



REPUBLIC OF KENYA



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**Wafula & another v Mulunda (Civil Appeal 51 of 2018)
[2022] KECA 1145 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1145 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 51 OF 2018
PO KIAGE, K M'INOTI & M NGUGI, JJA
OCTOBER 21, 2022**

BETWEEN

GODFREY WANJALA WAFULA 1ST APPELLANT

KOLOLI WAFULA NASIOMBE 2ND APPELLANT

AND

JAIRUS WAKHUNGU MULUNDA RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at
Bungoma (Mukunya, J.) dated 28th March, 2018 in ELC Case No. 17 of 2013)*

JUDGMENT

JUDGMENT OF KIAGE, JA

1. The appellants, Godfrey Wanjala Wafula and Kololi Wafula Nasiombe filed an Originating Summons dated 28th February 2005 against Jairus Wakhungu Mulunda, the respondent. They sued in their capacity as personal representatives of the estate of their late father, Wafula Mulanda John (the deceased) who was also a brother to the respondent. They claimed that the deceased was entitled to the ownership of 2.3 acres of parcel number Kimilili/Kibingei/216 (suit property). Prior to his demise, the deceased had been in peaceful and continuous occupation of the suit property without interruption for more than 12 years and consequently, had acquired ownership by virtue of adverse possession. Among other prayers, the appellants sought a declaration that the respondent held the 2.3 acres of the suit property in trust for the deceased and by virtue of being the personal representatives of the deceased, the title of the portion be registered in their names.
2. The respondent filed a replying affidavit asserting that both he and the deceased acquired separate parcels of land from their late father. He was gifted the entire suit property on 11th November 1980, while the deceased acquired title number Kimilili/Kibingei/699 through the assistance of their father.



The deceased raised his family on his parcel of land until 28th July 1987, when he forcefully moved into the suit property. Contrary to the appellants' claims, the illegal possession was not peaceful as the respondent filed suit on 25th September 1991 and the court battles went on until 22nd January 2003. Fortunately, they ended in favour of the respondent. Furthermore, the respondent counterclaimed for the eviction of the appellants as their occupation had no legal basis.

3. On 8th July 2009, before Muchemi J and in the presence of the parties' advocates, directions were given by consent as follows;
 1. The O/S and supporting affidavit be deemed as Plaintiff.
 2. Replying Affidavit be deemed as defence and counterclaim.
 3. The Supplementary Affidavit be deemed as reply to defence and defence to counterclaim.
 4. The matter to proceed by way of Viva Voche evidence and to be heard by one Judge in Bungoma.”
4. Accordingly, the record of appeal reveals that the 1st appellant gave his testimony on 18th July 2013. Thereafter, on 23rd February 2016, before Mukunya, J. the appellants through their advocate Mr. Juma withdrew their suit without objection from the respondent's counsel. The relevant part of the record is as follows;

Mr. Juma: I am applying that the suit be withdrawn and the court to determine the issue of costs.

M/S Mufutu: We shall not oppose withdrawal subject to costs. We have a counterclaim for eviction.

Court: The Plaintiff is allowed to withdraw the suit with costs to the defendant. The defendant shall now fix his counter claim for hearing and serve the Plaintiff.

It is so ordered.”

5. That notwithstanding, on 5th December 2016, before Mukunya, J, Mr. Juma sought the consolidation of the suit with Environment and Land Court No. 5 of 2016 and claimed that they concerned the same subject matter. Ms Mufutu opposed the application on the grounds that the plaintiff in that case was different hence a stranger to the suit and the claim therein was different. In a ruling delivered on 10th March 2017, Mukunya, J. rejected the application for consolidation on the basis that since the originating summons was withdrawn, the case ceased to exist. Consolidation thus was untenable. He ordered that the respondent's counterclaim be fixed for formal proof.
6. Subsequently, the appellant's advocate filed a notice of motion dated 12th May 2017 which sought to set aside the order for formal proof and to grant leave for the appellants to file a defence to the counterclaim out of time. On 1st March 2018, Mukunya, J. delivered a ruling and held, in part, as follows;

I have considered the application. I see it as an attempt to resurrect the withdrawn suit. The suit (O.S) was withdrawn by the plaintiff/applicant on his own volition leaving only the issue of costs. The counterclaim was raised in the (sic) reply to the O.S.....Some 13 years ago....

