



Nyaga & another (As trustees of Four N Company Ltd) v Mbiti (Environment and Land Appeal E009 of 2021) [2023] KEELC 18923 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 18923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E009 OF 2021
A KANIARU, J
JANUARY 31, 2023**

BETWEEN

DAVID NJERU NYAGA 1ST APPELLANT

LAWRENCE NJAGI NJUE 2ND APPELLANT

AS TRUSTEES OF FOUR N COMPANY LTD

AND

KARAKI MUTURI MBITI RESPONDENT

(Being an appeal against the Judgment and Decree of the Chief Magistrate's Court at Embu Hon. M.N. Gicheru dated 24.5.2021 in Embu ELC No. 11 of 2018)

JUDGMENT

1. This appeal arose from the judgment of the lower court (Hon. M.N. Gicheru, Chief Magistrate, as he then was) delivered on 24/5/2021. The appellants – David Njeru Nyaga and Lawrence Njagi Njue – were the plaintiffs and had brought the suit as trustees of Four N Company Ltd. The respondent – Kakangi Muturi – was the defendant. The appellants had impleaded the respondent in the lower court claiming that she had trespassed into their land – Land parcel No. EMBU/MAVURIA/2189 – and erected illegal structures on it. They wanted the respondent ordered to vacate the land and to remove the alleged illegal structures. They also prayed for mesne profits and costs of the suit.
2. The respondent filed a defence in which she denied the appellants claim. She amended the defence later and added a counter-claim. She pleaded, inter alia, that she was on the land as a purchaser of some two acres and that the appellants and the seller of the land to her had fraudulently conspired to deprive her of her land. In the counter-claim, the seller – one Murango Muria – was added as the 2nd defendant. The respondent wanted the court to declare that she had a registrable interest in the land by virtue of her long possession and/or occupation. She also prayed for a permanent injunction against the appellants, costs of the suit and interest, and/or any other relief the court may deem fit.



3. The lower court heard the matter and in a judgement delivered on the date aforesaid, it dismissed the appellants suit and allowed the respondents counter-claim. The dismissal of the appellants suit and allowing of the respondent's counter-claim is what triggered the filing of this appeal before me.
4. The appeal is predicated on seven grounds. A look at the grounds show that the lower court was faulted for failing to consider "critical issues that the appellant had raised in the plaint"; failing "to properly appreciate/apply the law."; misdirecting itself "on the triable issues thus arriving at a wrong decision"; "ignoring crucial evidence tendered by the appellant"; "allowing the respondent's counter claim" despite holding that the court lacked jurisdiction; "relying on presumptions and issues not canvassed" before the court and, finally, "ignoring crucial statutes" like the Land Control Act Cap 302, Laws of Kenya.
5. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 13/4/2022. In the submissions, there is a recap of the lower court proceedings. Then it was emphasized that the appellants had shown that they are the registered owners of the land; that though the respondent claimed to be a purchaser, no consent of Land Control Board was obtained; and that it was erroneous for the trial court to hold that a possible customary trust existed in favour of the respondent while the pleadings had not mentioned or suggested such a trust. It was submitted that parties are bound by their pleadings and the court itself is also bound by the pleadings before it. The cases of *Malawi Railways vs Nyasuru* [1998] M Wsc 3, *Galaxy Paints Company Limited vs Falcon Guards Limited*: CA No. 219 of 1998, and *Adetoun Oladeji Limited vs Ningeria Breweries Plc*: S.G. 91 of 2002, were cited to drive this point home.
6. The trial court was also faulted for not having regard to Sections 6 and 7 of the Land Control Act. Section 6 makes land transaction in controlled area void after the period required to obtain consent has expired while Section 7 requires that any money or consideration given for such void transaction be recovered as a debt by the person who paid the money or consideration. According to the appellants therefore, the respondent was only entitled to claim back the money she had allegedly paid to purchase the land. It was submitted that she couldn't claim any ownership.
7. The respondents submissions were filed on 28/6/2022. The submissions gave a synopsis of the lower court matter and then proceeded to address the grounds of appeal. According to the respondent, the appellants were fraudulent against her and can not therefore be said to be bonafide purchasers of the land.
8. All the other averments made against the respondents were denied and it was pointed out that the respondent had become entitled to the land by adverse possession. Various cases including *Gichiga Kibuthia vs Caroline Nduku* [2018] eKLR *Muny Maina vs Hiram Gathiba Maina* [2013] eKLR, *Felicity Mutete Mutula vs James Ndambuki* [2020] eKLR, *James Maina Kinya vs Gerald Rwendeka* [2018] eKLR and *Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another* [2020] eKLR were cited for reinforcement and demonstration of the positions espoused by the respondent.
9. I have considered the appeal as filed, the lower court proceedings and decision, and rival submissions by learned counsel on both sides. In handling the matter, I have to be guided by the observations of the court in *Selle vs Associated Motor Boat Company Ltd* [1968] 123 where the duty of the court was stated as follows:

