



Waithera & another (Suing as the Administrator of the Estate of Kamau Njacha alias Njacha Kamau & Monica Waithera) v Wangari (Sued as the Administrator of the Estate of the Late Nelson Karanja Wagaya (Deceased) & 5 others (Environment and Land Appeal 68 of 2023) [2025] KEELC 1309 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1309 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 68 OF 2023
YM ANGIMA, J
FEBRUARY 20, 2025
(FORMERLY NYAHURURU ELCA E007 OF 2023)

BETWEEN

MONICA WAITHERA 1ST APPELLANT
JOTHAM KAMAU NJACHA 2ND APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF KAMAU NJACHA
ALIAS NJACHA KAMAU & MONICA WAITHERA

AND

TERESIAH WANGARI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE NELSON KARANJA WAGAYA (DECEASED) 1ST RESPONDENT
NELSON KARANJA WAGAYA (DECEASED 2ND RESPONDENT
MONICAH WANJIRU KARANJA 3RD RESPONDENT
MONICAH WANJIRU KARANJA 4TH RESPONDENT
DISTRICT LAND REGISTRAR NYANDARUA 5TH RESPONDENT
DISTRICT LAND REGISTRAR NYANDARUA 6TH RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. H. O. Barasa (SPM) dated 17.01.2023 in Engineer SPMCC No.22 of 2019 – Monica Waithera Njacha and Jotham Kamau Njacha (suing as administrators of the estate of the late Jotham Kamau Njacha vs Teresia Wangari (as administrator of



the estate of Nelson Karanja Wagaya) and 2 others. By the said judgment the trial court dismissed the Appellants' claim against the Respondents with costs.

B. Background

2. The record shows that vide a plaint dated 31.07.2019 the Appellants used the Respondents seeking an order of permanent injunction restraining the Respondents from encroaching and trespassing upon or interfering with Title No. Nyandarua/Mawingo/2567 (parcel 2567). They also sought costs of the suit against Respondents.
3. The 1st Appellant pleaded that he was the registered owner of parcel 2567 whereas the estate of the late Nelson Karanja Wagaya (the deceased) was the registered owner of Title No. Nyandarua/Mawingo/335 (parcel 335). The 1st and 2nd Respondents were said to be the administrators of the estate of the deceased.
4. The Appellants pleaded that the 1st and 2nd Respondents had wrongfully encroached upon and hived off a portion of 2 acres out of parcel 2567. It was further pleaded that previous efforts to resolve the said dispute through judicial and administrative means were not successful hence the suit.
5. The record shows that the 1st and 2nd Respondents filed a statement of defence dated 20.08.19 denying the Appellants' claim in its entirety and putting them to strict proof thereof. It was denied that the 2nd Respondent was an administrator of the estate of the deceased. It was further pleaded it was the 1st Respondent who was the registered owner of parcel 335 in her capacity as the administrator of the estate of the deceased. The Respondents denied having trespassed upon or hived off a portion of 2 acres out of parcel 2567 and put the Appellants to strict proof of their allegations.
6. There is, however, no indication on record of the 3rd Defendant having filed any defence to the Appellants' suit.

C. Trial court's decision

7. The record shows that upon a full trial at which the concerned parties tendered their evidence the trial court found and held that the Appellants had failed to prove their claim on a balance of probabilities as required by law. In arriving at the said decision, the trial court heavily relied upon the report of the District Surveyor- Nyandarua South which was prepared following a consent recorded by the warring parties on 19.04.2022. As a consequence, the trial court dismissed the Appellants' suit with costs to the Respondents.

D. Grounds of appeal

8. Being aggrieved by the said judgment, the Appellants filed a memorandum of appeal dated 15.02.2023 and amended on 10.05.2024 raising the following 9 grounds of appeal;
 - i. The Learned Magistrate erred in fact and in law in finding that the Appellant had not proved his case on a balance of probabilities.
 - ii. The Learned Trial Magistrate erred in fact and law by ignoring the evidence presented before the learned Trial Court by the Plaintiff/Appellant.
 - iii. The Learned Trial Magistrate erred in fact and Law by relying on the Surveyor's report while he did not clarify which map he used.
 - iv. The Learned Trial Magistrate erred in fact and law in solely relying on the Surveyor's report in delivering his judgment without considering the evidence produced by the Appellant.



- v. The Learned Trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions on a balance of convenience and the irreparable harm being suffered and likely to be suffered by the Appellant as a result of the circumstances surrounding the delivered judgment.
 - vi. That the Learned Trial Magistrate erred in fact and law for failing to consider that the public access road encroaches on the Appellant's rightful property.
 - vii. The Learned Trial Magistrate erred in law and fact by failing to address himself completely on the interests and rights of the Appellant to own property despite the evidence presented and demonstration of the same.
 - viii. The Learned Trial Magistrate erred in law and fact by failing to appreciate the evidence attached from previous court decisions regarding the matter.
 - ix. That the Learned Trial Magistrate erred in law and in fact by failing to interrogate the changes and differences between the Scheme Development Plan dated 3rd May 1966 and the Registry Index Map relied on by the surveyor and whether there were any reasons granted for the amendments.
 - x. The Learned Trial Magistrate erred in law and fact in not considering that the Appellant has two (2) acres hived out of his property while he has been in occupation since 1966.
 - xi. The Learned Trial Magistrate erred in land and fact by failing to interrogate the history of and land, how the 1st Respondent acquired the title and the legality thereto.
 - xii. The Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's with costs.
9. As a result, the Appellants sought the following reliefs in the appeal;
- i. This Appeal be allowed with costs;
 - ii. The Judgment and Order made on 17th January, 2023 by the Honoura Court (H.O. Barasa (SPM) in Engineer ELC No. 22 Of 2019; Jotham Njacha -V- Teresiah Wangari & 2 Others be discharged and/or set aside with costs to the Appellant;
 - iii. A declaration that the parcel of land known as Nyandarua/Mawingo/2567 is as indicated on the Title deed and the Scheme Development Plan hence if the Registry Index Map.(RIM) does not reflect that, then it is an error on the face of the record.
 - iv. Cancellation and rectification of the Register to reflect the true position on Nyandarua/Mawingo/335 and error on the face of the record be rectified.
 - v. The cost of the Appeal and the Chief Magistrates Court be borne by the Respondents; and
 - vi. Such orders and reliefs that the Honourable Court may deem fit to grant

