



REPUBLIC OF KENYA



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**Karanja v Mugi (Sued as the Administrator of the Estate of Joseph Kimuhu Githengere)  
(Civil Appeal 83 of 2018) [2023] KECA 1101 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1101 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 83 OF 2018  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**SAMUEL PETER GITAU KARANJA ..... APPELLANT**

**AND**

**HANNAH NJERI MUGI (SUED AS THE ADMINISTRATOR OF THE ESTATE  
OF JOSEPH KIMUHU GITHENGERE) ..... RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. J.N. Mulwa, J.) dated and delivered on 15th May 2018 in HC Civil Case No. 101 of 2002)*

**JUDGMENT**

1. The High Court (J. N. Mulwa, J.) in a judgment delivered on 15<sup>th</sup> May 2018 dismissed the appellant's case which sought to declare him as the owner of the property known as Dundori/Lanet/5/17“A” (also referred to as Plot 71). The appellant, Samuel Peter Gitau Karanja, had sued Joseph Kimuhu Githengere, the husband of Hannah Njeri Mugi. Hannah Njeri Mugi is the administratrix of the estate of Joseph Kimuhu Githengere who passed away during the trial.
2. The appellant who testified as PW1 stated that his father bought Plot No. 71 which is now registered as Dundori/Lanet/5/71“A” measuring 2½ acres from Nakuru Kiamunyeki Company Limited (hereinafter referred to as the company) on his behalf. He produced entrance fee receipt, share capital receipts and a ballot paper as exhibits. He testified that in 1975 when demarcation and allocation was done some plots including Plot No. 71 remained un-allocated. In 1981, he was allocated the plot by a probe committee which was set up to investigate misappropriation of funds and plots by the company's directors. He, however, did not take immediate possession of the plot until 1987 when he moved in to plough the land but the deceased Joseph Kimuhu Githengere laid claim to it and prevented him from entering it. He also testified that he lodged a dispute which was heard by the District Officer (D.O.) of Bahati Division who ruled in his favour. In 1988, another probe committee, in which Michael Waweru who is alleged to have sold the plot to the defendant sat as a member, was set up and it ruled



that the suit property belonged to the respondent. The appellant also testified that his father, Evanson Karanja Kiriongi, was a director of the company from 1972 to 1975.

3. The other witness of the appellant was Mathew Kingori Gitahi who testified as PW2. He stated that he was a member of the 1981 Probe Committee and that Plot No. 71 was not allocated to anyone nor purchased by anyone as at the time he served in the Committee. He testified that it is the Committee which sold the plot to the appellant in 1982. On cross-examination, he stated that the company bought the land in 1973, subdivided it in 1975 and the balloting for the plots was done in 1975. His testimony was that the appellant came to own the plot in 1982 after the probe and that the share certificate was issued to him in 1982 together with a ballot paper. He further stated that in 1982 the company was merely selling plots and not issuing shares.
4. The administratrix of the estate of the respondent, Hannah Njeri Kimuhu, testified as DW1. She stated that her late husband bought the suit plot from one Michael Njenga Waweru and they had cultivated it from 1982 to date. She produced a sale agreement entered into on February 11, 1982 and added that she was present during the sale. She also stated that they had initially leased the plot two years prior to the sale. Further, that they paid a consideration of Kshs 35,000.00 in instalments as per the terms of the agreement.
5. Joseph Gaitho Mwaura testified as DW2 stating that he was one of the founding directors of the company in 1973. He stated that in 1974 the company bought a farm and subdivided it to its shareholders during which Plot No. 71 was allocated to Michael Waweru who was the chairman of the company. He also stated that the plot was later sold and transferred to the deceased Kimuhu Githengere in 1982.
6. Japhason Kariuki Gichuki testified as DW3 and told the trial court that he was a member of the Board of Directors of the company from 2001 and that the certificate for Plot No. 71 was assigned to Michael Waweru on February 2, 1977 but later was sold to Joseph Kimuhu Githengere. He stated that the share certificate owned by the appellant was not genuine because as at the time it was allegedly issued, the company was not selling shares but plots and that the last shares were sold in 1973 and balloting done in 1975. His evidence was that Plot No. 71 belonged to the husband of Hannah Njeri Mugi who bought it from Michael Waweru the person originally allocated the plot by the company.
7. Upon hearing the matter, the trial court found in favour of the estate of the respondent noting that the suit property was allotted to Michael Waweru who then sold it to the deceased. The court proceeded to rule that the deceased could not be declared a trespasser, having acquired the plot through a *bona fide* purchase for value from Michael Waweru who was the original allottee of the plot, and therefore the legal owner of the said plot.
8. The appellant being dissatisfied with the judgment of the trial court is before us raising 10 grounds of appeal as follows:
  - i. That the trial Judge erred in law and fact when she entered into the arena of dispute by arriving at the holding that the 1981 probe committee's actions in repossession and reallocation or sale of the subject plot was ultra vires its mandate;
  - ii. That the learned trial judge erred in law and fact in upholding the Respondent's submission and evidence as the rightful and legal allottee of Plot No. 71 her late husband having purchased the same from Michael Waweru, the original allottee in the absence of cogent evidence;
  - iii. That the Learned trial judge erred in law in not finding that the Respondent's evidence tendered in the case was insufficient to warrant a finding that the suit land did not belong to the Appellant;



