



Nakuru Industries Limited v Shah & 2 others (Suing in their Representative Capacities as Trustees of Shree Visa Oshwal Community - Nakuru) (Civil Appeal 24 of 2016) [2024] KECA 1783 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1783 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 24 OF 2016
MA WARSAME, SG KAIRU & FA OCHIENG, JJA
DECEMBER 6, 2024**

BETWEEN

NAKURU INDUSTRIES LIMITED APPELLANT

AND

VINOD SHAH 1ST RESPONDENT

JS SHAH 2ND RESPONDENT

BL SHAH 3RD RESPONDENT

**SUING IN THEIR REPRESENTATIVE CAPACITIES AS TRUSTEES OF SHREE
VISA OSHWAL COMMUNITY - NAKURU**

(Being an appeal against the judgment and decree of the High Court at Nakuru (Mulwa, J.) dated 24th March, 2016 in Nakuru ELC Case No.34 of 2023)

JUDGMENT

1. By an amended plaint dated 24th June 2011, the appellant, Nakuru Industries Limited, approached the High Court seeking a declaration that the respondents, Vinod Shah, J.S. Shah, and B.L. Shah (sued in their representative capacities as trustees of Shree Visa Oshwal Community – Nakuru had trespassed onto the Plaintiff’s parcel of land known as LR Nos.21975, 19921 and 11264 Nakuru Municipality (suit properties); hence an eviction order should issue. The appellant also sought a permanent injunction to restrain the respondents from entering or remaining or continuing in occupation of the suit properties.
2. The respondents filed their statement of defence and counterclaim dated 7th April 2003 upon which the appellant filed a reply to defence and defence to counterclaim dated 28th April 2003.



3. The matter proceeded for trial in which the appellant called three witnesses with the respondent calling one. Parties filed written submissions followed by oral highlighting through their respective counsel.
4. By a judgment delivered on 24th March 2016, the court dismissed the appellants case finding in favour of the respondent's counterclaim. The court granted an order of specific performance of the agreement dated 7th April 1996 effecting the transfer of property known as LR No.21975 to the respondents and to surrender the road marked "A" in the plan annexed to the agreement; a declaration that the appellant holds the properties known as LR No.19921 and 11264 in constructive trust for the respondents pending the compliance with the specific performance ordered above; the alternative claim for Shs.30,000,000/= being costs of the development was dismissed; and costs of the suit were awarded to the Respondents
5. The appellant filed a Notice of Appeal on 24th March 2016 and the Record of Appeal on 21st July 2016. The amended memorandum of appeal dated 25th June 2018 raises ten grounds of appeal. Notably, as set out in the Amended Submissions dated 16th March 2020, the appellant challenges the findings of the judge to the effect that it was not the owner of the suit premises, obtained title by fraud and that it holds any land in trust for the respondent.
6. The appellant argues that while the registered owner was recorded as Nagaria Estates Limited, the appellant was the beneficial owner and dealt with the property as such as acknowledged by various parties. This includes the respondent's acceptance of the appellant's property donated to the National Museum in 1996 and the portion that the respondent have registered in their names. The appellant samples various correspondence to assert this position.
7. The appellant adds that if at all the appellant's ownership of the suit property was for determination, then Nagaria Estates Limited held the property under the doctrine of resulting trust, which arises when one party pays the purchase price and the conveyance is made in the name of another. This makes the appellant a beneficial owner from which it gains all the rights that accrue to it. In addition, Nagaria Estates Limited was a wholly owned subsidiary of the appellant. He cites Halsbury's Laws of England, 3rd Edn. Vol.38 p.861 para 451 cited in Allan Kiama vs. Ndia Mathunya & Others Civil Appeal No.42 of 1988 and Godfrey Kagia Githire vs. George Ndichu Kagia & 4 Others [2008] eKLR.
8. The appellant maintains that the agreement of 7th April 1996 obtained through undue influence and intimidation, the same having been as a result of a reconciliation presided over by the then Comptroller of State House, Mr. Frakline Bett. The appellant denies ever having requested or agreed to Mr. Bett presiding over the meeting. That Mr Bett's involvement was not a simple case of mediation but evidence of his influence being brought to achieve a specific outcome. The appellant therefore urges that the agreement is unenforceable and the learned judge discounted this assertion. Reference is made to Halsbury's Laws of England, 4th Ed. Re- issue Vol.9(1) at page 467 para. 712 and National West Minister Bank PLC vs. Morgan [1985] 1 AC 686. On the validity of the agreement the appellant submits that the judge was required to interrogate the agreement and satisfy herself that it met all the ingredients of a binding agreement.
9. Proceeding on the premise that the appellant expressed willingness to donate land to the respondents by a letter dated 4th July 1996, the disposition contained in that agreement constituted an incomplete gift as the respondent failed to meet the stipulated conditions. The agreement was therefore withdrawn by a letter dated 19th November 1996. Further, the gift was incomplete for want of registration of the suit property in the name of the Respondents under the applicable Registration of Lands Act. The appellant relies on the Supreme Court case of Malcolm Bell vs. Daniel Toroitich Arap Moi & Another [2012] eKLR among other authorities.



