



**Wasike v Wamalwa (Environment and Land Appeal 14 of 2023)
[2024] KEELC 13699 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 14 OF 2023
EC CHERONO, J
NOVEMBER 14, 2024**

BETWEEN

ROSELINE NANJALA WASIKE APPELLANT

AND

WYCLIFFE SIMIYU WAMALWA RESPONDENT

*(Being an appeal arising from the Judgment and decree delivered by Hon. C.A.S
MUTAI (SPM) in Bungoma CMELC No. 54 of 2018 delivered on 03/03/2023)*

JUDGMENT

Introduction

1. The Appellant herein was the 2nd defendant in the primary suit while the Respondent was the plaintiff therein.
2. The appeal seeks to set aside the judgment and decree of the trial court delivered by Hon. C.A.S Mutai on 03/03/2023 in Bungoma CMELC No. 54 of 2018 and to have the appeal allowed and or the court to examine the evidence afresh and reach its own conclusion.
3. In the impugned judgment the trial magistrate allowed the respondents case and ordered for the transfer of land parcel Bugoma/Tongaren 2916 measuring 25 x 100 to him from one Peter Wamalwa Khakina(the 1st defendant in the primary suit). Being aggrieved by the said judgment, the appellant herein preferred an appeal vide a memorandum of appeal dated 10/03/2023.The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
 - a. That the learned trial magistrate erred in law and in fact when he held that the 2nd defendant had no evidence that she rightfully acquired the parcel of land in dispute thus shifting the burden of proof to the 2nd defendant contrary to the law.



- b. That the trial magistrate erred in law and in fact when he allowed the plaintiffs case without evidence on record.
- c. That the trial magistrate erred in law and in fact when he disregarded the 2nd defendants' submissions and evidence on record thus arriving at wrong conclusion.
- d. That the trial magistrate erred in law and in fact when he allowed the plaintiff's suit without any fraud being attributed to the 2nd defendant in the plaintiff pleadings thus arriving at a wrong conclusion.

Proceedings before the subordinate court

4. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the subordinate Court.
5. The Respondent commenced his suit on the trial court by way of a plaint dated 13/08/2028 seeking for;
 - a. A permanent injunction restraining the the 1st and 2nd defendants from interfering with his portion measuring 25 by 100 feet out of parcel no. Bungoma/Tongaren 2916 formerly no.2404.
 - b. An ordered compelling the 3rd defendant to revoke or cancel the title deed issued to the Rosaline Nanjala Wasike (the 2nd defendant) over parcel registration no. Bungoma/Tongaren 2916.
 - c. Costs of the suit.
 - d. Any other orders that the court deems fit to grant.
6. The Respondent averred that he was the legal and bonafide purchaser of the portion measuring 25 by 100 feet forming part of plot 2404 which was later sub divided and registered as Bungoma/Tongaren 2916(hereinafter referred to as the 'suit land'). One Peter Wamalawa Khakina (the 1st defendant in the primary suit) sold to the appellant a plot measuring 25 by 100 feet to also be curved out of plot 2404.The Respondents averred that he has been in occupation and use of his portion where he has tenants. That the Appellant went ahead and took out a title deed which covered his portion of land despite a caution that he had registered.
7. In support of his case the Respondent testified as the sole witness where he adopted his witness statement dated 13/08/2018. He produced as P-Exhibit 1 an agreement dated 01/11/2012 for the purchase of the claimed portion at a consideration of Kshs. 420,000/=. He testified that he does not reside on the land but collects rent from the tenants who are in occupation. He produced a green card as P-Exhibit 2 which shows that he placed a caution on the land when the Appellant started laying claim on it and that the caution was later removed without his input and a title issued to the Appellant.
8. On cross-examination, he testified that he had been collecting rent from the tenants on the suit land for long before the Appellant restrained him. That the Appellant is a wife to the said Peter Wamalwa who sold the suit land to him and that although she was not a witness to the sale agreement, her co-wife was. That that the said Agreement stipulated that in the event of breach, the seller would compensate him for the market value of the property. It was his evidence that he was expecting the seller to facilitate the transfer process.



