



Njogu v Kibage (Civil Appeal 95 of 2019) [2024] KECA 290 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 290 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 95 OF 2019
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
MARCH 8, 2024**

BETWEEN

DANIEL NDERI NJOGU APPELLANT

AND

LYDIA MUTHONI KIBAGE RESPONDENT

*(Being an Appeal from the decree and Judgment of the Environment and Land Court of Kenya at Kerugoya (E.C Cheronu, J.) dated 14th March 2019 in **ELC NO. 487 of 2013)*

JUDGMENT

1. The appellant, Daniel Nderi Njogu, and the late Daniel Kibage, (the deceased) were brothers. The deceased died in 1993, leaving land Parcel No. Ngariama/Nyangeni/49 (the suit property) registered in his name. The respondent Lydia Muthoni Kabage is the deceased's widow.
2. The dispute before the Environment and Land Court at Kerugoya was between the appellant and the respondent over the suit property. The appellant's case was that between 1995 and 1997, through a written sale agreement, he bought the suit property, which measures about eight acres, from Phares K. Gakuya (now late) for Kshs.4,000. The deceased advanced him Kshs.500 towards the purchase. The appellant and the deceased agreed that each would equally share the land, four acres each, and that the whole parcel would be registered in the name of the deceased to hold in trust for the two in equal shares. On this understanding, the two took occupation of the suit property. Each of them occupied four acres on which the deceased planted tea bushes and set up a home. When the deceased died, according to the appellant, the respondent begun encroaching on his portion of land. This is why the appellant sued the respondent seeking to injunct her, for a declaration that he owned four acres of the suit land, and for an order seeking the transfer of the said four acres to him.
3. The respondent denied the claim, saying that the suit property absolutely belonged to the deceased who had only allowed the appellant to occupy four acres of the same, and for a limited period only.



The respondent counterclaimed for the vacant possession of the four acres and sought the eviction of the appellant from the said four acres.

4. This is the dispute that the Environment and Land Court (E.C. Cheron, J.) heard, and on 14th March 2019 dismissed the appellant's claim with costs and allowed the counterclaim with costs. The learned Judge found that, first, the claim against the respondent was incompetent because she was not the legal representative of the estate of the deceased and, therefore, could not be sued; and, secondly, that the appellant had not proved that he had bought the suit land from Phares K. Gakuya as the said seller had not been called to testify and there was no explanation why, if the appellant had bought the land, he had registered it in the name of the deceased, or at least had not got the land to be jointly registered.
5. Those are the findings that led the appellant to come before us in this appeal. His grounds, as contained in the Memorandum of Appeal, were as follows:-

- “ 1) That the Honourable Judge of the Environment and Land Court erred in law and fact when he stated that the filing of the succession suit in Nairobi, and not in Kerugoya was fraudulent or mischievous and in basing his decision on the registry where the suit was filed.
2. That the learned Judge of the Environment and Land Court erred in law and fact in his conclusion that the defendant lacked locus standi to be sued for the reason that the defendant had not taken out the grant of representation in respect of the estate of her husband when the respondent was actually an administratrix in the said estate together with the appellant by virtue of Nairobi HCSC No. 2478 of 1996: In the matter of the Estate of Daniel Kibage (deceased).
3. That the learned Judge of the Environment and Land Court erred in law and fact when he dismissed the appellant's case allegedly *inter alia* on the ground of lack of letters of administration on the part of the appellant but the learned judge paradoxically nevertheless entered judgment in favour of the respondent as prayed in the counterclaim when the respondent herself testified that she had not taken out the grant or representation in respect of the estate of her deceased husband.
4. That the learned Judge of the Environment and Land Court erred in law and in fact when he did not call for and inspect, pursuant to Order 14 Rule 6 of the [Civil Procedure Rules](#), the record of Nairobi HCSC No. 2478 of 1996 to satisfy himself with regard to the citations issued therein and court orders made thereon.
5. That the learned Judge of the Environment and Land Court erred in law and fact when he concluded that the respondent was a wrong party to the suit when the respondent's deceased husband did not disturb the appellant's possession and development of the portion he was occupying during his lifetime and when it was the respondent's trespass onto the suit land that prompted the institution of the suit.
6. That the learned Judge of the Environment and Land Court erred in law and fact when he was not persuaded by the note written by the original owner of the suit land in support of the appellant's case when the law obligated the honourable Judge to accept the said note.



