Njane v Gichimu (Environment and Land Appeal E031 of 2023)
[2024] KEELC 14166 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14166 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL E031 OF 2023

FM NJOROGE, J

DECEMBER 19, 2024

BETWEEN

CHRISTOPHER GICHIMU NJANE ..... APPELLANT

AND

PAUL MWAURA GICHIMU ..... RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. P.E. NABWANA delivered on 13th December 2023 in Mpeketoni SRMCC ELC NO. EO10 of 2022)

JUDGMENT

1. Vide a Memorandum of Appeal dated 27/12/2023, the Appellant appeals to this court challenging the judgment dated 14/12/2023 in Mpeketoni SRMCC ELC No. E010 of 2022 (hereinafter the lower court case).

2. Though this is an appeal to the ELC and the rule against prolixity applies, the memorandum of appeal herein is like the one in Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR) where the Court of Appeal extensively decried thus:

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal.
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> This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein

Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> " We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues, namely whether the learned judge erred in finding that the respondent, Felix Kipchoge Limo Langat was in adverse possession of 1.214 hectares of the property known as Mogobich/Cheptilik/Block 1(Kipsebwo)/225 (the suit property) and whether, in a case founded on adverse possession, the learned judge was entitled to determine it on the basis of a constructive trust."

3. In fact, when it came to argue the appeal, out of 18 grounds herein the appellant herein argued only 2 issues before this court which could have been contained in two grounds.

4. A brief background of this case is that the Appellant was the plaintiff and the Respondent the defendant the lower court case. The Plaint sought an order of eviction of the respondent from Lamu/ Lake Kenyatta 1/867 (hereinafter "the suit land") and/or an order of vacant possession against the respondent and the OCS Mpeketoni Police Station to enforce the eviction order, and costs of the suit.

5. The appellant's case was that he is the administrator of the late James Njane Gichimu; that the respondent opposed the grant issued to the plaintiff without success and the High Court at Garsen later confirmed it. He then transmitted the title into his name as administrator. Despite numerous attempts to have the respondent vacate the suit land he refused, hence the suit for eviction.

6. The respondent filed a defence and counterclaim dated 25/8/2022 which he amended on 30/8/2022 and in which he stated as follows: that the plaintiff was irregularly appointed administrator to the estate of the deceased; that his objection to the grant issued to the appellant was unjustly dismissed; that the issuance of the grant was based on misinformation; that the subsequent transfer of title was therefore invalid; that the deceased had been registered in trust for other beneficiaries including the respondent; that he is the appellant's uncle and has been in occupation for more than seven years, built a permanent home and had been conducting mixed farming thereon; that the suit property vested in the respondent by virtue of adverse possession.

7. In his counterclaim he reiterated the matters in the defence and averred that he had been in possession since 1999, and that other beneficiaries, whom he alleged that the appellant had not consulted beforehand, had consented in writing to his being appointed as administrator and that the appellant would also be included as a beneficiary. He stated that the appellant had failed to involve or list all the beneficiaries as required by law in the process of his application for a grant. The counterclaim sought the following orders:

    a. A declaration that the suit property belonged to the respondent's deceased father and was held in trust by the appellant's deceased father to hold in trust for the other co-beneficiaries;

    b. Costs of the suit;

c. Any other relief;

d. An order compelling the plaintiff to recognize and acknowledge the pre-existing trusts and interest in the suit land by the other co-beneficiaries.

8. After a hearing of the evidence from both sides the lower court rendered a judgment on 14/12/2023. Judgment was in favour of the defendant. The plaintiff's suit was wholly dismissed with costs. A declaration was issued that a customary law trust exists over the title issued in favour of the James Njane Gichimu over the suit land which trust was in favour of four persons (including the appellant's father and the respondent's father.) An order was made that the appellant and the respondent together with their families shall convene a meeting and have the suit property divided into four equal parts and the appellant as administrator of the estate of his father and the respondent's father shall transfer to the said other beneficiaries within 45 days. Upon failure to comply the land registrar was to annul and cancel the title currently in favour of the appellant in respect of the suit land and issue new titles to the beneficiaries of the customary trust or their representatives at their own costs. It is that judgment that prompted the present appeal.

9. The memorandum of appeal contains 18 grounds.

10. The appeal was disposed of by way of written submissions of which both parties filed as ordered. I have considered the grounds in the memorandum of appeal the submissions and the case law relied on.

Submissions of The Appellant.

