



REPUBLIC OF KENYA



**Akhula & another v Mutia & another (Environment and Land Appeal 009 of 2023)
[2024] KEELC 7115 (KLR) (Environment and Land) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 009 OF 2023
EK WABWOTO, J
OCTOBER 30, 2024**

BETWEEN

COSMAS KODI AKHULA 1ST APPELLANT

ROSE MKAMWAKONDO SALAMA 2ND APPELLANT

AND

BONIFACE NZUKI MUTIA 1ST RESPONDENT

SAMMY KISOMBE MWAKANGALU 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. D. Wangechi (SPM)
delivered on 5th September 2022 in ELC Case No. 18 of 2018 at Voi)*

JUDGMENT

1. This appeal is against the judgment and decree of Hon. D. Wangechi (SPM) delivered on 5th September 2022 in Voi PMCELC No. 18 of 2018 Boniface Nzuki Mutia =Versus= Cosmas Kodi Akhula & 2 Others. In her judgment, the Learned Magistrate entered judgment as follows:-

“In the upshot, I make the following orders:-

- a. That an order of permanent injunction is hereby issued against the 1st and 2nd Defendants barring them jointly and severally from building, constructing or in any other manner interfering with the Plaintiff’s quiet enjoyment, possession and occupation of the piece of land measuring 50ft x 100ft situated adjacent to the main road Birikani – Voi Road.
- b. That the 3rd Defendant shall bear the cost of the suit and counter claim.”



2. The Appellants being aggrieved by the said decision filed the instant appeal vide a Memorandum of Appeal dated 25th September 2022. The Memorandum of Appeal set out the following grounds:-
 1. The Learned Magistrate erred in law and equity by awarding the 1st respondent (hereafter the plaintiff by original action) the suit land even after holding that the 2nd respondent (hereafter the vendor or 3rd defendant by original action) could not pass a good title to the plaintiff or the 1st and 2nd defendants.
 2. By issuing the equitable remedy of a permanent injunction in favour of the plaintiff in the court below, the learned magistrate misapprehended and misapplied inter alia the equitable maxims that where equities are equal, the first in time take precedence; equity follows the law and that one who seeks equity must do equity.
 3. The learned magistrate erred in law by delivering an unconvincing, and contradictory judgment, against the weight of evidence and clear and uncontroverted findings on the applicable law.
 4. The learned magistrate erred in law by giving a null and void transaction the imprimatur of court.
 5. The learned magistrate failed to give any reason(s) why she was granting an equitable remedy to the plaintiff instead of the 1st and 2nd defendants who were the first purchaser.
 6. The learned magistrate erred in law by disregarding or ignoring the overwhelming evidence of the appellant's building plan and receipts for purchase of building materials, thereby arriving at an erroneous conclusion.
 7. The learned magistrate erred in law when she found that the 1st and 2nd defendants before the court below were purchasers for value without notice, yet the 3rd defendant was neither a registered owner or a beneficiary, nor a trustee (In Re Estate of Kariuki (2002) 2 KLR 125).
 8. The judgment of court is an affront to many statutory provisions, including the Community Land Act, The Law of Contract Act, the Planning Act, and The Land Control act (Phillip v. Copping (1935) 1 KB 13).
 9. The decree made by the trial court on 5.9.2022 is a sanction of a fraudulent transaction, yet fraud vitiates all transactions known to law [Lazarus Estates Limited v. Beasley (1956)].
3. The Appellant sought for the following reliefs in this appeal:-
 - a. To allow this appeal ex debito justitiae. Set aside the judgment of 5.9.2022 in its entirety, with costs to the Appellants, here and in the court below.
 - b. Dismiss the Plaintiff's suit with costs to the Appellant's Counterclaim with costs to the Respondents.
 - c. Issue a declaration that the vendor (3rd defendant, by original action Mr. Sammy Kisombe Mwakangalu) could not pass a good title to the Plaintiff or the first and second Defendants as he was neither the registered owner, a trustee or a beneficiary, or a member, of the Kishamba 'B' Group Ranch registered owner of the suit land and is thus liable to refund purchase price received from the Appellant's and the Plaintiff for failure of consideration Or in the Alternative.



