Mwasambu & another (Appealing as the administrators of Masumbuko Jambo Mwasambu (Deceased)) v Kenga (Civil Appeal E043 of 2021) [2024] KECA 357 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 357 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E043 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MARCH 22, 2024

BETWEEN

OSCAR LULU MWASAMBU ..... 1ST APPELLANT

ANDERSON MWARINGA MWASAMBU ..... 2ND APPELLANT

APPEALING AS THE ADMINISTRATORS OF MASUMBUKO JAMBO MWASAMBU (DECEASED)

AND

HARRISON DZENGO KENGA ..... RESPONDENT

(An Appeal against the decision and orders of the Environment & Land Court at Malindi (Olola, J.) delivered on the 21st February, 2019 in Malindi ELC Civil Case No. 292 of 2016)

JUDGMENT

1. Masumbuko Jambo Mwasambu (the deceased) filed a suit at the Kilifi Resident Magistrates Court on 25th September 2007. In his Plaint, the deceased sought a declaration that the respondent, Harrison Dzengo Kenga, was: i) unlawfully and illegally demanding possession of six acres of Plot No. Kilifi/ Ngerenya/868 (the suit land); ii) an order directing that the caution lodged against the title to the suit land be removed; iii) a permanent or mandatory injunction against the respondent, his servant or his agents from interfering with his peaceful enjoyment of the entire suit land; iv) damages for unlawful and illegal lodging of caution against the suit land; v) costs and interest.

2. Upon service of the suit, the respondent filed a defence and counterclaim against the deceased in which he also sought: i) a declaration that the deceased had sold him 6 acres of the suit land, and that the documentation of the land being sold in the Sale Agreement dated 14th February 1989 and 23rd October 1993 and the transfer made on 17th January 1996 as Plot No. Kilifi/Ngerenya/898 was erroneous or

mistakenly indicated; and an order directing the deceased to surrender for rectification to the Kilifi District Land Registrar the Title Deeds from Plot No. Kilifi/Ngerenya 868 and the subdivided portion, Plot No. Kilifi/Ngerenya/1012.

3. It was the respondent's case that, on 14th February 1989, the deceased sold him 6 acres of a parcel of land situated at Ngerenya Village for Kshs. 40,000. The agreement for sale comprised one that was hand-written and another that was typed. On the date of the agreement, he paid Kshs. 4,000 as down payment, and that it was agreed that the rest of the purchase price would be paid in instalments.

4. He claimed that at the time they entered into the agreement, the property was unregistered, and that it was agreed that the vendor would process the title documentation with the Kilifi Lands Office. The respondent stated that he paid a further Kshs. 1,000 on 3rd July 1989 and Kshs. 20,000 on 23rd July 1989, which brought the total amount paid to Kshs. 25,000 leaving a balance of Kshs. 15,000; that it was later agreed that the purchase price be adjusted to Kshs. 70,000, which he subsequently paid; that, thereafter, he accompanied the deceased to the Land Control Board where they obtained the consent to transfer 6 acres of the suit land.

5. On 15th January 1995, a land surveyor carried out a survey of the deceased's land whereupon it was discovered that it comprised 12.5 acres. On 6th February 1996, a title deed was issued to him for his portion being Kilifi/Ngerenya/1013 while the other portion measuring 6.5 acres was registered in the deceased's name being Kilifi/Ngerenya/1012. It was then that they realized that during the preparation of the sale agreement, they had erroneously indicated the wrong parcel number Plot No. 898 in the agreement, and other documentation, and yet the land for which the sale related was Kilifi/Ngerenya/868, and hence the claim.

6. The respondent further testified that, when they discovered the anomaly, they requested assistance from the District Land Adjudication & Settlement Officer, who visited the land and carried out a ground verification of the properties; that the exercise confirmed that he was in occupation of part of Plot No. 868 while the deceased and his family occupied the remainder of Plot No. 868, and that Plot No. 898 was occupied by one Kombe Nzai Lewa. Thereafter, all the parties were summoned by the Kilifi Land Registrar to rectify the error, but that the appellants did not honour the summons or surrender the title deeds for rectification. He stated that he then lodged a Caution against the title and filed the suit in the Resident Magistrates' Court.