7. That the learned Judge of the Environment and Land Court erred in law and fact when he rejected the appellant's uncontroverted testimony on how he acquired the suit land and the agreement the appellant had with the respondent's deceased husband over ownership, development and occupation of the suit land.
8. That the learned Judge of the Environment and Land Court erred in law and fact when he did not consider and be persuaded to accept the appellant's claim against the respondent, owing to the appellant's long and uninterrupted occupation, development, and plaintiff of perennial crops on the suit land by the appellant.
9. That the learned Judge erred in law and in fact in making locus standi an issue in the case when the same was not an issue as the respondent had in her defence and counterclaim pleaded that she was indeed a legal representative of the estate of the deceased.
10. That the learned Judge of the Environment and Land Court erred in law and in fact by making a failure on the appellant and the deceased to share the suit land equally without anything in writing when the appellant and the deceased occupied and developed equal portions of the suit land.
11. That the learned Judge of the Environment and Land Court erred in law and in fact when he was not convinced that Phares Gakuya had sold the land when there was no issue whether or not the said land was indeed by Phares Gakuya and when it was therefore not absolutely necessary to call Phares Gakuya as a witness principally to testify that he had sold the said land to the appellant.
12. That the learned Judge of the Environment and Land Court erred in law and in fact in his conclusion that the cases cited in support of the appellant's case were distinguishable from and irrelevant to, the appellant's case when the same were relevant and binding or persuasive upon his court.
13. That the learned Judge of the Environment and Land Court erred in law and in fact when he did not analyze the respondent's counterclaim and how she had proved her case, glossed over the issues with regard to the counterclaim, and wrote a judgment not in accordance with the Civil Procedure Rules.
14. That the learned Judge of the Environment and Land Court erred in law and in fact when he did not advert to the constitution to cure any procedural defects with respect to the appellant's case and when he failed to decide the case on substantive justice.
15. That the learned Judge of the Environment and Land Court erred in law and in fact when he did not rule, in the alternative and in compliance with the dictates of dispensing substantive justice, that the appellant did prove his case on account of long and uninterrupted possession and occupation of the suit land.
16. That the learned Judge of the Environment and Land Court erred in law and in fact when he decided the said case against the weight of the evidence in support of the appellant's case.



17. That the learned Judge of the Environment and Land Court erred in law and in fact when he decided the case before him on considerations not known to law.
 18. That the learned Judge of the Environment and Land Court erred in law and in fact in ordering the eviction of the appellant from the suit land without considering and or deciding on the huge developments the Appellant had done on the suit land and without, in the wider interest of justice, stating what would happen to the said developments.”
6. During the hearing of the appeal learned counsel Mr. Masore Nyang’au appeared for the appellant. He had filed written submissions which he highlighted. Learned counsel Mr. Karanja was held brief for Mr. Mugambi for the respondent. Learned counsel for the respondent had also filed written submissions. In the submissions by learned counsel for the appellant, the learned Judge is accused of falling into error when he found that the appellant’s suit was incompetent on account of having sued the respondent who lacked capacity because she had not taken out letters of administration in respect of the estate of the deceased, yet the learned Judge had gone ahead and granted the respondent a judgment against the appellant in the counterclaim. It was contended that the jurisdiction of the court and the competency of the suit were not issues that either party had raised. In any case, it was urged, the respondent had deponed in her affidavit sworn on 28th July 2003 that following the revocation of the grant that had been issued to the appellant in High Court Succession Cause No. 2478 of 1996 she had herself been appointed as the administratrix of the deceased’s estate. Therefore, she had capacity to be sued and to sue.
 7. Learned counsel Mr. Masore Nyang’au took issue with the learned Judge’s finding that the appellant’s case had not been proved because the seller of the land had not been called to testify in support of the sale. According to the learned counsel, the sale agreement had, as shown by pages 65 to 70 of the Record, been admitted in evidence by consent; there being the sale agreement, it was argued, the evidence of the appellant had been materially supported.
 8. Learned counsel for the respondent supported the findings by the learned Judge, and submitted that the suit was statute barred; that the appellant had not lived or built on the suit property, or planted tea on the property after the deceased had died; and that the orders that the appellant had sought could not be granted as the suit was defective as the respondent was not the proprietor of the suit property.
 9. We have considered the evidence that was tendered before the learned Judge, the impugned judgment and the rival submissions. Our jurisdiction under Rule 31(1) of the Court of Appeal Rules, 2022 is to re-appraise the evidence and draw our own conclusions thereon. In *Peters –vs- Sunday Post Limited* [1958] EA 424, the Court of Appeal for Eastern Africa observed as follows:-
 10. We are called upon to determine three questions:-
 - a. whether, on the evidence, the learned Judge was correct to find that the appellant had sued the respondent who lacked capacity to be sued;
 - b. whether the evidence called by the appellant was sufficient to prove his case on the balance of probabilities; and
 - c. whether the respondent had a good counterclaim.



11. In the Judgment, the learned Judge noted as follows:-

“The defendant in her testimony stated that she had not filed succession cause in respect of the estate of her late husband Kibage Daniel. If that be the case, it therefore means that the plaintiff has sued a party without capacity and this suit is therefore incompetent.”

