



Muriithi (Suing as the guardian ad litem of Grace Wangari Mwangi) v Mwangi (Environment and Land Appeal 85 of 2023) [2024] KEELC 7057 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 85 OF 2023**

YM ANGIMA, J

OCTOBER 17, 2024

BETWEEN

MWANGI STEPHEN MURIITHI (SUING AS THE GUARDIAN AD LITEM OF GRACE WANGARI MWANGI) APPELLANT

AND

ELSE WAIRIMU MWANGI RESPONDENT

(Being an appeal against the judgment and decree of Hon. S. Mogute (SPM) dated 14.09.2022 in Nyahururu CM ELC No. 219 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S. Mogute (SPM) dated 14.09.2022 in Nyahururu CM ELC 219 of 2018 – Else Wairimu Mwangi -vs- Grace Wangari Mwangi. By the said judgment, the trial court allowed the Respondent’s suit against the Appellants and dismissed the Appellant’s counterclaim. The Respondent was also awarded costs of both the suit and the counterclaim.

B. Background

2. By a plaint dated 29.03.2017 the Respondent sued the Appellant before the trial court seeking the following reliefs:
 - a. That the honourable court do order that the parcel of land Nyandarua/Ndaragwa(Kianjogu) Block 1/165 be partitioned into two equal portions for the two parties herein to get their individual titles.



- b. The honourable court do order its Deputy Registrar to sign all the necessary partition documents on behalf of the defendant.
 - c. The defendant be ordered to pay costs of the suit.
 - d. Any other or further relief this honourable court may deem fit to grant.
3. The Respondent pleaded that she and the Appellant were owners in common in equal shares of Title No. Nyandarua/Ndaragwa (Kianjogu) Block 1/65 (the suit property) but the Appellant was disputing her equal share. The Respondent pleaded they were registered as such by virtue of being the wives of the late Mwangi Ndiangui Muiga (Muiga) who was the initial owner of the suit property by virtue of his shares at Muririchua Farm Company Limited (the Company).
4. The record shows that the Appellant filed a statement of defence and counter claim dated 04.05.2017. By her statement of defence she denied the Respondent's claim in its entirety. She denied that Muiga was the original owner of the suit property and pleaded that it was her son, Samuel Ndiangui (Samuel) who was allocated the same by virtue of his membership of the company. She further pleaded that Samuel had bequeathed her 12 acres whereas he gifted the Respondent's son 5 acres out of the suit property. It was contended that the Respondent's name was entered in the land register because her son was still a minor at the material time.
5. By her counterclaim, the Appellant reiterated the contents of her defence and denied that Muiga was ever the owner of the suit property. She pleaded that the Respondent was only entitled to 5 acres out of the suit property and not one half as claimed. As a result, she sought the following reliefs in her counter-claim:
 - a. A declaration that L.R. Nyandarua/Ndaragwa (Kianjogu) Block 1/165 belonged to Samuel Ndiangui and that the same be subdivided into two portions of 5 acres for Else Wairimu Mwangi and 12 acres for Grace Wangari Mwangi.
 - b. Costs of the counter claim plus interest.
 - c. Any other or further reliefs that this honourable court may deem fit and just to grant.
6. The Respondent filed a reply to defence and defence to counterclaim dated 30.05.2017. She joined issue with the Appellant's defence and reiterated the contents of her plaint. She denied that the suit property was initially owned by Samuel and asserted that Muiga was the legitimate owner thereof. She denied the Appellant's counterclaim and contended that the suit property ought to be shared out equally between the wives of Muiga.

C. Trial Court's Decision

7. The record shows that upon a full hearing of the suit, the trial court believed the evidence of the Respondent and held that the suit property initially belonged to Muiga and that there was no credible evidence to support the counterclaim that Samuel was the original owner thereof. As a consequence, the trial court allowed the Respondent's claim and proceeded to dismiss the Appellant's counterclaim. The trial court also awarded the Respondent costs of both the suit and counterclaim.