7. On 17th August 2008 when the matter came up for hearing, the respondent raised a Preliminary objection to the effect that the deceased's claim was time barred by dint of section 7 of the *Limitation of Actions Act* and, further, that since the claim was also for removal of the caution registered against the land, it could only be tried by the High Court pursuant to section 159 of the Registered *Land Act* (now repealed).

8. Having heard the objections, the trial Magistrate dismissed the objection made pursuant to section 159 of the Registered *Land Act*, but upheld the objection that the suit was time barred. Accordingly, the court proceeded to strike out the suit and ordered each party to bear their own costs.

9. The deceased appealed the decision to the Environment and Land Court at Malindi and, by a judgment delivered on 20th June 2014, the court allowed the appeal and reinstated the suit. Subsequently, the suit was transferred to the Environment and Land Court for hearing and disposal. On 29th January 2018, the parties fixed the matter for hearing on 4th April 2018, but on the hearing date, the appellants, as legal representatives of the deceased, and their advocate failed to attend prompting the court to dismiss their case for want of prosecution. The respondent was thereafter directed to proceed with his Counterclaim and a date fixed for judgment; that an attempt to reopen the case and arrest the judgment was denied

by the trial court, and no appeal was filed against that decision. In a judgment dated 21st February 2018, the trial Judge found in favour of the respondent and allowed the Counterclaim.

10. The appellants were aggrieved by the learned Judge's decision and filed an appeal to this Court on the grounds that the judgment of the Court does not satisfy the mandatory requirements of the Civil Procedure Rules; that the learned Judge failed to consider the appellants' pleadings and allowed the respondent's counterclaim on the basis of evidence which did not prove the case on a balance of probabilities; failed to properly evaluate the respondent's evidence and submissions and wrongly dismissed the appellants' case.

11. The appellants filed written submissions which learned counsel for the appellant, Mr. Odhiambo highlighted during a virtual hearing of the appeal. Counsel submitted that the respondent's evidence did not support the pleadings in his counterclaim in that all the documents produced were in respect of Plot No. 898 and not Plot No. 868; that, further, the Land Control Board consent ought to have been obtained within six months from the date of the agreement and that, having obtained the consent almost three years later, the transaction was null and void. Counsel further submitted that the appellants were not heard during the trial, and that the attempt to reopen the case and to arrest the judgment was denied by the trial court; that, on this basis, the appeal ought to be allowed.

12. On his part, learned counsel for the respondent, Mr. Shujaa, relied on his filed submissions in which he submitted that the learned Judge properly evaluated the evidence and rightly found that the respondent had proved his counterclaim against the appellants; that the handwritten agreement dated 23rd October 1993 was executed by the vendor who affixed his thumb print against his name, and that the respondent, the purchaser and two witnesses also subscribed their respective signatures against their names; and that the respondent also produced in evidence an acknowledgement of receipt of part payment of the purchase price dated 23rdJuly 1989. The acknowledgement was affixed with the deceased's thumb print below the signatures of the witnesses, and next to the respondent's signature; that the acknowledgement of part performance of the contract was in terms of the proviso to section 3 of the Contract Act. The evidence adduced also proved that the respondent took possession of the land after completion of all formalities in part performance of the contract; that the deceased applied for Land Control Board consent and executed the Transfer of land form; that the appellants did not adduce any evidence in rebuttal and that, therefore, the respondent's evidence remained unchallenged.

