Mugwe v Margaret Wangui Muriuki, George Maina Muriuki & Patricia Muthoni Kariuki (Suing as the Administrators of the Estate of Simon Muriuki Muriithi - Deceased) & another (Environment and Land Appeal 76 of 2023) [2024] KEELC 4480 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4480 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 76 OF 2023

YM ANGIMA, J

MAY 30, 2024

(FORMERLY NYAHURURU ELCA NO. E014 OF 2023)

BETWEEN

GEORGE MUCHAI MUGWE .... APPELLANT

AND

MARGARET WANGUI MURIUKI, GEORGE MAINA MURIUKI & PATRICIA MUTHONI KARIUKI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF SIMON MURIUKI MURIITHI - DECEASED) .... 1ST RESPONDENT

THE COUNTY LAND REGISTRAR, NYANDARUA COUNTY .... 2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. H. O. Barasa (SPM) dated 13.02.2023 in Engineer SPM ELC No.29 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. H. O. Barasa (SPM) dated 13.02.2023 in Engineer SPM ELC No. 29 of 2018 – George Muchai Mugure -vs- Margaret Wangui Kariuki & Others. By the said judgment, the trial court dismissed the Appellant's suit against the Respondents with costs.

B. Background

2. The material on record shows that by a plaint dated 19.09.2018 the Appellant sued the Respondents seeking the following reliefs:

    a. A declaration that the defendants have encroached onto the plaintiff's parcel of land Title No. Nyandarua/Mawingo/194 to the extent of 5 acres or thereabouts and that they surrender and or be evicted from the aforesaid portion.

    b. An order to the 2nd defendant to rectify and fix the boundaries between the parcel Nos. Nyandarua/Mawingo/194 and 205 as per the original registry map of Mawingo Settlement Scheme which was used to undertake the initial survey as per the report of the Director of Surveys dated 05.09.2017.

    c. An order directed to the 2nd defendant to amend and or rectify the area registry map and or plans in respect of the boundary between parcel Nos. Nyandarua/Mawingo/194 and 205 as per the original registry map held by the Director of Surveys.

    d. Rectification of the plaintiff's Title Deed in respect of his parcel Nos. Nyandarua/Mawingo/194 to put the proper and the correct acreage computed as per the original survey/registry map held by the Director of Surveys.

    e. Costs of this suit.

    f. Any other relief this Honourable Court may deem just and expedient.

3. The Appellant pleaded that all material times he was the registered proprietor of Title No. Nyandarua/Mawingo/194 (Parcel 194) which was allocated to him in 1963 in Mawingo Settlement Scheme (the Scheme). The Appellant pleaded that the late Simon Muriuki (the deceased) was allocated Title No. Nyandarua/Mawingo/205 (Parcel 205) and that both parties were shown the beacons and boundaries of their respective parcels at the time of allocation.

4. It was the Appellant's contention that the deceased had wrongfully encroached on about 5 acres of parcel 194 on the basis of a fraudulent Registry Index Map (RIM) which purported to show the existence of a road separating the two parcels contrary to the original map kept by the Director of Surveys (the Director).

5. It was also the Appellant's case that the deceased had colluded with the 2nd Respondent to fraudulently amend the RIM and plans for the scheme and cause his portion of 5 acres to be registered as part of the deceased's land with the consequence that the deceased had taken over occupation of the said portion of Parcel 194. The Appellant further pleaded that in spite of issuance of a demand and notice of intention to sue, the Respondents had failed to make good his claim hence the suit.

6. The record shows that the 1st Respondent filed a defence dated 16.10.2018 and amended on 05.12.2019 denying the Appellant's claim in its entirety. The 1st Respondent conceded that the Appellant was the owner of Parcel 194 whereas the deceased was the owner of Parcel 205 but pleaded that the owners had taken up possession of their respective parcels a long time ago and fenced them and that the boundaries had remained intact for a long period of time. The 1st Respondent denied the fraud and allegations of fraud pleaded against the deceased and put the Appellant to strict proof thereof.

