



Murage (As the Administrator of the Estate of Bernard Chiori Murage) v Softwhite Beach Limited & 5 others (Civil Appeal E015 of 2020) [2022] KECA 803 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 803 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E015 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 29, 2022**

BETWEEN

**JOSEPH NICHOLAS MURAGE APPELLANT
AS THE ADMINISTRATOR OF THE ESTATE OF BERNARD CHIORI
MURAGE**

AND

**SOFTWHITE BEACH LIMITED 1ST RESPONDENT
JOSEPH KASHURU MUMBO 2ND RESPONDENT
MASUMBUKO YERRY KOMBE 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
CHIEF LAND REGISTRAR 5TH RESPONDENT
DISTRICT LAND REGISTRAR, KILIFI 6TH RESPONDENT**

(An appeal against the judgment delivered in the Environment and Land Court at Malindi (Olola J.) on 13th May 2020 in Malindi ELC No. 30 of 2011)

JUDGMENT

1. This appeal arises from a judgment dated 13th May 2020 by the Environment and Land Court (ELC) at Malindi (Olola J.) delivered in Malindi ELC Case No 30 of 2011, in which the trial Judge dismissed the 1st Respondent's suit with costs to the 2nd and 3rd Respondents, after finding that the title to land parcel No. Chembe/Kibabamshe/393 was valid and that its purported mutation and sub division creating parcels No Chembe/Kibabamshe/651 and 652 were unprocedural, illegal and fraudulent. The ELC further allowed the 2nd and 3rd Respondent's counterclaim and found that the 2nd Respondent procedurally and legally acquired title for land parcel No. Chembe/Kibabamshe/393, and



- that the 3rd Respondent was a bona fide purchaser thereof, and granted them a permanent injunction restraining the 1st Respondent from dealing with plot No. Chembe/Kibabamshe/393.
2. The Appellant being aggrieved by the decision of the Environment and Land Court (Olola J.), proffered this Appeal and filed a memorandum of Appeal dated 19th November 2020, in which he raised 22 grounds of appeal which challenged the findings of the ELC for failing to acknowledge that the Appellant's title had been cancelled without any evidence and or testimony that the alleged cancellation was done in accordance with the law and that an order was issued in Succession Cause No. 438 of 1988 by the High Court at Nairobi, transmitting the suit property to the Appellant which Court is of concurrent jurisdiction; and for failing to enjoin the Appellant and consider the unchallenged evidence he had filed before rendering judgment, thereby infringing on his right to fair trial.
 3. A procedural history of this matter is that the 1st Respondent filed a plaint dated 13th April 2011, in which it claimed that in 2006 or thereabout, it purchased Plot Title No. Chembe/ Kibabamshe/651 & 652 from La Marina Limited, after carrying out due diligence and establishing that prior to 1998 Plot Title No Chembe/Kibabamshe/393 was registered in the name of the government but not occupied, and that between 1998 and 2001, Plot Title No Chembe/Kibabamshe/393 was subdivided to Plot Title No Chembe/Kibabamshe/651 and Plot Title No Chembe/Kibabamshe/652. The 1st Respondent therefore sought a declaration that the title to Chembe/Kibabamshe/393 was illegal null and void, and that the titles to plot No. Chembe/Kibabamshe/651 and Plot No. Chembe/Kibabamshe/652 were valid and he was he indefeasible and absolute proprietor thereof; and injunctions restraining the 2nd to 3rd Respondents from dealing with plot No. Chembe/ Kibabamshe/393.
 4. The 2nd and 3rd Respondents in response filed a Defence and Counterclaim dated 12th May 2011, alleging that there was no subdivision done to Plot No Chembe/Kibabamshe/393, and sought declarations that the title to Chembe/Kibabamshe/393 was valid, the 3rd Respondent was the bona fide and legal owner thereof; and an injunction restraining the 1st Respondent from dealing with plot No. Chembe/Kibabamshe/393.
 5. The trial Judge in the ELC heard the Respondents and their witnesses and reserved the matter for judgment. It appears from the record that while the said judgment was pending, the Appellant filed an application by way of a Notice of Motion dated 25th July 2019, seeking to be enjoined as an interested party in the suit; a suspension and arrest of the judgment that was scheduled for delivery on for 21st November 2019; and that the trial proceedings be reopened and he be allowed to participate, tender evidence and make submissions. The main grounds for the application were that that the Appellant's father, Bernard Chiori Murage (deceased) was issued with a title deed on 22nd September 1978 for Chembe/Kibabamshe/393 (hereinafter "the suit property"), which was at the time of his demise charged to KCB Bank Limited for an amount of Kshs 500,000/- on 8th March 1982, and the charge still subsisted at the time of the trial. Therefore, that the Appellant as administrator of the deceased estate ought to be joined in the suit arising from the said title.
 6. Further, that there was a decision of the National Lands Commission communicated in the Gazette Notice of 2017 which confirmed that the property was registered to his father. In addition, that the Respondents participated in proceedings in the National Land Commission and were aware of the deceased's interest in the suit property but failed, refused and neglected to inform the Court of the said competing interest or to join the deceased. Lastly, that the Appellant thereby had locus to pursue the deceased assets, and any orders that would be issued by the Court affecting the suit property would affect him.