10. Without prejudice to the foregoing submissions, the appellant urged us to hold that the agreement, the basis upon which the counter-claim was granted is invalid and unenforceable because it was entered into between the parties while the appellant had no legal capacity to enter into the said agreement pursuant to section 340 of the *Companies Act*. Be that as it may, the appellant continues, the position after June 1994 when the company was struck off the Register would be that the asset was deemed bona vacantia in which case the identified allottee from the government would have been the appellant having been a beneficial owner through its subsidiary as held in *Githurai Ting'ang'a Company Limited vs. Stephen Kimani Kahunyo* [2010]eKLR.
11. The appellant faults the trial judge for holding that the title LR No. 19921 in constructive trust for the respondents when the title did not exist having been cancelled after it was surrendered to the Commissioner of Lands.
12. The appellant also faults the trial court for failing to make a determination and findings on certain issues in contravention of Order 21 rule 5 of the Civil Procedure Rules. The three issues that remained undetermined are – whether the appellant requested Mr. Franklin Bett to preside over any reconciliation meeting between it and the respondent concerning the disputed land; whether or not the Commissioner of Lands was misled into allocating LR No.19921 measuring 1.6 Hectares to the respondents and whether the development upon the suit property was justified and whether it was done with the express or implied authority of the appellant, and whether the appellant consented to the said development. The appellant contends that the answer to all the three questions was in the negative and would have had a profound effect on the outcome of the case had they been taken into consideration. That these circumstances render the decision by the trial court incomplete and unreliable in the absence of the court failing, in its decision, making a determination upon each separate issue. The appellant cited *Simba Colt Motors Limited vs. James Gitahi Mwangi* [2015] eKLR.
13. The appellant's final ground of appeal is that it was denied the benefit of cross examination as Mahendra Shamji did not complete his testimony. That this error in procedure resulted to unfairness thus prejudicing the entire trial as section 146 of the *Evidence Act* provides that evidence is to be tested by cross-examination.
14. The appellant concludes in urging that it is in the interests of justice that this appeal be allowed. That in exercise of our appellate jurisdiction, the judgment of the High Court be set aside and substituted therefore with a judgment allowing the appellant's claim as presented in the amended plaint filed at the High Court and dismissing the respondent's counterclaim in the High Court. The appellant further prays for costs of the appeal.
15. The respondent, in opposing the appeal vide submissions dated 10th October 2019 has responded to each of the ten grounds of appeal set out in the memorandum of appeal. The sum of their submissions is that the onus of proving a claim lies with the party asserting a fact. To the respondents, the appellant's suit before the trial court was primarily a claim based on trespass by the respondent in constructing a school, swimming place and an auditorium.
16. The respondent further contends that the appellant failed to prove before the trial court ownership of the suit property and unpermitted entry and development on the suit property by the respondent. The respondent added that the appellant's witnesses PW1 and PW2 indeed supported the respondent's case.
17. On the allegation of unprocedural, unlawful and illegal obtaining of title, the respondent traces the history of the titles from the gazettement as a monument under *Legal Notice No.1007 of 1943*, purported purchase by Niagara Estates Limited, relinquishing the site to the Trustees of the National



