



REPUBLIC OF KENYA



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**Kebenei v Tanui & another (Civil Appeal 77 of 2018)
[2024] KECA 972 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 972 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 77 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

JOHN KIPSUM KEBENEI APPELLANT

AND

KIPKEMEI J TANUI 1ST RESPONDENT

LAWRENCE K ALWALA 2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret (Mwilu, J.) delivered on 28th April, 2010) in High Court Civil Appeal No.58 of 2005)

JUDGMENT

1. This is an appeal against the judgment of P.M. Mwilu, J. (as she then was) rendered on 12th April, 2014. A brief background shall provide context.
2. The appellant, (the then plaintiff) vide a plaint dated 15th March, 2001 filed a suit in the Senior Principal Magistrate’s Court at Eldoret against the two respondents (the then 1st and 2nd defendants). In the suit the appellant averred that he is the “sole registered owner of land parcel No.Cheptiret/Cheplaskei Block/4/56 measuring 4.33 Ha” (the suit land). He contended that the respondents had trespassed on his land. His prayer was that an order of eviction and a permanent injunction be issued against the two respondents.
3. In a statement of defence dated 28th March, 2001, the respondents denied in toto the averments in the plaint. They also denied the averments in paragraph 10 of the plaint which stated:

“There is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.”



4. The outcome of the trial that ensued in the Magistrate's court is a judgment rendered by W. N. Njage, the then Principal Magistrate Eldoret. In the penultimate part he stated:

“In paragraph 10 of the plaint which is supported by his verifying affidavit, he depones that there has not been any previous proceedings in any court between him and the defendants over the same subject matter. With respect this is a falsehood. There has been previous proceedings in the High Court of the same subject matter. The said parcel of land in my view this fact (sic) which was not disclosed by the plaintiff is of sufficient materiality. The plaintiff seeks an injunction in an equitable remedy. He who seeks equity must do equity. I do find that due to the non- disclosure the plaintiff has not come to court with clean hands. His hands are ‘soiled’ as it were. The non-disclosure was not innocent but to my mind deliberate. The plaintiff cannot expect to benefit unfairly when he has not come to court with clean hands.

Be that as it may, I would wish to comment that the plaintiff's case is based on trespass. A claim based on trespass is the preserve of the Land Dispute Tribunal. I am aware that this issue was addressed by the former trial Magistrate.

But in my considered view however this claim being a claim founded on alleged trespass would have been properly handled by the Land Dispute Tribunal. In the light of the foregoing therefore I do hold that the plaintiff has not established his case on a balance of probabilities against the defendant to warrant the granting of the order sought. I am inclined to dismiss the same with I hereby do. I award costs of this suit to the defendants.”

5. The appellant was aggrieved by the said outcome and his first appeal as indicated above was dismissed by Mwilu, J. who rendered herself as follows:

“There was suppression of material facts in the applicant's affidavit in the case cited above just as the Magistrate found in the case giving rise to this appeal. In this case the appellant disintitled himself by unconscionable manner, of the injunction sought. He sought an equitable remedy. He was obliged to do equity. He came to court with soiled hands. The trial court did not err. There was proved to be non- disclosure. It is irrelevant that the same was innocent or deliberate and the magistrate thought it was a deliberate one and I do not fault him.

The trial court is faulted in this appeal for having relied on extraneous factors not put to the court for adjudication. The cases found to have existed prior to the one giving rise to this appeal were seen by the appellant as irrelevant factors.

Once the trial court found as a fact that the appellant had committed non-disclosure of the existence of previous cases and determined that such non- disclosure was of material sufficiency, he could have dismissed the case on that ground alone. He found two other grounds to dismiss the same. The appellant sought an injunction. He came to court with soiled hands thereby disintitling himself of the remedy sought. He did not prove grounds for eviction. This appeal is found to be unmeritorious and it is dismissed with costs.”

6. The appellant was still aggrieved by the said outcome and in a Memorandum of Appeal dated 26th June, 2018 listed 10 grounds of appeal. These can be summarized as follows:
- i. There was no non-disclosure on the part of the appellant;
 - ii. The judge erred in finding that the appellant had come to court with dirty hands;



- iii. The Judge erred in holding that there was another suit in respect of the same subject matter;
 - iv. The Judge erred in finding that the dispute ought to have been dealt with by the Land Dispute Tribunal;
 - v. The Judge erred in failing to find that Eldoret PMCC No. 37 of 1993 had abated; and finally, she erred:
 - vi. in failing to hold that the respondent's claim was time barred.
7. When the appeal came up for plenary hearing on 23rd October, 2023, Mr. Ndere holding brief for Mr. Nyachiro for the appellant, Mr. Mathai for the 1st respondent and Mr. Wanyonyi for the 2nd respondent all opted to wholly rely on their written submissions.
 8. In the appellant's submissions dated 10th December, 2022, the appellant condensed the 10 grounds of appeal into three, having abandoned ground 4 on the question of jurisdiction.
 9. In respect of grounds 1, 2, 3 and 6 it was contended that no proof was tendered to show that the appellant deliberately failed to disclose that there was previous litigation between the same parties over the same parcel of land.
 10. In respect of grounds 5, 7, 8 and 9, it was submitted that the appellant had proved that he was the registered owner of the suit land; that the appellant was not aware of the suit between one Regina Chemto (also known as Regina Kabot Jemto) and the respondent's father (suit No.396/193) which in any event must have abated one year after the death of the parties therein;

that the appellant was not enjoined in the suit and there was no substitution made and that the appellant obtained the title following a succession suit. Finally, the trial judge in ground 10 of the Memorandum of Appeal was faulted for not granting the appellant the relief sought.
 11. The appeal was resisted by the respondents. In the respondent's submissions dated 10th June, 2022, Mr. Mathai for the 1st respondent contended that the trial court lacked jurisdiction as the issue at hand was one of trespass and hence the matter ought to have been handled by the Land Disputes Tribunal.
 12. Secondly, it was contended that the appellant never disclosed the existence of Senior Principal Magistrate's Court Succession Cause No.393/1993, Succession Cause No.160/1995 and Succession Cause No.243 of 1993 filed in respect of the suit land; and that in Succession No.160 of 1995, Regina Kobot Jeruto, the appellant's mother fraudulently transferred to herself the suit land.
 13. In respect of ground 6 the respondents seemed to concede that Eldoret Principal Magistrate's Court No.397 of 1993 had abated as the 1st respondent's father who had been sued by the appellant's mother had died before the suit was concluded and there had been no substitution of the deceased.
 14. We have anxiously considered the record, the oral submissions, the authorities cited and the law. As this is a second appeal, we are enjoined by law to consider only matters of law. In *Karingo vs. R* [1982] KLR 213. It was stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja - vs- R* (1956) 17 EACA 146).”