7. The 1st Respondent opposed the application in a replying affidavit sworn on 7th October 2019 by its director, Zipporah Nyaguthi Gitonga, citing it was too late in the day since the suit had been in Court for eight years, that the Appellant was aware of the suit as early as 17th July 2017, and there was no explanation why the Appellant had not filed this application then. Lastly, that the matter was fully heard and was pending judgment, and it would be extremely expensive for the 1st Respondent if the matter was reheard and the only remedy for the Appellant was compensation by the Government.
8. On 5th December 2019, Olola J. delivered a ruling dismissing the Appellant's application, and held that while the Appellant's father may have been issued with title for the said LR. No. Chembe/Kibabamshe/393, there was no nexus or claim between him and the parties before the ELC, who trace their connection to the suit property from letters of allotment issued in 1999 and the titles issued thereafter. Therefore, that the Appellant had no claim against any of the parties in the existing suit even where it was established that the subsequent allocation of the suit property by the Government was without basis, and that the Appellant's remedy if any lies in seeking compensation from the Government. The learned Judge proceeded to reserve the main suit for judgment and subsequently delivered the impugned judgment on 13th May 2020 leading to this appeal.
9. We heard the appeal virtually on 23rd March 2020, and learned counsel James Kagoro appeared for the Appellant, learned counsel, Mr Kokebe appeared for the 3rd Respondent, and learned counsel Ms. Lutta was present for the 3rd, 4th and 5th Respondents. There was no appearance for the 1st Respondent despite its advocates having been served with the hearing notice. We however relied on written submissions dated 18th September 2021 filed by the said advocates. Mr. Kagoro highlighted his written submissions, while Mr. Kokebe informed the Court that the 2nd Respondent was deceased and highlighted submissions he had filed on his behalf. Ms. Lutta indicated that she had not filed any submissions and did not oppose the appeal.
10. Mr. Kagoro submitted on four main areas raised by the Appellant's grounds of appeal, namely the failure to give the Appellant an opportunity to be heard, the cancelling of the Appellant's title without cause and without official records from the Ministry of Lands, the existence of prior orders by the High Court in Succession Cause 438 of 1998 transmitting the suit property to the Appellant, and failure to join the Appellant in the suit in the ELC suit despite the knowledge by the trial Judge and Respondents that he was the first registered owner and of his interest in the suit property. Mr. Kagoro in this respect analysed the evidence relied upon by the trial Judge, particularly the Gazette Notice alleged to have cancelled the Appellant's title, to submit that it was an error for the judge to find that the said title was cancelled.
11. The Appellant's case in a nutshell is that his title preceded the Respondents' title as such was indefeasible save in the instance of fraud which were required to be expressly pleaded and proved including in the Respondents' responses to the application for joinder. He placed reliance in this respect on and urged this Court to find that the 1st and 3rd Respondents title were invalid and to uphold his title. He placed reliance on the Court of Appeal case of *Benja Properties Limited vs Syedna Mobammed Burbannudin Sabed & 4 Others* [2015] eKLR which reiterated the holding in Dr. Joseph Ng'ok Justice Moiyo Ole Keiwua and 2 others C.A. No 60 of 1997 (unreported), and also placed reliance on sections 24a, 25 and 26 of the *Land Registration Act* to submit that the Appellant's title had priority over any other alleged titled issued over the suit property.
12. The 1st Respondent's advocates position, as stated in written submissions dated 18th September 2021, was that the Appellant not being a party in the ELC proceeding, could not challenge the ELC's judgment on the substance of the evidence adduced in the proceedings, and could only challenge the ruling delivered on 5th December 2019. Reliance was placed on the decisions in *Communications*



Commission of Kenya & 4 others vs Royal Media Services limited and 7 others [2014] eKLR and *Centre for Rights Education and Awareness & Another vs John Harun Mwau & 6 Others* [2012] eKLR on the locus standi of a person who was not a party in the trial court in an appeal.