E. Directions on submissions.

10. 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 Appellants' submissions were filed on 9.05.2024 whereas the 1st and 2nd Respondents' submissions were filed on 2.05.2024.



F. Issues for determination

11. Although the Appellants raised several grounds of appeal the court is of the opinion that the appeal may effectively be determined by resolution of the following key issues;
 - a. Whether the trial court erred in law and fact in dismissing the Appellants' claim.
 - b. Whether the Appellants are entitled to the reliefs sought in the appeal.
 - c. Who shall bear costs of the appeal.

G. Applicable Legal Principles

12. 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.”

13. 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...”

14. 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.”

15. 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 Appellants’ claim

16. The court has considered the material and submissions on record on this issue. The Appellants’ case before the trial court was that the 1st and 2nd Respondents had wrongfully encroached upon parcel 2567 thereby annexing about 2 acres of their land. The Appellants’ contention was apparently based on their understanding of the location of an access road separating parcels 2567 and 335.
17. It was evident from the material and evidence on record that the disputing parties had different ideas on where the access road should be located. The record shows that vide a consent recorded on 19.04.2022 the parties agreed to have a government surveyor visit the two parcels and to prepare and file a comprehensive report on the proper location of the access road.
18. The pertinent parts of the consent order stipulated as follows;
 - a. That the government surveyor do visit the land in dispute and thereafter prepare a comprehensive report relating to the public access road and where exactly the same is supposed to be.
 - b. That this should be done within 60 days.
 - c. That the parties do share the surveyor’s costs equally.
19. The record shows that vide a report dated 05.08.2022 the district surveyor- Nyandarua South filed his report in which he identified the location of the access road as per the registry index map. It is pertinent to note that the position of the road as per official records differed substantially from what both the Appellants and the Respondents pointed out to the surveyor as the correct location. It would appear that whereas the Respondents accepted the location as identified by the District Surveyor, the Appellants did not.



20. In finding that the Appellants had failed to prove their claim against the 1st and 2nd Respondents the trial court analyzed the evidence before him as follows;

“In this case the order that led to the District Land Surveyor visiting the land in question was recorded by the consent of both parties. In fact, it is 2nd plaintiff who prompted the recording of that order when he requested during his testimony that the land be visited. The said land surveyor confirmed that he visited the land and carried out the required exercise in the presence of all parties. He also confirmed that he used the registry index map that was in his possession. In my opinion, I do not think a Government Surveyor, who has not personal interest in this matter can use the wrong Registry Index Map to carry out such an important activity and, in the circumstances, I have no reason whatsoever to reject his opinion and the sketch map that was attached to his report. With the finding of this expert, it cannot be said that the plaintiffs have proved their case on a balance of probabilities. The report literally killed the plaintiffs’ case. It would be preposterous for this court to grant prayers sought when it has clearly been demonstrated that if the access road is drawn as proposed by the plaintiffs, there will be an encroachment upon Land Parcel Number Nyandarua/Mawingo/335, which parcel does not belong to the plaintiffs.”

21. The court finds absolutely no fault with the trial court’s analysis of the evidence before him. The court also finds no fault with the trial court’s conclusion on the basis of the evidence before him. Although the expert opinion of the land surveyor was not conclusive and fool-proof, the trial court was entitled to give it due weight especially in the absence of evidence to show that the surveyor was either biased or compromised. The trial court had no other credible expert evidence to the contrary.
22. The court thus agrees with the trial court that the Appellants had failed to prove the alleged encroachment upon parcel 2567 by the 1st and 2nd Respondents. The Appellants had therefore failed to prove their claim against the Respondents on a balance of probabilities as required by law.

b. Whether the Appellants are entitled to the reliefs sought in the appeal

23. The court has found that the trial court did not err either in law or fact in finding and holding that the Appellants had failed to prove their claim against the Respondents on a balance of probabilities. It would thus follow that the Appellants are not entitled to succeed and consequently are not entitled to the reliefs sought or any one of them.

c. Who shall bear the costs of the appeal

24. 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 Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the 1st and 2nd Respondents shall be awarded costs of the appeal. However, the 3rd Respondent shall not be entitled to any costs since he did not participate in the appeal.

I. Conclusion and disposal orders

25. The upshot of the foregoing is that the court finds no merit in the Appellants’ appeal. As a consequence, the court makes the following orders for disposal thereof:
- a. The appeal is hereby dismissed in its entirety.



- b. The judgment and decree of the trial court dated 17.01.2023 in Engineer SPMCC No. 22 of 2019 is hereby affirmed.
- c. The Appellants shall pay the 1st and 2nd Respondents' costs of the appeal. However, the 3rd Respondent shall bear his own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF FEBRUARY 2025.

In the presence of:

Ms. Mwangi for the Appellants

Mr. Njihia for the 1st and 2nd Respondents

No appearance for the 3rd Respondent

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Y. M. ANGIMA

JUDGE

