



**Githae v Wambui (Environment and Land Appeal 40 of 2023)  
[2024] KEELC 3758 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3758 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL 40 OF 2023**

**YM ANGIMA, J**

**MAY 9, 2024**

**BETWEEN**

**PHILIP PATRICK KARIUKI GITHAЕ ..... APPELLANT**

**AND**

**SAMUEL KIHANG'A WAMBUI ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. S.N. Mwangi  
(SRM) dated 29.07.2021 in Nyabururu CM ELC No. E043 of 2021)*

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 29.07.2021 in Nyabururu CMCC ELC No E043 of 2021 – Philip Patrick Kariuki Githae v Samuel Kihanga Wambui. By the said judgment, the trial court dismissed the Appellant’s suit against the Respondent with costs.

**B. Background**

2. Vide a plaint dated 17.05.2021 the Appellant sued the Respondent before the trial court seeking the following reliefs:
  - a. A declaration that Title No Nyandarua/Ol Joro orok Salient/2131 is held by the defendant in trust for the plaintiff.
  - b. An order for dissolution of the said trust and transfer of Title No Nyandarua/Ol Joro orok Salient/2131 by way of execution of all necessary documents by the defendant and in default, the honourable court do execute the same in favour of the plaintiff.
  - c. Costs of the suit plus interest thereon at court’s rate.



- d. Any other or better relief deemed fit by the honourable court.
3. The Appellant pleaded that vide a sale agreement dated 05.10.2015 the Respondent sold Title No Nyandarua/Ol Joro orok Salient/2131 (the suit property) to him at an agreed consideration of Kshs 3,375,000/= which he paid in full. He pleaded that despite making an additional payment of Kshs 300,000/= towards stamp duty and transfer charges the Respondent had disappeared and failed to facilitate the transfer of the suit property into his name.
4. The Appellant further pleaded that he took possession of the suit property after execution of the sale agreement and that he had undertaken massive development thereon. It was thus his case that the Respondent was holding the suit property in trust for him. It was also his case that despite issuance of a demand and notice of intention to sue the Respondent had failed to oblige hence the suit.
5. The record shows that the Respondent neither entered appearance nor filed a defence to the action. As a result, the suit was heard *ex parte* before the trial court whereby the Appellant testified on his own behalf as the sole witness.

### **C. Trial Court's Decision**

6. The record shows that upon the *ex parte* hearing the trial court dismissed the Appellant's suit with costs on two main grounds. First, that the Respondent was not the registered owner of the suit property on 05.11.2015 when the sale agreement was made hence the Appellant had failed to conduct due diligence. Second, there was no evidence to show that the Appellant was in occupation of the suit property and had undertaken any developments thereon.

### **D. Grounds of Appeal**

7. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 29.08.2022 raising the following 10 grounds of appeal:
  - a. The learned trial magistrate erred in law and in fact by finding that the Appellant had failed to prove his case on a balance of probability despite the overwhelming and uncontroverted evidence presented by the Appellant.
  - b. The learned trial magistrate erred in law and in fact by finding that a constructive trust was not created between the Appellant and the Respondent yet there was a common intention between both parties to sell and transfer the suit land to the Appellant.
  - c. The learned trial magistrate erred in law and in fact by finding that there was no constructive trust between the Appellant and the Respondent on the basis that the Respondent became the registered proprietor of the suit land after the sale agreement had been entered into.
  - d. The learned trial magistrate erred in law and in fact by imposing upon the Appellant the obligation to prove who the previous owner of the suit property was prior to the Respondent acquiring ownership despite the Respondent's acquisition and proprietorship of the suit land being undisputed.
  - e. The learned trial magistrate erred in law and in fact by failing to apply the doctrine of constructive trust in order to protect the Appellant from being deprived his right to property by the Respondent who having received the entire consideration stands to benefit unfairly.



- f. The learned trial magistrate erred in law and in fact by finding that the Appellant did not prove that he has been in occupation of the suit land despite him having testified to this fact and there being no evidence to the contrary.
  - g. The learned trial magistrate erred in law and in fact by failing to appreciate that the Appellant was required to prove his case on a balance of probability and not beyond reasonable doubt and as such, the Appellant was not duty bound to cure the trial court's curiosity as to whom the registered owner of the suit land was as at 05.10.2015 when the parties entered into a sale agreement.
  - h. The learned trial magistrate erred in law and in fact by failing to find that the Respondent being the registered proprietor and having received the consideration for the sale of land, held the suit land in trust for the Appellant.
  - i. The learned trial magistrate erred in law and in fact by rendering a conflicting judgment in that, on one hand the trial court held that the Respondent was the undisputed registered owner of the suit land and on the other hand failed to find that the Respondent held the suit land in trust for the Appellant by virtue of him being the registered owner who sold the land to the Appellant.
  - j. The learned trial magistrate erred in law and in fact by basing the judgment on a misinterpretation of the terms in the sale agreement, in particular, the learned trial magistrate erred in fact by finding that the balance of the consideration was to be paid once the suit land was transferred to the Appellant before 05.11.2015, yet the sale agreement clearly stated that the balance of the consideration was to be paid upon production of the title deed by the Respondent which was to be processed by 05.11.2015 and not upon transfer of the suit land to the Appellant.
8. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the appeal be allowed.
  - b. That the judgment of the trial court be set aside in its entirety.
  - c. That the Appellant be awarded costs of the appeal.
  - d. That the court do grant any other or better relief it may deem fit.

#### **E. Directions on Submissions**

9. When the appeal was listed for directions it was directed 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 filed written submissions dated 31.01.2024 whereas the Respondent's submissions were dated 06.02.2024.

#### **F. Issues for Determination**

10. Although the Appellant raised 10 grounds in his amended memorandum of appeal, the court is of the opinion that the key issues for determination may be summarized as follows:
- a. Whether or not the trial court erred in law and fact in dismissing the Appellant's suit.
  - b. Who shall bear costs of the appeal.



## G. Applicable Legal Principles

11. 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 v Associated Motor Boat Co. Ltd & others* [1968] EA 123 at page 126 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.”

12. Similarly, in the case of *Peters v 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...”

13. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt v 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.”



14. In the case of *Kapsiran Clan v 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

15. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for dismissing his suit even though it was not defended and his evidence at the trial was not challenged or controverted. He faulted the trial court for holding that the Respondent was not the registered proprietor of the suit property at the time the sale agreement was made hence he had no capacity to enter into the agreement dated 05.10.2015. The trial court was also faulted for holding that there was no evidence of the Appellant's occupation of the suit property whereas his evidence thereon was not challenged at the trial.
16. The Respondent, on his part, fully supported the decision of the trial court and submitted that he had no legal capacity to enter into the sale agreement dated 05.10.2015 since he obtained registration of the suit property much later. He further submitted that it is not automatic for undefended suits to be allowed since the claimant must first prove his claim to the respired standard. The Respondent relied upon, *inter alia*, the cases of *Karugi & another v Kabiya & 3 others* [1983] eKLR and *Gichinga Kibutha v Caroline Nduku* [2018] eKLR in support of that submission. The Respondent further submitted that there was no sufficient evidence of payment of the purchase price since the Appellant only produced an application for funds transfer which may have been cancelled or countermanded afterwards. So, the Respondent was not sure whether or not he actually received the purchase price!
17. Whereas the court agrees that it is not every undefended suit which should be allowed it must be remembered that the standard of proof in civil cases is generally on a balance of probabilities, and not higher. The court finds it strange that the Respondent can submit that he was unsure whether he actually received the purchase price because the Appellant only produced an application for funds transfer and not a receipt hence there was a risk that the transfer request was cancelled. It must be remembered that the Respondent did not file any defence disputing payment of the purchase price. He did not file any defence pleading that he was unable to transfer the suit property to the Appellant due to default in payment of the purchase price. The court is of the view that the Appellant adequately proved payment of the purchase price on a balance of probabilities.
18. The court has considered the Respondent's contention that he had no capacity to enter into the sale agreement dated 05.10.2015 for the sale of the suit property because he was registered as proprietor much later. This cannot be a serious submission. So, why did he sign the agreement if he had no capacity to sell? And why did he receive the purchase price for the suit property? The court is of the opinion that registration of a person in the land register is not the only means of establishing ownership to property. For instance, it may take a while to have a beneficial owner to be registered as the proprietor in the land



register. A person may also be entitled to land on account of a trust but his name may not appear in the land register. Such persons who are entitled to an interest in land may not be able to transfer their interest through the land register until they are actually entered in the register. However, there is no law prohibiting them from arranging their affairs by making sale agreements for the sale of their yet to be registered interest.

