



**Mwania v Wanzuu (Environment and Land Appeal E001 of 2022)  
[2023] KEELC 411 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 411 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E001 OF 2022  
A NYUKURI, J  
JANUARY 25, 2023**

**BETWEEN**

**PATRICIA NGINA MWANIA ..... APPELLANT**

**AND**

**ESTHER WANZUU ..... RESPONDENT**

*(An Appeal from the judgment of Honourable A. G. Kibiru, Chief  
Magistrate, Machakos, delivered on 15<sup>th</sup> day of December, 2021 in CM  
ELC Case No. 68 of 2018, Patricia Ngina Mwanja vs. Esther Wanzuu)*

**JUDGMENT**

**Introduction**

1. The Appellant has sought to overturn the judgment in Machakos CMC ELC Case No. 68 of 2018, Patricia Ngina Mwanja vs Esther Wanzuu, delivered on 15<sup>th</sup> December, 2021 by Hon. A.G. Kibiru, Chief Magistrate. In that case, vide a plaint dated 28<sup>th</sup> June 2013, the Appellant sued the Respondent seeking for a permanent injunction to restrain the Respondent from occupation use and ownership of plot number 80 at Konza-Malili (suit property), demolition of the structures put up by the Respondent and orders of eviction against the Respondent. She stated that she purchased the suit property from one Tete Waita Mulyangu (hereinafter referred to as Tete) on 17<sup>th</sup> June, 2011 and that the Respondent had denied her access to the same without any lawful justification.
2. In response to the Appellant's claim, the Respondent by way of defence and counterclaim stated that she was put in occupation of the suit property in 2003, on account of her 1981 woman to woman marriage Tete and that the sale of the suit property by Tete to the Appellant was done without her consent or knowledge and without the approval of the management of Konza Ranching and Farming Cooperative Society Limited (hereinafter referred to as Konza Ranching Society).



3. In the counterclaim, the Respondent sought a declaration that the suit property is matrimonial property co-owned by herself and Tete; a permanent injunction to restrain the Appellant and costs of the suit.

**The Evidence:**

4. At the hearing, the record shows that Tete, who was PW1, and who recorded a witness statement dated 28<sup>th</sup> June 2013, was noted by the court as being of advanced age and incoherent. Therefore, she was discharged by the court, without taking the witness stand. Subsequently, on an application by the Plaintiff's counsel, her statement was adopted as evidence.
5. PW2, Patricia Ngina Mwanja, the Plaintiff in the suit, and the Appellant herein, testified that on 17<sup>th</sup> June, 2011 she purchased plot No. 80 Konza from Tete and upon payment of the entire purchase price, took possession thereof. She further stated that the Respondent trespassed on the suit property in October 2012 and stopped her from using the said plot. She therefore sought for injunction and eviction of the Respondent.
6. On her part, the Respondent testified as DW1 and stated that she was married to Tete (PW1) in a woman to woman marriage, and that Tete was 90 years and of unsound mind. Her position was that she lives on the suit property with three of her children and her other six children live on her husband's other land. She claimed that the alleged sale of the suit property was without notice to her or her consent. She maintained that the suit property was matrimonial property co-owned by herself and her husband Tete whereof she took possession in 2003 and put up a permanent house and also cultivates the same.
7. DW2, Robert Mutua Bondo testified that the Respondent herein was her sister and that in 1981 she was married to Tete in a woman to woman marriage. According to him, the Respondent took possession of the property in 2003. Further that the Appellant reported at the DCI that the Respondent had trespassed on the suit property and that the accusations were found to be baseless and rejected. He also stated that the alleged sale of the suit property to the Plaintiff was without consent or approval of the family members including the Respondent and that the Appellant failed to conduct due diligence and seek the family's approval. He averred that at the time of the alleged sale on 17<sup>th</sup> June, 2011, Tete was old, senile and not capable of entering into a binding sale agreement and that the suit property was matrimonial property.
8. DW3, John Saku Tete, stated that he was a son of the Respondent and that he took photographs of Plot 80 Konza, where his mother lives.
9. Upon hearing the evidence, the trial court held that neither the Plaintiff nor the Defendant proved their claims, hence dismissing both the suit and the counterclaim.
10. The Appellant being dissatisfied with the judgment of the trial court filed this appeal based on the grounds that:-
  - a. The trial court erred both in law and fact by dismissing the appellant's case despite the fact that the appellant had proved her case against the respondent on a balance of probabilities.
  - b. The trial court erred both in law and fact by failing to find and hold that the appellant lawfully purchased Plot No. 80 at Konza Ranching & Farming Cooperative Society Limited from Tete Waita Mulyangu the latter of whom was and still is a bonafide member of the said society.