9. In re-examination, he stated that he conducted due diligence prior to purchasing the suit land and later entered the sale agreement where he paid a consideration covering the land and the developments thereon.
10. The Appellant entered appearance and filed a statement of defence dated 02/11/2018 where she averred that she is the registered owner of land parcel no. Bungoma/Tongaren/2916 and that she was a total stranger to the agreement between the Respondent and the said Peter Wamalwa Khakina. She averred that the suit land never belonged to the said Peter Wamalwa Khakina who had lost a case before the Business Premises Premises Rent Tribunal. That the suit land was registered in her name in trust for her children. Lastly, she stated that the Respondent was requested to remove the caution but he refused.
11. In support of her case, the Appellant testified as the sole witness where she adopted her witness statement dated 15/11/2015 and her list of documents of even date where she produced a copy of title deed, minutes dated 12/02/2010, letter dated 02/05/2018 and a letter dated 24/03/2017 as D2Exhibit 1-4. He also marked for identification various documents that were not produced. She denied being involved in the sale of the suit land and that she was the one who developed it.
12. On cross-examination, she testified that the title to the suit land was processed in her favour by the said Pete Wamalwa Khakina after the clan directed for the sub-division of the larger piece so that she and her children can be allocated some portions. She testified that she first got her title for plot no. 2916 on 01/01/2018 which was sub-divided from land parcel Bungoma/tongaren/2404 originally in the name of Peter Wamalwa Khakina
13. For purposes of record, the Bungoma Land Registrar who had been sued as the 3rd defendant in the primary suit filed a statement of defence dated 02/11/2018 denying the respondents claim. The said Peter Wamalawa Khskina who was the 1st Defendant in the primary suit filed a statement of defence dated 07/12/2021 equally denying the Respondents case. The said party testified as a sole witness where he adopted his witness statement dated 07/12/2021 as his testimony-in-chief. He testified that he sold land measuring 25 by 100 feet to the Respondent which is currently registered as Bungoma/Tongaren/2916. That the Appellant who was is 1st wife had opposed the transaction and as such, he could not obtain a consent from the land control board to transfer the same to the respondent. He testified that the area along the road where he sold to the Respondent was his portion as reflected in the clan meeting.

Submissions on the appeal.

14. When this appeal came up for directions, the parties agreed that the same be canvassed by way of written submissions. The Appellant filed her submissions dated 14/07/2024 while the Respondent filed his submissions dated 15/09/2024.

Appellants Submissions

15. The Appellant submitted that the Respondent did not sufficiently prove his case as required pursuant to Section 117 of the *Evidence act*. She submitted that the trial court did not consider the evidence she presented. She relied on the case of Kadzo Mkutano vs. Mukutano Mwamboje Kadosho & 2 Others and the provisions of Section 26 (1) (b) and 93(2) of the *Land Registration Act* No.3 of 2012.
16. The Respondent on their part submitted on three issues and placed reliance in the provisions of Article 64 of *the Constitution*, 2010, section 1A of the *Civil Procedure Act*, Section 3 (3) of the laws of contracts, Section 107 of the *Evidence Act*, Section 24,25, 26 and 93 of the *Land Registration Act*. He also cite the



case of Supreme Court Of Kenya Petition Number 11 Of 2020; Joseph Ombogi Ogentoto (Appellant) —And— Martha Bosibori Ogentoto (Respondent) —And— The Federation Of Women Lawyers (Fida Kenya) And 1st Amicus Curiae And Law Society Of Kenya (2nd Amicus Curiae). He urged the court to dismiss the appellants case.

Legal Analysis And Determination.

17. I have read the Memorandum of Appeal, the Record of Appeal, written submissions as filed by the parties and the court record generally and identify the following as the issues that emerge for determination:
- a. Whether or not the respondent satisfied the grounds for grant of an order sought in the trial court.
 - b. Whether or not the trial court erred in allowing the respondents suit
 - c. What order to make on costs
18. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in the case of *Selle & Another vs Associated Motor Boat Co. Ltd.& others* (1968) EA 123 where it was stated that;

“... this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally”

Whether or not the respondent satisfied the grounds for grant of an order sought in the trial court.

19. The gist of the dispute before the trial court was the Plaintiff/Respondent's claim that he was entitled to a 25ft by 100ft portion of land to be carved out of land parcel No. Bungoma/tongaren/ 2404 situate in Tongaren based on an alleged Sale Agreement dated 01/11/2012 for a consideration of Kshs. 420,000 which covered both the land and the developments thereon acquired from one Peter Wamalwa Khakina. The said Peter Wamalwa Khakina confirmed that indeed he sold the said portion of land to the Respondent. However, the Appellant herein contend that the suit land belonged to her, the same having been allocated to him by the clan and being the holder of the certificate of title. In short, the Appellant asserted rights as the registered owner while the Respondent claims rights as a bona fide purchaser for value.
20. In support of his claim, the Respondent produced a Sale Agreement. He also produced a green card which shows that at the time of the alleged agreement on 01/11/2012, Peter Wamalwa Khakina was the registered owner of Bungoma/tongaren/2916, a sub-division of land parcel No. Bungoma/tongaren/2404. The said green card also indicates that the Respondent had indeed registered a caution over the land and that the Appellant became the registered owner of the said land on 18/07/2018.
21. The Appellant in further support of his claim produced a certificate of title for the said land in her name, a letter from the deputy county commissioner Bungoma North summoning the Respondent



and Peter Wamalwa Khakina before the Land Control Board, Tongaren, a letter from the land Registrar Bungoma to the Respondent intimating her intention to remove the caution registered on the suit land and minutes of the Bamutilu clan on the division of property between Peter Wamalwa Khakina and the Appellant herein.

22. It is not in contestation that the Appellant holds the title deed for land parcel No.bungoma/tongaren/2916 which the Respondent asserts holds his portion of land. The indefeasibility of the title is provided for under Section 26 (1) (b) of the *Land Registration Act* which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

23. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

24. The Appellant contends that she was allocated the suit land by the clan and that Peter Wamalwa Khakina had no right to dispose of the same or any portion thereof. She also stated that she was not aware of the purported sale and that she did not consent to the same.

25. In view of the foregoing, it is imperative to note that the Respondent had the responsibility to prove his claim over the suit land under Section 109 of the *Evidence Act* which provides as follows;

“Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. The Respondent claimed that he was a bonafide purchaser for value and that the Appellant’s registration as the sole registered owner of the suit land was erroneous. He stated that he conducted due diligence and confirmed that the seller was the registered owner and as such, he is entitled to his portion of the suit property. The appellant on the other hand contended that the suit property had been allocated to her by the clan in the year 2010 after her said husband who is also the purported seller of the suit property married a second wife.

27. The Respondent is said to have purchased the suit land on 01/11/2012 while the commencement date of the *Land Registration Act* of 2012 was on 02/05/2012. The applicable law in this case is therefore the *Land Registration Act*, 2012.



28. It is imperative to note that section 28(a) of the [Land Registration Act](#), 2012 recognises spousal rights over matrimonial property as being an overriding interest over registered land. Further, section 93(2) of the [Land Registration Act](#) recognises rights gained by contribution of a spouse whose name is not on the register as well as section 93(3)(b) which enjoins a transferee to inquire from the transferor whether his/her spouse has consented to the transfer in cases where a spouse who holds land or a dwelling house in his name individually undertakes disposition of the same.
29. It is noteworthy that the property in question is a clan land owned jointly between the Appellant and her estranged husband and also the seller herein as shown vide minutes of the clan dated 02/12/2010. The Appellant therefore, had an overriding interest over the property and it was incumbent upon the said seller to seek her consent before purporting to sell the property and for the Respondent to ensure that prior to the purported purchase, he was satisfied that his spouse had given her consent.
30. Further, it should be noted that the purported seller in his evidence stated that he failed to complete the transfer because of the Appellant's objection which made it difficult for him to obtain a Land Control Board consent. In this case, it is my view that the purported sale was a nullity under section 6 of the provisions of the [Land Control Act](#). According to preceding paragraphs, the Court draws the irresistible conclusion that the Appellant had acquired spousal rights at the time of the purported sale under the [Land Registration Act](#) 2012 which are overriding interests in land and therefore, her husband could not sale the land to the Respondent without her consent and knowledge. In any event, there was no consent from the appellant and none at all.
31. Furthermore, the suit land was not available for sale in the first place having been allocated to the Appellant. The title of the suit land was registered in the name of Peter Wamalwa Khakina in trust for the Appellant.

Whether or not the trial court erred in allowing the respondents suit

32. Having carefully evaluated the evidence adduced before the subordinate Court, I find that the trial magistrate misdirected himself in the decision that he reached and the same is therefore liable to be set aside.

Which party bears the costs.

33. It is trite law that award of costs is at the discretion of the Court and that under Section 27 of the [Civil Procedure Act](#), costs generally follow the event.
34. In the end, I find that this appeal merited and the same is hereby allowed with costs.
35. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14TH DAY OF NOVEMBER, 2024.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of

Mr. Wamalwa Simiyu for the Appellant.

Respondent/advocate-absent.

Bett C/A.

