.53) so far as they are applicable in the circumstances.
>
> (2) When registered, such a transfer has the same effect as a transfer for valuable consideration."

17. The Judge found that the respondent had acquired possessory rights in the land having been put on the land by the deceased. We agree.

18. The respondent was put in possession of the land by the deceased when the deceased was alive. He moved into the land and developed it. His interests in the land were obvious to the appellant and his occupation of the land created an overriding interest in his favour. We find this appeal to have no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2025.

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR