



REPUBLIC OF KENYA



**Kasongo v Aimi Ma Kilungu Limited & 2 others (Environment and Land Appeal 57 of 2018) [2024] KEELC 5452 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5452 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 57 OF 2018**

**A NYUKURI, J**

**JULY 24, 2024**

**BETWEEN**

**AMBROSE MUSAU KASONGO ..... APPELLANT**

**AND**

**AIMI MA KILUNGU LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MALITINA MUTU KASONGO ..... 2<sup>ND</sup> RESPONDENT**

**JABE INVESTMENT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in CMCC No. 897 'A' of 2012 delivered on 7th August 2018 by Hon. Kibiru A.G, Chief Magistrate)*

**JUDGMENT**

**Introduction**

1. This appeal is against the judgment of Honourable Kibiru A. G, Chief Magistrate delivered on 7<sup>th</sup> August 2018 in Machakos CMCC No 897 'A' of 2012. In the impugned judgment, the learned magistrate dismissed the appellant's counterclaim and allowed the respondent's claim by issuing restraining orders against the appellant and directing the appellant to transfer the suit property to the respondent.

**Background**

2. Machakos Civil Suit ELC No 897A of 2012 was filed by Malitina Mutu Kasongo, who sued Aimi Ma Kilungu Limited and her son Ambrose Musau Kasongo, seeking injunctive orders restraining the defendants from trespassing on parcel No 1397 (the suit property) and a mandatory injunction compelling the 1<sup>st</sup> defendant to transfer the suit property in the favour of Jabe Investment Limited, the interested party therein. It was the plaintiff's case that she was a member/shareholder of the 1<sup>st</sup>



- defendant and the registered owner of all that parcel of land known as Agricultural Plot No 1397 situate at Yoani Mukaa within Machakos County. She further stated that on 20<sup>th</sup> April 2011, she sold the said land to Jabe Investment Limited (the interested party) but was unable to transfer the same to the said buyer because of malicious and unjustified objections by the 2<sup>nd</sup> defendant which led the 1<sup>st</sup> defendant to decline the transfer. She also stated that the 2<sup>nd</sup> defendant had trespassed on the suit property. She asserted that the actions of the defendants had interfered with the quiet enjoyment of the suit property by the interested party.
3. The suit was opposed. The 1<sup>st</sup> defendant filed defence dated 10<sup>th</sup> October 2021 denying the plaintiff's claim. It claimed to be a stranger to the averments by the plaintiff but confirmed to have declined the plaintiff's request to transfer the suit property to Jabe Investments because of a caveat filed by the 2<sup>nd</sup> defendant, who is the plaintiff's son claiming beneficial right in the suit property.
  4. The 2<sup>nd</sup> defendant entered appearance and filed a statement of defence and counterclaim dated 7<sup>th</sup> October 2011. He denied the plaintiff's claim and stated that the objection raised was valid and had a legal basis because he has a legitimate interest in the suit property. He also stated that in 1975 he gave his now deceased father Maxim Kasongo Kimundi, money which the later used to purchase a share at the 1<sup>st</sup> defendant being share No 1768, registered in the name of his father. That his late father held parcel 1397 and 1490 in trust for the 2<sup>nd</sup> defendant. Further that on 23<sup>rd</sup> March 1996, in a clan meeting, his father admitted that the two parcels of land belonged to the 2<sup>nd</sup> defendant and committed to transfer the same to him but died before transferring the suit property to the 2<sup>nd</sup> defendant. He claimed that the plaintiff secretly and fraudulently transferred the suit property without obtaining grant to the estate of the later Maxim Kasongo Kimundi. He stated that he cited the plaintiff vide Machakos High Court Citation Cause No 122 of 2011 in respect of the estate of Maxim Kasongo Kimundi and that on 27<sup>th</sup> June 2011 the court ordered the plaintiff to take out letters of administration in relation to the deceased's estate. He prayed that the parcels of land numbers 1397 and 1490 be declared the sole properties of the 2<sup>nd</sup> defendant and the same be transferred to the 2<sup>nd</sup> defendant, and the transfer to the plaintiff be declared illegal or in the alternative, an order that the said parcels form part of the estate of the Maxim Kasongo Kimundi, the appellant's father and should be given to the 2<sup>nd</sup> defendant having been held by the deceased in trust for the 2<sup>nd</sup> defendant.
  5. On 7<sup>th</sup> May 2013, upon application, Jabe Investment Limited were joined to the suit as interested party. The interested party filed a statement of claim dated 3<sup>rd</sup> June 2013. It supported the averments in the plaint and added that at the time it purchased the suit property, the same was unoccupied and undeveloped, denied that the property was occupied by the 2<sup>nd</sup> defendant and claimed to have incurred expenses in regard to fencing the suit property. It claimed to have conducted due diligence before purchasing the suit property by first confirming from the 1<sup>st</sup> defendant that the plaintiff was the registered owner of the suit property. It also denied the 2<sup>nd</sup> defendant's counterclaim and contended that the suit property had not been in the name of the late Maxim Kasongo Kimundi upon whom the 2<sup>nd</sup> defendant's claim was premised and that the later was not even an administrator of the said estate and that therefore he was merely a busybody. It also argued that the sale between the plaintiff and the interested party was sealed, and therefore the 2<sup>nd</sup> defendant has no claim over the suit property.
  6. The matter proceeded to hearing by way of viva voce evidence. Consequently, upon considering the pleadings and evidence, the trial court found that the issue of the estate of the late Maxim Kasongo cannot be litigated before that court and that the same was settled in the succession cause. The court also found that the interested party was an innocent purchaser for value and granted the plaintiff's prayers as prayed. It is this judgment that provoked the instant appeal.



7. The appellant, aggrieved by the finding of the trial court, appealed against the same, by a Memorandum of Appeal dated 13<sup>th</sup> August 2018 citing the following grounds;
  - a. That the learned Magistrate erred in law and in fact by failing to consider all evidence as given in court by the 2<sup>nd</sup> defendant and his witnesses.
  - b. That the learned Magistrate erred in law and in fact by failing to take into account that the suit property could not fall into the succession cause of the late Maxim Kasongo Kimundi.
  - c. That the learned Magistrate erred in law and in fact by failing to consider that the appellant's suit or counterclaim was rightfully before this court and could not fall into the succession cause of the late Maxim Kasongo Kimundi.
  - d. That the learned Magistrate erred in law and in fact by failing to consider the documents produced by the appellant more so the agreement by Maxim Kasongo Kimundi to transfer the suit land to the appellant.
  - e. That the learned Magistrate erred in law and in fact by failing to consider that the plaintiff Malitina Mutua Kasongo deliberately declined to testify in court as she knew the truth of the matter.
  - f. That the learned Magistrate erred in law and in fact by failing to consider that there was no proper sale agreement of suit land to the interested party hence no transfer could/can take place.
  - g. The learned magistrate erred in law and fact in failing to consider the appellant's submissions thus arriving at the wrong finding.
8. Subsequently, the appellant sought the following prayers;
  - a. That the trial magistrate's judgement on all findings except the issue of costs of suit dated 7<sup>th</sup> August 2018 be set aside and the appellant's counterclaim allowed as prayed on its entirety.
  - b. That costs of this appeal and the court below be paid to the appellant.
9. The appeal was canvassed by way of written submissions. The appellant's filed his submissions on 7<sup>th</sup> February 2022 while the 1<sup>st</sup> respondent's submissions were filed on 11<sup>th</sup> May 2022. The 3<sup>rd</sup> respondent's submissions were filed on 16<sup>th</sup> May 2022.