19. In this particular case, the Respondent was ultimately registered as proprietor of the suit property on 20.11.2015 and a title deed issued to him on 03.12.2015. It cannot lie in his mouth to contend that he had no capacity to sell or that he had nothing to sell on 05.10.2015 hence the entire transaction should be considered null and void. The court fully agrees with the Appellant's submissions that a constructive trust was established between the Appellant and the Respondent by virtue of the sale and that from the moment the Respondent was registered as owner on 20.11.2015 he held the title to the suit property in trust for the Appellant. This is in line with the Court of Appeal decision in *William Kimutai Kitilit v Michael Kibet* [2018] eKLR whereby it was held, inter alia, that:

“Turning to the present appeal, the leaned judge made a findings of fact in terms of paragraph 3 above and also made a finding of law that the Appellant created a constructive trust in favour of the Respondent. It is not in dispute that the Appellant sold a 2 acres portion of his land comprising of 2.440 Hectares to the Respondent in 2008. He gave possession of the land to the Respondent who fenced the land and developed a portion of half an acre by planting trees. The Respondent paid the last installment of the purchase price in 2010. However, the Appellant did not transfer the 2 acres to the Respondent and instead caused the whole land to be registered in his name on 04.12.2012, and filed a suit for the eviction of the Respondent thereafter. By the time the Appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the Respondent and it would be unjust and inequitable to allow the Appellant to retain the 2 acres that he had sold to the Respondent in the circumstances of the case.”

20. The court is thus satisfied that the trial court erred in law in holding that there could be no trust relationship between the parties because the Respondent was not yet the registered owner of the suit property as at 05.10.2015 when the sale agreement was signed. It is also strange that the trial court was curious to know who the registered proprietor was on 05.10.2015 when there was no adverse claim by a third party and when the Respondent had not filed any pleading or tendered any evidence disclaiming that he had any legal or equitable interest in the suit property.
21. The court also agrees with the Appellant that his evidence on occupation and development of the suit property was not challenged nor controverted at the trial. He was not required to produce financial record to demonstrate that he actually undertook developments thereon with his own funds. The court is thus of the view that the trial court erred in law in its evaluation of the evidence before it and as a result arrived at an erroneous decision. It is the finding of this court that on the basis of the evidence before the trial court, the Appellant's case was adequately proved on a balance of probabilities as required by law hence he was entitled to succeed in his claim.

#### **d. Who shall bear costs of the appeal**

22. 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 v Twentsche Overseas Trading Co. Ltd* [1967] EA



287. The court finds no good reason to depart from the general rule. As a result, the Appellant shall be awarded costs thereof.

### **I. Conclusion and Disposal Orders**

23. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. As a consequence, the court makes the following orders for disposal of the appeal:

- a. The appeal be and is hereby allowed.
- b. The judgment of the trial court dated 29.07.2022 in Nyahururu CM ELC No E043/2021 is hereby set aside and substituted with judgment in favour of the Appellant in the following terms:
  - i. A declaration be and is hereby made that the Respondent Samuel Kihanga Wambui holds Title No Nyandarua/Ol Joro orok Salient/2131 in trust for the Appellant, Philip Patrick Kariuki Githae.
  - ii. An order be and is hereby made for the dissolution of the said trust and the Respondent is hereby ordered to execute all necessary documents to facilitate the transfer of Title No Nyandarua/Ol Joro orok Salient/2131 to the Appellant within 14 days from the date hereof in default whereof the Deputy Registrar of the court shall do so on his behalf.
  - iii. The Appellant is awarded costs of the suit.
- c. The Appellant is hereby awarded costs of the appeal.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

In the presence of:

Ms. Muigai for the Appellant

Mr. Gicheha for the Respondent

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