One, if the respondent had no capacity to be sued because she had not taken out letters of administration in respect of her deceased husband’s estate, it meant that she did not have capacity to sue for judgment in the counterclaim for the same reason of lack of letters. She had a counterclaim against the appellant, why did the learned Judge grant the counterclaim? Two, and this is crucial in our view, the evidence did not support the learned Judge’s finding on capacity. As was submitted by learned Counsel for the appellant, the respondent had in her sworn affidavit dated 28th July 2003 deponed that she had been appointed as the legal administratrix of the estate of her late husband, and had gone ahead to state that –

“the grant of letters of administration has to date not been confirmed as I could not have applied for such confirmation in view of this case.”

We, consequently, find that the respondent had capacity to sue and be sued as she had obtained the grant of letters of administration in respect of the estate of her deceased husband who was the registered owner of the suit property.

12. On the question whether the appellant had proved his claim, it was common ground that he and the deceased were brothers. The deceased was the registered owner of the suit property. The appellant had testified that he was the one who had bought the suit property from Phares K. Gakuya between 1965 and 1975 and got it registered in the name of the deceased to hold it in trust for them in equal shares. Upon the death of the deceased, the respondent was claiming the whole of the suit property. In support of his evidence as to how he had bought the suit property, the appellant produced the sale agreement which had been signed by the seller and had been witnessed. Against the evidence, this is what the respondent told the learned Judge: -

“The land in dispute belongs to my late husband. He bought from Phares Gakuya. He did not tell me how much he bought it but he told me he bought it. It is approximately 8 acres.....
.....I did not see my husband and the seller execute a sale agreement ”

13. According to the respondent, the same person the appellant was saying sold him the suit property was the same one who had sold the suit property to the deceased. She, however, did not witness the transaction. She did not have the sale agreement. The deceased told her he had bought the suit property. He did not show any document to evidence the transaction. On the appellant’s part, he not only testified as to the purchase but had the sale agreement duly signed and witnessed to evidence the transaction. The sale agreement was produced to the learned Judge by consent of the parties who were represented. To our mind, the appellant had a more likely version of how the suit property had been acquired. On the basis of his evidence, we find, he was the one who had bought the suit property and got it registered in the name of the deceased, and on the basis that they would equally share it. On the question of sharing it equally, it was common ground that each party occupied four acres of it and



had put up a home and planted tea. Infact, in the amended defence and counterclaim this is what was pleaded by the respondent: -

“ 13. The defendant contends that the plaintiff is, without the consent of the defendant, unjustifiably and illegally in possession of approximately four (4) acres of the suit land on which he has planted tea.”

In her evidence before the learned Judge, the respondent stated that the appellant was living on the land during the lifetime of the deceased. We find that there was irrefutable and admitted evidence that, before the deceased died, the appellant was occupying four acres of the eight acres that constituted the suit property. If his case was that the deceased held the four acres in trust for him, the recorded evidence supported the claim.

14. We are alive to the fact that the deceased was the registered proprietor of the suit property. Section 24(1) of the [Land Registration Act](#), 2012 provides that –

“ 24. Subject to this Act

(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

15. Section 25(1) of the Act provides that the rights of a registered owner of land are indefeasible, and are held free from all other interests and claims. Such rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the Act as not requiring noting in the register. Section 28(b) of the Act provides that trusts, including customary trusts, are an overriding interest that would submit and affect a title, without them being noted on the register in respect of the title.

16. It is now accepted that the concept of trust must be proved. This Court in *Mumo -vs- Makau* [2002] 1EA.170 observed as follows: -

“ It is trite that trust is a question of fact and has to be proved by evidence. This Court said so in *Wambugi –vs- Kimani* [1992] E KAR 58.”

17. The evidence called by the appellant was clear that he bought the suit property from Phares K. Gakuya and got it to be registered in the name of his brother (the deceased), on the understanding that each of them was entitled to four acres of the property. Each settled with his family on the respective four acres, and developed the same including planting tea. It was after the deceased died that his widow (the respondent) began to lay claim on the whole of the eight acres. We find that, on the evidence, the appellant had a beneficial right in equity to the four acres of the suit property that was registered in the name of the deceased. See *Juletabi African Adventure Limited & another -vs- Christopher Michael Lockley* [2017] eKLR. The appellant had proved that the deceased held the four acres in trust for him. Therefore, the learned Judge erred when he found that the appellant had not proved his case.

18. With the foregoing finding, we have no hesitation in returning the verdict that the respondent’s counterclaim, which was based on the contention that the deceased as the registered proprietor of the suit property had an indefeasible claim to the same, was without basis and ought to have been dismissed by the learned Judge.

19. Consequently, we allow this appeal with costs. The judgment and decree by the learned Judge is hereby set aside. In its place, there will be judgment for the appellant as prayed in the plaint, and the



respondent's counterclaim is ordered dismissed with costs. In particular, it is declared that the appellant owns half of land parcel Ngariama/Nyangeni/49; the respondent is ordered to transfer half of land parcel Ngariama/Nyangeni/49 to the appellant; and the respondent and all those acting under her are hereby restrained from interfering with the appellant's quiet enjoyment of his portion of land parcel Ngariama/Nyangeni/49.

Dated and Delivered at Nairobi this 8th day of March 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

