Iriga (Suing in Her capacity as the Administrator of the Estate of Ignatius Iriga Nderi) v Kirugu & another (Environment and Land Appeal E005 of 2023) [2024] KEELC 5536 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5536 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E005 OF 2023

LN GACHERU, J

JULY 18, 2024

BETWEEN

JANE WANJIRU IRIGA (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF IGNATIUS IRIGA NDERI) ..... APPELLANT

AND

PATRICK FREDRICK KIRUGU ..... 1ST RESPONDENT

IRIGA NDERI (BEING SUED IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF IGNATIUS IRIGA NDERI) ..... 2ND RESPONDENT

(Being an appeal from the Judgement of Hon. Susan Mwangi, Senior Resident Magistrate delivered on the 30th January 2023, in MCELC Case No. 41 of 2020)

JUDGMENT

1. Vide a Memorandum of Appeal dated 8th February, 2023, and filed before the Court on 9th February 2023, and the Record of Appeal, dated 1st March, 2023, the Appellant herein has challenged the decision of the trial Court dated 30th January, 2023, in MCELC Case No.41 of 2020 (Senior Resident Magistrate's Court at Murang'a). Consequently, the Appellant has sought for the following Orders:

    1. That the Judgment of Hon. Susan Mwangi, Senior Resident Magistrate delivered on the 30th January, 2023, in MCELC Case No.41 of 2020, and all consequential proceedings, orders, and decree be set aside and substituted with an order striking out MCELC Case No.41 of 2020, suit against the Appellant with costs to the Appellant.
    2. That the costs of this Appeal be awarded to the Appellant.
    3. That such further or other orders be made as are just in the circumstances of this Appeal."

2. The Appeal is anchored on the following thirteen (13) grounds set out on its face:

   i. That the trial Court erred in law and in fact by finding that the Plaintiff purchased the parcel of land known as title number Makuyu/ Makuyu/ Block IV/102 from the Defendants despite there being no evidence of purchase of the said property.

   ii. That the trial Court erred in law and in fact by making a declaration that the Plaintiff is the rightful owner of the parcel of land known as title number Makuyu/ Makuyu/ Block IV/102.

   iii. That the trial Court erred in law and in fact by finding that the Plaintiff has met the threshold for the grant of a permanent injunction.

   iv. That the trial Court erred in law and in fact by finding that the Completion notice issued by the Defendants was not received by the Plaintiff.

   v. That the trial Court erred in law and in fact by failing to make a finding that the sale agreement dated 6 May 2010 is rescinded and terminated by the Completion notice issued to the Plaintiff by the Defendants.

   vi. That the trial Court erred in law and in fact by finding that the Defendants are in breach of the Sale Agreement dated 6 May, 2010 despite the Agreement having been rescinded by the Defendants.

   vii. That the trial Court erred in law and in fact by issuing an order for Specific Performance for a Sale Agreement that is already rescinded and terminated.

   viii. That the trial Court erred in law and in fact by failing to find that the Plaintiff failed to deliver on his promise to obtain a duplicate title for land parcel Makuyu/ Makuyu/ Block IV/102.

   ix. That the trial Court erred in law and in fact by determining issues not in dispute between the Plaintiff and the Defendants and finding that the Defendants failed to report the loss of the certificate of Title for land parcel number Makuyu/ Makuyu/ Block IV/102 to the police and obtain a police abstract, and write to the Lands Registrar Murang'a for the re-issuance of another.

   x. That the trial Court erred in law and in fact by finding that the Plaintiff is in possession of title number Makuyu/ Makuyu/ Block IV/102 in the absence of any proof of the said possession.

   xi. That the trial Court erred in law and in fact by considering possession as proof of ownership of land.

   xii. That the trial Court erred in law and in fact by awarding the remedies sought by the Plaintiff.

   xiii. That the trial Court erred in law and in fact by failing to appreciate the evidence tendered by the Defendants and analyze and apply the correct law thereby arriving at erroneous conclusions that is not premised on the evidence and the law in respect of orders sought by the Plaintiff."