- d. Issue a declaration that all the agreements for sale mentioned in the suit and counterclaim before the court below were null and void and legally ineffectual and the 3rd defendant should refund to the appellants and the plaintiff the purchase price as money had and received for failed consideration and the possession of the suit land to remain in the appellants.
4. At the hearing, the parties took directions to have the appeal canvassed by way of written submissions. The Appellant filed written submissions dated 2nd August 2024 while the 1st Respondent filed written submissions dated 10th October 2024. No written submissions were filed by the 2nd Respondent and neither did he participate in these proceedings.

The Appellants submissions

5. The Appellant submitted that the trial court was partially right to hold that the 1st Defendant was a bonafide purchaser for value without notice of any defeat in the 3rd Defendant's title but there was no justification for the trial court to hold that an injunction could issue to bar the 1st and 2nd Defendants from interfering with the Plaintiff's possession of the suit plot.
6. It was submitted that if the 3rd Defendant could not pass a good title to any of the purchasers, the equitable remedy for an injunction was unavailable to preserve the possession the court vested on the Plaintiff without an iota of evidence that he and not the 1st and 2nd Plaintiffs developed the suit land. It was the Appellants submissions that they were flabbergasted that after the court found that the 3rd Defendant could not pass a good title to the suit land as it vested in Kishamba B Group Ranch, the court could still contradict itself and grant an equitable remedy in favour of the Plaintiff.
7. It was further submitted that in considering grounds 1, 2, 3, 4 and 6 of the Appeal, the court could not award the suit property to the Plaintiff by a side wind in the form of an injunction having found that the sale was null and void. The court did not also give convincing reasons as to why it gave the injunctive order. The court was urged to grant the reliefs sought in the appeal together with costs of the appeal on a higher scale.

The 1st Respondent's submissions

8. The 1st Respondent submitted on the following issues:-
 - i. Whether the title could pass to the 1st Respondent the suit land even after holding that the 2nd Respondent could not pass a good title to the Plaintiff or the 1st and 2nd Defendants.
 - ii. Whether the Learned Magistrate misapprehended and misapplied inter alia the equitable maxims that where equities are equal, the first in time takes precedence, equity follows the law and that one who seeks equity must do equity.
 - iii. Whether the Learned Magistrate erred in law by disregarding or ignoring the overwhelming evidence of the Appellants evidence and receipt for purchase of building material, thereby arriving at an erroneous conclusion.
 - iv. Whether the judgment of court is an affront to many statutory provisions, including the Community Land Act, the Law of Contract Act, The Planning Act and the Land Control Act.
 - v. Costs of this Appeal.
9. Citing the case of Hubert L. Martin & 2 Others =Versus= Margaret J. Kamar & 5 Others (2016) eKLR, it was submitted that in as much as the Appellants bought land from the 2nd Respondent, Sammy Kisombe Mwakangalu, they bought a different parcel of land from the one owned by the



1st Respondent. It was argued that during the cross-examination of Benson Mlambo Mwakina, the Chairman of Kishamba B Group Ranch stated that Kishamba A is where people are residing and Kishamba B was set aside for grazing of their animals. It was also argued that the Chairman had no authority to declare that the parties herein are not members of the Kishamba B Group Ranch while it is clear that the land in dispute is not surveyed and that he is only estimating the one which is covered by the ranch. It was also submitted that DW2 Justus Korir the Land Surveyor stated in cross-examination that the suit property is not surveyed and he did not say whether the suit property is in Kishamba B Group Ranch or not considering that he was the expert. It was therefore the 1st Respondent's contention that the 2nd Respondent passed the title he had that of an unsurveyed portion of land to the 1st Respondent.

