



**Magutu v Mbugua (Environment and Land Appeal E024 of 2021)  
[2024] KEELC 4610 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4610 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E024 OF 2021**

**BM EBOSO, J**

**JUNE 5, 2024**

**BETWEEN**

**PETER GITONGA MAGUTU ..... APPELLANT**

**AND**

**AGNES WANJIRU MBUGUA ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon V. Kachuodho, Senior Resident Magistrate,  
delivered on 22/2/2021 in Thika Chief Magistrate Court Civil Case No. 267 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the Judgment rendered by Hon. V. Kachuodho, Senior Resident Magistrate, on 22/2/2021 in Thika CMC Civil Case No. 267 of 2018. The appellant is a biological brother to the respondent. The key question which falls for determination in the appeal is whether the respondent proved that land parcel number Ruiru/ Kiu Block 5/1796 and the corresponding share certificate were held by the appellant in trust for the respondent. I will outline a brief background to the appeal before I dispose the issue.

**Background**

2. The respondent initiated her claim in the trial court vide a plaint dated 11/12/2018. She sought a declaration that she was the *bonafide* owner of “Plot Share Certificate No. 8200 Block F 162 Phase 1 Langata Development Company Ltd (Ruiru Kiu Block 5/1796).” She also sought an order decreeing the appellant to transfer the said property to her. Lastly, she sought costs of the suit.
3. The respondent’s case in the trial court was that, in 2006, she decided to buy land. She raised Kshs. 200,000/- and gave it to their mother, Waithera Magutu, to buy for her the land. Their mother in turn delegated the appellant together with her other son, Paul Ndichu Magutu, to source for and buy



the land on behalf of the respondent. The two siblings identified the suit property and purchased it on behalf of the plaintiff. It was her case that the suit property was registered in the name of the appellant but it was clear to the parties involved that the appellant held the suit property in trust for the respondent. The respondent contended that when she subsequently asked the appellant to convey the land to her, the appellant declined.

4. The appellant filed a defence dated 4/2/2019 in which he denied the allegation that the respondent gave their mother Kshs. 200,000/- to source and buy land for her. He also denied having obtained the land as a trustee of the respondent, adding that he was the absolute owner of the suit property. He denied the particulars of breach of trust as particularized in the plaint. He neither pleaded a set off nor brought a counterclaim in the cause.
5. In his subsequent written witness statement dated 22/1/2014, which was adopted during trial, the appellant changed his position and testified that whereas the respondent gave their mother the sum of Kshs. 200,000/-, he repaid her the said sum through payment of legal fees in a succession cause relating to the estate of the one Helmut. During cross-examination, the appellant confirmed that the respondent provided the sum of Kshs. 200,000/- which their mother gave to him to buy the suit property on behalf of the respondent. He also confirmed that he indeed purchased the suit property on behalf of the respondent using the said money and caused it to be registered in his name in 2006. He added that subsequent to that, he gave the respondent money to be applied towards legal fees in a succession case relating to the estate of the late Helmut. It was his evidence that the respondent told him that he should keep the suit property in lieu of her refunding him the money he had advanced to her towards legal fees.
6. Upon conclusion of trial and receipt of submissions, the trial court rendered the impugned Judgment in which it found that the respondent had proved her case on the balance of probabilities. The trial Magistrate rendered herself thus:

“I find since it’s not denied that the land was bought for and on behalf of the Plaintiff, the same should revert to her, and since the defendant is claiming ownership of the land based on alleged cash he advanced to plaintiff way after the land had already been bought for and on behalf of the plaintiff, it therefore follows it would be prudent for him to pursue his claim for refunds of the said monies in a competent forum which would allow the said issue to be conversed [*sic*] and settled fully, since the same was not counterclaimed in this suit, I leave it at that.

From the foregoing, I therefore find from the evidence before court, the plaintiff has proved her case on a balance of probabilities against the defendant. The plaintiff is entitled to the prayers as prayed in the plaint. I accordingly enter judgment for the plaintiff as prayed in the plaint.”

## Appeal

7. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal advancing the following four grounds of appeal:
  - i. The Learned Magistrate erred in law and fact in arriving at a conclusive finding of a fact that a trust can be created or inferred orally without any written evidence for one to be an agent of another in buying registered land parcel, without any written memorandum.