3. From the Record of Appeal, it is evident that the trial Court upheld the Plaintiff's (now 1st Respondent) claim over the suit land. Further, the trial court held and found that the Appellant and the 2nd Respondent executed a valid contract for the disposal of the suit property with the 1st Respondent. The trial Court also determined that the contract dated 6th May, 2010, for the disposal of the suit property was not rescinded by the Appellant and the 2nd Respondent herein as claimed.

4. In the proceedings before the trial Court, the Plaintiff(1st Respondent) laid claim to the suit property on the basis of a Sale Agreement dated 6th May, 2010, which was executed between himself in the role of

Purchaser, the Appellant and the 2nd Respondent acting jointly as the vendors and co-administrators of the estate of Ignatius Iriga Nderi, the original registered proprietor of the suit land.

5. The Appellant and the 2nd Respondent admitted in the proceedings before the trial Court that they executed the said sale agreement for sale of the suit land and received Kshs.200,000/=, (two hundred thousand) from the 1st Respondent as part payment out of the agreed-upon entire purchase price of Kshs.400,000/=

6. Further, the Appellant and the 2nd Respondent filed a joint Statement of Defence and opposed the said suit at the trial Court. They blamed the 1st Respondent for the failure to execute the Sale Agreement dated 6th May, 2010. At paragraph 6 of their joint Statement of Defence dated 8th October, 2015, the Appellant and the 2nd Respondent contended that, subsequent to executing the contract for sale of the suit land with the 1st Respondent on 6th May, 2010, they informed him that the title deed to the suit property was lost or mislaid and further that they were taking all necessary steps to obtain a duplicate certificate of title.

7. Following delivery of the trial Court's decision on 30th January, 2023, in the 1st Respondent's favour, the Appellant filed before the trial Court an Application for stay of execution of its judgment dated 30th January, 2023, and Decree issued on 16th February, 2023, which was disallowed.

8. Thereupon, the Appellant approached this Court via a Notice of Motion dated 17th February, 2023 , seeking a stay of execution of the trial Court' Judgment, which application was opposed by the 1st Respondent. A Ruling was delivered by this Court in respect of the said Application on 11th August, 2023, to preserve the substance of the current Appeal, and the Court directed in its Ruling that the status quo as of 11th August, 2023, be maintained in respect of the suit land.

9. Further, the Court directed the Appellant to set the Appeal down for hearing within 60 days, from the date of the said Ruling, failure to which the Order for status quo would be automatically lifted.

10. Consequently, the Appellant filed and served the Record of Appeal. Thereafter the court directed that the Appeal be canvassed by way of written submissions, and gave time lines for filing the same. The Appellant did not file her submissions, even after being given several opportunities. The 1st Respondent did file his submissions, which the court has carefully read and considered.

Appellant's Case

11. As stated above, the Appellant did not file any written submissions; Accordingly, the Court will rely on her Memorandum of Appeal, Record of Appeal, and exhibits produced and evidence tendered before the trial Court.

12. In her Memorandum of Appeal dated 8th February, 2023, the Appellant herein reiterated the averments tendered before the trial Court. She contended that the Agreement for the disposal of the suit property executed on 6th May, 2010, was rescinded by herself and the 2nd Respondent, in their capacity as the vendors of the same, on account of the Completion Notice which they issued to the 1st Respondent.

13. It was the Appellant's further contention that the 1st Respondent failed in his promise to deliver a duplicate title in respect of the suit property. The Appellant relied on the terms of the letter issued by the 1st Respondent's Advocates dated 30th October, 2013, to anchor her claim that the 1st Respondent made an undertaking to obtain a duplicate title in respect of the suit property; thereby, absolving both the Appellant and the 2nd Respondent of all responsibility in terms of pursuing the matter of issuance of a duplicate title.

1st Respondent's Submissions

14. The 1st Respondent filed written submissions on 5th March, 2024, through the Law Firms of MBUE NDEGWA & COMPANY ADVOCATES, and identified two issues for determination:

    a. Whether the Appellant rescinded the contract dated 6th May, 2010.

    b. Whether there was a valid and enforceable contract.

15. It was the 1st Respondent's submission that the Appellant has contradicted himself by alleging on pages 81-83 of the Record of Appeal, that he served a "Completion Notice" upon the Law Firm of Gichuki King'ara & CO. Advocates (who were the 1st Respondent's Advocates), whereas on page 86 of the same Record, the Appellant alleges that she served the said Completion Notice upon the 1st Respondent personally.