11. The appellant's submissions were quite brief. They addressed two issues: whether the magistrate had jurisdiction in ordering cancellation of title acquired through the succession process in the High Court and who ought to bear the costs of the appeal. On the first issue the appellant maintained that the High Court confirmed the grant in the succession cause and transmission was effected and title issued in the appellant's name. the court also heard and determined an objection in the succession cause, stating that the objector who was the respondent had not established trusteeship, and no appeal had been filed against that finding. Consequently, the magistrate's finding that there was trusteeship came second to the judge's finding that there was none. The appellant relied on Article 165 of *the constitution* as granting the High Court unlimited original jurisdiction in criminal and civil matters. The appellant submitted, the learned trial magistrate erred in delivering his judgment that ignored the doctrine of stare decisis. He relied on Section 26 of the *Land Registration Act* and the decision in Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others 2015 eKLR and urged that the lower court could not reintroduce a ground pleaded and dismissed by the High Court. He poses the question as to whether the learned trial magistrate then was sitting on appeal on the decision of the High Court.

12. The appellant also stated that the status of the grant confirmed by the High court was left hanging, in that it was not possible in the light of the new decision by the trial magistrate to distribute the estate as ordered in that confirmation yet no appeal had overturned it. He submitted that the magistrate has by his judgment nullified the grant without any application being made before him. In conclusion the appellant asked the court to order the respondent to pay the costs of the present appeal.

Submissions of the Respondent.

13. The respondent submitted identified the issues for determination as follows: whether the trial court rendered a just and sound judgment based on the facts and evidence tendered; whether the appeal has merits as to warrant the grant of the orders sought; what reliefs the court should grant in the circumstances of the case. On the first issue the respondent submitted that no error of law or facts was

committed by the trial magistrate and the magistrate's judgment was sound; that the acquisition of title in the name of the appellant was incapable of vesting upon him absolute title over a suit property subject to a customary law trust; that as per Kanyi Vs Muthiora 1984 KLR regardless of whose name land was registered in, as long as a trust exists the beneficiaries' interests can not be defeated; that a customary trust operates as an overriding interest in land that validly entitles beneficiaries to claim as against the registered proprietor, and in the present dispute the appellant can not validly insist on an absolute title over the entire estate of the deceased as the deceased held the land in trust for his brothers; that the claim for eviction was illegal and inconsistent with the trust; that it is absurd that the appellant is the one who filed the suit yet he is now challenging the jurisdiction of the trial magistrate; that the jurisdiction of the trial magistrate was properly exercised pursuant to Section 9 (a) of the *Environment And Land Court Act* 2011. That on the issue of res judicata the claim before the lower court and the case before the High Court are distinguishable as the High Court dealt a succession claim while the lower court dealt with an ownership claim and the respondent was trying to enforce an unregistered interest premised on a customary law trust. Citing Muchanga Investments Limited Vs Safaris Unlimited (Africa) Ltd 2009 eKLR the respondent termed the appeal as vexatious and an abuse of the court process and sought that it be dismissed with costs.

Determination.

14. The grounds presented by the appellant can be congealed into the following:

    a. Whether the learned trial magistrate erred in law and in fact in failing to disqualify himself for lack of jurisdiction on the basis of the doctrine of res judicata in that the High Court at Garsen had already made a decision on the same issues raised in the suit before him; (Grounds 1,2, 3 4, 6 7, 8, 9, 10, 11, 12, 13 and 14).

    b. Whether the learned trial magistrate erred in law and in fact in failing to consider the fact that the respondent conflicted himself by claiming adverse possession in the High Court and trust in the lower court; (Ground 5).

    c. Who should bear the costs of the present appeal.

15. Regarding the first issue the preliminary question is whether the learned trial magistrate's attention was brought to the existence of the High Court decision invoked to claim that the issue of customary trust is res judicata. The trial magistrate appeared to be quite aware of the decision of the High Court. In his analysis he referred to the existence of the confirmed grant in favour of the appellant and noted that the respondent faulted the grant for the reason that the respondent and other family members were not included in that succession cause. He seemed aware of Mr Komora's position that under Article 165 (6) the High Court holds a supervisory position with regard to the subordinate courts, and the plea that he should not be seen to be sitting on appeal against the decision of the High Court. He went on to tackle the issue as to whether the decision of the High Court was binding on him and addressed the doctrine of stare decisis at length. It is clear that the trial magistrate's decision was rendered after full consideration of the High Court decision. However, there are some points that he raised to justify his decision to proceed and determines the issue of whether or not there was a customary trust. One of these was that the matter had proceeded before the High Court in the succession case and the respondent was unable to produce evidence. He also asked himself a question: if there was no evidence in the succession case then, was there any before him in the lower court case? he proceeded to determine that the issue was purely the preserve of the Environment and Land Court, which he could hear and determine in accordance with Section 9 of the ELC Act. He thus made a conscious election and rightly so and proceeded examine the evidence and subsequently and gave his decision on it hence the present appeal. Did he thus err in finding that he could determine the matter?