"An appeal to this court 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 witness and should make due



allowance in this respect. In particular this court is not bound necessarily to follow the trial judge findings of fact if it appears either that he has clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. It may be useful also to draw guidance from the case of Abok James Odera T/a A.j. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR where the court expressed itself thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

11. My understanding of the appellant’s beef with the judgement delivered is that the trial court did not properly appreciate the evidence; that it erred by inferring a customary trust in favour of the respondent when the same was never pleaded or canvassed; that it was wrong to fault the appellant for not making available the sale agreement to the court while there was no dispute as to the fact that the appellant had purchased the land; and that the trial court ignored crucial provisions of Land Control Act – particularly Section 6 and 7 thereof – which would have made it arrive at a different decision.
12. It is clear that as plaintiffs in the lower court, the appellants were accusing the respondent of trespass. It is crucial too that they did not indicate when the trespass took place. The appellants wanted the respondent evicted and her structures on the land removed.
13. The respondent on the other hand filed a defence and pleaded that she had bought the land, cleared the purchase price, and gone into possession. According to the defence, the land was bought from one Murango Muria who failed or reused to transfer it to the respondent. That happened way back in 1993.
14. As initially filed, the defence was without a counter-claim. But it was later amended and a counter-claim added. In the counter claim, the seller – Murango Muria – was added as the 2nd defendant. The respondent pleaded, inter alia, that she bought some two acres from 2nd defendant in 1993 and was given vacant possession of the same. She went into occupation and has been on the land since 1993. She pleaded that she had severally requested the seller to transfer the land to her and the seller would promise to do so but never did. Then the seller fraudulently colluded with the appellants and her land was sold and transferred to the appellant. The respondent averred that she has proprietary rights as a beneficial owner; that the appellant holds the land in trust for her; or, in the alternative, that she has registrable overriding interests in the nature of adverse acquisition for which she is entitled to move to the high court to urge for a declaration or other orders to that effect.
15. It is important to appreciate that when the seller of the land was sued as 2nd defendant in the respondent’s counter claim, he didn’t respond to the suit and an interlocutory judgement was entered against him on 25/1/2021.
16. I have set out in detail some of the things that transpired in the matter in the lower court because of some of the allegations made against that court by the appellants. For instance, the appellant faulted that court for inferring trust in the matter while such trust was allegedly neither pleaded nor canvassed. It now turns that the respondent expressly pleaded trust in her counter-claim. It is therefore wrong in my view for the appellants to seek to create the impression that the trial court plucked the notion of



trust from the air. The fact of the matter is that trust was expressly pleaded and the lower court had a proper legal and factual basis for inferring it.