- iv. That the Learned trial judge erred in holding that the Appellant's title was fraudulently obtained whereas there was no evidence adduced to support the claim as proof of fraud is higher than in the standard of proof in civil cases on a balance of probabilities but lower than beyond a reasonable doubt;
  - v. That the learned trial judge erred in law and fact in disregarding the evidence adduced by the Appellant and arriving at the conclusion that the Respondent acquired the said plot through a *bona fide* purchase for value from the original allottee therefore the legal owner;
  - vi. That the Learned trial judge erred in law and fact in upholding the interest of the Respondent whereas the Respondent had failed to set out with reasonable degree of precision the genesis of her interest as the purported exchange of the plot as between Michael Njenga Waweru and Mburu Gichua took place on 18/4/1977 whereas the certificate in the name of Michael Njenga Waweru was issued on 2/2/1977;
  - vii. That the learned trial judge erred in disregarding the evidence and submission by the Appellant that there was no allocation of Plot No. 71 to the said S. M. Gichua to subsequently vest interest in the said Michael N. Waweru vide an exchange of plots and the process was flawed and only aimed at sanctifying and or regularizing the fraudulent actions of the said Michael N. Waweru;
  - viii. That the Learned trial judge erred in law and in fact in disregarding the evidence adduced to the effect that the Appellant was duly allotted the suit land, paid the requisite fees and was issued with title deed to evidence his entitlement to the property known as Dundori/Lanet/5/71 'A';
  - ix. That the Learned trial judge erred in law and fact in failing to appreciate that the sanctity of title sought to be protected under the *Constitution* applies to property legally and regularly acquired which was the case in respect of the Respondent; (*sic*)
  - x. That the Learned judge's erred in applying her conscience rather than the law in evaluating the evidence as presented before the Court hence the findings are totally unsupported in law.
9. The appeal before us was canvassed by way of written submissions with the firm of M/s Mirugi Kariuki & Co. Advocates appearing for the appellant while that of M/s Waiganjo & Co. Advocates appeared for the respondent. Counsel for the appellant submitting on the first ground of appeal argued that the trial court erred by descending into the arena of the dispute to the detriment of the appellant. Counsel submitted that the trial Judge also erred in making findings on issues which were not pleaded thereby negatively impacting on the appellant's case. Counsel pointed out that the question as to the name of the company was not an issue before the court and the trial Judge's incorrect finding that there were two companies known as Nakuru Kiamunyeki Company Limited and Kiamunyeki Farmers Company Limited adversely impacted on the final outcome of the case. Counsel faulted the trial court for considering the issue of the company name to the exclusion of the question as to who owned the suit property. He urged that the company had two names which were used interchangeably and referred to one and the same entity that is the Kiamunyeki Farm Co. Ltd which was in place between 1971 to 1980. Still on this issue, counsel urged that the trial court had no jurisdiction to invalidate the workings and findings of a probe committee as those were internal affairs of the company. According to counsel, as the trial Judge was sitting as the Environment and Land Court, she had no authority to interrogate the operations of an internally established committee as such power was reserved for the High Court.
10. In support of grounds 2, 3, 5, 8 and 10 counsel submitted that the evidence on record did not support the findings by the trial court on the question of ownership of the suit property. According to counsel, the trial court failed to consider the fact that the receipts produced by the appellant predated those by the respondent. He faulted the trial court for being biased in the manner in which it appraised the



evidence on record and as a result arrived a decision that favoured the respondent with no evidentiary backing. Counsel argued that the trial court erred by relying on the sale agreement produced by the respondent to discredit the appellant's receipts. Counsel also faulted the trial Judge arguing that the court considered issues not raised in the pleadings despite the court stating that parties were bound by their pleadings. According to counsel, the question on what was the name of the company was not an issue raised by either of the parties yet the court made a finding on it; and this to the detriment of the appellant's case.

