



**Ratia v Ratia & 2 others (Civil Appeal 46 of 2017)
[2023] KECA 31 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KECA 31 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 46 OF 2017
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JANUARY 26, 2023**

BETWEEN

NCHOKOINE OLE RATIA APPELLANT

AND

JACKSON PARSIMET OLE RATIA 1ST RESPONDENT

REGISTRATION OF LANDS, NAROK DISTRICT 2ND RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, NAROK

DISTRICT 3RD RESPONDENT

(Being an appeal arising from the judgment of the High Court at Nakuru (A. Mshila. J, delivered on 9th November, 2015) In Civil Appeal No. 79 of 2011)

JUDGMENT

Background

1. This suit was commenced by a case which was filed in the Magistrate's court by Jackson Parsimei Ole Ratia (the 1st respondent), against Nchokoine Ole Ratia (the appellant), The Registrar of Lands Narok District (2nd respondent) and The District Land Adjudication and Settlement Officer, Narok District (3rd respondent). He substantively sought for orders of permanent injunction against the appellant from entering, alienating or interfering with his quiet use, enjoyment and possession of the parcel of land known as Narok/Cis-Mara/Olchoro/1669 (formerly plot No 55). He also sought an order for rectification of the register in respect of the said parcel of land.
2. The 1st respondent's case was that he is the beneficial owner of Narok/Cis-Mara/Olchoro/1669 (the suit land), which was originally owned by Ratia group ranch Incorporation (the group ranch). That in 1982, the group ranch resolved to distribute the ranch to its members and Nkitika Ole Ratia the father of the 1st respondent and the appellant being one of the original 19 members of the group ranch, was



allocated two shares. In the year 1997, Nkitika Ole Ratia divided his two shares into four portions and distributed them to his four sons. The 1st respondent received the suit land, the appellant received plot No 53, another son Sankale Ole Ratia received plot No 52 and still another son Ntimama Ole Ratia received plot No 54.

3. The 1st respondent stated that he lived on and developed the suit land for about seven (7) years, before he discovered that the appellant had been registered as the owner and had been granted the title deed to the suit land by the 2nd and 3rd respondents. The 1st respondent complained to the 2nd and 3rd respondents who admitted, *vide* a letter dated August 11, 2009, that the title had been given to the appellant erroneously.
4. The 1st respondent claimed that he was entitled to the suit land as a member of Ratia group ranch and a son of Nkitika Ole Ratia, who was among the 19 original, or initial members of the group ranch.
5. The appellant filed a defence and counterclaim and asserted that he was the registered owner of the suit property and had acquired the title lawfully. He acknowledged that the suit land was originally owned by the group ranch, and his father Nkitika Ole Ratia was one of the original members. That however, in the year 1995 the group agreed to allow the appellant and 16 other persons to become members and he was then allocated the suit land.
6. The appellant averred that he made payments to the lands office for processing the title and he was duly registered as the owner and issued with the title deed dated January 28, 2009. In his counterclaim, he urged the court to declare the 1st respondent a trespasser and issue an eviction order against him.
7. There was no appearance for the 2nd and 3rd respondents.
8. Upon consideration, the court held that in respect of the prayer for a permanent injunction, the 1st respondent failed to establish a prima facie case since the title of the suit land was registered in the appellant's name. In regards to the rectification of the register, the court held that section 143 (1) of the [Registered Lands Act](#) (now repealed) targeted registration other than a first registration.
9. The trial court concluded that therefore, it could not order for the rectification of the register and that in any case, the subordinate court had no jurisdiction to order for the rectification of the register. The 1st respondent's suit was therefore dismissed with costs.
10. Aggrieved by the judgment, the 1st respondent filed a memorandum of appeal in the High Court, on the grounds inter alia, that the Magistrate erred in law and in fact;
 - i. In finding that the 1st respondent did not file a defence to counterclaim when one was filed on October 1, 2009;
 - ii. In making a finding that the appellant's registration as proprietor of the suit land was a first registration under section 143 of the [Registered Land Act](#) when the group ranch itself had previous title which it transferred to the appellant;
 - iii. In failing to find that the effect of section 27 of the [Registered Land Act](#) has been vitiated by the mistake in the registration of the appellant as proprietor in place of the 1st respondent;
 - iv. In finding that the mistake admitted in the letter written by the 2nd and 3rd respondents was made by the father of the 1st respondent;
 - v. In finding that the court does not have the jurisdiction to order rectification of the register of a parcel of land;
 - vi. In disallowing the 1st respondent's case and allowing the appellant's case.



