



**Shilaro v Shilaro & another (Environment and Land Appeal  
E017 of 2022) [2024] KEELC 3767 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

**DO OHUNGO, J**

**APRIL 25, 2024**

**BETWEEN**

**JOHN SHILARO ..... APPELLANT**

**AND**

**SAMUEL SHINDANI SHILARO ..... 1<sup>ST</sup> RESPONDENT**

**SHEM FESTO SHILARO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal  
Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal  
Magistrate) delivered on 4th April 2022 in Butali MCELC No. 9 of 2019)*

**JUDGMENT**

1. Litigation leading to this appeal started before the Subordinate Court on 1<sup>st</sup> March 2019 when the appellant filed plaint dated 22<sup>nd</sup> February 2019 against the first and second respondents herein as first and second defendants, respectively. He also joined Titus Marachi and Peter Juma as third and fourth defendants, respectively. The appellant averred in the plaint that he was the owner of land parcel number N/Kabras/Surungai/11xx (the suit property) and that the defendants had entered the suit property and started farming on two acres thereof in March 2017, started building a house thereon on 19<sup>th</sup> February 2019 and even placed a caution against it on 21<sup>st</sup> June 2018. He prayed for the defendants' eviction and removal of the caution.
2. The defendants filed a joint statement of defence and counterclaim through which they denied the appellant's averments and averred that they were rightful occupants of two acres of the suit property. They prayed that the appellant's suit be dismissed and further that the suit property to revert to the initial registered owner for purposes of succession, "that the subdivided portions 11xx, 11xx, 11xx and 11xx be surrendered to the rightful owners by the" appellant and that the appellant provides documentary evidence on when and how he acquired title to the suit property.



3. Upon hearing the matter, the Subordinate Court (Hon. Z J Nyakundi, Senior Principal Magistrate) delivered judgment on 4<sup>th</sup> April 2022 and made the following order:

The parties to invite a surveyor to hive one (1) acre for the 1<sup>st</sup> defendant and one (1) acres (sic) for the 2<sup>nd</sup> defendant from parcel No. N/Kabras/Surungai/11xx.

4. Dissatisfied with that outcome, the appellant filed this appeal 14<sup>th</sup> June 2022 through Memorandum of Appeal dated the same date. The appeal was admitted out of time on 23<sup>rd</sup> October 2023 pursuant to Section 16A of the [Environment and Land Court Act](#). It will be noted that the appellant did not join the third and fourth defendants in the appeal.

5. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:

1. The learned trial Magistrate erred in law when he failed to appreciate that the Respondent testified that he was given Land by the Clan after the death of his grand father a faction the Clan had no legal authority to do.
2. The learned trial Magistrate erred in law and in fact in not finding as he should have that the second Respondent said that he was given the Appellants land by the clan.
3. The learned trial Magistrate erred in law in failing to appreciate that the suit land in issue was registered in the name of the Appellant.
4. The learned trial Magistrate erred in law in granting the 1<sup>st</sup> Respondent Orders that were not prayed for in the Plaint as the 2<sup>nd</sup> Respondent had prayed for succession.
5. The learned trial Magistrate erred in law and in fact in awarding to the second Defendant what was not claimed for.
6. The learned trial Magistrate erred in law as there was no counter-claim by the Respondents on record.
7. That that judgement is bad in law and has occasioned a failure of justice.

6. The appeal was canvassed through written submissions. The appellant argued that he was the registered owner of the suit property and that if the respondents had any issue with the registration, they should have filed a proper case. He further contended that the counterclaim was not understandable since it suggested that parcel numbers 11xx, 11xx and 11xx were also registered in the name of the appellant yet that was not supported by evidence. That the prayer in the counterclaim that the appellant provides evidence as to how he acquired the suit property was contrary to the burden of proof and further that the respondents did not pray for one acre of the suit property. That since the suit property was registered in the name of the appellant and not part of the deceased's estate, the prayer that succession be undertaken was misplaced. The appellant further argued that the learned magistrate having found that the appellant was the registered proprietor of the suit property, ought to have granted the reliefs that were sought. He therefore urged this court to allow this appeal.

7. In answer, the respondents argued that since the appellant failed to include the third and fourth defendants in this appeal, what is before this court is not an appeal but a fresh suit. That based on the findings of the Subordinate Court, it was clear that the registration of the appellant as proprietor was fraudulent and needed investigation. In response to the contention that the Subordinate Court granted



reliefs that were not sought, the respondents argued that the court had jurisdiction to grant such relief as it deemed fit. Further, that the evidence on record pointed to the existence of a resulting trust. In conclusion, the respondents contended that the appeal lacks merit and urged the court to dismiss it.