15. In his evidence in chief the appellant told the court that he inherited the land from his mother, Regina Chemto following a Succession Cause. He denied any knowledge of a case between his mother and the 1st respondent's father. He denied any insinuation that the respondents were his relatives.
16. In his oral testimony during the trial, the 1st respondent testified that the land he occupies (the suit land) was purchased by his father (who is now deceased) in the year 1972; that Regina Chemto, the mother of the appellant and who is a sister to the 1st respondent's mother had filed suit, Civil Case No.393/1993 against the 1st respondent's father; that that case is still pending; that Regina Chemto subsequently registered the suit land in her name in the year 1996; that the respondents filed Succession Cause No.143 of 1993 against Regina; that Regina died before the suit was concluded; that in Succession Cause No.160/1995 Regina Chemto changed the farm into her name claiming to have been a widow of the 1st respondent's father. (The 2nd respondent is a son of the 1st respondent).
17. DW3 Kapkoiyo Tabaes testified that she was married to one Kimeto Arap Alwala. She denied the contention that Regina was her co-wife. She further stated that Regina "...has given the plaintiff a girl" (the plaintiff therein, being the appellant herein).
18. If ever there was a case where abuse of the court process is at its best, then this is one such case. The trial court by consent of the parties, received the following files: Eldoret P & A Cause No.160/95, 143/1997, Eldoret SPMCC No.393/1993 and Eldoret HCC&A No.,243/97.
19. In Eldoret SMCC 393/93 Regina Kobot Jeruto filed suit against Kimeto Alwala (the father of the 1st respondent herein). Unfortunately, Kimeto Alwala died before the conclusion of that case. Thereafter, Regina filed Eldoret HC P&A 160/95 in respect of the Estate of Kimetto Alwala and whereas she named the two respondents as beneficiaries, she proceeded to have the suit land transferred to herself to the exclusion of the two beneficiaries. The respondents sought to challenge the letters of administration issued to Regina Chemto vide Eld HCC P& A 160/95. Unfortunately, Regina Chemto passed on before the said application for annulment of the grant issued to Regina Chemto was heard. Thereafter the respondents filed Eld.HCC No.143/97 applying for letters of administration in respect of the Estate of the said Regina Chemto. The court granted the respondents the letters of administration in respect of the estate of Regina Chemto.
20. On his part, the appellant filed Succession Cause No.243/97 and obtained letters of administration in respect of the estate of the same Regina Chemto. Suffice to state that there are two letters of administration in respect of the estate of Regina Chemto.
21. Be that as it may, it is admitted that the appellant does not reside on the suit land. He resides at a place called Kiplombe. On the converse, the respondents live on the land. It is this same suit land that Regina Chemto had filed suit No.393/93 against the 1st respondent's father. Unfortunately, the 1st respondents' father died before the suit was heard and determined. Regina Chemto took advantage of the death of the 1st respondent's father and applied for letters of administration in respect of the estate of the 1st respondent's father. She obtained letters of administration to the exclusion of the two respondents inspite of the fact that she had named them as beneficiaries of the estate of the late Kimetto Alwala. Upon the respondents discovering Regina Chemto's move, they sought to annul the letters of administration issued to her. Unfortunately, Regina Chemto passed on before the application for annulment was heard and determined. It was then that the respondents turned to apply for letters of administration in respect of the estate of Regina Chemto and which letters were issued to them. The appellant equally applied for letters of administration in respect of the estate of Regina Chemto and as stated above, he too obtained the letters of administration.



- 22. It would appear that based on the letters of administration issued to the appellant, the appellant proceeded to have the suit land registered in his name. The appellant was said to have been related to Regina Chemto as she “gave him her daughter,” presumably in marriage.
- 23. From the above narration, can the respondents be said to be trespassers? We do not think so as the respondents are the two beneficiaries listed in the Succession Cause filed by Regina Chemto in respect of the estate of Kimetto Alwala, the 1st respondent’s father.
- 24. Besides, the respondents obtained letters of administration of the estate of Regina Chemto who had successfully filed succession proceedings to inherit the land owned by Kimetto Alwala, the 1st Respondent’s father. It is in view of the above that we too think the respondents are not trespassers on the land that was hitherto owned by their late father, Kimetto Alwala. It is also evident that the appellant was aware of the previous proceedings touching on the suit land, and in particular Eldoret HCC 243/97 which he himself had filed. To that extent, the averment in paragraph 10 of the plaint was erroneous and plainly wrong.
- 25. It is for the foregoing reasons that we have come to the conclusion that this appeal is for dismissal. However, we hasten to add that no plethora of suits will avail any of the parties. The Succession Causes have to be revisited and proper orders sought therein. Otherwise, we cannot at this juncture interfere with the orders issued in those Succession causes which remain valid orders unless and until set aside and/or varied.
- 26. Be that as it may, the order that commends itself to us is that the appeal herein is without merit. It is hereby dismissed with costs to the respondents.

DATED, SIGNED & DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE
 **JUDGE OF APPEAL**

L. ACHODE
 **JUDGE OF APPEAL**

W. KORIR
 **JUDGE OF APPEAL**

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

Signed
DEPUTY REGISTRAR