### **Appellant's submissions**

10. Counsel for the appellant submitted on each of the grounds of appeal as laid down in their Memorandum of Appeal. On the 1<sup>st</sup> ground, it was submitted that this being a first appeal, this court has a duty to peruse and consider the aspects of the evidence that show that share No 1768 was held by the deceased on behalf of the appellant and consequently that plot number 1397 is the property of the appellant.
11. On the second ground of appeal, it was submitted for the appellant that the alleged transfer of the suit property to the 1<sup>st</sup> respondent was fraudulent and a nullity as the same was not the property of the deceased, because the property had been held by the deceased in trust for the appellant. Counsel argued that the transfer to the 1<sup>st</sup> respondent was a mystery as it happened long after the deceased had passed on, without a succession cause being filed. It was their submission that the said property could not be deemed as belonging to the estate of the deceased as the same had been fraudulently transferred to the 1<sup>st</sup> respondent, who was still alive.



12. On the 3<sup>rd</sup> ground of appeal, it was their argument that the 1<sup>st</sup> respondent was duty bound to transfer the suit property to the appellant for the reason that the deceased confirmed that he held the same in trust for the appellant and the appellant's right to the land would not have been defeated by fraudulent and unlawful transfer to the 1<sup>st</sup> respondent. On the 4<sup>th</sup> ground, it was their submission that the minutes of the clan meeting held on 23<sup>rd</sup> March 1996 and confirmed by other witnesses ought to have been given a serious consideration and the trial court ought to have found that the appellant's claim on the suit property was rightfully established.
13. Regarding the 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal, it was contended for the appellant that the agreement between the 1<sup>st</sup> respondent and the interested party having been done on 20<sup>th</sup> April 2011, whereas the grant to the estate having been confirmed on 16<sup>th</sup> February 2015, the said agreement was a nullity, hence it was erroneous for the trial court to regard that piece of evidence in favour of the 1<sup>st</sup> respondent. It was further submitted that the 1<sup>st</sup> respondent had no proper and legal title to the suit property and the trial court ought to have addressed that aspect of the evidence which it did not.
14. On the 7<sup>th</sup> and final ground, counsel submitted that the trial court failed to consider the appellant's submissions for their full purport and effect and it was their view that had the court taken its time to fully consider the appellant's submissions, it would have arrived at a different conclusion. They concluded by citing the case of *Titus Muiruri Doge v Kenya Conners Ltd* (1988) eKLR and submitted that the deceased had made a promise to transfer plot No 1397 to the appellant and that having passed away before fulfilling the promise, the 1<sup>st</sup> respondent ought to make good the same.

### **1<sup>st</sup> respondent's submissions**

15. While supporting the findings of the trial court, counsel for the 1<sup>st</sup> respondent argued that the appeal lacked merit as the decision of the trial court was sound and just. Counsel argued that the suit property could not be deemed to belong to the deceased as evidence in form of membership card for member number 1768 of Malitina Mutu dated 27<sup>th</sup> October 2001 was produced. It was their submission that there was no nexus between the appellant's claim of agreement between himself and his late father and the ownership of the suit property. It was further argued that no evidence was produced in support of the alleged agreement or payment of money by the appellant to his late father, hence the trial court was right in dismissing the appellant's case.
16. It was also submitted that the argument advanced in support of ground 4 of the Memorandum of Appeal was untenable considering that the same was not in conformity with provisions of section 3 (3) of the *Law of Contract Act* Cap 23 yet the argument was advanced to justify a disposition of land. Counsel argued that as the suit property belonged to the 1<sup>st</sup> respondent at the time of sale to the interested party, confirmation of grant had no relevance to the sale. They concluded by submitting that the appellant had contradicted himself in the alternative prayer (b), by seeking an order that the suit property formed part of the estate of the late Maxim Kasongo Kimundi when they alleged that it did not.