17. On my part, I wouldn't regard the trust arising as a customary one. I would prefer to view it as a constructive trust arising from the fact of purchase, payment of full purchase price, followed by possession or occupation or, in the alternative, it can be seen as arising from accrual of ownership rights acquired adversely coupled with subsequent continued possession and/or occupation after such rights have already accrued.
18. The appellants also thought that the lower court did not address itself properly or at all to the provisions of *Land Control Act* (Cap. 302). They said that Section 6 requires consent to be obtained concerning purchase of land situated within a land control area. The land in dispute was said to be in such an area and no consent was obtained.
19. To drive the point home, the appellants cited and quoted the case of *Hirani Ngaithe Githire vs Wanjiku Munge* [1979] KLR 50 where the following observation was made:

“the position is simple and clear. Section 6 of the *Land Control Act* is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court can not do that; for it not for us to legislate but to interpret what parliament has legislated. So in this case that the agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area. Unless consent is first obtained any such dealing is not only illegal but absolutely void for all purposes.”

20. Section 7 and 22 of the same Act were also cited by the appellants to make the point that any purchase money paid in respect of a transaction that becomes void for lack of consent of Land Control Board is recoverable by the purchaser as a civil debt and that where such purchaser has already gone into possession pursuant to the purchase such continued possession after the transaction has become void amounts to a criminal offence.
21. I am constrained to observe that the position espoused by the appellants no longer constitute good law. In the new constitutional dispensation, the law has been interpreted in a radically different manner. I will give an example: In *George Chayuga Aliaza vs Zephania Khisa Saul* (Civil Appeal No. 134 of 2017) [2022] KECA 583 (KLR) the facts before the court were that the respondent was the registered owner of land parcel No. KAKAMEGA/MABUSI/416 measuring 3.11 Ha. He entered into agreements with the appellant on 16/9/2002 and 4/10/2004 for the sale of one acre and 0.3 of an acre at a price of 160,000/- and 57,000/- respectively. The appellant paid the total purchase price. The respondent was put into possession but the requisite processes under the *Land Control Act* were not undertaken. Later on, the respondent, who was the seller, sought to evict the appellant, the purchaser, for the reason that the sale had become void for want of Land Control Board consent.
22. While delivering its judgment, the court captured the new approach as follows:

“However, a distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where a seller fails or refuses to apply for such consent. The provisions of *Land*



Control Act can not continue to be read as though the circumstances prevailing at its enactment are still in place”

The court went on “There will be situations in which an application for consent under Section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent.” (emphasis mine)

23. The new legal position was then captured well in the judgement as follows:

“In my view, from the time the appellant entered in the first of the two parcels of land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the constitution*, requires that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.” (emphasis mine)

24. There are broad analogies between the above case and the one at hand. Like in the case at hand, the above case involved a seller who sold portions of his land, received the full purchase price, failed to transfer the land to the purchaser and later turned around to claim that the transaction was void for want of consent from the Land Control Board. The courts position is that the decision of this court should be informed by the enlightened reasoning adopted in the above case, which reasoning eschewed a legalistic and narrow approach that focused only on the provisions of *Land Control Act* and adopted a stratagem infused with principles of fairness and justice derived from hallowed principles of the Law of equity.

25. I also realize that the appellants are faulting the lower court for making the observation that they had not made available their sale agreement while the respondent had shown her own agreement. According to the appellants, its enough that they had shown that they had title to the land. They said that the fact that they had shown the title should have made the court invoke in their favour the presumption contained in Section 26 (1) of the *Land Registration Act*, 2012. The presumption is as follows:

Section 26(1):

“The certificate of title issued by the registrar of Land upon a transfer or transaction by the proprietor 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.”

26. In the new constitutional dispensation, the above presumption only holds true where the process of getting the title is proper and lawful and where the title itself is not under challenge. In *Munyu Maina Vs Hiram Gathiha Maina*: Civil Appeal No. 239 of 2009 [2013] eKLR the court held, inter alia, that where the registered proprietor’s root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is that title that is under challenge and therefore the registered proprietor must go beyond the instrument of title and show that the acquisition was legal, formal, and free from any encumbrance including interests which would not be noted in the register.