- c. The trial court erred both in law and fact by failing to rely on the statement of the appellant's witness (Tete Waita Mulyangu) which statement the court had admitted as evidence by the said witness.
  - d. The trial court erred both in law and fact by holding that Tete Waita Mulyangu had no capacity to sell Plot Number 80 at Konza Ranching & Farming Co-operative Society Limited notwithstanding the fact that the official search tendered in evidence by the respondent was Crystal Clear that she (Tete Waita Mulyangu) is the proprietor of the said Plot Number 80.
  - e. The trial court misapprehended the facts of the appellant's case and ended up pronouncing a judgment that was a complete departure from the clear and credible facts and evidence tendered by the appellant.
11. Therefore, the Appellant sought for orders that the appeal be allowed, the lower court judgment be set aside and the same be substituted with a judgment in favour of the Appellant.
  12. The appeal was canvassed by way of written submissions. On record are the Appellant's submissions filed on 27<sup>th</sup> June, 2022 and the Respondent's submissions filed on 15<sup>th</sup> September, 2022.

### **Submissions**

13. Counsel for the Appellant submitted that the Appellant was forthright and credible in her evidence, and cross examination neither controverted the facts nor shook her credibility. It was the Appellant's position that the defence failed to dislodge the Appellant's evidence. Counsel argued that the Respondent did not allude to any fraud in her pleadings or evidence and that she admitted that she had been given ten acres by Tete, where she had permanently settled with her children. That the ten acres are in Kalanzoni while the suit property is situated in Malili, which is five kilometers away from Kalanzoni. Counsel contended that the fact that Tete did not disclose to the Respondent when she took the purchase price of Kshs. 400,000/=, was not justification to trespass on the suit property.
14. According to counsel, the trial magistrate misdirected himself when he held that Tete was not the proprietor of the suit property and therefore did not have capacity to sell the land to the plaintiff. Further that the finding that Tete was not the proprietor of the suit property was a misapprehension of the facts of the case as she had the requisite capacity to sell the suit property as the search certificate being Exhibit 2 produced by the Respondent demonstrated such capacity.
15. On their part, counsel for the Respondent submitted that the Appellant failed to call witnesses to the sale agreement to prove that she had a well-founded claim of ownership.
16. On whether the court erred in not relying on witness statement of PW1, counsel for the Respondent submitted that a witness who is considered by the court to be prevented from understanding the questions put to them or from giving rational answers to those questions due to extreme old age, is not a competent witness in accordance with Section 125 of the Evidence Act. Counsel pointed out that as noted from the court record, PW1 was not only incapable of taking the witness stand, but was also unaware of her environment and therefore an incompetent witness.
17. Counsel argued that although the witness statement of Tete (PW1) was admitted as evidence by the trial court at the exparte hearing of the suit, on an application by the Respondent to reopen the Plaintiff's case, the court allowed reopening of the Plaintiff's case and ordered the recall of the Plaintiff's witness. That however when Tete was recalled, she was of advance age, appeared confused and unaware of her environment and was reluctant to take the witness stand. Counsel therefore argued that it is not correct that the evidence of PW1 was unchallenged but that the witness could not testify. That this



infact confirmed the evidence of DW1 and DW2 that PW1 had been senile since 2005 with frequent episodes of talking to herself.

18. On whether Tete had capacity to sell the suit property, counsel argued that the registered owner of the land was a member of Konza Ranching and Farming Cooperative Society which society did not approve the transfer. Counsel also contended that the Appellant failed to satisfy the trial court that there was a valid sale of the suit property.

