



Kimani (Sued as the legal representative of the Estate of Stephen Kimani Gakenia) v Murage & another (Environment and Land Appeal 3 of 2023) [2024] KEELC 5422 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 3 OF 2023**

YM ANGIMA, J

JULY 18, 2024

BETWEEN

JACQUELINE NJOKI KIMANI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN KIMANI GAKENIA) APPELLANT

AND

DANIEL MWANGI MURAGE 1ST RESPONDENT

ISAAC THEURI GITHAE 2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. S. O. Mogute -SPM dated 18.03.2023 in Nyahururu CM ELC No. 358 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S. O. Mogute (SPM) dated 18.03.2023 in Nyahururu CM ELC No. 358 of 2018 – Daniel Mwangi Murage -vs- Isaac Theuri Githae & Jacqueline Njoki Kimani (as the legal representative of Stephen Kimani Gakenia). By the said judgment, the trial court allowed the 1st Respondent’s suit against the Appellant as prayed in the plaint together with costs.

B. Background

2. By a plaint dated 25.10.2018, the 1st Respondent sued the 2nd Respondent and Stephen Kimani Gakenia (the deceased) now represented by the Appellant, seeking the following reliefs:
 - a. A declaration that the purported registration of any transfer of Plot No. UNS Comm. Plot No. Y45 – Ol Kalou Town to Stephen Kimani Gakenia is illegal, unlawful and void ab initio and the same be cancelled forthwith.



- b. A declaration that the Plaintiff is the legal owner of Plot No. UNS. Comm. Plot No. Y45 – Ol Kalou Town having acquired it by way of purchase on the 29.06.2005 and his name be entered in the register.
 - c. Costs of the suit plus interest.
 - d. Any other or further relief that this honorable court may deem just and fit to grant.
3. The 1st Respondent pleaded that vide a sale agreement dated 29.06.2005 he purchased Plot No. Y45 - Ol Kalou Township (the suit property) from one, Priscilla Bochere Ogendi (Priscilla) for a sum of Kshs.350,000/= through the 2nd Respondent who was acting as her agent (the agent) at the material time. He pleaded that the 2nd Respondent handed over the original ownership documents upon payment of the full purchase price and that the suit property was transferred into his name by the then Town Council of Ol Kalou (the Council) on 28.06.2005.
 4. It was the 1st Respondent's case that he took vacant possession of the suit property and developed it with permanent structures. It was further pleaded that sometime in June 2018 he discovered that the deceased and the agent had colluded and fraudulently and illegally caused the suit property to be transferred to the deceased. He pleaded several particulars of the alleged fraud and illegality in paragraph 6 of the plaint. It was pleaded that in spite of issuance of a demand and notice of intention to sue the deceased and the agent had failed to make good his claim hence the suit.
 5. The record shows that the 2nd Respondent filed a defence dated 10.01.2019 and amended on 05.03.2020. He admitted that he had sold the suit property to the 1st Respondent as an agent of Priscilla for a consideration of Kshs.350,000/=. He further admitted that the suit property was transferred to the name of the 1st Respondent by the council. He pleaded that the deceased was not the owner of the suit property and that the circumstances under which the same was transferred to him remained unknown hence he must have obtained registration illegally and fraudulently.
 6. The record further shows that the deceased filed a defence dated 06.12.2018 denying the 1st Respondent's claim in its entirety and putting him to strict proof thereof. He pleaded that he was not aware of the alleged sale of the suit property to the 1st Respondent and that he was not aware of any agency relationship between Priscilla and the agent.
 7. The deceased pleaded that sometime in 1994 he purchased the suit property from Priscilla for valuable consideration who handed him all the ownership documents whereafter the same was transferred to him. He further pleaded that his ownership documents were lost or destroyed in 1997 during politically instigated violence when his house was raided and burnt. He thus denied any fraud and illegality in the acquisition of the suit property. It was the deceased's pleading that the purported sale and transfer of the suit property to the 1st Respondent was fraudulent and illegal and he pleaded several particulars of alleged fraud and illegality against the 1st Respondent.
 8. The deceased further denied that the 1st Respondent had taken possession of and developed the suit property and put him to strict proof thereof. In the alternative, he pleaded that any such possession or development would be unlawful since the 1st Respondent was not the legitimate owner of the suit property.
 9. It was also the case of the deceased that the 1st Respondent had no cause of action against him and that the suit was time-barred under the *Limitation of Actions Act* (Cap.22). He thus prayed for dismissal of the 1st Respondent's suit with costs.



10. The record shows that the 1st Respondent filed a reply dated 19.12.2018 to the defence filed by the deceased. He joined issue with the deceased upon his defence and reiterated the contents of the plaint. It was pleaded that the deceased was at all material times aware of the sale to the 1st Respondent and that he had never objected to his occupation and development. He denied all the allegations of fraud and illegality pleaded against him and sought strict proof thereof.