- ii. The Learned Magistrate erred in law and fact by failing to appreciate that, during the stage of pleading before trial commenced, the principal witness of the respondent, Waithira Magutu, had recanted her filed statement as a witness to the respondent and had instead filed an affidavit in court sworn on January 22, 2019 clarifying that truthfully, the appellant had not enriched himself with Kshs. 200,000/- and had actually paid a sum of Kshs. 200,000/- from his own resources to the land selling entity.
  - iii. The failure by the Learned Trial Magistrate to factor in evidence contained in the filed sworn affidavit by Waithira Magutu, the common mother of both the appellant and the respondent amount to a mis-trial as vital evidence and averments by this witness who had played a crucial role was excluded.
  - iv. The Learned Magistrate erred in fact in arriving at a decision to the effect that, the appellant acquired the land parcel from Langata Development Company Limited as agent of the respondent and thus as a mere trustee for the respondent, against the weight of evidence adduced by the appellant and his witnesses.
8. The appellant urged this court to allow the appeal and set aside the Judgment of the trial court and substitute it with an order dismissing the respondent's suit.

### **Appellant's Submissions**

9. The appeal was canvassed through written submissions dated 11/4/2023, filed by M/s Kamiro R N & Co. Advocates. Counsel for the appellant outlined a brief background to the appeal and urged the court to "hold that all evidence on record, taken together, leads to the inevitable conclusion that the appellant truly approached the land selling company as a purchaser of share offered as a purchaser and not as an agent of the respondent" (*sic*).
10. Counsel contended that the respondent failed to offer evidence indicating that she had appointed the appellant as her agent or trustee to acquire the shares on her behalf. Counsel submitted that the title held by the appellant was "remotely associated with any money the respondent might have given to Waithira Magutu". Counsel added that Waithira Magutu's allegation that she received money from the respondent could not "faithfully be attributed to have been meant and used to purchase" the suit property. Counsel urged this court to allow the appeal.

### **Respondent's Submissions**

11. The respondent filed written submissions dated 19/7/2023 through M/s Kanyi Kiruchi & Co. Advocates. Counsel for the respondent identified the following as the two issues that fell for determination in the appeal: (i) Whether the appeal is merited; and (ii) the question relating to costs of the appeal.
12. On whether this appeal is merited, counsel pointed out that this appeal was filed on 22/3/2021 which was outside the limitation period prescribed under Section 79G of the *Civil Procedure Act*. Counsel urged the court to dismiss the appeal on that ground. Counsel further submitted that the appeal was fatally defective because the record of appeal did not contain a copy of the decree appealed against.
13. Counsel added that the appellant had admitted in his evidence during trial that indeed the respondent gave their mother Kshs. 200,000/- for purchase of the suit property, adding that the appellant failed to tender evidence demonstrating that he financed the succession cause which the respondent was



involved in. Counsel argued that the respondent proved existence of a trust and demonstrated breach of the trust by the appellant. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

14. I have read and considered the entire original record of the trial court, the records filed in this appeal and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this Judgment, the key issue to be determined in this appeal is whether the respondent proved that the suit property was held by the appellant in trust for her. Before I dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction. I will also first dispose the two peripheral issues which the respondent raised in her submissions.
15. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
16. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
17. One of the peripheral issues which the respondent raised in her written submissions relates to the limitation period for lodging an appeal in this court. The respondent's counsel argued that this appeal, which was lodged on 22/3/2021, is statute-barred under Section 79G of the *Civil Procedure Act*. Counsel contended that the impugned judgment having been rendered on 22/2/2021, the 30 days limitation period lapsed on 21/3/2021.
18. I have considered the above argument. I have also looked at the calendar and counted the days. First, February of 2021 had 28 days. Second, by dint of the provisions of Section 57 of the *Interpretation and General Provisions Act*, the day when the impugned Judgment was rendered [22/2/2021] is excluded when computing the prescribed period of 30 days. Consequently, time started running on 23/2/2021. When 30 days are reckoned from 23/2/2021, it is clear that the limitation period lapsed on 24/3/2021. The present appeal was filed on 22/3/2021, which fell within the limitation period of 30 days. I do not therefore find any merit in the respondent's contention that this appeal is statute-barred.
19. The second peripheral issue which the respondent raised is that this appeal is fatally defective by dint of the appellant's failure to include the decree of the trial court in the record of appeal. The respondent did not raise this issue prior to admission of this appeal. Secondly, the respondent had every right to bring a formal application inviting the court to strike out the appeal on the ground that the record of appeal was incomplete. She elected not to pursue that route. By so doing, she denied the appellant the opportunity to respond to the issue or to remedy the omission. It is clear from the above background



that this particular issue was raised as an ambush in the submissions of the respondent. It would be unfair to entertain the issue at this point.