D. Grounds of Appeal

8. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 30.09.2022 raising the following 5 grounds of appeal:



- a. That the learned trial magistrate erred in law and in fact in failing to find that the honourable court lacked jurisdiction to hear and determine the suit before it.
 - b. That the learned trial magistrate erred in law and in fact in failing to find that the Respondent had not exhausted the available channels before filing the suit and the dispute ought to have been determined by the Land Registrar first as per the provisions of Section 94 of the [Land Registration Act](#).
 - c. That the learned trial magistrate erred in law and in fact in disregarding the evidence on record and in holding that L.R. No. Nyandarua/Ndaragwa (Kianjogu) Block 1/165 be divided into 2 equal shares.
 - d. That the learned trial magistrate erred in law and in fact in failing to find that L.R. No. Nyandarua/Ndaragwa (Kianjogu) Block 1/165 belonged to Samuel Ndiangui and the same was to be shared in the ratio of 12:5 acres in favour of the Appellant.
 - e. That the learned trial magistrate erred in law and in fact in dismissing the counter claim with costs and allowing the suit with costs.
9. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the appeal be allowed.
 - b. That the judgment of the trial court be set aside.
 - c. That the Respondent's suit before the trial court be dismissed as her counterclaim allowed.
 - d. That the Appellants be awarded costs of the appeal and of the suit before the trial court.

E. Directions on Submissions

10. 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's submissions were filed on 20.09.2024, whereas the Respondent's were filed on 15.10.2024.

F. Issues for Determination

11. Although the Appellant raised 5 grounds in his memorandum of appeal, the court is of the opinion that the same may be summarized as follows:
- a. Whether the trial court had jurisdiction to entertain the Respondent's suit.
 - b. Whether the trial court erred in law and fact in allowing the Respondent's suit.
 - c. Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim.
 - d. Who shall bear costs of the appeal.

G. Applicable Legal Principles

12. 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.”

13. 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...”

14. 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.”

15. 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

Whether the trial court had jurisdiction to entertain the Respondent's suit

16. The court has considered the material and submissions on record on this issue. The Appellant submitted that the dispute between the parties was a matter of partition of the suit property hence the same ought to have been referred to the land registrar for resolution under Section 94 of the [Land Registration Act](#), 2012. It was thus the Appellant's contention that the trial court had no jurisdiction to entertain the Respondent's suit in the first instance. The Appellant relied upon the cases of Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd (1989) eKLR, John Adero & Another -vs- Ulinzi Sacco Society Ltd [2022] eKLR; and Secretary, County Public Service Board & Another -vs- Halbhai Gedi Abdille [2017] eKLR in support of his submission.
17. Section 94 of the [Land Registration Act](#) stipulates as follows:
- "(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of title or certificate of lease, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common;
 - (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by: -
 - (a) any one or more of the tenants in common without the consent of all the tenants in common; or
 - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
 - (3) The Registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to:-
 - (a) whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected;
 - (b) the nature and location of the land;
 - (c) the number of tenants in common and the extent of their respective shares particularly, the extent of the share of any tenant



- in common by whom or on whose behalf the application has been made;
- (d) the value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;
 - (e) where the tenants in common are spouses or the tenants in common who do not agree on the partition are dependants of or related to the tenants in common, whether the interests of those tenants in common who have not agreed to the partition have been or will be adequately provided for as a consequence of or after the partition is effected, and particularly, a spouse or dependants of the tenant in common who is applying for the partition will not be rendered homeless by the partition;
 - (f) in respect of an application made by a person referred to in subsection (2)(b), whether the interests of the spouse or any dependants of the tenant in common whose share is to be sold in execution of a judgment or decree, will be adequately catered for and particularly, any spouse or dependants will not be rendered homeless by the sale;
 - (g) if the tenants in common are pastoralists, whether the tenants in common who have not agreed to the partition will, after the partition, still retain grazing rights, including grazing rights created by an easement in the partitioned land, to sufficient land of the quality and nature and in the location customarily used by those pastoralists;
 - (h) the proper development and use of the land and whether it may be adversely affected by the partition applied for;
 - (i) the hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order; and
 - (j) any other matters that the Registrar considers relevant.
- (4) The Registrar may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition, by the tenants in common who have applied for the partition and how the expenses and costs of the partition are to be borne, as the Registrar may consider just and reasonable.
- (5) Any co-tenant aggrieved by the decision of the Registrar may apply to the Court for a review of that decision.