13. Mr. Kokebe on his part submitted that the Court was being called to decide on the ruling issued on 5th December 2019, on which the Appellant withdrew his appeal. He submitted that the Gazette Notice that cancelled the Appellant's title had timelines which were not adhered to with the result that the suit property reverted back to the government, and was subsequently allocated to the 2nd Respondent, while the 3rd Respondent was a bona fide purchaser for value thereof without notice and was in possession of the said property.

14. As this is a first appeal from the decision of the ELC, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated 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 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”

15. The Court of Appeal's jurisdiction is also clearly stated in Article 164(3) of *the Constitution* and is limited to the hearing of appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. The *Appellate Jurisdiction Act* in this respect reiterates in section 3(1) that this Court's jurisdiction is only appellate. This Court therefore, does not have jurisdiction to hear and determine new claims or issues that were not pleaded or urged in the judgments appealed from. It is not in dispute that the Appellant was not a party in the ELC, nor were the issues he raises in this appeal pleaded or canvassed in the suit in the ELC or addressed in the impugned judgment appealed from. His claims are therefore essentially a new cause of action, and it is notable in this respect that in his memorandum of appeal dated 19th November 2020, the Appellant not only seeks to set aside the impugned judgment by the ELC, but also prays that we give declaratory orders as regards his title and rights to the suit property.

16. We in this respect are in agreement with the holding by this Court (Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu, JJ.A) in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others)* [2016] eKLR on a similar question as to whether this Court had jurisdiction to consider the claim for damages when there were no pleadings or claim for such damages in the trial Court. The Court in answer held as follows:

“(58) There is no doubt that the damages prayed for by the respondents in their plaint were damages to the 1st respondent's machinery which machinery had by then neither been dismantled nor sold. As the damages arising from the sale of the 1st respondent's machinery were not pleaded, the respondent's pleadings could not form the basis for award of such damages. The disposal of the 1st respondent's goods resulted in a new cause of action that could not be dealt with by the Court of Appeal in Civil Appeal No 88 of 2000 as the jurisdiction of the Court at that stage was limited to consideration of the proceedings



and judgment of the High Court. In considering Appeal No. 88 of 2000, the Court was exercising its original jurisdiction that in terms of Rule 29(1) of the Court Rules called for the Court to re-appraise the evidence adduced in the superior court and draw inferences of fact. The Court could not deal with new issues that had neither been raised nor considered at the trial. Neither the delay in the delivery of the High Court judgment nor the length of the litigation could justify the Court assuming jurisdiction where there was none.

17. In addition, we note that the Appellant did file a Notice of Appeal against the ruling by the ELC dated 5th December 2019 declining to join him as an interested party in the subject suit. Mr. Kagoro submitted in this respect that the Appellant withdrew the said appeal, for reasons that it was overtaken by events by the subsequent delivery of the judgment by the ELC, and opted to instead pursue this appeal. However, the Notice of appeal filed herein appeals against the judgment by the ELC delivered on 13th May 2020, yet it is notable that one of the issues the Appellant urges in this appeal is the failure to join him in the suit in the ELC and afford him a right to hearing, which was also the subject of the ELC ruling dated 5th December 2019. This Court (Nambuye, Mwilu, Musinga, Kiage & J. Mohammed JJ.A) in this respect explained in *Nguruman Ltd vs Shompole Group Ranch & Another* [2014] eKLR that we have no jurisdiction to hear an appeal on a ruling or judgment on which there is no Notice of Appeal filed, and we cannot therefore also address any of the issues arising from the ruling by Olola J. dated 5th December 2019 on the Appellant's application for joinder.
18. The long and short of our findings is that we have no jurisdiction to hear the Appellant's appeal, which is hereby struck out with costs to the Respondents.
19. It is so ordered

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY 2022.

S. GATEMBU KAIRU (FCIArb)

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