13. This is a first appeal from the decision of the High Court in its original jurisdiction. This Court's mandate as a first appellate court is as stipulated explicitly in rule 31(1) of the Court of Appeal rules, namely to re-appraise, re- evaluate and re-analyze the record, consider it in light of the rival submissions and draw its own conclusions thereon and give reasons either way. See Selle vs Associated Motor Boat Co. [1968] EA 123. Moreover, it is trite law that this Court will only depart from the finding by the trial Court if they were not based on evidence on record; where the court is shown to have acted on the wrong principles of law, or where its discretion was exercised injudiciously as was held in Mbogo & Another vs Shah (1968) EA 93.

14. With this in mind, the issues falling for this Court's determination in the disposal of this appeal are:

    i. whether the respondent proved his case to the required standards; and

    ii. whether the delay in obtaining Land Control Board consent rendered the transaction a nullity.

15. With respect to the question as to whether the trial court properly analysed the evidence to satisfy itself that the respondent's evidence was sufficient to prove that the deceased had sold the suit land, that is Plot No. 868 to him, the court held:

> "...it was not in dispute that the original Plaintiff herein the late Masunbuko Jambo Mwasambu, and the Defendant entered into an agreement for sale of land. While the agreement referred to Kilifi/Ngerenya/898, the parties' intention it would appear was to sell and buy Parcel No. Kilifi/Ngerenya/868 in which both of them resided at the time of the trial herein...
>
> ...it is apparent from that following the sale, the parties went to the Land Control Board on 21st January 1993, whereupon consent was given for the transfer the Land Control Board consent letter of the same date confirms that while the Plaintiff's Plot measure 12 acres in total, he was selling to the Defendant, six of the said acres. That indeed confirms the position as indicated in the Agreement executed by the parties dated 23rd October 1993, which adjusted purchase sale price of the land to Kshs.70,000/-. The agreement was witnessed by among others, DW2..."

The learned Judge went on to conclude that:

> From the material place before me, I am satisfied that the Defendant has proved that he bought 6 acres of land from the plaintiff, and not 3 acres as purported by the Plaintiffs"

16. For the respondent to prove that he purchased the suit land from the deceased, section 107 (1) 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."

Section 108 further provides that:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

17. In the case of Miller vs Minister of Pension (1947) ALL ER 373 Denning, LJ described the standard of proof for civil cases as:

> "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."

18. In the instant case, the appellants' suit was dismissed for non-appearance at the hearing and, therefore, the respondent was left to prove his counterclaim. In similar circumstances, in the case of Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR, this Court had occasion to consider whether the plaintiff satisfactorily proved his claim in a case where the defendant failed to adduce evidence as is the situation here. The Court stated in that case:

19. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

20. As to whether the respondent sufficiently proved his counterclaim in support of his case, the respondent produced hand written sale agreements dated 14th February 1989 and 23rd October 1993 signed by persons who witnessed it. The agreement indicated that the deceased had agreed to sell the respondent 6 acres of Plot No. 898. He also produced acknowledgements of payments dated 23rd July 1989. Also adduced was a transfer for 6 acres of Plot No. 898 signed by the deceased. An application for Land Control Board consent and the consent was also presented together with Minutes of the Baahari Land Control Board dated 21st January 1993 where at Minute 25/93 appears the agenda item for sale of 6 Acres of Plot No. 898 belonging to the deceased to the respondent. The minutes indicate that both parties were present and that they were interviewed, and that the transaction was subsequently approved. In addition, there were also the testimonies of Hastings Ngala Charo (DW 2) and Kahindi Dickson Jefwa (DW3) who confirmed being witnesses to the sale agreement.

21. Based on this evidence, the learned Judge was satisfied that the respondent had proved his claim on a balance of probabilities.

22. The appellants' challenge to the trial Judge's decision is that the documents relied on by the respondent to prove his case referred to Plot No. 898 and not the suit land, Plot No. 868, which is the deceased's property. In their submissions before us, they contend that the land that the deceased sold to the respondent was Plot No. 898, and that it is for this reason that they sought orders to have him evicted.