8. This is a first appeal. Consequently, the mandate of this court is to re-consider and re-evaluate the pleadings, the evidence, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether there was a valid counterclaim, whether trust was established, whether fraud was established and whether the reliefs sought ought to have issued.
10. The appellant has contended that the respondents did not file a valid counterclaim. The procedure for pleading a counterclaim is found at Order 7 Rule 7 of the Civil Procedure Rules which provides:

Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim.
11. Additionally, Order 4 Rule 6 of the Civil Procedure Rules provides:

Every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative, and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just, whether or not it could have been asked for or granted when the suit was filed; and this rule shall apply also to a defence or counterclaim.
12. Thus, a defendant who seeks to mount a counterclaim is required to specifically state in his statement of defence that he is doing so. The respondents herein, who were self-represented at the time of filing their defence, complied with Order 7 Rule 7. Although they did not elegantly plead their counterclaim, I have discerned the reliefs that they sought, as I have reproduced at paragraph 2 of this judgment. In view of the right of access to justice under Article 48 of *the Constitution* as read with the court's duty to facilitate the just, expeditious, proportionate, and affordable resolution of disputes under Section 3 of the *Environment and Land Court Act* and Sections 1A and 1B of the *Civil Procedure Act*, I am satisfied that the respondents also complied with Order 4 Rule 6 of the Civil Procedure Rules and that they pleaded a valid counterclaim. Whether the counterclaim succeeds is a different question.
13. The next issue for determination is whether fraud was established. The respondents contended in this appeal that the evidence on record pointed to the existence of a resulting trust. The suggestion there is that the appellant held the suit property in trust for them. Whether trust exists is a question of fact which must be proven through evidence. The key considerations are the nature of the holding of the land and intention of the parties. See *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
14. Parties must however plead the case that they want to be determined. In that regard, it is important to remember the basic principle that parties are bound by their pleadings. The court too is in a sense bound by the parties' pleadings since they circumscribe the issues for determination. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.



15. The central role of pleadings was restated by the authors of Bullen and Leake and Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No. 5) as follows:

The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

16. I have perused the respondents' defence and counterclaim. They did not plead any trust. They cannot fault the Subordinate Court on an issue that they did not raise. I find that trust was neither pleaded nor established.
17. There is no dispute that the appellant was and remains the registered proprietor of the suit property. That much is confirmed by the certified copy of the register of the suit property that was produced in evidence. A perusal thereof confirms that the first registered proprietor was Barnaba Shilaro who from the evidence on record was the father of the appellant and Peter Juma who was fourth defendant in the suit before the Subordinate Court. It is not in dispute that Barnaba Shilaro was the grandfather of the respondents in this appeal.
18. Barnaba Shilaro was registered as proprietor of the suit property on 19<sup>th</sup> January 2009. Subsequently, the suit property was transferred to the appellant herein who became registered proprietor on 23<sup>rd</sup> January 2013. He remains the registered proprietor. During the trial, the appellant stated, and the fourth defendant confirmed that Barnaba Shilaro passed away in the year 2016. Thus, the suit property was transferred to the appellant by Barnaba Shilaro in his lifetime.
19. As a registered proprietor of land, the appellant is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
20. The respondents contended in this appeal that the registration of the appellant as proprietor was fraudulent. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
21. The respondents did neither pleaded fraud nor strictly proved it to the required standard. Equally, they did not expressly pray for an order of cancellation of the appellant's title. In sum, the respondents did not establish fraud. The learned magistrate clearly erred in ordering subdivision of the suit property since the respondents did not seek such an order and since no case for cancellation of the appellant's title had been made.
22. The respondents contended that they were allocated portions of the suit property at clan meetings held in August 2016 and February 2017 and at which, according to them, the late Barnaba Shilaro's



property was shared out. It will be noted that the suit property ceased being Barnaba Shilaro's property way back on 23<sup>rd</sup> January 2013. As correctly contended by the appellant, the clan had no authority to transact on the suit property.

23. In view of the foregoing, it is manifest that the respondents' counterclaim had no leg to stand on to the extent that it grounded on unproven claims of trust and fraud. The counterclaim was for dismissal.
24. On the other hand, the appellant who demonstrated that he was the registered proprietor of the suit property, was entitled to the full rights and benefits of such proprietorship including the right to remove persons like the respondents who were on the suit property without his permission. Further, a perusal of the certified copy of the register of the suit property shows that a caution was registered against the suit property on 21<sup>st</sup> June 2018 as entry number 7 in favour of Peter Juma Shilaro who was claiming a beneficiary interest. The caution was also reflected in the certificate of search dated 2<sup>nd</sup> October 2018. Peter Juma Shilaro was the fourth defendant. He testified and stated that he had no interest in the suit property. In those circumstances, there is no valid reason for the caution to remain.
25. Arising from the foregoing discourse, I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with the following orders:
  - a. The respondents' counterclaim is dismissed.
  - b. The respondents to vacate the parcel of land known as N/Kabras/Surungai/11xx within 90 (ninety) days from the date of delivery of this judgment. In default, the Subordinate Court to issue an eviction order.
  - c. The caution registered against land parcel number N/Kabras/Surungai/11xx on 21<sup>st</sup> June 2018 as entry number 7 in favour of Peter Juma Shilaro be removed by the Land Registrar.
  - d. In view of the close family relationship between the parties, I make no order as to costs of both this appeal and the suit before the Subordinate Court..

**Dated, signed, and delivered at Kakamega this 25<sup>th</sup> day of April 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Appellant

No appearance for the Respondents

Court Assistant: M Nguyayi

ELCA No. E017 of 2022 (Kakamega) Page 3 of 3