7. The 1st Respondent further denied that the deceased had encroached upon and occupied any portion of Parcel 194 as alleged by the Appellant or at all and put the Appellant to strict proof thereof. The 1st Respondent also pleaded that the Appellant's suit was bad in law and misconceived since there were clear legal provisions governing the resolution of boundary disputes which the Appellant had not observed. As a result, the court was urged to dismiss the suit with costs.

8. The record shows that the 2nd Respondent filed a defence dated 22.10.2019 denying the Appellant's claim in its entirety. It was pleaded that the jurisdiction of the court had not been properly invoked and that the suit was bad in law and ought to be dismissed or struct out in limine.

9. The 2nd Respondent denied the fraud and particulars of fraud pleaded by the Appellant and put him to strict proof thereof. It was pleaded that the Director was the one mandated to carry out surveys and realignment of boundaries and was ready and willing to conduct a survey of the suit properties upon provision of security in order to resolve the matters complained of.

10. The record shows that the Appellant filed a reply dated 30.11.2018 to the 1st and 2nd Respondent's defences whereby he joined issue with the Respondents on their respective defences and reiterated the contents of his plaint. He maintained that his suit was properly before the court and prayed for dismissal of the defences and for entry of judgment in his favour as prayed in the plaint.

C. Trial Court's Decision

11. The record further shows that upon a full hearing at which the parties tendered their evidence the trial court found and held that the Appellant had failed to prove his claim on a balance of probabilities as required by law. The court found that the Appellant had failed to prove the fraud and particulars of fraud pleaded in the suit. In particular, the court held that the Appellant had failed to prove that the deceased had colluded with the 2nd Respondent to fraudulently amend the RIM and that a fraudulent RIM had been used to process the title documents for the suit properties. As a result, the trial court dismissed the Appellant's suit against the 1st and 2nd Respondents with costs thereby provoking the instant appeal.

D. Grounds of Appeal

12. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 10.03.2023 raising the following seven (7) grounds of appeal:

    a. The learned chief magistrate erred in law and in fact by finding that the Appellant had not proven his case to the required standard and thereby arrived at an erroneous decision.

    b. The learned trial magistrate erred in law and in fact when he failed to take into consideration the evidence of PW-2, and in particular that the amendment to the original/initiative survey map was irregular and unprocedural as it was not accompanied by explanatory notes and mutation form, to the detriment of the Appellant.

    c. The learned trial magistrate erred in law and in fact when he failed to give due consideration and weight to the Appellant's evidence and in particular the letter dated 5th September, 2017 from the Director of Surveys.

    d. The learned trial magistrate erred in law and in fact when he held that the Appellant did not prove fraud against the Respondents when the amendment

of the original/initial map was unsupported by the Mutation Form and explanatory notes.

e. The learned trial magistrate erred in law and in fact by finding and holding that the amendment done to the original/initial map was not to the detriment of the Appellant and or that it did not prejudice the Appellant.

f. The learned trial magistrate erred in law and fact when he failed to consider the fact that the original/initial map at the time of survey of Mawingo Settlement Scheme was not the one that was used to issues titles in the scheme, to the detriment of the Appellant.

g. The learned chief magistrate erred in law by finding and holding that the 1st defendant had not encroached into the plaintiff's parcel of land Nyandarua/Mawingu/194.

13. As a consequence, the Appellant sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the judgment of the trial court dated 13.02.2023 be set aside and substituted with an order allowing the Appellant's suit.

c. That the Appellant be awarded costs of the appeal.

E. Directions on Submissions

14. When the appeal was listed for directions it was directed, with the concurrence of the parties, present that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 18.03.2024 whereas the 1st Respondent's were filed on 18.03.2024. However, the 2nd Respondent did not file any summons in the appeal.

F. Issues for Determination

15. Although the Appellant raised 7 grounds in his memorandum of appeal, the court is of the view that the same may be summarized into the following key issues:

a. Whether the trial court erred in law and fact in dismissing the Appellant's suit.

b. Who shall bear costs of the appeal.