18. The court is not satisfied that the nature of the dispute among the parties was simply one of partition. The pleadings indicate that the Appellant disputed the capacity and circumstances under which the Respondent was registered as a co-owner. The Respondent contended that the suit property was initially owned by the late Muiga and that the parties were registered as tenants in common by virtue



of being his wives. The Appellant, on his part, contended that the suit property was initially owned by her son Samuel and that the Respondent was only brought in to hold a portion of 5 acres on behalf of her own son who was a minor at the material time.

19. The court is of the opinion that the nature of the dispute between the parties required adjudication through the judicial process. The trial court was entitled to inquire into and determine the capacity and circumstances under which the parties were registered as tenants in common and to determine their respective property rights and final entitlement. The court is unable to agree with the Appellant's contention that such a dispute could effectually be determined by the land registrar through partition proceedings.

Whether the trial court erred in law and fact in allowing the Respondent's suit

20. The material on record shows that the trial court found for the Respondent because it was satisfied on the basis of the evidence placed before it that the suit property initially belonged to Muiga and not Samuel. The court considered the payment receipts in the name of Muiga some which were dated as far back as 1973 and 1976. The trial court did not believe the Appellant's documents to be authentic since some of the letters from the company which he relied upon were not on the company's letterhead. The trial court also considered the fact that no witness from the company was called to support the Appellant's counterclaim that Samuel was the original owner of the suit property.
21. The court finds no fault with the trial court's finding and holding on who was the original owner or allottee of the suit property. In fact, the trial court's finding is fully consistent with the oral and documentary evidence on record. The Respondent produced some payment receipts for payment of shares in the company by Muiga dated 1973 and 1976. The court is thus satisfied that the trial court was justified in holding that the Respondent had proved his claim on a balance of probabilities.

Whether the trial court erred in law and fact in dismissing the Appellant's counterclaim

22. The court has considered the material and submissions on record on this issue. It is evident that the Respondent's claim and the Appellant's counter-claim were mutually exclusive. The trial court could only have found that either Muiga or Samuel was the original allottee of the suit property from the company. This court has already held that the trial court did not err in law or fact in holding that Muiga was the original allottee of the suit property. As a result, the Appellant's counterclaim which was based upon initial ownership by Samuel was bound to fail. In the event, the trial court was justified in dismissing the Appellant's counter-claim on the basis that it had not been proved to the required standard.

Who shall bear costs of the appeal

23. 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 is aware that the parties herein are close relatives. The court is further aware of the need to bring about reconciliation and harmony among the two families of Muiga. As a result, the court shall order that each party to the appeal shall bear his own costs of the appeal.

I. Conclusion and Disposal Orders

24. The upshot of the foregoing is that the court finds no merit in the appeal. As a result, the court makes the following orders for disposal of the appeal:



- a. The Appellant's appeal be and is hereby dismissed in its entirety.
- b. The judgment and decree of the trial court in Nyahururu CM ELC No. 219 of 2018 is hereby affirmed.
- c. Each party shall bear his own costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIRTUALLY IN THE PRESENCE OF THE PARTIES THIS 17TH DAY OF OCTOBER, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Waichungo for the Appellant

Mrs. Maina for the Respondent

C/A - Carol