C. Trial Court's Decision

11. The record shows that at the hearing of the suit the 1st Respondent and the 2nd Respondent testified and called their respective witnesses and were cross-examined by the advocate for the Appellant. However, the Appellant did not tender any defence evidence because his advocate was absent on the date slated for defence hearing. The record shows that the trial court placed the file aside until 12 noon to await his advocate but he did not turn up for defence hearing. The record further shows that vide a judgment dated 18.03.2023 the trial court found that the 1st Respondent had proved his claim against the Appellant to the required standard and consequently entered judgment in his favour as prayed in the plaint together with costs.

D. Grounds of Appeal

12. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 15.05.2023 raising the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact by failing to consider how the purported authority to transact and or the purported power of attorney over the suit property was issued to the 1st Defendant and exercised.
 - b. The learned trial magistrate, in arriving at his decision, erred in law and fact in failing to closely consider and evaluate the grossly defective process of the purported sale and transfer of the suit property and change of ownership of the suit property at the defunct Ol Kalou Town Council, between the 1st and the 2nd Respondent.
 - c. The learned trial magistrate erred in law and in fact in finding that Mary Wangechi Nyagu had no transfer documents.
 - d. The learned trial magistrate, in arriving at his decision, erred in law and fact in heavily relying on documentary evidence produced by the Plaintiff and 1st Defendant which on the face of the documents and the oral evidence adduced during the hearing of the suit were self-contradictory.
 - e. The learned trial magistrate erred in law and fact in failing to accord the 2nd Defendant and the 2nd Defendant's witness (who is the registered allottee of the suit property) an opportunity to be heard despite there being overwhelming evidence in support of the defence case thereby resulting into a miscarriage of justice.
 - f. The learned trial magistrate, in arriving at his decision, erred in law and fact by taking into consideration, irrelevant facts and circumstances which he should not have taken into account and ignored the relevant considerations.
 - g. That the necessary issues of law and fact were not framed and answered by the trial court.
 - h. That the learned trial magistrate, in arriving at his decision, erred in law and fact in failing to consider the written submissions of the learned counsel of the 2nd Defendant.



- i. That the learned trial magistrate erred in law and in fact in failing to find that the 1st Respondent/Plaintiff had failed to prove his case to the required standard.
13. As a result, the Appellant sought the following reliefs in the appeal:
- a. The judgment delivered by the trial court Honourable S.O. Mogute, Senior Principal Magistrate in Nyahururu ELC No. 358 of 2018 on 18th April, 2023 in favour of the 1st Respondent/Plaintiff be set aside.
 - b. The decree arising from the said judgment in the trial court be set aside and quashed.
 - c. A declaration that the transaction and the process of sale and transfer of the parcel of land known as Uns. Commercial Plot No. Y45, Ol Kalou Town (the suit property) to 1st Respondent/Plaintiff and the subsequent entry of the 1st Respondent's/Plaintiff's name at the defunct Ol Kalou Town Council's records as the owner of the suit property was null and void ab initio.
 - d. A declaration that Stephen Kimani Gakenia is the legal and rightful proprietor of the suit property.
 - e. An order compelling the Ol Kalou Town Council (or its successor in title) and Ministry of Lands to rectify their records (as the case may be) to reflect the name of the registered proprietor of the suit property as Stephen Gakenia and to issue the relevant document of title in respect of the said suit property in favour of Stephen Kimani Gakenia.
 - f. A permanent injunction restraining the 1st Respondent/Plaintiff whether by himself, his agents, servants, assigns and/or anyone acting on his behalf whatsoever from transferring, selling, charging, erecting or causing to be erected thereon any structures and or disposing and or in any other manner interfering with the Appellant's quiet and peaceful use and possession of the parcel of the suit property save for the removal of any of his properties that may be on the suit property within sixty (60) from the date of the judgment and at his own cost.
 - g. The costs of the trial court together with interest thereon at court rates and costs of this appeal together with interest.
 - h. That this honourable court be pleased to issue any other reliefs it may deem fit, just and appropriate to grant.

E. Directions on Submissions

14. 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 undated submissions on 08.03.2024 whereas the 1st Respondent filed written submissions dated 05.06.2024. However, the 2nd Respondent did not file any submissions and he did not participate in the proceedings.

F. Issues for Determination

15. Although the Appellant raised 9 grounds in his memorandum of appeal, the court is of the view that the same may be summarized into the following 3 key issues:
- a. Whether the trial court erred in law and fact in holding that the 1st Respondent had proved his claim to the required standard.



- b. Whether the Appellant is entitled to the reliefs sought in the appeal.
- c. Who shall bear costs of the appeal.

A. Applicable legal principles

16. 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 –vs- 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.”