16. Further, the 1st Respondent denied that the documents appearing on pages 81-83 of the Record of Appeal, were received by his then Advocates on record, because no date appears on the receiving stamp. He pointed to the Court the letter appearing on page 86 of the Record of Appeal, wherein a date does appear on the receiving stamp from the Law Firm of Gichuki King'ara & CO. Advocates.

17. He further submitted that during the trial, the Appellant was not able to confirm on cross-examination whether he served the aforesaid Completion Notice upon the 1st Respondent.

18. Further, that the trial Court was correct to enter the finding and holding that the contract executed by the parties before it and dated 6th May, 2010, was valid and enforceable. He added that the trial Court was equally correct to hold that Courts cannot rewrite contracts for the parties.

19. The 1st Respondent argued that in the letters by his Advocates, which form part of the record, he offered "conditional assistance" to the Appellant and the 2nd Respondent with regard to procuring a duplicate title to the suit property. The condition, he asserted, was that the Appellant and the 2nd Respondent were to deliver completion documents and that upon receipt of the same, the 1st Respondent would offer his assistance to obtaining a duplicate title to the suit land.

20. It was his further submissions that the Appellant and the 2nd Respondent did not deliver the Completion Documents to him, thereby, failing to meet the said condition. The 1st Respondent underlined that his offer to assist the vendors of the suit property to procure a duplicate title "cannot be deemed, by any stretch of imagination, that he assumed the Appellant's contractual responsibility".

21. He also submitted that the Appellant in her Statement of Defence, which is on record, has admitted that she bore the obligation to obtain a duplicate title to the suit property. That the Appellant was seeking to introduce in the current Appeal a new defence of assumption of responsibility, waiver, estoppel and acquiescence and the above-mentioned allegations or defence are entirely absent in the Appellant's Statement of Defence on record.

22. It was the 1st Respondent's further submission that the Appellant failed to supply Completion Documents as contracted; therefore, her claim in this Appeal that time was of essence for the purpose of the contract should be considered with the foregoing in mind. Further, he pointed out that the Appellant admitted under cross-examination that she failed to report the loss of the title document to the suit land to the Police or to obtain a Police-Abstract, and to bring into operation the provisions of Section 33 of the *Land Registration Act*.

23. The 1st Respondent submitted that the trial Court was correct in its holding that he adduced sufficient evidence for the grant of a permanent injunction as against the Appellant and the 2nd Respondent. He also submitted that the finding and holding of the trial court was based upon a sound consideration of the entirety of the evidence presented to the said Court.

24. In response to the Appellant's contention that the trial Court introduced extraneous issues to the suit before it, particularly the question of who was in actual occupation of the suit property, the 1st Respondent submitted that possession was addressed in the contract dated 6th May, 2010, which is on record; wherein, Clause 6 thereof contains a clause on the subject of "Vacant Possession".

25. It was his further submissions that possession was not an extraneous issue that was introduced de novo by the trial Court. He also submitted that the Appellant's contention that the trial Court equated possession to ownership cannot be supported by any reading of the decision of the trial Court.

26. The 2nd Respondent did not appear appearance for purposes of the instant Appeal, and consequently, he did not file any response to the Appeal and/ or written submissions.

27. This court has considered the Memo of Appeal, the Record of Appeal and exhibits thereon, and the written submissions by the 1st Respondent, and finds the issues for determination are;

    i). Whether the Appellant rescinded the contract dated 6th May, 2010?

    ii. Whether the Appellant is entitled to the orders sought?

28. The court will determine the above two issues simultaneously. Consequently, the Court has considered the instant Appeal together with the written submissions in totality, and the relevant provisions of law. This is a first Appeal, and therefore, the Court is allowed to consider both the law and the facts. See section 65(1)(b) of the *Civil Procedure Act*, which provides;

> "(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
>
> (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;"

29. Further, the duty of the Appellate court is set out in Section 78 of the *Civil Procedure Act*, which duty is to re-consider, re-evaluate, re-analyze and re-assess the available evidence before the trial court, and then come up with its own independent decision, but always bearing in mind that this court as an Appellate one, has not seen nor heard the witnesses, like the trial court did, and therefore should give allowance to that.