16. Did the objection form a final finding on the issue of customary trust such as to disentitle the respondent from counterclaiming under the same cause of action in the suit for eviction under the doctrine of res judicata?

17. Res judicata is a doctrine that seeks to prevent a multiplicity of suits and to bring litigation to finality. In Kenya it is embodied in Section 7 of the *Civil Procedure Act* which states 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"

18. The principles of res judicata are also outlined in Lotta vs. Tanaki [2003] 2 EA 556 cited in Republic v City Council of Nairobi & 2 others [2014] eKLR as follows:

> In the case of Lotta vs. Tanaki [2003] 2 EA 556 it was held as follows:
>
> > " The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

19. In a recent case Malindi ELC MISC NO. E017 OF 2024 Petro Oil Kenya Limited Vs Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 Others this court observed as follows:

> " In order therefore to decide whether a case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:
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> (i) what issues were really determined in the previous case;
>
> (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.
>
> (iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction."

20. It is not in controversy that the issue of whether or not the appellant held the land under a customary trust in favour of the respondent and others was decided by the High Court and it was made an issue in the subsequent case before the lower court. Nyakundi J in a ruling dated 26/2/2021 considered affidavit evidence and held that there was no evidence produced by the respondent to support the claim

that trusteeship created in so far as the estate of Gichimu Njane Kamau is concerned. He observed that the respondent herein appeared to be moved by the desire to establish that the spouse to the deceased James Njane Gichimu should not inherit his estate for the reason that she remarried soon after the deceased died. He also noted that the respondent was a brother to the deceased and thus not in direct descendant of the deceased so as to be a dependant as provided for under Section 29 of the *Law of Succession Act*. It is an inescapable fact that the High Court also noted that in their objection the respondent and his brothers had claimed that they were sons to the deceased while they were not a fact that is false. There being no evidence of a customary trust in favour of the objectors the High Court thus invoked the provisions of Section 38 of the *Law of Succession Act* on how the deceased's estate ought to be distributed. No appeal was lodged against the High Court ruling on the objection.

21. It is also clear that the parties in the High Court case were the same as the parties in the lower court case, litigating under the same title. The remaining issue is whether the High Court had jurisdiction to hear and determine the issue. It is noteworthy that the High Court has unlimited jurisdiction in civil and criminal matters under Article 165 which states as follows:

> " Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;"

22. The environment and land court and subordinate courts have their jurisdiction in respect of matters provided for under the *Land Registration Act* by virtue of section 101 as follows:

> " 101. Jurisdiction of court
>
> The Environment and Land Court established by the *Environment and Land Court Act* (Cap. 8D) and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

23. The trial magistrate relied on Section 9 of the Magistrate's Courts Act (MCA) which provides as follows:

> " 9. Claims in employment, labour relations claims, land and environment cases
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> A magistrate's court shall—
>
> (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
>
> (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (ii) compulsory acquisition of land;
>
> (iii) land administration and management;
>
> (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally;

(b) in the exercise of the jurisdiction conferred upon it under section 29 of the *Employment and Labour Relations Court Act* (Cap. 8E) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."

24. From the provisions of Section 101 LRA and Section 9 MCA both the ELC and the Subordinate court would have jurisdiction to hear and determine matters relating to trusts including customary law trusts.

25. However, it is noteworthy that the High Court heard and determined the issue, not by way of a stand-alone suit brought before it for declaration of trust, but as a succession issue in the normal process of the confirmation of a grant. Naturally, matters relating to customary trust are within the realm of succession where beneficiaries of an estate of a deceased person and who descend from his patriarchy or matriarchy, and who claim to be genealogically linked to him by such descent or lineage, claim inheritance from his estate.

26. On his part, the trial magistrate considered the High Court ruling and held that what was before him was a claim regarding title but ended up declaring a customary law trust existed, the very opposite of what the High Court had decided.

27. Notably, the disputes that begin with claim of whether or not there exists a customary law trust would, if a trust is established, finally boil down to the issue of how the title is to be dealt with, but that does not imply that the matter ceases to be a claim regarding a customary trust occurring in a succession cause. In fact, the actual confirmation of grant and distribution of land held under a customary law trust may very much depend on the succession practices and traditions of the community the holder of the title comes from and such matters are better suited for succession proceedings which are not the province of this court. The dominant theme in this dispute while the objection was before the High Court was the customary trust as in that court, there was no doubt that the suit title was already registered in the appellant's name. The High Court had to see, and did see the title document for the purpose of its issuance of a confirmation of grant. It could not confirm the grant while an unresolved objection premised on a customary law trust was still pending. Clearing the way of all stumbling blocks to the distribution of the estate was inevitable. That had to be done by determining the objection. It is not strange that the High Court dealt with the issue of whether or not there was a customary law trust when the parties submitted themselves to its jurisdiction. To this end the High Court even gave directions on 21/6/2018 that viva voce evidence be taken. This was in addition to the filed affidavit evidence of the parties.