A. Applicable legal principles

16. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows:

> " ...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> "...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

19. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in dismissing the Appellant's suit

20. The court has considered the material and submissions on record. It is evident from the material on record that the Appellant's claim before the trial court was predicated upon fraud on the part of the deceased and the 2nd Respondent. It is also evident from the impugned judgment that the trial court dismissed the Appellant's suit because it found that he had failed to prove the fraud and particulars of fraud pleaded in his suit. In particular, the trial court found no credible evidence to reach the conclusion that the amendment of the RIM was fraudulent or that there was collusion between the deceased and the 2nd Respondent in its amendment.

21. The Appellant faulted the trial court for, inter alia, failing to properly consider the evidence of PW2; failing to give due weight to the letter dated 05.09.2017 from the Director; and for failing to find that the amendment of the RIM for the scheme was irregular due to lack of explanatory notes and the relevant mutation forms.

22. A perusal of the judgment reveals that contrary to the Appellant's contention, the trial court actually considered the evidence of PW2 and the allegations in the Director's letter dated 05.09.2017. At page 184 of the record of appeal, the trial court considered the evidence of PW2 as follows:

> " PW2 further admitted during cross-examination that there was a current map which was used to issue the title deeds herein. He, however, explained that original maps can be amended and they are usually amended. He did not come out clearly to state whether the map which was used to issue the titles herein was fraudulently amended to the detriment of the plaintiff. In fact, he did not rubbish the document and as the evidence stands, this court cannot safely find that the wrong map was used to issue the title deeds and/or that everything was done through fraud. Her problem was that there were no notes indicating what brought about the amendments. She confirmed that she did not follow up to find out if there [was] a mutation relating to the amendment…"

23. Upon analyzing the entire evidence before him the trial court concluded as follows:

> " There was no evidence tendered before this court to show that the deceased committed any acts of fraud. No evidence was presented before this court such as would leave no doubt in the mind of the court that the deceased and the Land Registrar colluded to come up with a fraudulent map. In fact, no tangible evidence has been tendered before this court to prove that the Registry Index Map which was used to issue the title deeds herein was a fraudulent document and/or the same was fraudulently amended as alleged. I expected the plaintiff to go out of his way to demonstrate that indeed the second RIM did not exist and/or that the same is a forgery and/or that it was a fraudulent document. No such evidence was tendered. This court was told that it is possible (and it usually happens) to amend the Original Registry Index Map."

24. The court has re-evaluated the entire evidence which was tendered before the trial court on the issue of fraud and the allegations of fraud. The court finds no fault with the trial court's finding that the allegations and particulars of fraud pleaded in the amended plaint were not proved to the required standard. There was no evidence of collusion between the deceased and the 2nd Respondent to fraudulently alter or falsify the original map for the scheme or to falsify the RIM.

25. As was held in the case of Vijay Morjaria -vs- Nasingh M. Darbar & Another [2000] eKLR allegations of fraud are serious allegations which must be proved on a standard higher than a balance of probabilities but not as high as beyond reasonable doubt. The court is of the opinion that the Appellant's evidence before the trial court fell short of the required standard hence the trial court could not safely conclude that the RIM for the scheme had been fraudulently altered by the deceased in collusion with the 2nd Respondent. Moreover, as a matter of law, the land registrar has no legal mandate nor the requisite expertise to amend or alter the RIM. It is the Director of Surveys and his officers who have the mandate to amend all survey records including the RIM and the land registrar can only issue a title deed upon the relevant RIM being amended by the Director or his subordinate officers.

b. Who shall bear costs of the appeal

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st Respondent shall be awarded costs of the appeal. However, the 2nd Respondent shall not be awarded costs since he neither participated in the appeal nor filed any submissions.

I. Conclusion and Disposal Orders

27. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. The court finds no fault with the decision of the trial court hence there is no reason to disturb it. As a consequence, the court makes the following orders for disposal of the appeal:

a. The appeal be and is hereby dismissed.

b. The judgment and decree of the trial court dated 13.02.2023 is hereby affirmed.

c. The 1st Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF MAY, 2024.

In the presence of:

N/A for the Appellant

Ms. Wangare holding brief for Mr. Gachie Mwanza for the 1st Respondent

N/A for the 2nd Respondent

C/A - Carol

....

Y. M. ANGIMA

JUDGE