Museum of Kenya in 1966 with a request for gazettelement despite already having been gazetted, allotment of the part of the site in 1992 on the respondent's application and eventually the dispute culminating into the agreement mediated by Mr Franklin Bett. The respondent sums up the evidence and testimony to support the observation by the learned Judge that the appellant had obtained the titles to the disputed lands in an unlawful and illegal manner.

18. On the appellant's allegation that the agreement was entered into under undue influence, intimidation or coercion, the respondent avers that the appellant is estopped from making such an allegation having benefited from the said agreement and used it as a basis upon which it made its claim at the court. The respondent quotes section 120 of the *Evidence Act* on the general principles of estoppel as well as the Court of Appeal decision in *Serah Njeri Mwobi vs. John Kimani Njoroge Civil Appeal No.314 of 2009*. The respondent avers that the conduct amounts to approbation and reprobation which is not acceptable from the myriad of cases cited in the submissions.
19. As for the involvement of the then President of the Republic of Kenya or his Comptroller of State House, the respondents defer that they were not parties to proceedings and no judicial review or constitutional challenge sought against them over what they are now alleged to have done. The respondents are categorical, anchored by the Supreme Court case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, that the appellant cannot anchor its ground of appeal on an alleged violation of *the Constitution* of Kenya 2010 as it was not in existence at the time events subject to the High Court case took place.
20. The respondents contend that the record shows that the appellant purchased the subject land while it was still a gazetted site as evidenced in the letter dated 3rd August 1995. The respondents also rely on the case of *Lucy Njeri Njoroge vs. Njoroge Kaiyabe HCCA No.14 of 1998* where it was held that section 19 of the *Stamp Duty Act* offers no absolute prohibition of admissibility of unstamped documents, nor does it declare them a nullity for want of stamping. That in any event the agreement of 7th April 1996 is part of the appellant's bundle of documents produced in evidence and it cannot therefore challenge or raise an objection as to its admissibility.
21. With respect to ownership of the property, the respondent points to PW1s testimony where it is conceded that the appellant's ownership occurred after the meeting giving rise to the agreement of 7th April 1996 as the property previously was owned by Nagaria Estates Limited.
22. On the undetermined issues, the respondents indicate that the testimony of PW2 was that it is the appellant's chair who invited Mr. Franklin Bett to the meeting and that the appellant's chair did not complain as having been compelled to sign the agreement but was rather happy about the conclusion of the dispute. On whether the Commissioner of Lands was misled into allocating LR No.19921 to the Respondent, the issue was dealt with and resolved by the agreement of 7th April 1996 and nothing material arose from this issue as the agreement charted a path that would resolve the entire dispute between the parties. Under the agreement, the appellant was to re-transfer the title to the respondents. Having failed to do so, the High Court found it unconscionable for the appellant to retain the property and inferred the constructive trust.
23. With respect to development of the property, the respondents assert that PW1 conceded that his own children went to the developed school on the property, that he saw the development coming up, was aware of the construction works and that the appellant's chair attended the opening ceremony of the school and was accorded special treatment and indeed blessed the project.
24. On the incomplete testimony, the respondent adds that DW1 testified fully. That Counsel Mr. Adala merely stated that there was one witness for cross examination and proceeded to advise that he had