28. Jurisdiction is everything and without it a court can not move an inch. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR it was held as follows:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

29. In this court's view there was a complete hearing of the issue before the High Court and since the issue arose within a succession cause and was not raised in an independent suit before the High Court, it became a borderline case and the provisions of Section 101 LRA notwithstanding that court was competent, and had jurisdiction, to determine it as part of its duties. This holding should not be seen

as a surrender of jurisdiction by this court but rather as a recognition of the need in borderline cases to allow either court that has apparent jurisdiction to apply itself to the expeditious just and proportionate resolution of the dispute before it without recusing itself and dispatching the litigants on needless and interminable perambulations between it and other courts on matters in which the real boundary of jurisdiction between two courts has been left quite uncertain by the legal regimes applicable. For instance, in this dispute, perchance the High Court had recused itself for want of jurisdiction and stayed confirmation of grant while the appellant went to commence a full suit before another court, he would still have finally retraced his steps back to the High Court for confirmation of grant. Handling the borderline issues in that manner may have the salubrious effect of giving life to the overriding objective provisions of Section 1A (1) and 1(B) of the *Civil Procedure Act* whose provisions respectively are as follows:

> " 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."
>
> 1B. Duty of Court
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> For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
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> (a) the just determination of the proceedings;
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> (b) the efficient disposal of the business of the Court;
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> (c) the efficient use of the available judicial and administrative resources;
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> (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
>
> (e) the use of suitable technology."

30. Upon the High Court's ruling the appellant had right under Section 61 of the LRA to be registered. That section states as follows:

> " If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of ..... [deceased]" or "as administrator of the estate of ..... [deceased]", as the case may be."

31. Consequently, it was improper for the trial magistrate, not being an appellate court, to entertain any claim for customary law trust raised through the respondent's counterclaim as that matter was res judicata. The only way it could be revisited was through an appeal or by way of a review. The trial magistrate's judgment brought into existence orders that were totally in conflict with the High Court orders which had expressly ruled out the possibility of the respondent and his brothers inheriting from the estate of James Njane Gichimu which is not a healthy state of affairs in the administration of justice. As far as it is possible, a court ought to avoid giving orders in conflict with another court's prior orders unless the conflicting orders are made in a direct appeal, which the trial magistrate's case was not. For the foregoing reasons the appeal before me should succeed.

32. Regarding the second issue framed for determination hereinabove, this court notes a severe defect in draftsmanship of ground no 5 on the memorandum of appeal from which it is derived. That ground lacks clarity. This court's attempts to understand that ground as crafted yielded the second issue. However, I have closely scrutinized the objection to the making of the grant and the High Court ruling on the same and found that the only ground relied on for the objection is the alleged existence of the customary trust. A further scrutiny of the amended statement of defence and counterclaim in the lower court case showed that the claim of adverse possession originated as an element of defence at paragraph 8 and it was neither repeated in the body of the counterclaim nor in its prayers. In situations where adverse possession is claimed alongside another cause of action the usual resort of a court is to consider if the two claims are contradictory. In adverse possession cases any parallel cause of action in the same pleading that challenges the validity of the paper title may oust the court's jurisdiction to hear and determine the adverse possession claim. Thus the court may elect to hear and determine the challenge to the owner's registered title only.

33. In the trial court, the court appears to have ignored the claim for adverse possession and riveted its attention on the customary law trust claim by the respondent which, unfortunately, had been determined by the High Court. I fail to find any adverse consequence to the respondent arising out of the manner in which the trial magistrate handled it the causes of action outlined in the amended defence and counterclaim.

34. Concerning costs, this is a family dispute and Article 45 of *the Constitution* emphasizes that "...the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State." It behoves this court to hopefully consider that with no extremes of execution on costs or demands for payments thereof being made by any party, some amity in the family may be maintained and ultimately reintegration at the end of this dispute may be possible. For that reason, I order that each party shall bear its own costs of this appeal and of the lower court proceedings.

35. The upshot of the foregoing is that the present appeal succeeds and thus the judgment and decree of Hon. P.E. Nabwana delivered on 14th December 2023 in Mpeketoni SRMCC ELC No. EO10 of 2022 and all consequential orders are hereby set aside and substituted with an order allowing the plaintiff's claim in terms of prayer (a) and (b) in the plaint dated 8/6/2022 and dismissing the respondent's counterclaim dated 30th August 2022 with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI