



Shah & 2 others v Gut Ventures Limited & another (Environment and Land Appeal 19 of 2022) [2024] KEELC 7282 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 19 OF 2022
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

**DEEP RAJNIKANT SHAH 1ST APPELLANT
KAVIT RAJNIKANT SHAH 2ND APPELLANT
MADHU RAJNIKANT SHAH 3RD APPELLANT**

AND

**GUT VENTURES LIMITED 1ST RESPONDENT
THE CHIEF LAND REGISTRAR, NAIROBI 2ND RESPONDENT**

(An Appeal arising from the Ruling/Order delivered on 6th September 2022 by Hon. Edgar Kagoni (PM) in the Chief Magistrate’s Court at Nairobi in MCELC No. 1528 of 2020)

JUDGMENT

1. The Appellants have filed this appeal against the ruling delivered on 6th September 2021 by Hon. Edgar Kagoni (PM) in the Chief Magistrate’s Court at Nairobi in MCELC No. 1528 of 2020 on the following grounds:
 - a. The trial court erred in law and in fact in failing to find that the suit is time barred under the *Limitation of Actions Act*, the 1st Applicant having disclosed that it discovered in 2006 (16 years ago) that the suit property was registered in the names of the Appellants herein.
 - b. The trial court erred in law and fact in failing to find that the Respondent was non-suited and lacked locus standi to file the suit as it has never been the registered owner of, and has no title to the suit property herein.
 - c. The trial court erred in law and in fact in failing to find that the court has no jurisdiction to hear and determine the suit as the suit property, being a fully developed property with 7



apartments thereon in the up-market Westlands area of Nairobi is valued at approximately Kshs. 800,000,000/- in the open market.

- d. The trial court erred in law and in fact in failing to find that the issues in the suit ought to be the subject in HCC 834 of 2006- Hasmukh Sumaria & 3 others v Gut Ventures Limited pending in the High Court at Nairobi.
 - e. The trial court erred in law and in fact in ordering the 2nd Respondent to rectify the Land Registrar and register the 1st Respondent as owner of the suit property that it has never lawfully owned.
2. The Appellant has sought the following reliefs, that:
- a. The appeal be allowed.
 - b. The said ruling/order of the lower court dated 6th September 2022 be set aside.
 - c. The 1st Respondent's suit be dismissed with costs.
 - d. The costs of this Appeal and the court below be awarded to the Appellants.

Submissions

3. Counsel for the Appellants submitted that this matter relates to LR No. 209/3007/3 (LR No. 7305) which is registered in the names of the Appellants since 13th April 1999; that this appeal is against the ruling dated 6th September 2022, in which the trial court disallowed their application dated 2nd July 2022 and Grounds of Opposition dated 25th July 2022, and ordered the Chief Land Registrar to reconstruct the Deed file of the suit property in the favour of the 1st Respondent and that this was done at the interlocutory stage without full hearing of the suit and in disregard of the defences and affidavit evidence on record and final orders were irregularly granted without trial.
4. Counsel submitted that its application and Grounds of opposition raised serious matters of fact and law which the court brushed aside; that the trial court even before service of the pleadings upon the Appellants, granted final orders ex parte on 27th January 2021 and that the pleadings and documents were not provided to them until 7th April 2022.
5. Counsel submitted that the suit is time barred under the *Limitation of Actions Act*, as in its Amended Complaint, the 1st Respondent indicated that he discovered about the transfer of the suit property to the Appellants on 3rd July 2006; that this suit was however instituted 16 years later, contrary to Section 7 of the *Limitation of Actions Act* and that the dispute of ownership of the suit property was part of HCC No. 834 of 2006 in which the 1st Respondent was a party.
6. Counsel urged that there is lack of locus standi; that Habib Bank Limited (as chargee) from whom the 1st Respondent claims to have purchased the property ought to have been involved so as to authenticate the 1st Respondent's case; and that the 1st Respondent's silence between 1999 and 2006, when it purportedly purchased the property is unrealistic and suspect for someone who claims to have bought the property in 1996.
7. Counsel argued that the trial court lacked jurisdiction as the value of the property is more than 20 million, seeing as the rent for each apartment was Kshs. 23,000/- in 2006 and the property is located in the Parklands area in Nairobi. Counsel also urged that the trial court failed to consider whether the pendency of HCC No. 843 of 2006 was res judicata or abuse of court process in order to prevent multiplicity of suits.



