



Citi Bank N.A. Kenya v Eric Kamau Mwenje & Maureen Waithera Mwenje (Suing as the Legal Administrators of the Estate of David Solomon) & 2 others (Environment and Land Appeal 006 of 2023) [2024] KEELC 6219 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 006 OF 2023
LN GACHERU, J
SEPTEMBER 26, 2024**

BETWEEN

CITI BANK N.A. KENYA APPELLANT

AND

ERIC KAMAU MWENJE & MAUREEN WAITHERA MWENJE (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF DAVID SOLOMON) 1ST RESPONDENT

MURANG'A LAND REGISTRAR 2ND RESPONDENT

ALGAMENE BANK NEDERLAND M.V. NAIROBI 3RD RESPONDENT

(Being an Appeal from the Judgement of Hon Susan Mwangi SRM, delivered on 26th July 2023, in the Chief Magistrate Court at Muranga in CMCC E035 OF 2021)

JUDGMENT

1. The Appeal herein dated 10th August, 2023, challenges the decision of the trial Court (the Chief Magistrate's Court at Murang'a) delivered on 26th July, 2023, in CMCC No. E035 of 2021. The Appellant is seeking the following Orders:
 - a. This appeal be allowed.
 - b. The judgment and decree of the trial court delivered on 26th July 2023, be and is hereby set aside.
 - c. The suit against the appellant, which was the 1st Defendant in the trial Court be dismissed with costs.
 - d. The costs of this appeal be borne by the Respondent.



2. Through a Certificate of Confirmation of grant which was confirmed on 9th June, 2010, and rectified on 20th October, 2010, the 1st Respondents were appointed as the Legal Administrators of the estate of the late David Solomon Kamau Mwenje, the registered proprietor of land parcel number LOC.17/Iganjo.1015 (the suit property). A caution had been registered against the suit property on 13th May 1985, by the 3rd Respondent.
3. In the proceedings before the trial Court, the 1st Respondents sought the removal of the caution registered against title deed for the suit property on grounds that there was no liability owed by the estate of the deceased to the 1st Defendant (now Appellant). They further claimed that the charge interest held by the 3rd Respondent herein over the suit property was taken over by the Appellant herein on 16th November 2001, with the approval of the Central Bank of Kenya and through Kenya Gazette Notice number 7890.
4. In its Defence filed before the trial Court on 21st July 2021, the Appellant while admitting that that it took over part of the banking business of the 3rd Respondent, stated that it did not take over the account of the deceased, and was a stranger to the registration of the caution in respect of the suit land.
5. Further, in the Witness Statement of Paul Njiri, the Director, Operations and Technology with the Appellant bank dated 19th July 2021, the Appellant stated that due to banker-customer confidentiality, it was unable to provide the list of accounts which it took over from the 3rd Respondent.
6. The trial Court in its decision delivered on 26th July, 2023, stated that the Appellant in response to the 1st Respondent's letter dated 16th May 2013, seeking the removal of the caution registered over the suit property, directed the 1st Respondent to the Law Firm of Walter Kontos Advocates. The trial Court further found that the 1st Respondent thereafter wrote to the said Law Firm of Walter Kontos Advocates vide a letter dated 21st May 2013, and the same letter was received on 23rd May 2013, as attested by the receiving stamp of the said Law Firm of Walter Kontos Advocates.
7. The trial Court determined that the Law Firm of Walter Kontos Advocates, failed to respond to the 1st Respondent's letter for about ten years, and further held that the Appellant failed to provide any reasons for maintaining the caution registered in respect of the suit property.
8. Accordingly, the trial Court directed the Appellant and the 3rd Respondent to execute the forms and/or application for withdrawal of the caution registered over the suit land and to file the same with the 2nd Respondent for removal of the aforesaid caution. The trial Court further awarded the 1st Respondents the costs of the suit.
9. The Appeal is anchored on the following seven (7) grounds:
 1. The trial court erred in ordering the appellant to remove the caution when it was not disputed that the caution was placed over the property by the 3rd Respondent.
 2. The trial Court erred in ordering the Appellant to remove the caution when it was common ground that the appellant did not take over the 1st Respondent's account from the 3rd respondent.
 3. The trial Court erred in failing to consider the Appellant's evidence that it only took over part of the assets of the 3rd Respondent and it did not take over the 1st Respondents' account from the 3rd Respondent.



4. The trial Court erred in finding that the Appellant, through Walker Kontos advocates, failed to comply with the removal of the caution, when the evidence was clear that Walker Kontos advocates represented the 3rd respondent.
 5. The trial Court erred in fact and in law in finding that the appellant, through Walker Kontos advocates intentionally withheld information, when the evidence was clear that Walker Kontos advocates represented the 3rd respondent.
 6. The trial Court erred in ordering the Appellant to remove the caution when the evidence adduced in court demonstrated that the appellant had no interest in Title Number LOC17/Iganjo/1015.
 7. The trial Court erred in failing to consider that interlocutory judgment had been entered against the 3rd Respondent on 17th February 2022, and that the said 3rd Respondent never defended the suit.”
6. The Appeal was admitted with directions that the same be canvassed by way of written submissions.

The Appellant’s Submissions

7. The Appellant filed written submissions on 15th April 2024, through the Law Firm of Harrison Hamilton and Matthews & Co. Advocates, and submitted that the trial Court misread the contents of the Appellant’s letter to the 1st Respondents dated 17th May, 2013, to the effect that the Law Firm of Walter Kontos Advocates, were the Appellant’s lawyers, and were tasked with the sale and purchase between the Appellant and the 3rd Respondent.
8. It was the Appellant’s further submissions that the same has no interest in the suit property, and was not opposed to the removal of the caution in question as it was not party to the transaction between the deceased and the 3rd Respondent. The Appellant argued that the trial Court’s decision dated 26th July, 2023, is incapable of being complied with as the Appellant is not the cautioner, hence could not have applied to remove the caution.
9. Reliance was placed on Section 133 (1) of the Registered *Land Act* which provides as follows:

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the registrar”.
10. It was argued that the trial Court’s directive for the Appellant to execute the relevant forms for withdrawal of caution was incapable of performance, as the Appellant was not the cautioner. The Appellant urged the Court to re-evaluate the evidence tendered before the trial Court in exercise of the mandate of a first appellate Court.
11. Further, Reliance was placed in the holding of the Court in the case of which held *Selle ...Vs... Associated Motor Boat Co.* [1968] EA 123, where the Court held that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

12. The Appellant further submitted that considering the totality of the evidence presented before the trial Court, and the fact that the Appellant did not have an interest in the caution registered over the suit land, the trial Court ought to have granted prayer (b) of the Plaint dated 4th August 2021, for the caution to be removed without ordering the Appellant to execute the relevant forms which exercise the Appellant, not being the cautioner, is incapable of undertaking.
13. In addition to the prayers numbered (a), (b), (c) and (d) in the instant appeal, it was further submitted that this Court ought to allow prayer (b) of the 1st Respondents' Plaint dated 4th August 2021, because no party including the 3rd Respondent which had registered a caution over the suit land has claimed an interest in the suit land.

The 1st Respondents' Submissions

14. The 1st Respondents' filed written submissions dated 17th May, 2024, through the Law Firm of G.N. Mugo and Company Advocates. Two issues for determination were identified as follows:
 - a. Whether the Court has power to order for the removal of the caution.
 - b. Whether the trial Court erred in law and in fact in finding that the Appellant should execute the forms and/or application for the withdrawal of caution registered against the suit land."
15. The 1st Respondents cited the provisions of Section 73 (1) A of the Land Registration Act 2012, to anchor the proposition that a caution may be removed by the cautioner, by order of the Court or, by the Registrar.
16. It was further submitted that the Appellant was enjoined in the suit before the trial Court on the basis of having taken over certain assets and liabilities held by the 3rd Respondent who is the cautioner. They added that the 2nd Respondent was enjoined to the suit at the trial Court for failure to remove or withdrawal the same caution, despite an application to that effect having been lodged by the 1st Respondents.
17. Reliance was placed in the holding of the Court in the case of Mwangi Rukwaro & Another V Land Registrar Nyeri [2019] eKLR to buttress the proposition that whereas the Court is empowered to remove a caution/restriction, the same should be preceded by a process whereby the cautioner is afforded an opportunity to participate as set out under Section 73 (2), (3) and (4) of the Land Registration Act, 2012.
18. The 1st Respondents submitted that both in the suit before the trial Court and in the instant Appeal, no party has an interest in the maintenance of the caution registered over the suit land.
19. For this submissions, reliance was sought in the holding of the Court in the case of Maria Nganga Gwako V Charles Mwenzi Nganga Civil Appeal no. 287 of 2012 (2014) eKLR wherein, the Court cited the reasoning of the Court in Magdalene Wambui Mbugua Muhia & 2 Others V Charles King Kigwe & 3 others [2019], in support of the argument that where the cautioner fails to provide any reasonable cause as to why the caution should not be removed, then the application for the removal of the same must succeed.
20. It was further submitted that the trial Court acted within the law in directing the Appellant to execute the necessary forms for the removal/withdrawal of the caution placed on the suit property, because the



Appellant failed to adduce evidence that it did not take over the Bank Account or liabilities belonging to the estate of the deceased when it took over the liabilities and assets of the 3rd Respondent.

21. They urged the Court to dismiss the instant Appeal with costs including the costs at the trial Court.
22. Having considered the Memo and the Record of Appeal, the available evidence before the trial court and the rival written submissions, the court finds the issue for determination are; -
 - I. Whether this the appeal is merited?
 - II. Who shall bear the costs of the suit?

I. Whether this appeal is merited?

23. This being a first Appeal, the court has a duty to reevaluate and re consider the available evidence, and then come up with its own conclusion. See the case of *Gitobu Imanyara & 2 Others vs AG (2016) eKLR*, where the Court of Appeal held;

“An Appeal to this Court from the trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled.