27. This is the same position manifest in the case of *Funzi Development Ltd & Others Vs County Council of Kwale*, Civil Appeal No. 252 of 2005, Mombasa [2014] eKLR where the court observed thus:
- “... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper, and regular. A court of law can not on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”
28. A look at the respondents counter claim shows clearly that the respondent views the appellants title as fraudulently acquired. The appellants and the 2nd defendant in the counter-claim were said to have colluded to perpetrate the fraud. It is clear that the respondent was claiming the portion of the land she had bought. What this in essence meant is that the appellant title to the land was under challenge and the appellants therefore had a duty to demonstrate that they acquired the title lawfully. Such lawful acquisition would necessarily entail showing the background and antecedents leading to and/or surrounding the acquisition. As the appellant’s title was under challenge, the lower court was therefore not wrong to observe that the sale agreement should have been made available. After all, it is such sale agreement that initiated the process leading to acquisition of the title.
29. There is also an un-answered question concerning the reality that informed the appellant’s purchase of the land and the subsequent filing of their lower court suit against the respondent. The evidence on record shows that when the appellants were purchasing the land, they noticed the evidence of the respondent’s occupation of a portion of it. They asked the seller about it and they were allegedly told that the respondent was a relative of the seller who would soon be made to move out.
30. Apparently, the appellants did not see the need of approaching the respondent to inquire how and why she was on the land. To this court, this was a lapse of due diligence on the part of the appellants. What baffles this court more is that the appellants went ahead to transact with the seller. It is that same seller who should have put them into vacant possession of the land. When it ultimately dawned on the appellants that the respondent would not move from the land, it is not shown that they tried to prevail on the seller to honour his verbal undertaking to remove her from the land. They instead filed a suit in the lower court intending that the court itself should give them vacant position. Curiously, the same seller was left out as a party in the suit. Why or how a seller who had allegedly given a promise to remove the respondent from the land and subsequently failed to do so was left out of the suit is something this court does not understand.
31. The respondent herself filed a counter-claim and joined the said seller as 2nd defendant in the counter-claim. The seller did not defend the suit. A judgement was entered against him. It is important to appreciate that the respondent had alleged fraud against the seller. The fact that the judgement entered against the seller is not challenged implies that fraud is demonstrated against him. It is that same fraud that the seller was said to have committed in collusion with the appellants. This position considerably weakens the strength of the appellants case. The entry of the judgement against the seller seems to suggest an inference that the respondent was also found to have acquired a registrable interest against the seller. It is a registrable interest that subsisted even when the same seller was selling the land to the appellants. A question then arises whether the seller could transfer the respondent’s registrable interest to the appellant without the consent of the respondent. It seems to me obvious that the answer to that is No.
32. The appellants have also taken issue with the fact that the lower court seems to have accepted that the respondent could be an adverse possessor. In fact according to the appellants, the lower court found the respondent to be an adverse possessor, albeit in disguise. My reading of the lower court judgement does



not show that this is the position. In the counter-claim, the respondent had merely asked the court to find that she had a registrable interests in the nature of adverse rights that she could pursue in the high court. My reading of the lower court judgment shows that the lower court agreed with this position.

33. There was no express or unequivocal finding by the lower court that the respondent was an adverse possessor. I do not understand that anybody can extract a decree or order from that judgement showing clearly that the respondent is an adverse possessor. In my view, the position taken by the appellants on this issue is less than correct. The lower court merely agreed that the respondent possibly has adverse rights which she could pursue in the high court.
34. From all the foregoing, it is clear that the appellants appeal largely rests on quicksand. They misapprehended applicable law, made allegations that they were not able to substantiate, made crucial omissions in the suit that weakened their case, and clearly failed to exercise all due diligence before transacting with the seller of the land.
35. The upshot is that the merits of the appeal before me have not been demonstrated and I hereby dismiss the appeal with costs to the respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF JANUARY, 2023.

In the presence of Hussein for Joy Mbwire for appellant and Waititu for M/s Gacheri Nyaga for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

31/01/2023