8. In the High Court, it was submitted, the 1st Respondent and the 3rd Appellant's ownership of title and collection of rent from the apartments was at issue and that the order of the trial court on 27th January 2021, for the reconstruction of the title deed in favour of the 1st Respondent were final and effectively dispensed with the necessity of further proceedings, without hearing evidence at trial.
9. It was submitted that the Appellants and the 2nd Respondent were condemned unheard and that their application before the trial court seeking the striking out of the suit had merit in law and fact.
10. Counsel for the 1st Respondent submitted that the suit before the trial court was that of rectification and the Chief Land Registrar was to reconstruct the deed file for the subject property; that this was necessitated when the 1st Respondent carried out a search and found that the suit property was bearing IR No. 80092 instead of IR No. 7305 and that the 1st Respondent then sought orders for reconstruction which were issued on 16th February 2021 and therefore, this suit cannot be termed as time barred as the 1st Respondent acted without unreasonable delay.
11. Counsel submitted that the 1st Respondent lodged a complaint on 7th May 2018 with the Directorate of Criminal Investigation which resulted in a Miscellaneous Application Republic vs Chief Land Registrar in Kiambu, where the DCI sought to be supplied with documents by the Land Registrar; that the Registrar was unable to produce the documents in relation to the suit property and undertook to reconstruct the suit property's Deed File and that the 1st Respondent executed an indemnity dated 15th July 2019.
12. It was Counsel's submission that the 1st Respondent had and has locus standi in the matter; that the Appellants never proved lack of locus standi and have not produced any documents to prove their allegation.
13. Counsel asserted that the trial magistrate had jurisdiction to entertain this matter. Counsel urged that the Appellants' claim that the trial court lacked jurisdiction has not been proved.
14. Furthermore, Counsel denied that the suit was res judicata. Counsel submitted that the issues raised in HCC 834 of 2006 are different and involve different parties and that the Appellants herein were not parties to the suit.
15. Counsel also submitted that the trial court was vested with power to order rectification of the Land Register; that such powers of rectification is used to correct errors, mistakes, omissions, upon giving notice to the concerned parties and provided they don't materially affect the proprietary interest of a party. They relied on Sections 79 and 80 of the [Land Registration Act](#) and the cases of Mary Ruguru Njoroge vs John Samuel Gathuma Mbugu [2014] eKLR and Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR.

Analysis and Determination

16. This being a first appeal, the court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent findings, and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law.
17. The appellate court will only depart from the findings by the trial Court if they were not based on the evidence on record, where the said Court is shown to have acted on wrong principles of law or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA 93.



18. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court held that:
- “ This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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.”
19. This appeal has been filed against the ruling of Hon. Edgar Kagoni (PM) in the Chief Magistrate’s Court at Nairobi in MCELC No. 1528 of 2020, delivered on 6th September 2022.
20. In its ruling dated 6th September 2022, the trial court considered two applications. The first application is dated 2nd July 2022 and was filed by the Appellants seeking to strike out the suit. The second application is dated 8th March 2022 filed by the Respondent, and sought to rectify the register in favour of the Respondent. The trial court dismissed the Appellants’ and allowed the Respondent’s application.
21. The Appellants had asserted that the trial court lacked jurisdiction to hear the matter as the value of the suit property exceeded the court’s pecuniary jurisdiction. The Appellants submitted that the value of the suit property exceeds Kshs. 800 million.
22. The trial court found that this argument lacks merit because the dispute before the court was not centered on the value of the suit property but on ownership, fraud and the court’s power to order the Chief Lands Registrar to cancel the entry of the transfer of the suit property to the Appellants. The court relied on the provisions of the Magistrates Court Act 2015 and Section 26 of the *Environment and Land Court Act*.
23. The trial court also found that the Respondent had locus standi to institute the suit under Article 22(1) and (2) of *the Constitution* of Kenya, which grants every person the right to institute proceedings claiming that their rights under the Bill of Rights had been infringed.
24. On the claim that the 1st Respondent discovered the fraud in 2006, the court found that there was no supporting affidavit admitting such a fact by the Respondent; that there was no Amended Plaintiff in the lower court admitting such a fact; that the Amended Plaintiff was for HCCC No. 834 of 2006 and that the Appellants consequently failed to show how the suit was time barred.
25. The trial court also found that the suit was neither res judicata nor sub judice because the parties in the trial court and those in High Court Civil Case No. 834 of 2006 were different; that the High court matter concerned a dispute for unlawful distress of rent whereas this suit was about ownership of the suit property and claims of fraud.
26. The trial court thereupon upheld the Respondents’ application for rectification.
27. The following issues arise for the determination of this court:
- a. Whether the Respondent had locus standi to file the suit before the trial court.
 - b. Whether the issues in this suit are the same as those in HCC 834 of 2006
 - c. Whether the suit is time barred
 - d. Whether the trial court had pecuniary jurisdiction over the suit property.