- closed his case and asked for leave to file written submissions. At a subsequent court appearance on 11th September 2015, the appellant's counsel did not dispute the written submissions made on behalf of the respondent that their sole witness DW1's testimony was not challenged by way of cross examination.
25. The respondent therefore seeks an order for the dismissal of the appeal.
 26. As a first appeal, our jurisdiction is settled. Article 164(3) of *the Constitution* provides for our jurisdiction to hear appeals from the High Court and section 3(1) of the *Appellate Jurisdiction Act*. Rule 31 of the Court of Appeal Rules empowers us to reappraise the evidence and record and where necessary make our own findings. In exercise of this jurisdiction, we have time and again stated that we have a role to re-evaluate, re-assess and re-analyse the evidence on record and ascertain that the conclusions reached by the learned trial Judge should not be disturbed.
 27. We note from the record that the trial court listed a total of twelve issues for determination. However, noting that the same were intertwined the trial court expressed itself as follows:
 - “ 16. The court has considered the above issues as formulated. It is its view that all the issues are intertwined, though both the plaintiff and the defendant proceeded to submit on each separately in their written submissions. The court will proceed to interrogate the parties submissions jointly and or severally as may be appropriate.”
 28. In the same breadth, despite the ten grounds of appeal listed in the memorandum of appeal, the appellant, as earlier indicated through its submissions, mainly challenges the findings of the judge as to the appellant's ownership of the land in issue and the that the land is held in trust for the respondents.
 29. Taking into account the grounds of appeal and the submissions by the parties, it is our position that the appeal can be disposed off on the basis of making a determination on whether the appellant is the lawful owner of the suit property. It is upon this finding that the consequential orders made by the trial court suffice. These include the orders of specific performance of the agreement dated 7th April 1996 and the declaration of the resulting trust as made by the trial court.
 30. The ownership of the title by the appellant is challenged on two fronts, for being a separate entity from its subsidiary, Nagaria Estates Limited and secondly, for the unprocedural and unlawful manner in which the appellant acquired the property. In order to determine the ownership of the suit properties, the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) has held that it is important to go to the root where the basis of the challenge to the ownership is in issue. The Supreme Court stated as follows:
 31. So how did the titles in issue come about? According to the appellant, L.R. Nos.21975 and 19921 were owned by Nagaria Estates Limited, a wholly owned subsidiary company of the appellant which was dissolved and struck out from the register of Companies. The appellant, in the year 1966 vide letter dated 25th February 1966 donated and surrendered 1.6 Hectares of the said land parcels to the National Museums of Kenya for use as pre- historic sites upon agreed conditions. The appellant also donated some land to the respondents where a nursery and primary school were constructed. Later, the respondents needed more land to expand the school so it successfully approached the National Museums of Kenya to cede part of the land donated to it by the appellant whereupon it constructed the secondary school, swimming pool, auditorium and playground together with certain road reserves and other lands belonging to the appellant.
 32. That while the dispute was pending, the respondents through intimidation, duress, fraud and illegality through undue influence by the then State House Comptroller, Frankline Bett, caused the appellant