Instead of replying, the Plaintiff later after 12 years withdrew the suit. He cannot now be heard to say that he is being condemned unheard. The suit he filed was withdrawn by him



after 12 years. There is no suit. All that is left is a counterclaim. He is unfit to cross examine the respondents as they formally (sic) proof their claim for eviction.”

7. The matter proceeded for formal proof. Mukunya, J. considered the uncontested counterclaim and found in favour of the respondent. He held that the respondent proved his case on a balance of probability that the suit property solely belonged to him. He ordered that the appellants be evicted therefrom.
8. Aggrieved by the judgment, the appellants filed the instant appeal containing 9 grounds which, condensed, are that, the learned judge erred by;
 - a. Holding that there was a counterclaim when the respondent’s response did not amount to a counterclaim.
 - b. Denying the appellants an opportunity to be heard in defence of the purported counterclaim.
 - c. Punishing the appellants for the mistake of their counsel.
 - d. Making a decision on an issue that was time barred and already spent.
 - e. Failing to consolidate the suits thereby causing a miscarriage of justice.
 - f. Taking into consideration irrelevant and unreliable matters hence arriving at an erroneous decision.
9. In this appeal, the appellants appeared in person, while the respondent is represented by the firm of Kiarie & Company Advocates.
10. In an effort to re-litigate their suit with rather lengthy submissions, the appellants allege discovery of new evidence concerning the portion of the suit property they were claiming. I consider it unnecessary to rehash those submissions herein as they have no place in this appeal. They ought to have been made at the High Court at the appropriate time. I shall, however, summarize the submissions that deal with the grounds of appeal raised.
11. The appellants submitted that the learned judge was biased as he ordered that the counterclaim be heard by way of formal proof without involving the appellants. They claim further bias when the learned Judge held that there was no rejoinder to the counterclaim yet the record reflects, specifically on 8th July 2009, that there was one. The learned Judge, who had ruled that Mr. Juma was unfit to cross-examine the respondent, later on retracted that position and allowed cross-examination to take place. This, according to the appellants, was a sign that he was not well versed with the law and procedure concerning counterclaims.
12. The appellants stated that Bungoma ELC No. 5 of 2016, filed by their brother, Alex Sande, which the learned Judge erroneously declined to consolidate with the suit in question, is still pending in court. They claim that the learned Judge hastily disallowed the prayer without giving their advocate, at the time, a chance to proffer his reasons for the request. This led to a miscarriage of justice.
13. They submit finally, tht the learned Judge erred by holding that the deceased was gifted title number Kimilili/Kibingei/699 by his father yet he purchased it with his salary. They submit that the learned judge based his decision on erroneous facts. We are urged to order the reinstatement of their suit to accord the appellants a chance to ventilate their case without bias.
14. The respondent contended that there was indeed a valid counterclaim on record. As the record reflects, the replying affidavit, by consent, was deemed as a defence and counterclaim before Muchemi, J. on 8th July 2009. When the appellants withdrew their Originating Summons, which was deemed as a Plaintiff,



the court ordered that the counterclaim proceed for hearing. Formal proof for the counterclaim was conducted and judgment delivered on its basis. These are clear indicators that the counterclaim existed. The claim that the judgment was based on contradictory and unreliable evidence is unsubstantiated as the learned judge properly relied on the evidence tendered by the respondent. The said evidence was uncontested as the appellants neglected to file a reply to the counterclaim for over 12 years and the learned Judge correctly rejected their plea to file a response out of time.