11. Counsel while submitting on grounds 4 and 6 asserted that the trial court made an adverse finding that the appellant fraudulently acquired ownership of the suit property notwithstanding that the evidence on record was not sufficient to prove the element of fraud to the required standard. Counsel relied on the case of *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others*, Civil Appeal No. 215 of 1996 as cited in *Pamba Ong'weno Amila v John Juma Kutolo* [2015] eKLR to buttress the argument that the standard of proof where fraud is alleged is much higher than the standard for ordinary civil cases. Counsel also reiterated his submission that the trial court dived into the arena of litigation when it made an adverse finding on the appellant by holding that a party cannot be a judge in their own case which finding it relied on to discredit the 1981 probe committee findings.
12. As regard ground 7 of the appeal, counsel submitted that there was no evidence of allotment of Plot No. 71 to one Michael Waweru and therefore the respondent could not have acquired any transferrable interest from the said person. In the end, counsel urged us to allow the appeal, set aside the judgment of the trial court and make a finding that the appellant is the lawful owner of the suit property.
13. For the respondent, counsel identified two issues for determination, namely, whether the pleadings were supported by the evidence and whether the probe committee had the mandate to repossess and sell Plot No. 71 or execute the mandate of the directors of the company. Counsel set off by relying on the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as delineating the mandate of a first appellate court and urged us to delve into both the facts and the law. Addressing the issue whether the pleadings were supported by the adduced evidence, counsel referred to Sections 107 and 108 of the *Evidence* to submit that the burden of proof is with the litigant who desires the court to believe in their case. Counsel submitted that despite the appellant seeking to be declared the legal allottee of the plot known as No. 71, he only produced a title deed for the parcel of land known as Dundori/Lanet 5/71 (A). Counsel pointed out that the appellant did not include a title deed for the said parcel of land which title he obtained during the pendency of the suit considering that the suit commenced in 1988. Counsel relied on *Galaxy Paints Company Limited v Falcon Guards Limited* CACA No. 219 of 1998 for the proposition that parties are bound by their pleadings and asserted that the appellant sought a declaration of ownership for a different parcel of land and not the suit property.
14. Counsel also submitted that from the evidence on record, it was evident that the 1981 probe committee cancelled and repossessed parcels of land including plot No. 71 which had allegedly been grabbed. It was counsel's position that the probe committee went beyond its mandate by disposing land that was not available for sale. Counsel also submitted that the evidence on record did not establish who purchased the land between the appellant and his father and that no sale agreement was ever produced to support the alleged sale. Counsel reiterated that the mandate of the probe committee was specific and they were expected to prepare findings from their investigations and were not mandated to act as the board of directors for the company or sell the company's properties. Counsel contended that the transfer in favour of the appellant was illegal and this fact was supported by the findings of the latter probe committee which found in favour of the respondent. In conclusion, counsel maintained that there was overwhelming evidence to confirm that the appellant procured a title deed by fraud and or through a corrupt scheme and that the learned trial Judge properly rejected the appellant's case based



on the evidence before her and correctly held that the respondent was the lawful allottee of the suit land.

15. This is a first appeal and as correctly submitted by the respondent, we are mandated to render ourselves on issues of both law and fact. In doing so, we must, however, take cognizance of the fact that where oral evidence was taken, as was done in this case, it was the trial court that had the benefit of seeing the witnesses and appreciating their demeanor. This statement finds support in the decision of this Court, differently constituted, in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where it was held that:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.”

16. In execution of our mandate, we have duly considered the record of appeal, the submissions and the authorities relied upon by parties in the appeal. In our view, this appeal turns on the determination of the question as to the *bona fide* allottee of plot No. 71 and whether the respondent legally acquired interest in the plot.
17. Addressing the question as to who was the *bona fide* allottee of plot No. 71 requires an appreciation of the history of the suit property. Like all other land buying companies that were in vogue immediately after independence, the members of the company herein paid a membership fee to join and acquire shares in the company. The shareholding became a critical tool because in the end, it would form the basis upon which land would be allocated. Upon purchase of shares, one would then be issued with a share certificate as well as various receipts for all manner of payments made to the company. After the surveying and subdivision of the land bought by the company into smaller portions, allotment of land to members would then ensue through balloting. Members would then be issued with a ballot denoting the plot number balloted for. Membership was therefore denoted by the share certificate. The company would maintain a register of members indicating their details, the share certificate number, plot number and such other details as may be peculiar to the membership.
18. In the circumstances, proof of the *bona fide* allottee of plot No. 71 calls for the interrogation of the available documentary evidence.

In doing so we are guided by Sections 107, 108 and 109 of the *Evidence* which provide as follows:

“107. Burden of proof.

1. 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

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.



108. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

19. From the record, it is discernable that Kiamunyeki Farmers Ltd was formed in 1972 and registered in 1973 with the sole purpose of purchasing Thybo Farm LR Nos. 4628, 4730, 2,4452 and 448. Balloting for the plots was done in 1975. In 1981 there were leadership wrangles in the company and a probe committee was appointed to investigate alleged mismanagement of the company’s affairs and property. In 1985, this probe committee allegedly sold land to the appellant. The appellant is said to have purchased company shares worth Kshs. 3,000 through his father. According to the appellant, at the time he purchased the suit property from the company, the same had not been allotted to anyone. On the part of the respondent, she contends that her late husband who was the initial defendant in the proceedings that gave rise to this appeal purchased the suit property from Michael Waweru in 1982. A share certificate No. 687 dated February 2, 1977 in the name of Michael Waweru was produced as an exhibit. There is also on record a letter dated April 18, 1977 by one S. M. Gichua who was the original allottee of plot No. 71 having joined the company in 1974. The documents show that Mr Gichua owned the suit property until 1977 when he transferred it to Michael Waweru in exchange for Waweru’s plot No. 69 at New Njoro Farmers Company Limited.
20. From this set of evidence, there is no doubt that the original allottee of the suit property was one S. M. Gichua. The agreement between Gichua and Michael Waweru regarding the exchange of their plots in their respective companies has not been challenged. We also note that this transaction took place way before the 1981 probe committee was put in place. According to the appellant, he purchased the same plot from the probe committee. He produced a share certificate in support of his case. The appellant also argues in this appeal that the Respondent had failed to set out with reasonable degree of precision the genesis of her interest as the purported exchange of the plot between Michael Njenga Waweru and Mburu Gichua took place on April 18, 1977 whereas the certificate in the name of Michael Njenga Waweru was issued on February 2, 1977.
21. We have perused the pleadings and the *viva voce* evidence tendered by both parties, and note that the issue regarding the difference in the dates was not addressed by the parties at the trial. This Court cannot therefore enter the realm of speculation as to how the transaction between Mburu Gichua and Michael Waweru was conducted in terms of which activity preceded the other. However, from the record, we find that there is cogent evidence that plot No. 71 was balloted and allocated in 1974 and was passed to Michael Waweru in 1977. The issue herein is whether the same was free for allocation by the probe committee in 1983 or for sale in 1985 as alleged by the appellant. We do not find any evidence to support the claim by the appellant that the probe committee was vested with the power to invalidate balloting of plots and dispose of them. Without this evidence, the appellant’s assertion that it is through that means that he acquired the said plot rests on quick sand.
22. Proof in civil disputes is always on a balance of probabilities. Therefore, a party who persuades the court that what he has pleaded in his case, and supported with evidence, is more likely than not to be what took place will have a judgment granted in his favour. In this case, from the evidence on record and the exhibits, it is unlikely that the appellant was the *bona fide* allottee of the suit property. He could not have secured that allotment when the bona fide interest of the S. M. Gichua which was passed on to Michael Waweru had not been legally extinguished. That interest is what Michael Waweru subsequently transmitted to the deceased husband of the respondent. Furthermore, it is also evident that a subsequent probe committee established in 1987 confirmed the lineage of the respondent’s



ownership of the plot. Our finding therefore is that the learned Judge properly rendered herself on the evidence and arrived at a conclusion backed by evidence that Michael Waweru who sold the plot to the deceased Joseph Kimuhu Githengere had *bona fide* interest in the suit property.

23. The next issue for our determination is in respect as to whether the respondent acquired transferrable or beneficial interest in plot No. 71. In this regard, having arrived at the conclusion we have hereinabove, and there being no challenge as to the sale agreement between Michael Waweru and Joseph Kimuhu Githengere it follows that the respondent has a legally recognizable right to the suit property. Evidence was led to substantiate the respondent's claim that the said parcel of land was purchased by Joseph Kimuhu Githengere through a sale agreement dated November 20, 1982. This evidence was not disputed. In the circumstances, we find that the late Joseph Kimuhu Githengere acquired beneficial interest over plot No. 71. This being the case, the appellant's claim of trespass by the respondent is without merit.
24. The remaining issue is the determination of the costs of this appeal. Ordinarily, the award of costs is a matter within the court's discretion. In exercising that discretion, courts ordinarily adhere to the principle that costs follow the event. In considering whether to depart from the principle that costs follow the event, courts consider various factors including the issues canvassed, the conduct of parties during the hearing and the relationship between parties. We note that this case commenced in 2002, over 20 years ago. Prior to that, the dispute had been a subject of contestation before the company. It has also attracted a fair share of criminal litigation. The appellant has been relentless in his quest to evict the respondent from the suit land. It follows that the respondent has had to live with all these challenges during the time that the matter has been in the court corridors. In the circumstances, the respondent having successfully defended her case in this appeal warrants an award of costs and we award her the costs of this appeal.
25. In conclusion, we find that this appeal is without merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023**

**F. OCHIENG**

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**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**