**Analysis and Determination:**

19. Having considered the appeal, the submissions and the entire record, in my considered view, the issues that emerge for determination are;
  - a. Whether the evidence of Tete had any probative value.
  - b. Whether there was a valid sale agreement between the Appellant and Tete.
20. This being a first appeal, the duty of this court is to reevaluate, reanalyze and reconsider the evidence presented in the trial court afresh, and come up with its own conclusions and determinations but bearing in mind that it had no opportunity to see the witnesses testify and ought to give due allowance for that.
21. The duty of the first appellate court was discussed in the case of Peters vs Sunday Post Ltd [1958] E.A 424, where the court held as follows:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate so to decide”.
22. Similarly, in the case of Peter M. Kariuki vs. Attorney General [2014] eKLR, the court held as follows:-

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are inconsistent with the evidence.”
23. In the case of Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, in so far as the role of a first appellate court is concerned, the court held as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to reevaluate, reassess, and reanalyze the extracts on record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
24. Essentially therefore, the duty of the first appellant court is to reanalyze and reevaluate the evidence presented before the trial court and interrogate whether the findings reached by the trial court were justified and in tandem with the evidence.
25. On the issue as to whether the evidence of Tete had any probative value, I note that although the trial court adopted the witness statement of Tete dated 28<sup>th</sup> June 2013 as her evidence in chief, that was



- done after the court had found that although she had presented herself in court, she was incoherent and unaware of her environment. When counsel for the Respondent sought to cross examine her, the trial court noted that she was reluctant to take the witness stand. It was the Appellant's submissions that the trial court in its judgment failed to take into account the evidence of Tete. On the other hand, the Respondent relied on Section 25 of the Evidence Act and argued that Tete was an incompetent witness.
26. Having considered the record, I note that on 25<sup>th</sup> November 2020, the trial court adopted the witness statement of Tete (PW1) as her evidence in chief. Since that decision was not set aside, reviewed or appealed against, the adopted statement of Tete remains evidence on record. However, the question is what is the value of evidence that has not been subjected to cross examination, where the opposite party was willing and ready to cross examine the witness? The Respondent did not have opportunity to cross examine Tete because she was incoherent, unaware of her environment and reluctant to be cross examined.
27. I take the view that evidence that has not been subjected to cross examination where the opposite party has been denied an opportunity to cross examine, cannot have the same value as evidence that has been tested by cross examination. During cross examination, the credibility of both the evidence and the witness is interrogated among other matters. In this case, Tete's soundness of mind, senility and capacity to enter into a binding legal agreement was additionally an issue raised by the Respondent who stated that Tete had been senile since 2005.
28. What then is the probative value of evidence that has not been subject to cross examination? The right to a fair hearing under Article 50(2)(k) of the Constitution encompasses the right to adduce and challenge evidence which includes the right to cross examine the opposite party, and their witnesses. My considered view therefore, is that where evidence is not tested by cross examination due to the fact that the witness has not made it possible to be cross examined, with the consequences that the opposite party's right to a fair trial has been violated by such denial to cross examine, then such evidence is of no legal effect, it is inconsequential and lacks probative value.
29. I am fortified in my opinion by the decision in *Vidhyadhar vs Manikrao* AIR 1999 SC 1441 paragraph 16, where the Supreme Court of India stated as follows:-
- “where a party to the suit does not appear into the witness box and state his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct....”
30. Similarly, in the case of *Noah Makhalang'ang'a Wekesa vs Albert Adome & 3 others*, Kitale HCEP 6/2013, the court held as follows:-
- “In as much as the rest of the petitioner's witnesses who deponed supporting affidavit were not availed in court for cross examination for purposes of testing the veracity of their averment, their evidence though forming part of the petitioner's case may be treated as being inconsequential and devoid of probative value.”
31. In the premises therefore, I find and hold that the evidence of Tete had no probative value, was irrelevant and inconsequential. Hence, the only evidence on record in support of the Appellant's case before the trial court was the evidence tendered by the Appellant herself. Therefore, the trial court did not error by failing to place any value on Tete's evidence.



32. On whether there was a valid sale agreement between Tete and the Appellant, the Appellant contended that the sale was held on 17<sup>th</sup> June 2011 in the presence of witnesses and the area chief and therefore that the Respondent's presence on the suit property amounted to trespass as the suit property belonged to her. On the other hand, the Respondent argued that she had been in occupation of the suit property since 2003 by virtue of her woman to woman marriage to Tete and that the suit property was matrimonial property. She further contended that her consent to sell was not sought or obtained by Tete and that the transfer of the suit property which was Tete's share at Konza Ranching Society was not approved by the Society.
33. I note that parties in this matter agreed that the suit property was owned by Tete, being her share of Konza Ranching Society as demonstrated by the search obtained at the said society. It is therefore clear that the suit property has not been registered in the name of Tete under any written law in respect of registration of land in Kenya.
34. It was also not disputed that Tete was a member of Konza Ranching Society and that she was granted the suit property by virtual of her membership. It was further not in dispute that the transfer of the suit property was not approved by Konza Ranching Society.
35. The trial magistrate having considered the evidence on record, held as follows:-