- e. Whether the trial court lawfully ordered rectification of the register of the suit property.
28. The Appellants have argued that the trial court failed to find that the Respondent lacked locus standi to file the suit. Locus standi is defined by the Black's Law Dictionary, 9th Edition as;
- “The right to bring an action or to be heard in a given forum.”
29. The court in the case of Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229, defined locus standi as follows;
- “The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such proceedings.”
30. Indeed, locus standi goes to the root of a case, and without it, such a suit cannot stand. This was held in Priscilla Jesang Koech vs Rebecca Koech & 3 others [2018] eKLR as follows:
- “Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of BV Law society of Kenya v Commissioner of Lands & others, Nakuru High Court, Civil Case No 464 of 2000. It was held that: If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”
31. The Appellants claim that the 1st Respondent lacked the standing to institute this suit as they have never been the registered owners of the suit property and did not have any title to it.
32. The Appellants have attached to the Plaintiff's Bundle of Documents which was filed in the trial court. It contains particulars of the suit property issued before the public auction; a memorandum declaring Gut Ventures Ltd as the purchaser of the suit property; a copy of a cheque for Ksh. 7.5 million paid on 7th August 1996 as a deposit for the suit property; a Transfer in favour of the Appellants from the 1st Respondent, which purports to lease the suit property to the Appellants for a period of 50 years; as well as a certificate of title in favour of the 1st Respondent.
33. Contrary to the Appellants' claim, the 1st Respondent presented a copy of title in its favour. In any event, the non-production of title does not in itself amount to lack of locus standi to institute a suit in respect to recovery of land. This is because a person can hold an interest in land without necessarily having a title. The upshot is that this ground of appeal is unmerited and accordingly fails.
34. The Appellants also assert that the suit before the Magistrates Court raised issues similar to those in HCC 834 of 2006. The 1st Respondent has denied that the suit was res judicata. It submit that the issues raised in HCC 834 of 2006 are different and involve different parties and that the Appellants herein were not parties to the suit.
35. The legal framework of res judicata is set out in Section 7 of the [Civil Procedure Act](#) as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



36. The Supreme Court case of John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR delimited the operation of the doctrine of res judicata as follows:

“We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

37. The Supreme Court further laid out the elements that should be met for one to invoke res judicata in a civil suit as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR).”

38. As noted, the suit before the trial court was a claim for ownership, fraud allegedly on the part of the Appellants and rectification of the register of the suit property. On the other hand, HCC No. 834 of 2006, was a tenancy dispute filed by persons asserting to be tenants of the suit property against the 1st Respondent, Gut Ventures Ltd. None of these tenants were parties in MCELC No. 1528 of 2020.

39. Further the tenants in the High Court suit sought an order for accounts to be taken between themselves and the 1st Respondent; a declaration that the distress for rent levied by the 1st Respondent on 19th July 2006 was irregular and unlawful; general damages for unlawful distress/ trespass and a mandatory injunction to restrain the 1st Respondent from unlawfully levying distress for rent and or interfering their quiet and lawful enjoyment of the suit premises.

40. It is therefore apparent that the subject matter in HCC 834 of 2006 is very different from that in MCELC No. 1528 of 2020, and that these two disputes concerned different parties. The Appellants have also failed to establish that judgement was issued in HCC 834 of 2006 on its merits.

41. On this basis, the suit in the lower court was not res judicata nor was it an abuse of court process as alleged by the Appellants.

42. In its ruling, the trial court found that the Appellants had failed to establish that the 1st Respondent had admitted that it learnt about the fraud in respect of the suit in 2006. They asserted that the same was not stated in any supporting affidavit or in the amended claim before the trial court.



43. This court has perused the Record of Appeal, as presented by the Appellant, which contains the original Plaintiff dated 14th October 2020. At paragraph 6, the Plaintiff asserts as follows:

“ Shockingly, on or about 3rd July 2006, upon conducting a search on the suit property’s title, the Plaintiff discovered that the same was bearing a different I.R. No. 80092 and that it had been fraudulently, illegally and unlawfully transferred on 13th April 1999 to the Defendants without the Plaintiff’s consent and knowledge.”

44. This paragraph is reproduced in the Amended Plaintiff in the trial court in MCELC Case No. E1528 of 2020 dated 5th November 2020, and not in the Amended Plaintiff in HCC No. 834 of 2006, as alleged by the trial court. This admission of knowledge of the fraud is also made in the Respondent’s Notice of Motion application and Supporting Affidavit dated 5th November 2020.