23. So did the respondent purchase Plot No. 898 or Plot No. 868? The respondent's case is that, at all times, the deceased intended to sell, and sold to him, 6 acres of the suit land, that is Plot No. 868. But, on account of an error in the registration of the title, the suit land was indicated as Plot No. 898, which they relied upon for sale and transfer of the suit land, and that, had it not been for the mistake in the title number, the circumstances as they later transpired would not have occurred.

24. In the text book entitled, "General Principles of the Law of Contract" authored by K. I. Laibuta, a 'common mistake' is described as:

> A mistake is said to be common where both parties operate under the same mistake which is fundamental and not merely collateral to the attainment of the main object of the contract."

26 Halsbury's Laws of England, para 1670, 3rd Edition further states:

> Where there exists a real common intention between the two parties to a transaction, but mistake occurs in the expression of that intention, the court may correct the mistake in order to give effect to the real intention. To justify the court in so doing, it must appear that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both."

25. In the case of Tropical Food Products International Ltd vs Eastern & Southern African Trade and Development Bank [2007] eKLR, this Court considered circumstances of mistake in the contractual context thus:

> "Mistake in its wider sense is of course a frequently used and abused English word. A graphic illustration was given in Moynes v Cooper [1956] 1 All ER. 450, at page 453, thus:
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> > "'A' shoots at a pigeon and kills a crow 'by mistake': 'A' shoots at a crow believing it to be a pigeon and kills it 'by mistake': 'A', not intending to fire his gun, lets the gun off 'by mistake'. In the first case, the mistake was simply a bad shot, in the second, a failure to distinguish a crow from a pigeon, and in the third, gross carelessness."
> >
> > "Nevertheless, "mistake", in its legal sense, both in the common law and equity has availed relief to parties invoking it, either to declare a contract void or voidable. It is unnecessary to go into detailed learning about this subject as it has been amplified in numerous texts and court decisions over the centuries. Suffice it to cite the passage by Lord Denning, which was relied on by the respondent, in Solle v Butcher [1949] 2 All ER 1107 at page 1119:
> >
> > "Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v. Lever Bros., Ltd. (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. Torrance v. Bolton (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake. A contract is also liable in equity to be set aside if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault".

> "So that, equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral." (Emphasis ours)

26. In other words, where a contract has been made, and the parties have all agreed with sufficient certainty to the same terms on the same subject-matter, then the contract is good. In a contract of this nature, neither party can rely on his own mistake to declare it a nullity from the beginning, notwithstanding that in his view it was a fundamental mistake, or that the other party was aware that a mistake had occurred.

27. The above cited excerpt was cited in this Court's decision in the case of Kiplangat Arap Biator vs Esther Tala Cheyegon [2016] eKLR where the facts were in many respects similar to the circumstances of this case. There, the respondent, Esther sold a parcel of land to the appellant, Biator. At the time of the sale, the land was an empty plot, and was described as Plot No. 3 situated at the lower end of a plot where the respondent's residential home was located. The appellant paid the purchase price for Plot No. 3, "at the lower end' took over possession and proceeded to develop it. When electricity power lines were being surveyed in the area, the appellant discovered that Plot No. 3 was the land on which Esther's family had built their residential home while Plot No. 500 was his parcel at the lower end. The appellant made capital of the discovery and claimed that the respondent had sold him the parcel with the residential house, and not the empty plot at the lower end of the residential plot. He sought to have her evicted from Plot No. 3. Satisfied that a mistake in the sale of the land had occurred, this Court concluded:

> "A mistake occurred in the process of drawing up the agreement and that is why the equitable remedy of rectification is appropriate in this matter".