### **3<sup>rd</sup> respondent's submissions**

17. Responding to grounds 1 and 7 of the Memorandum of Appeal, counsel submitted that there was no evidence produced by the appellant, in form of receipts or written agreement, to prove the claim that the appellant gave money to his late father to purchase shares on his behalf, and particularly share number 1768 and that therefore his ownership claim was far fetched. On ground No 2, they argued that the appellant's claim that the suit property did not form part of the estate of the late Maxim Kasongo Kimundi could only be sustained if the appellant would have proved his ownership claim of the suit



- property as against the 1<sup>st</sup> respondent. It was their contention that at the time of sale of the suit property, the same belonged to the 1<sup>st</sup> respondent hence a confirmed grant was not a requisite document for sale.
18. On grounds 3 and 4 of the appeal, counsel submitted that the appellant's allegations that his late father had agreed to transfer the suit property to him was incapable of being implemented since if there were an agreement between him and his father the same ought to have been approved by the 2<sup>nd</sup> respondent and that the clan meeting was not signed or approved by the 1<sup>st</sup> respondent who is alleged to have been present. They urged the court to find no probative value in the alleged clan meeting minutes.
  19. On ground 5 of the appeal, it was submitted that the argument that the 1<sup>st</sup> respondent failed to testify in court remains unsubstantiated since the appellant had not challenged the power of attorney produced as the respondent's exhibit, nor was there any evidence to show that the respondent was not sickly or old adduced. On ground No 6 of the appeal, it was their submission that the sale of the suit property to the interested party fully satisfied the requirements set out under section 3(3) of the *Law of Contract Act* Cap 23. It was also their argument that the 1<sup>st</sup> respondent had legal title to the property, and that the appellant did not file objection to the succession cause in regard to his father's estate. They concluded by stating that the appellant's claim over the suit land was a miscalculated afterthought which ought to be dismissed.

### **Analysis and determination**

20. The court has duly considered the appeal, the record and parties' rival submissions. The only issue that arises is whether the trial court was right in dismissing the appellant's counterclaim and allowing the 1<sup>st</sup> respondent's claim as sought in the plaint.
21. The duty of the first appellate court is to reassess, reconsider and reanalyse the evidence and make its own independent conclusions bearing in mind that it had no opportunity to see or hear the witnesses and make due allowance for that. (See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123).
22. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the Court of Appeal held as follows;

On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.
23. Section 107 of the *Evidence Act* places the burden of proof in a suit on the plaintiff. In this suit, the appellant claimed that the suit property had been held in trust for him by his late father Maxim Kasongo Kimundi because he gave his father money to buy a share in Aimi Ma Kilungi Limited. Having considered the evidence before me, it is clear that there is no iota of evidence that was produced by the appellant to prove this allegation. The appellant's allegation of the suit property being held by his late father in trust for him was not proved at all. He faults the 1<sup>st</sup> respondent's ownership of the suit property.
24. Although in the record of appeal, the appellant excluded documents produced by the 1<sup>st</sup> respondent, it is clear from the original file before the trial court that the 1<sup>st</sup> respondent produced a membership card dated 27<sup>th</sup> October 2001 to demonstrate her membership of the 2<sup>nd</sup> respondent being member No 1768. She also produced the allotment dated 26<sup>th</sup> July 2006 showing that she balloted for plot numbers



1397 and 1490 being agricultural and commercial plots respectively. In the premises, it is clear that the suit property which was the share of the 1<sup>st</sup> respondent was lawfully owned by the 1<sup>st</sup> respondent, and no evidence has been presented by the appellant to demonstrate ownership. Therefore, the trial court did not err in making a finding that the appellant failed to prove his counterclaim and the 1<sup>st</sup> respondent proved her claim.

25. In the premises, I find no merit in the appeal which I dismiss with costs to the respondents.

26. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Mwangela for appellant

Ms. Mutua for 1<sup>st</sup> respondent

Ms. Nzilani for 3<sup>rd</sup> respondent

No appearance for 2<sup>nd</sup> respondent

Court assistant – Josephine