30. This Court will also bear in mind that the trial Court exercises discretion too, as set out by *the Constitution* and Statues, as does this court, and its decision cannot be interfered with simply because this is an Appeal. See the case of Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR, where the Court proclaimed as follows in regard to the scope of the appellate powers;

> "In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if

we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."

31. Further in the case of Mbogo & Another vs Shah, [1968] EA, p.15, the Court held that;

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

32. Again in the case of Kurian Chacko Vs Varkey Ouseph AIH 1969 Kerala 16, which was cited with approval in Bwire Vs Wayo and Saloki (Civil Appeal 032 of 2021 [2022], the court held that;

> " a first appellate court is the final court of fact ordinarily and therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage, and that anything less than a full re-evaluation of the entire evidence by the appellate court would amount to visiting an injustice upon a litigant.

33. Similarly, in the case of Abok James Odera t/a A.J. Odera & Associates Vs John Patrick Machira- & Co. Advocates [2013] eKLR, the duty of the first appellate Court was set out 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-analyze the extracts on the record and then determine whether the conclusion reached by the learned trial Judge are to stand or not and give reasons either way."

34. This was also echoed by the court in the case of Peter M. Kariuki v Attorney General [2014] eKLR, where it was held that:

> " We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

35. The court will now procced to consider the available evidence before the trial Court, being guided by the above decided cases. It is clear that in the proceedings before the trial Court and in the instant Appeal, the Appellant has consistently held to the position that the 1st Respondent assumed the responsibility to procure a duplicate title to the suit property; therefore, he should be held to his word.

36. The Appellant contended that the letter by the 1st Respondent's Advocates dated 30th October, 2013, established an obligation on the part of the 1st Respondent to procure a duplicate title to the suit land. At the trial Court, the letter by the 1st Respondent's Advocates dated 30th October, 2013, was interpreted by the Appellant and the 2nd Respondent to mean that the 1st Respondent voluntarily assumed the exclusive responsibility to procure a duplicate title in respect of the suit property; and,

having failed to obtain the same, the 1st Respondent should be adjudged the author of his own misfortune. The said letter reads in relevant part as follows:

> "Our client has confirmed his willingness to assist the Vendors in pursuing the matter of issuance of a duplicate title to the suit property to facilitate the transfer of the property to himself.
>
> He has in this regard instructed us to write to yourselves requesting that your client executes and delivers to us all the other completion documents described in paragraph 8 of the sale agreement of 6 May 2010 and if required by your client; we shall issue a professional undertaking to pay the balance of the purchase price in the sum of Kshs.200,000.00 to your client through yourselves within a period of ninety (90) days from the date receipt of the documents or upon registration of the transfer in favour of our client whichever is earlier..."

37. With regard to the two contentious issues of "Completion" and "Rescission" of the contract executed on 6th May, 2010, the trial Court reasoned as follows:

> "Clause 4 of the said agreement provided for completion date to be 90 days from the date of its execution. As noted above, the alleged rescission letter dated 19th May 2014, and which the defendants were unable to prove that they served it upon the plaintiff, was after the plaintiff's counsel had written to the defence counsel asking the defendants to provide to the plaintiff the completion documents which they were to hand over to the plaintiff within 90 days from the 6th May 2010, but had failed to do so claiming loss or misplacement of the original title deed."

38. The ratio of the decision of the trial Court dated 30th January, 2023 is set out as follows:

> "It has not been disputed that to date, the defendants have never availed the completion documents to the plaintiff. In turn, the defendants allege it was the plaintiff who had breached their sale agreement by failing to have the reissuance of the title deed which he had agreed to assist with but they forgot the condition for the said assistance was pegged on the defendants availing to him the other completion documents, which they failed to.
>
> Further, it was clear in clause 2.2 of their sale agreement that the plaintiff was to pay the balance of the purchase price being Kshs.200,000/- on the completion date, being the 90 days and whereby he was to be availed with the completion documents on or before the said completion date. From the above, it is evident and proved on a balance of probabilities that that it was the defendants who failed to avail the completion documents on or before the 90 days Completion date and even thereafter when the plaintiff opted not to rescind their sale agreement but instead gave them a chance to remedy their contractual obligations over 4 years later. Further, I wish to state that the remedy of rescission was not available to the defendants as the same could only arise upon them having handed over the completion documents to the plaintiff on or before the completion date of 90 days from 6th May, 2010.
>
> The defendants cannot therefore use rescission to cover up for their own breach..."