28. We agree and adopt the above conclusions reached for the purposes of the instant case. A consideration of the deceased's title showed that the deceased was issued with a title deed for Plot No. 898, which was relied upon by both the deceased and the respondent to enter into the sale agreement for the purchase of 6 acres of the suit land that belonged to the deceased. The respondent paid the full purchase price for the 6 acres portion. It cannot be doubted that, at the time of the transaction, though the title and sale agreement indicated Plot No. 898, the parties were of the same mind that the land in question was the suit land belonging to the deceased. It later turned out that Plot No. 898 belonged to a neighbour, Kombe Nzai Lewa, and that the correct title to the suit land was Plot No. 868. The appellants have not disputed that the deceased sold the respondent a portion of his land. Their complaint on the one hand is that the deceased sold 3 acres of Plot No. 898 to the respondent. On the other hand, they claim that the deceased did not sell a portion of his Plot No. 868, and that therefore the respondent was not entitled to 6 acres of the deceased's Plot No. 868.

29. Despite the appellants contestation, it is clear from the evidence that, at all times, the deceased intended to sell a portion of the parcel of land that he owned, that is, Plot No. 868. We have re-analysed all the respondent's transaction documents as well as the oral evidence and are satisfied that both the deceased and the respondent were mistaken into believing that the suit land was Plot No. 898 instead of Plot No. 868. Our conclusion is fortified by the evidence that, after purchasing the portion, both the deceased and the respondent were residing on the suit land, that is on Plot No. 868, which was the intended subject matter of the parties' agreement. This is evident from the appellants' pleadings seeking orders to evict him from the suit land, as well as the respondent's evidence, the Land Control Board application and consent, and the surveyor's report. Further support as to the existence of a mistake is to be found in a letter from the District Land Adjudication and Settlement Office acknowledging the error and requesting the appellants to surrender the deceased's title for rectification.

30. In view of the foregoiing, as did the learned Judge, we find that the respondent proved his case to the required standard; that he purchased 6 acres of the suit land belonging to the deceased, that is Plot. No. 868 and not Plot No. 898 as erroneously indicated in the title; that, at all times, it was the common intention of the parties to transact on Plot No. 868; and that there is no doubt that the respondent was entitled to registration in his name of 6 acres of Plot No. 868. Accordingly, we find no merit in the appellants' claims given that all the documents and evidence adduced by the respondent pointed to him having purchased 6 acres of the suit land. Accordingly, there is no basis upon which to interfere with the trial court's decision and the orders issued for surrender and rectification of the title to the suit land.

31. On the issue of the delay in obtaining consent from the Land Control Board, the record does not disclose that this issue was canvassed or determined by the trial court. Neither was it a ground of appeal in the Memorandum of appeal before us.

32. This Court when confronted with similar circumstances in Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto, [2018] eKLR interpreted rule 104 of the Court of Appeal Rules thus:

> Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage".

33. This position was reiterated in the case of Kenya Hotels Ltd vs Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR where this Court held that:

> The other challenge which in my assessment is a simple one and can swiftly be disposed of is the submissions by the appellant that section 6(1) of the *Land Control Act* that requires that consent be obtained from the land control board in transactions affecting agricultural land was not complied with. While it is conceded that this issue was not before the court below, the appellant submitted that the issue of whether or not the land is controlled is a question of law which can be raised at any time.
>
> It must be reiterated that this complaint was raised for the very first time in the appellant's written submissions before us. The issue was not one of the grounds upon which the appellant resisted the originating summons. Neither is it one of the grounds of appeal before us. Alive to the provisions of Rule 104 of the Court of Appeal Rules, that it could not raise or argue any grounds that were not specifically raised in the memorandum of appeal without leave of the Court..."

34. Likewise in this appeal, the appellants have sought to raise the issue of Land Control Board consent for the first time in their submissions. We consider it an ambush for the appellants to have raised it at the tail end of the appeal, particularly as these are matters that ought to have been determined in the trial court or, at the very least, the parties ought to have had an opportunity to respond to the issue during the appeal. While we appreciate that matters of law such as this can be raised at any time, the appellants having raised it in their submissions would, in our view, render it an afterthought. Given the circumstances, the matter of consent of the Land Control Board is a non-issue at this juncture, and is accordingly rejected.

35. In sum, the appeal is without merit and is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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

DEPUTY REGISTRAR