14. The allegation that the appellants were condemned unheard is untrue while the claim that they were punished for their counsel's mistake is unsubstantiated. Their advocate was given a chance to cross-examine the respondent during formal proof and the instructions to withdraw the Plaint emanated from them as they have clearly stated in their submissions. The appellants passed over the chance to appeal against the ruling that denied their application to consolidate the suits and therefore cannot revive that issue whilst challenging the final decision of the High Court, it is contended.
15. Similarly, the allegation that the learned judge dealt with an issue that was time barred cannot be canvassed at this juncture. In any case, the appellants never raised that issue at the High Court and are therefore estopped from raising a new issue on appeal. The respondent concluded that the appellants had failed to prove any of their grounds of appeal, which should be dismissed with costs.
16. From the record and submissions made, I perceive the issues for consideration as; whether there was a counterclaim and a defence; whether the learned judge erred by denying the appellants a chance to defend the counterclaim; whether the learned judge erred by declining to consolidate the suits; whether the learned judge punished the appellants for their advocate's mistakes and whether the learned judge relied on irrelevant and unreliable matters hence arriving at the wrong conclusion.
17. On one hand the appellants claim that the respondent's replying affidavit to the Originating Summons did not amount to a counterclaim while also claiming that they had a proper defence to it. This contradictory position speaks to their desperate but not altogether candid attempt to force another chance to re-litigate their suit. It seems to me the questioning of the validity of the counterclaim, is an attempt by the appellants to render the entire judgment null and void. However, it is very clear that the replying affidavit contained a counterclaim, which read as follows;
 18. That I hereby counterclaim for the eviction of the applicants from the suit land, for their occupation of my land has no legal basis whatsoever.
 19. That I swear to this Affidavit in reply to the one filed in support of the Originating Summons and in support to my Counterclaim for eviction."
18. Additionally, as reproduced earlier, the record evidently shows that on 8th July 2009, before Muchemi, J. the appellants', through their advocate consented to have the replying affidavit be deemed as a defence and counterclaim. The appellants are therefore bound by the consent order and therefore cannot purport to deny its existence in an attempt to revive their suit. In *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR Hancox, JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, which stated;

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement." (Emphasis added)



19. There is indisputable proof on the record that the counterclaim existed and thus this ground must fail.
20. On whether there existed a proper defence to the counterclaim, even though the alleged supplementary affidavit was by the same consent deemed as a reply to the defence and counterclaim on 8th July 2009, the same does not in fact exist and may not have been filed. That has to be the conclusion, as the alleged supplementary affidavit is not contained in the record of appeal. The appellants in their submissions avow its existence but have failed to reference where it is contained in the record. I have anxiously and painstakingly searched the record and found it not. Second, during the entire duration of the suit, none of the parties made any reference to it. Besides, the learned judge never alluded to its existence. In a ruling delivered on 10th March 2017, Mukunya, J. said in part;

...[T]he only issue alive herein is the counterclaim which seeks to evict the applicants. The counterclaim is unopposed. The same is only pending for formal proof.”
21. Similarly, in a ruling delivered on 1st of March 2018, pursuant to an application made by the appellants seeking leave to file a defence to the counterclaim out of time, Mukunya, J. stated in part;

The Court ordered that the Plaintiff be allowed to withdraw the suit with costs to the defendants and ordered that the defendant/respondent now fix his counterclaim for hearing and serve the Plaintiff/applicants.”
22. Finally, and most significantly, the application mentioned above was supported by an affidavit deposed by both appellants meaning that they were aware that there was no defence to the counterclaim hence the application for leave to file one out of time. The record, which is an infallible document, is prima facie proof of the correctness of the record of proceedings and entries in the court file. The “sanctity of the record” cannot be understated, (See *George Gikubu Mbutia vs. Housing Finance Company of Kenya Limited & 2 Others*[2018] eKLR) and in the instant case, it is ample proof of the non-existence of the alleged supplementary affidavit. Though directed to file one which would have been deemed as a reply to the defence and counterclaim, the appellants failed to do so and this ground should equally fail.
23. The appellants further complained that the learned judge erred by declining to consolidate the suits and denying them a chance to respond to the counterclaim. This, according to the appellants, was a miscarriage of justice. The learned judge declined the plea to consolidate the suits in a ruling delivered on 10th March 2017. Without getting into the merits of the learned Judge’s reasoning, the appellants are estopped from raising issues from interlocutory decisions against which they did not appeal, once a final judgment has been rendered.
24. The appellants passed the opportunity to challenge both rulings by way of interlocutory appeal and therefore cannot get a chance to relitigate their suit on an appellate level. The same fate befalls their assertion that the learned judge purportedly dealt with the suit whilst it was time barred. This is a point of law that ought to have been presented to the court at the first instance. Again, the appellants failed to do so and therefore all these grounds should fail.
25. The appellants have alleged that the learned judge punished them for their counsel’s mistakes. However, the record and their own submissions reflect that the said advocate acted with their authority. To my mind, the conduct of the appellants herein is an indicator that they did not take the proceedings as seriously as they deserved. They seem, with respect, to have simply sailed through. Only after realising that the outcome was not what they desired and they are trying to get a second bite at the cherry before this Court, which is untenable in law.



26. Once the appellants withdrew their Originating Summons, their entire claim against the respondent collapsed. See *Ephraim Mbae & 2 others vs. Gilbert Kabeere M’mbijjwe & 2 others*[2013] eKLR. As such, their grievances against the respondent cannot be revived on appeal. The learned Judge ordered that the respondent proceed with his counterclaim, which is in line with the provisions of Order 7 Rule of the Civil Procedure Rules.
27. The learned judge correctly applied his mind on the uncontroverted evidence presented by the respondent. The respondent produced the original title of the suit property and a copy of the green card which are prima facie proof that he is the proprietor of the suit property. This Court has held numerous times that a certificate of title is conclusive evidence that the person named therein is the absolute and indefeasible owner thereof unless the title is challenged on the ground of fraud or misrepresentation in which the holder is complicit. See *Embakasi Properties Limited & Another Vs. Commissioner of Lands & another*[2019] eKLR.
28. In the absence of such a challenge, I would conclude that the learned Judge arrived at a just conclusion that the suit property rightfully belonged to the respondent. The respondent proved his case on a balance of probabilities and discharged his burden of proof as required by Section 107 to 109 of the [Evidence Act](#). The appellants have conversely failed to prove that the learned Judge had any bias against them.
29. In the end, I would hold that this appeal lacks merit and would dismiss it but with no order as to costs given the close family ties, that bind the parties.

As M’Inoti and Mumbi Ngugi, JJ.A agree, it is so ordered.

JUDGMENT OF M’INOTI, JA

1. I have had the advantage of reading in draft the judgment of my brother Kiage, JA., with which I fully agree. I would only like to add a word as regards the appellants’ contention that the learned trial judge erred by entertaining a counterclaim that was time-barred.
2. It is trite that a plea that a claim is barred by limitation is a jurisdictional issue and may be raised even for the first time on appeal, or even by the Court suo moto. In *Pauline Wanjiru Thuo v David Mutegi Njeru*, CA No. 278 of 1998, this Court emphasised that a preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction. That an issue of limitation is jurisdictional is reiterated in [Anadlet Kalia Musau v. Attorney General](#) [2020] eKLR, [Margaret Wairimu Magugu v. Karura Investments Ltd & 4 Others](#) [2019] eKLR, [Harrison Ndungu Mwai & 500 Others v. Attorney General](#) [2018] eKLR, and [Thuranira Karauri v. Agnes Ncheche](#) [1997] eKLR.
3. However, in the circumstances of this appeal, it is abundantly clear that the appellants sought to raise the issue of limitation, at best as an afterthought, or at worst as a red herring. The respondent’s counterclaim for eviction of the appellants from the suit property, though an independent action in law, was provoked by the appellants’ suit to be declared the owners of the suit property through adverse possession. As Kiage J.A. has amply demonstrated, upon withdrawal of the appellants’ suit, all that remained was the respondent’s counterclaim, to which the appellants had not even bothered to file a defence.
4. After the withdrawal of the suit for adverse possession and in the absence of a defence to the counterclaim, there is absolutely nothing on record, even if this Court were charitable enough to entertain the plea of limitation, upon which the Court may conclude that the respondent’s counterclaim is time barred. In the absence of evidence on critical dates pertinent to limitation, there



is simply nothing on record that would support the appellants' contention that the respondent's counterclaim was time barred.

5. I would, accordingly, dismiss the appeal in the terms suggested by Kiage, JA.

JUDGMENT OF MUMBI NGUGI JA

1. I have had the benefit of reading in draft, the judgment of my brother, Kiage, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