Briefly put, they are that;- this Court must reconsider the evidence, evaluate 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 allowances in this respect”.

See also held in the case of *Abok James Odera t/a A. J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKRL*, where the Court held;

“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 evidence 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.”

24. This Court is equally guided by the holding of the Court in the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment)*, where the Court referenced the decision of the Court in the Indian case of *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L.Rs {2001} 3 SCC 179 as follows:

“The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it”.

25. Further, Section 78 of the *Civil Procedure Act* empowers a Court of first appeal to appreciate the entire evidence and arrive at a different conclusion. In the case of *Peters v Sunday Post Limited {1958} E.A.* page 254., the Court of Appeal for East Africa held as follows:

“It is a 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 has had the advantage of seeing and hearing witnesses.



An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that 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.”

26. The Court has carefully considered the pleadings, evidence and submissions tendered by the Appellant and the 1st Respondent at the trial Court, and the rival written submissions filed in respect of the instant appeal, and finds as follows:-
27. The Appellant while acknowledging that it assumed the liabilities and assets of the 3rd Respondent, was insistent that it did not take over the account belonging to the estate of the deceased - DAVID SOLOMON KAMAU MWENJE. Further, the Appellant felt itself subject to banker-customer confidentiality to the extent that it could not disclose the accounts which it took over from the 3rd Respondent.
28. In its submissions, the Appellant reiterated the following statement contained in its letter to the 1st Respondents dated 17th May, 2013:

“Kindly note that all legal matters pertaining to the affairs of ABN Amro are handled by their lawyers, Walker Kontos. As such, kindly direct your query to Walker Kontos.”
29. It is evident that the trial Court in its decision rendered on 26th July 2023, misread the contents of the Appellant’s letter addressed to the 1st Respondent dated 17th May, 2013, in its finding that the Law Firm of Walker Kontos Advocates were the Appellant’s Advocates whereas the said Law Firm was clearly stated to be acting for the 3rd Respondent in the transaction between the latter and the Appellant.
30. The 1st Respondents approached the trial Court having engaged the Appellant seeking removal of the caution registered in respect of the suit land to no avail. The caution in question was lodged by the 3rd Respondent, which did not enter appearance in the suit before the trial Court as well as in the instant appeal. The Appellant assumed what it described as “certain assets and liabilities” from the 3rd Respondent.
31. The Appellant argued and submitted that it did not take over the accounts operated by the deceased with the 3rd Respondent. However, no evidence was placed before the trial Court or this Court to show that upon assuming the 3rd Respondent’s assets and liabilities, the Appellant did not take over the deceased’s accounts from the 3rd Respondent.
32. It is trite that he who alleges must prove. Section 107 of the [Evidence Act](#), provides as follows:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”
33. Further, the Court holds and finds that it would not offend banker-customer confidentiality for the Appellant to disclose to the Court whether or not the account/s held by the deceased at the 3rd Respondent bank became the subject of the takeover of assets and liabilities between the Appellant and the 3rd Respondent on 16th November, 2001.



34. It is the holding of this Court that it is unreasonable for the Appellant to contend that it has no interest whatsoever in the caution registered over the suit land by the 3rd Respondent, having assumed the liabilities and assets belonging to the 3rd Respondent. The Court holds and finds that the Appellant is not a stranger to the transactions involving the 3rd Respondent having assumed the liabilities and assets of the latter.
35. In the instant Appeal, the Appellant urged the Court to allow prayer (b) of the 1st Respondents' Plaint filed before the trial Court and dated 2nd June 2021, on grounds that it is not the cautioner in respect of the caution in question.
36. In the interests of justice, the Court is minded to exercise the powers conferred upon it by Section 73 (1) of the Land Registration Act 2012, as read together with Section 133 (1) of the Registered Land Act (repealed), and hereby directs the removal of the caution placed on the suit property by the 3rd Respondent on 13th May, 1985.
37. For the avoidance of doubt, as provided by section 73(1) of the Land Registration Act, this Court directs that the caution lodged on the suit property Loc.17/Iganjo/1015, on 13th May 1985, by the 3rd Respondent be and is hereby removed forthwith.
38. Therefore, with the above direction and order of this Court on removal of caution, the Court finds that there would be no harm in allowing prayer no (b) of the 1st Respondents' Plaint dated 2nd June 2021, which is an alternative prayer in addition to the orders that were granted by the trial court.
39. From the foregoing, it is evident that the instant appeal is not merited. Consequently, this court in its appellate jurisdiction, finds and holds that the Appeal herein is not merited, save for allowing prayer no (b) of the Plaint dated 2nd June 2021.
40. For the above reasons, the said Appeal be and is hereby dismissed entirely with costs to the 1st Respondents which shall include the costs at the trial Court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 26TH DAY OF SEPTEMBER 2024.

L. GACHERU

JUDGE

26/09/2024.

Delivered online in the presence of;

Joel Njonjo - Court Assistant

M/s Sirawa H/B for Mr Mwihuri for the Appellant

Mr Nyoike for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

L. GACHERU

JUDGE

26/09/2024