11. The appeal was disposed of by way of written submissions. The 1st respondent submitted that the trial court's failure to consider his defence to the counterclaim, amounted to condemning him unheard. In regard to jurisdiction, it was argued that the [Registered Land Act](#) (now repealed) only restricted the jurisdiction of the Magistrate's court to land whose value was not above twenty-five thousand pounds, and there was no evidence that the suit land exceeded the said amount.
12. In rebuttal, the appellant contended that the 1st respondent was not prejudiced in any way by the fact that his counterclaim was not considered. That the evidence and exhibits each party relied on were produced and examined and it is on their basis that the court made its finding.
13. Upon consideration, the superior court found that the lower court had jurisdiction to determine the entire matter and all issues raised before it and further, that the trial court erred in finding that the appellant was a first registered owner with an absolute and indefeasible title. Accordingly, the court allowed the appeal.
14. In turn, the appellant was aggrieved and dissatisfied by the judgement of the superior court and has appealed against it in this court on the grounds that the learned Judge erred in law:
 - i. In holding that the honourable Magistrate had jurisdiction to determine the issues both in the plaint and counterclaim and still went ahead to determine the issues therein instead of ordering a retrial.
 - ii. In only analyzing the evidence of the plaintiffs, witnesses and making no mention of the defence evidence in her analysis hence arriving at a wrong conclusion.
 - iii. In ordering that the appellant's title be cancelled thereby making the appellant landless, while making the 1st respondent a beneficiary of two parcels of land.
 - iv. In failing to hold that the 1st respondent did not produce evidence that meets the threshold of fraud to warrant the cancellation of the appellant's title.
 - v. By being extremely biased against the appellant herein.
 - vi. By misapplying the law and evidence hence arriving at wrong conclusion.

Submissions

15. Both parties filed written submissions by which the appeal was disposed of. The appellant's submissions are dated April 26, 2022 and were filed by M/s Leina Morintat & Company Advocates, while those of the 1st respondent are dated May 5, 2022 and were filed by M/s PK Njuguna & Company Advocates.
16. The appellant submits that the subject matter of the suit is within the jurisdiction of the Magistrate. That having had the opportunity to hear the witnesses and gauge them personally, the Magistrate is the ideal person to deal with the matter and the superior court should have ordered a retrial, for the ends of justice to be met. He relies on section 78 of the [Civil Procedure Act](#).
17. It is also submitted that failure by the Superior Court to mention the evidence of the defence, implies that the learned Judge violated order 18 rule 4 of the [Civil Procedure Rules](#).

Further, that cancellation of the appellant's title has no justification in law, because the 1st respondent did not give evidence to show that the title of the appellant was illegal.



18. The appellant asserts that there was no evidence given to indicate that there was any malice in the registration process. He further alleges that members of the ranch were shifted and therefore, a good number of them were affected.
19. In opposition, the 1st respondent contends that section 78 (1) of *Civil Procedure Act* has five possible routes to follow and under paragraphs (a) it mandates the first appellate court to determine the case. He submits that the judgement of the Superior Court shows that the court not only analyzed the evidence of the appellant, but also made several mentions thereof in the determination.
20. The 1st respondent asserts that the Judge analyzed the evidence produced and saw that the land in issue was in the possession of the 1st respondent, allotted by his father who had been allocated by the group ranch pursuant to their resolution. That the 1st respondent had also developed the land and thus when the group ranch purported to allocate the parcel to the appellant, the 1st respondent protested to the group ranch and to the government officials. That in spite of the protests, the appellant went ahead and took title.

Determination

21. This is a second appeal. The duty of this court on a second appeal is to determine 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: *Stanley N Murithii & Another versus Bernard Munene* (2016) e KLR).
22. We have keenly considered the record of appeal, the rival arguments, the authorities relied on and the law applicable and have framed the following issues for consideration;
 - a. Whether the learned Judge was within her mandate to hear and determine this matter after holding that the magistrate's court had Jurisdiction to hear it,
 - b. Whether the learned Judge took the evidence of the defence in to consideration; and
 - c. Whether the learned Judge considered all the evidence before her and applied the relevant law before reaching her conclusion.
23. The role of the superior court as the first appellate court was expressed in *Selle & Another vs Associated Motor boat Co Ltd & Others* (1968) EA 123, as follows;

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
24. Section 78 of the *Civil Procedure Act* provides the mandate of the first appellate court as follows:
 1. subject to such conditions and limitations as may be prescribed, an appellate court shall have power-



- a. to determine a case finally;
 - b. to remand a case;
 - c. to frame issues and refer them for trial;
 - d. to take additional evidence or to require the evidence to be taken;
 - e. to order a new trial
2. subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
25. Upon careful perusal of the impugned judgement, it is clear that the learned Judge was aware of her duty as the first appellate court and appreciated the fact that she did not have the benefit of seeing the witnesses testifying.
26. Section 78 of the *Civil Procedure Act* gives the appellate court several powers. Under subsection 1 (a) the appellate court has the power to determine a case finally. As such, nothing bars the appellate court from determining a matter which the lower court had jurisdiction to determine but failed to do so. In the instant case the learned Judge was of the view that the evidence before the court did not support the judgment rendered by the trial court and was therefore, within her mandate to re-evaluate the evidence and reach her own conclusions.
27. The appellant argues that the Superior Court violated order 18 rule 4 of the *Civil Procedure Rules* by not mentioning the evidence of the defence. On the other hand, the 1st respondent states that the judge did analyze the appellant's evidence and mention it in her determination.
28. Order 18 Rule 4 of the *Civil Procedure Rules* stipulates that:
- “The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge: provided that-
- i. the court may use recording processes and technology as may from time to time be approved;
 - ii. the transcript of such evidence when checked and approved by the judge shall constitute the official record of the evidence.”
29. A glance at the impugned judgement clearly shows that the learned Judge, analyzed the evidence of both sides before reaching her conclusion. The appellant's case is stated at paragraphs 9 to 11, his submissions are considered in paragraphs 17 and 18 and finally his evidence analyzed side by side with that of the 1st respondent in paragraphs 21, 27 and 28. Clearly therefore, there is no basis to accuse the learned Judge of bias.
30. The appellant also faults the Judge for misapplying the law and evidence, hence arriving at the wrong conclusion. The 1st respondent on the other hand contends that the Judge applied the law and reached the correct conclusion.



31. Section 143 of the *Registered Land Act* (now repealed) provided that:
- (1) subject to subsection (2), the court may order rectification of the register by direction that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.
32. The learned Judge quoted section 143 above but also relied on numerous decisions both from this court and the superior court, where the notion that a first registration confers an absolute indefeasible title on a first registered proprietor of land was rejected. She pointed out that sections 27, 28 and 30 of the *Registered Land Act* do provide exceptions to indefeasibility of title.
33. In his submissions to this court, the appellant admits that there was an error in the registration process that affected many people, and caused many members of the group ranch to be shifted. It is however, the undisputed evidence of the 1st respondent that he was in possession of the suit land for 7 years and he had developed it.
34. We are guided by this Court’s decision in *Epaphrus Muturi Kigoro v William Mukui Nyaga* [2015] eKLR, in which the court grappled with similar facts to those in the instant case in regard to section 143 of the *Registered Land Act* and pronounced itself as follows:
- “The circumstances under which the respondent’s title was transferred perfectly entitled him to come to court under the overriding interests over his parcel of land because when the purported transfer was effected, he was in possession of the suit land. Before a first registration is effected, there are several steps including an enquiry of the persons who were in occupation that ought to be contacted. Under the provisions of section 30 of the *Registered Land Act* (cap 300), it makes provisions of what constitutes an overriding interest regarding a registered title as follows: -
- “Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –
- (a) ...
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed”.
35. From the foregoing, we are satisfied that the learned Judge considered all the evidence and arguments of the parties, and applied the relevant law properly before reaching her conclusion. We find no basis to interfere with determination of the learned Judge. Accordingly, this appeal is found to lack merit and is dismissed with costs.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. OCHEING

.....

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