- to execute an agreement, prepared at its offices, on a Sunday evening, by its directors and chairman on the one hand and the respondent trustees on the other hand and dated 7th April 1996 which agreement resolved the dispute. Pursuant to the agreement, the respondents returned the Original Title Deed for the land together with a copy of the agreement and surrendered the original grant No. L.R. 64338 to facilitate issuance of the two titles, by the Commissioner of Lands and further caused the same to be approved for transfer to the respondents by His Excellency Daniel Moi, the former President of Kenya.
33. As per the respondent, the property having been donated to the National Museums of Kenya and gazetted as a prehistoric site, the same was not available to be donated by the appellant and the land was in any event owned by the appellant's subsidiary and not the appellant at the time of donation. The respondents were therefore rightful owners of the portions of the suit land on which they had developed. Accordingly, and in order to have the dispute between the appellant and respondent resolved, recourse was made to the agreement of 7th April 1996. The gist of the agreement was that the appellant was to donate the lands in dispute to the respondent and in return the respondent was to thank them. That pursuant to the agreement the respondents returned the Title deed to the Commissioner of Lands for issuance of fresh title to the respondent but instead a title was issued in the appellant's favour.
34. From the foregoing, it is evident that the respondents were in possession of the certificate of titles for the suit property. It is also undisputable that the respondents surrendered their titles on the strength of the agreement of 7th April 1996. On the other hand, the appellant was not the previous registered owner of the property and only procured the title after the respondents had surrendered it. The evidence shows that the property was initially owned by Nagaria Estate Limited who in turn donated to the National Museums of Kenya. It is through the Museum that the respondents obtained their title. Meanwhile, the appellant through their related entity had earlier donated part of their land to the respondent community for construction of the school and related amenities.
35. In the same breadth, the appellant does not dispute in its claim the donation of the land to the National Museum by its predecessor in title, Nagaria Estates Limited. The appellant does not also seem to be challenging the National Museum's capacity to grant the letter of no-objection or seeking to exercise the first right of refusal to the land previously donated to the Museum.
36. At the heart of the dispute is the agreement of 7th April 1996 both in the circumstances of its execution and enforceability. Paragraph 6 of the Complaint before the High Court by the appellant provides:
- “6. Further and without prejudice to the foregoing, the Plaintiff avers that the Defendant's attempt to secure a right to the Plaintiff's parcel of land aforesaid vide an alleged agreement of 7th April 1996 cannot be sustained and is not sustainable under the law because the same was wrongfully secured under duress exerted on the Plaintiff's directors by the former State House Comptroller of this Country.”
37. Under Order 10 rule 2(1)(a) of the Civil Procedure Rules, every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies. The appellant, despite alleging duress, never set out any particulars beyond stating that the duress was exerted by the former State House Comptroller. Unfortunately, this is not persuasive since none of the witnesses in their testimonies or correspondence points to this. The agreement was signed by around twelve people including three directors of the appellant and five witnesses. Should there have been duress, it would in our view not be onerous to demonstrate the same.



- 38. We therefore have no difficulty finding that the same was enforceable. The concerns about the same not having been stamped, to us reeks of afterthought. The agreement was not only adduced by the appellant but also was not subject to revocation in the plaint. The appellant had the option to specifically seek to have the agreement voided as part of the claim, which is not the case at hand.
- 39. Having said so, it was a term of the agreement that the respondents surrenders the title in exchange for the community recognizing and acknowledging though belatedly, the generosity of the family of Mr. Premchand Nagpar Shah for donation of additional part of the land acquired after the amalgamation of the initially donated plot previously donated by the Late Nagpar Raimal family.
- 40. It is a well-known principle of contract law that consideration need not be sufficient and it is not for the court to inquire into the same, the court not having been called upon to do so. Similarly, while the court does not shy away from interfering with unconscionable terms (see Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR) and Kenya Commercial Finance Company Ltd vs. Ngeny & Another [2002] 1KLR) this is not what we have been called upon to do in this case.
- 41. Having dispensed with the agreement which is the crux of the dispute, it follows that the appellant has not justified how it obtained the titles on the basis of the agreement or at all. Being beneficial owners of the property by virtue of shareholding does not of itself, divest them of their legal duty to ensure compliance on the terms and conditions of the agreements and understandings entered into. Therefore, the respondents are the lawful owners of the suit properties and the registration in favour of the appellant was unprocedural. The effect of this finding is that the occupation and development of the suit property by the respondents is justified under the circumstances and no trespass can be inferred.
- 42. The question of undetermined issues does not arise as the appellant acknowledges in its own submissions that the rest of the issues rest on the finding of the ownership of the title. We also are not persuaded by the argument of the incompleteness of the record as the same has only been raised at the appeal and determining it as a court of first instance goes against our very jurisdiction invoked by the appellant as an appellate court. We also do not think anything turns on the retrospective application of *the Constitution*.
- 43. In the end, the finding of the trial court does not warrant our interference. This renders the appeal unsustainable and one for disallowing. As for costs, the position is that they follow the event but in view of the relationship between the parties, we don't think we should burden any party with costs. In the end, we make the following orders:
 - a. The appeal is disallowed.
 - b. The judgment and decree of the High Court at Nakuru Environment and Land Court division (Mulwa, J.) in HCELC No.34 of 2003 issued on 24th March 2016 be and is hereby affirmed.
 - c. Each party to bear own costs.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