10. On whether the Learned Magistrate misapprehended and misapplied inter alia the equitable maxims that where equities are equal, the first in time takes precedence, equity follows the law and the one who seeks equity must do equity, Counsel submitted that the initial owner of the suit land was the 2nd Respondent and from the evidence tendered before the lower court, the 1st Respondent took occupation and developed part of the suit land and that is why when the Appellants came in, he sued them and hence the Learned Magistrate's application of the equity maxims was in order.
11. The 1st Respondent also submitted that the evidence of purchase of building materials and obtaining of building plans and so on cannot be used as part of ownership of a parcel of land more so if the land has no title and thus the Learned Magistrate did not err in rejecting the said evidence.
12. It was contended that the provisions of the law of contract were met herein, there was compliance to Section 38 of the *Land Act* and the parties were bound by the said contract.
13. The 1st Respondent concluded his submissions by urging this court to dismiss the appeal with costs.

Analysis and Determination

14. Upon considering the court record, pleadings, evidence tendered, grounds of appeal and written submissions of the parties, the court has settled on the following issues for determination:-
 - i. Whether the Appeal is merited.
 - ii. Whether the trial court erred in law and fact in arriving at its decision and granting the reliefs sought.
 - iii. What are the appropriate reliefs herein.
15. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

Similarly, in *China Zhingxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- 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.”
16. The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated 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 the 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs-Thomas (1)*, [1947] A.C. 484.”
17. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
18. The court shall proceed to determine the said issues simultaneously.
19. The Appellants in their submissions partly faulted the decision of the Magistrate Court for granting a permanent injunctive order as against them in favour of the 1st Respondent. It was argued that after the Learned Magistrate had found that the 2nd Respondent could not pass good title, then she ought not to have granted orders of permanent injunction.
20. From the evidence that was tendered before the lower court it was evident that the 2nd Respondent was not a member of Kishamba B Group Ranch and he had no capacity to sell the properties to the Appellants and the 1st Respondent. In the circumstances considering that an order of permanent injunction is an equitable remedy, the Learned Magistrate could not have granted the same and as such it is the finding of this court that the Learned Magistrate in as much as she made a good analysis of the law and evidence tendered granted the reliefs which ought not to have been granted. In the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. (the Macfoy case) in which Lord Denning held that:
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse.”
21. From the analysis of this court, it is sufficient to state that the Learned Magistrate misdirected herself by granting the orders in the judgment delivered on 5th September 2022.
22. Section 78(2) of the *Civil Procedure Act* provides that:
- “(2) Subject aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed



by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.”

23. The purpose of the above provision is to enable an appellate Court to intervene where there is manifest misdirection by the trial Court either on point of law or fact which if allowed to stand, it can lead to grave injustice. Flowing from the foregoing discussion and this Court having found that the learned Magistrate erred, the judgment of the Lower Court delivered herein warrants the interference of this court.

Final orders

24. In view of the foregoing, the Appeal partially succeeds and the judgment of the lower court is hereby substituted with the following orders: -
1. The 1st Respondent’s suit before the lower court in respect to the Amended Complaint dated 18th February 2020 is hereby dismissed.
 2. The 2nd Respondent is hereby directed to pay a sum of Kshs. 90,000/= being refund of purchase price to the Appellants herein.
 3. A declaration is hereby issued that the land known as Taita/Taveta/Sagalla Kishamba ‘B’/1 belongs to Kishamba “B” Group Ranch and the agreements for sale of land dated 7th August 2011, 20th August 2011 and 17th July 2013 (or 17th July 2017) are null and void having been made by Vendors who had no interest in the land.
 4. The 2nd Respondent shall bear the costs of this Appeal together with the costs of the suit and counterclaim filed in the lower court.
 5. Interest is awarded at court rates on item (2) above payable from 21st May 2020 until its payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 30TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Kimani for the Appellants.

Ms. Isika for the 1st Respondent.

No appearance for 2nd Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