20. That is not all. The circumstances of this appeal are distinguishable. At this point, this court is seized of both the original record of the trial court and the record filed in this appeal. The original record of the trial court contains the original signed Judgment of the trial court dated 22/2/2021. It also contains the original signed Decree of the trial court dated 22/2/2021 and issued on 7/9/2021. The purpose for which a certified decree of the trial court was required has clearly been met by the fact that the original record of the trial court has been availed and contains the original Decree. For the above reasons, the court rejects the respondent's invitation to reject the appeal on the ground of failure to include the Decree in the record of appeal. I now turn to the key substantive issue in the appeal.
21. Did the respondent establish existence of a trust in relation to the suit property? The parties' respective cases in the trial court were summarized in the opening paragraphs of this Judgment. During trial, the respondent testified as PW1. Her evidence was in harmony with her pleadings as summarized in the opening paragraphs of this Judgment. She led evidence by her brother, Paul Ndichu Magutu, who testified as PW2. His evidence was that the respondent gave their mother [PW 3] Kshs. 200,000/- to buy land for her and that their mother in turn passed the money to him and requested him and the appellant to identify land and buy it for the respondent. He added that the two of them identified the suit property and purchased it on behalf of the plaintiff. He further testified that they decided to buy the land in the name of the appellant to hold it in trust for the respondent. Their mother, Waithera Magutu, testified as PW3. Her testimony mirrored the evidence of PW1 and PW2.
22. What were the appellant's pleadings and evidence? First the appellant, through his pleadings, completely denied the facts that had been outlined in the plaint in relation to the contention that the suit property was purchased for and on behalf of the respondent. Through his pleadings, he totally denied existence of a trust in the acquisition and registration of the land in his name. His subsequent witness statement and oral evidence were in total contradiction of his pleadings. In his evidence, he testified that the suit property was indeed purchased for and on behalf of the respondent. He conceded that, indeed, the respondent provided the sum of Kshs. 200,000/- which was used to purchase the suit property. He also conceded that the suit property was acquired and held by him in trust for the respondent. It was, however, his evidence that subsequent to acquisition of the suit property as a trustee of the respondent, he financed the respondent's legal costs in a subsequent succession dispute and the suit property became his absolutely by dint of the financing.
23. For avoidance of doubt, the relevant part of the appellant's testimony during cross-examination reads as follows:-

“Agnes Wanjiru is my younger sister. In 2006 Agnes was residing in Malindi. She did not buy properties using her brother. I confirm in 2006. Agnes gave my mother Kshs. 200,000/- to buy plot. My mother came with money to Nairobi and gave Paul Ndichu. Agnes and my mother asked me to look for plot. I found plot Block A 162 Phase 1 Langata Development Company. It has certificate of lease known as Ruiru Qui Blocks/1796. I confirm I bought that land on behalf of Agnes which was registered in my name. The property is not developed. My sister has never asked me to register land in her name. In 2007 had relationship with Mzungu who died. She needed money to file a succession cause to claim property of the deceased Mzungu Mr. Herbert hell keeper. She asked me for money and I gave her. When succession cause was over she told me on phone that money I had given her to pursue succession cause was same as one used to buy the plot. Instead of refunding me the money I had given her. I kept the plot and do not transfer it to her name. I didn't



give her money in hand. I gave her it passed through my brother total of Kshs. 180,000/- additional Kshs. 20,000/-. I have no documents to show I gave her the money. I took my money to Kangiri Advocate to swear affidavit. She understood what she aware.” [sic]

24. It is clear from the appellant’s pleadings and evidence that, apart from the appellant giving evidence that contradicted his defence, through his evidence during cross-examination, he admitted existence of a trust in relation to the suit property. He purported to advance a set-off through his evidence yet he did not plead the set-off.
25. For the above reasons, this court is satisfied that the respondent properly proved that the appellant acquired and held the suit property as her trustee. The appellant acknowledged the trust in his evidence during cross-examination.
26. Consequently, I do not find merit in this appeal. The appeal is dismissed for lack of merit. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE 2024**

**B M EBOSO**

**JUDGE**

In the presence of: -

Ms Muturi for the Respondent

Court Assistant: Hinga