45. Section 7 as read together with Section 26 of the *Limitation of Actions Act* provide that in the instance of fraud, the statutory window of limitation begins to run from when such fraud is discovered. The sections prescribe as follows:

“7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”



46. In the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR, the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.
47. There is no doubt that the alleged fraud in this case was discovered by the Respondent in 2006. It was at this point in time that the cause of action arose and time began to run. The window of time to file a suit for recovery of land expired in June 2018. The suit in the lower court was filed in 2020, two years out of time. The suit was therefore statute barred.
48. No reason was adduced in the lower court for this delay by the 1st Respondent. In any case, the court had no discretion to extend such timelines in any way. *Milimani Commercial Court MCELC Case No. E1528 of 2020* was consequently statute barred.
49. The last issue is whether the trial court had pecuniary jurisdiction over the suit property. The trial court found in its ruling that the suit did not concern a dispute as to the value of the suit property, but rather, concerned ownership of property.
50. Although the trial court considered Section 26(4) of the Environment and Land Court which gives it jurisdiction to entertain disputes relating to ownership, title and use of land, it failed to pay heed to the proviso of this section, which limits such jurisdiction. It provides as follows:
- “Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.”
51. The pecuniary jurisdiction of magistrates court is prescribed under Section 7 of the Magistrates Court Act as follows:
- A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
- (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.”
52. It is a matter of settled law that jurisdiction is set out in *the Constitution* or statute. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*,



statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

“...A Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”

53. Section 26 of the *Environment and Land Court Act* is clear: the jurisdiction of a magistrates’ court in determining matters of civil nature involving occupation, or title to land is limited to the pecuniary jurisdiction of the court. While no valuation report was submitted by either party, it is apparent from the memorandum of public auction annexed by the 1st Respondent to the affidavit dated 14th October 2020, that the value of the suit property as at 1996 was Kshs. 30.8 million.
54. Even without considering the appreciation of value that occurred between 1996 and 2020, when the suit was filed, the value of the suit property far exceeded that of the trial court, which was Kshs. 10 million.
55. The trial court therefore lacked the jurisdiction to determine the suit, or any application therein.
56. The Appellants have challenged the issuance of orders of rectification by the trial court at an interlocutory stage, and before hearing and adduction of evidence by the parties.
57. The orders of rectification which were sought by the 1st Respondent were in the nature of mandatory injunctions, as they required a party to take a positive action. This contrasts with a prohibitory injunction which requires parties to refrain from acting. Courts have always hesitated to issue mandatory injunctions unless in the clearest of circumstances.
58. The Court of Appeal in *Kenya Breweries Limited & Another vs Washington O. Okeyo* Civil Appeal No. 332 of 2000 [2002] 1 EA109 prescribed that a mandatory injunction should only be granted in special circumstances, such as where a party has attempted to get an advantage over another:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”

59. The 1st Respondent neither claimed nor adduced any evidence of any special circumstances that would have made the granting of rectification orders at an interlocutory stage.
60. The Plaintiff filed by the Respondents indicates that its claim against the Appellants is for fraud through forging a transfer dated 7th April 1999. This discovery, it asserts was made on 3rd July 2006. The order for rectification is sought as one of the final orders in the Plaintiff dated 14th October 2020.
61. As asserted by the Appellant, the trial court issued ex parte interlocutory orders on 27th January 2020 that pending the hearing and determination of the application, the Chief Land Registrar “be and is



hereby ordered to reconstruct the Title Deed file for the parcel of land L.R. No. 209/3007/3 I.R. No. 7305 in favour of the Plaintiff as the registered proprietor.”

62. How could the trial court have been satisfied that the impugned registration was fraudulent and ought to be rectified even before the matter was heard inter parties and before the parties adduced their respective evidence and witness testimonies? As set out in the case of R. G. Patel v. Lalji Makanji [1957] EA 314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

63. Indeed, upon issuing the orders of rectification, which were first issued on 27th January 2020 ex parte, there was indeed no need to pursue the full prosecution of the suit, the final orders having been issued.

64. In conclusion, this court is satisfied that the Appellants’ Appeal should succeed. The Appeal is allowed as follows:

- a. The Ruling and the subsequent orders of the lower court in MCELC No. 1528 of 2020 dated 6th September 2022 are hereby set aside.
- b. The 1st Respondent’s suit, MCELC No. 1528 of 2020, is statute barred and beyond the jurisdiction of the trial court. MCELC No. 1528 of 2020 is hereby dismissed with costs.
- c. The costs of this Appeal and the application in the lower court to be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Isindu for Appellant

Ms Mbugua holding brief Kego for 1st and 2nd Respondent

Court Assistant: Tracy