17. Similarly, in the case of *Peters –vs- 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...”

18. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt –vs- 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.”

19. In the case of *Kapsiran Clan -vs- 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 holding that the 1st Respondent had proved his claim to the required standard
20. The court has considered the material and submissions on record. The sum total of the Appellant’s grievances is that the trial court erred in law and fact in finding and holding that the 1st Respondent had proved his claim to the suit property to the required standard. It was submitted that the trial court relied upon unreliable and contradictory evidence in finding that the 1st Respondent was the legitimate owner of the suit property. The pleadings and evidence on record show that the 1st and 2nd Respondents were basically on the same side. Their evidence and that of their witnesses was against the Appellant who never testified at the trial.
21. In finding for the 1st Respondent, the trial court stated as follows:
- “The court notes that the Plaintiff’s evidence on record is supported by the evidence adduced by the 1st Defendant, DW2 and DW3. The 2nd Defendant did not tender any evidence in court to challenge the version given by the Plaintiff and supported by the 1st Defendant and his witnesses.
- The 2nd Defendant’s defence on record contains averments which are not supported by any material evidence. The pleadings filed by the 2nd Defendant are not evidence and the court cannot make any findings based on the same without evidence being tendered by the 2nd Defendant. What is stated in the defence by the 2nd Defendant remains unsubstantiated ...
- Going by the evidence adduced in this matter the court is satisfied that the Plaintiff has proved his case on a balance of probabilities. Judgment is entered in favour of the Plaintiff as prayed in his plaint dated 25.10.2018 in terms of prayer (a) and (b)...”
22. The court finds absolutely no fault with the trial court’s findings and holdings. The trial court did not blindly allow the 1st Respondent claim simply because the Appellant did not testify at the trial. It did consider the evidence on record and was satisfied that in the absence of evidence in rebuttal, the 1st Respondent had proved his claim to the suit property on a balance of probabilities. This court’s own evaluation of the totality of the evidence on record leads to the conclusion that the 1st Respondent had proved his claim to the required standard. There was adequate evidence on record to demonstrate that



- he had purchased the suit property through the agent and that he had taken possession and developed the same over the years without any objection by the deceased.
23. There was credible evidence on record to demonstrate that the suit property was actually transferred to the 1st Respondent by the council and that he had been paying rates over the years. There was also evidence to show that the agent and the 2nd Respondent had known each other for very many years and that it was the deceased who had asked the agent to source for a buyer after obtaining the requisite documents from Priscilla. In the premises, the court finds absolutely no substance in the Appellant's complaint that the 1st Respondent did not prove his claim to the required standard.
24. The court has considered the Appellant's grievance that the deceased was denied an opportunity of being heard in his defence in violation of Articles 47 and 50 of *the Constitution* of Kenya and Section 4 of the *Fair Administrative Action Act*. The record shows that the deceased was accorded an opportunity of being heard by the trial court. The record shows that the suit was last fixed for defence hearing on 20.12.2022 in the presence of the Appellant's advocate. Come the hearing date, the advocate was absent even though the Appellant was present in person. The record shows that the court of its own motion placed the file aside until 12 noon to await the advocate. By the time the matter was called out at 12.10 p.m. the advocate was still absent and there is no indication on record of the Appellant having sought an adjournment on that account.
25. The court has further noted that there was no application thereafter by the Appellant to re-open his case so that he may tender his evidence. The Appellant simply went ahead and filed written submissions and waited for judgment. It is only upon delivery of judgment that the Appellant complained about alleged violation of his constitutional right to a fair hearing. The court finds this complaint as being mischievous and fanciful. There is absolutely no substance in this ground especially in the absence of an application for review before the trial court and the absence of an explanation for the advocate's absence on 20.12.2022.
- a. Whether the Appellant is entitled to the reliefs sought in the appeal
26. The court has already found and held that the Appellant has failed to demonstrate that the trial court erred in law and fact in finding and holding that the 1st Respondent had proved his claim to the required standard. The court has noted that the Appellant has sought some substantive reliefs in the appeal which were not even pleaded or canvassed before the trial court. The kind of reliefs sought could only have been canvassed through a counterclaim. Since the Appellant had no counterclaim before the trial court, then the substantive reliefs sought in the appeal are untenable since they are not based upon any pleadings. In a nutshell, the Appellant is not entitled to the reliefs sought in the appeal, or any one of them.
- c. Who shall bear costs of the appeal
27. 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 –vs- 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 Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

28. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a consequence, the court makes the following orders for disposal thereof:



- a. The appeal be and is hereby dismissed in its entirety.
- b. The 1st Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH DAY OF JULY, 2024.

In the presence of:

Ms. Claire Nyabuti for the Appellant

Mr. Gicheru Gakenia for the 1st Respondent

No appearance for the 2nd Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