39. It is clear that the trial Court was not persuaded that, by virtue of the terms of the above stated letter, the 1st Respondent assumed the obligation to procure a duplicate title in respect of the suit property. The trial Court found and held as follows:

> " It is my finding in the circumstances of this case that there is no valid reason which has been put forward by the defendants to deny the plaintiff an order for specific performance. This is because it has been their failure to report the loss of the said title deed to the police, be issued with a police abstract, write to the Land Registrar for the reissuance of another one after he follows the laid down procedures pursuant to Section 33 of the *Land Registration Act*.

40. The Court is bound to give the words used by contracting parties their ordinary and plain meaning in order to actualize the intention of the parties, unless the context in which the particular words are used does not allow for the same. According to the Merriam Webster's dictionary (online), the transitive verb "to assist" means to "give supplementary support or aid to someone". The Merriam Webster's dictionary describes the noun "assistance" to denote "an act or action that helps someone". Further the term "supplementary" is defined in the Merriam Webster's dictionary (online) as follows: "additional"; and, "secondary".

41. In ordinary usage, "to assist" does not entail the abandonment of a particular task by the person/entity being assisted merely because some form of assistance has materialized. Rather, the phrase "to assist", denotes the appearance on the scene of a party known as the assistant, who helps to shoulder part of the work being undertaken by the person that is the beneficiary of the assistance. The primary obligation to perform the task in question remains with the one being assisted after the emergence of the assistance.

42. The Court finds and holds that from the phraseology of letter issued by the 1st Respondent's Advocates dated 30th October, 2013, there was no waiver created with the effect of discharging the Appellant and the 2nd Respondent herein from their legal obligation, by virtue of their capacity as co-administrators and vendors of the suit land to obtain a replacement for any lost or mislaid title.

43. Therefore, it is the holding of this Court that the trial Court did not misdirect itself by holding that the Appellant and the 2nd Respondent having failed to deliver Completion Documents to the 1st Respondent were not entitled take up his conditional offer of assistance to obtain a duplicate title to the suit property.

44. Further, pursuant to the provisions of Section 33 of the *Land Registration Act*, it was not the 1st Respondent's responsibility to initiate the process of obtaining a duplicate title over the suit property, as he was not the registered owner of the misplaced or lost title; neither was 1st Respondent a successor-in-title in respect of, or, an administrator of the estate subsuming the suit property.

45. Consequently, with the above analysis, this Court finds and holds that the 1st Respondent lacked the requisite legal capacity to procure a duplicate title in respect of the suit property, which capacity was vested in both the Appellant and the 2nd Respondent as co-administrators of the suit land.

46. Further, this Court holds and finds that by virtue of their position as co-administrators of the estate encompassing the suit property, the Appellant and the 2nd Respondent were placed under a legal obligation to supply the Plaintiff(1st Respondent), with the original title document to the suit property as contracted or, a duplicate title thereof, where the original title was reportedly lost or misplaced; Therefore, they cannot purport to shift the same obligation onto the 1st Respondent herein.

47. Having carefully considered the available evidence, and having re-evaluated, re-analyzed and re- assessed the said evidence, this Court finds and holds that the trial Court did not misdirect itself or arrive at a

wrong conclusion. Therefore, this Court, as an Appellate one, finds no reasons to interfere with the trial court's Judgement of 30th January, 2023 in MELC Case no.41 of 2020.

48. Consequently, this Court upholds the trial Court's findings of 30th January, 2023, and further finds and holds that this Appeal as contained in the Memorandum of Appeal filed on 9th February 2023, is not merited.

49. For the above reasons, the court further finds that this instant Appeal is not merited and is thus dismissed entirely with costs to the 1st Respondent.

It is so ordered

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS18TH JULY DAY OF JULY,2024.

L. GACHERU

JUDGE

18/7/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr Mwangi H/B for Mr. Rimui for the Appellant.

Mr Mbue Ndegwa for 1st Respondent.

N/A for 2nd Respondent.

L. GACHERU

JUDGE

18/7/2024