It is noted that the land allegedly sold was a share allocated by Konza Ranching and Farming Cooperative Society Ltd. Any sale of such share could only be authorized by the said society. Although the plaintiff had filed in her list of documents an application form for transfer of two acre plot, she did not call any witness from the Konza Ranching & Farming Cooperative Society Ltd to confirm if the sale was authorized. On her part, the defendant produced an application for official search from Konza Ranching & Farming Cooperative Society Ltd dated 5<sup>th</sup> August, 2019, which indicated that Wanzuu Tete Waita as the proprietor...

From the foregoing, it is the finding of this court that the Plaintiff has not proved on a balance of probabilities that she is the owner of plot No. 80 Konza Ranching & Farming Cooperative Society Limited, despite the fact that she had entered a sale transaction with PW1. On the other hand, the Defendant has also not proved ownership of the said land to herself, having produced evidence that the land is in the name of Wanzuu Tete Waita. Neither the Plaintiff nor the Defendant can claim ownership of the parcel of land, Tete Waita Mulyangu who allegedly sold the parcel of land to the Plaintiff was not a party to this suit. Tete Waita Mulyangu is not the proprietor of the parcel of land known as Plot No.80 Konza Ranching. She therefore did not have capacity to sell the land to the plaintiff. She had no good title to pass to anyone over the land. The Plaintiff's claim lies as against Tete Wait Mulyangu and not the Defendant. Consequently, I find the plaintiff's claim not proved to the required standard and the same is hereby dismissed. On the other hand, I find that the Defendant has not proved her claim over the land to warrant grant of the prayers sought in the counterclaim. The counterclaim is also dismissed.

36. This dispute therefore turns on whether land held by a member of a Cooperative Society as their share or interest in the society can be said to have been validly sold, where no approval of such sale and or transfer was given by the Committee of the Cooperative Society.
37. Rule 10 of the Cooperative Societies Rules 2004 provides for transfer of shares by members as follows:-

10 Subject to the provisions of Section 20 of the Act and paragraph 3 of this Rule  
(1) and subject to the approval of the committee, a member may transfer his share



or shares in a cooperative Society to any other member of the society or to any person whose membership of the society has been approved by the committee.

- 2) No transfer of a share in a Cooperative Society shall be valid and effective until such transfer has been recorded in the register of the society.
- 3) No transfer of a share or shares in a Cooperative Society shall be valid and effective if made by a member indebted to a society whether such debt is due for payment or not.
- 4) When for any reason other than death, a member of a cooperative society registered with limited liability holding deposit from non members ceases to be a member, he may, subject to Section 20 of the Act, transfer his share or shares in such society to another member, or to a proposed member approved by such society, but he shall not be entitled to repayment from the society of any money paid by him in respect of such shares.

38. Essentially therefore, a member of a Cooperative Society can only transfer their share to another member of the Cooperative Society or to another person whose membership of the Cooperative Society has been approved by the Committee of the Cooperative Society. Such transfer can only be sanctioned by the approval of the committee of the Society, and will only be deemed to be valid and effective upon recording of such transfer in the register of the Society.
39. The Appellant herein testified that she purchased the suit property from Tete. I have considered the search certificate produced by the Respondent which is relied upon by both parties, and I note that the land in issue is described as Plot Number 80 within Konza Ranch. I also note from page 46 of the record that Tete was member number 80 as shown from the membership card produced by the Appellant. Both parties agree that Tete was a member of Konza Ranching Society and that the transfer or sale of her share to the Appellant did not get the approval of the committee of Konza Ranching Society.
40. In view of Rule 10 of the Cooperative Society Rules 2014, a member can only transfer their interests in a Cooperative Society to another member or another person whose membership to the Cooperative Society has been approved by the committee. Even where such other person's membership to the Cooperative Society has been approved or an existing member of a Society, transfer of shares must also be sanctioned by the committee of the Cooperative Society.
41. In the instant suit, the suit property is not registered under any written law in the name of Tete, that is why it is merely identified as Plot Number 80 within Konza Ranch. Evidently, the suit property is held by Tete as a share or her interest in Konza Ranching Society. That Society is yet to transfer the suit property to Tete. It is my view that as long as the Society has not transferred the suit property to Tete under our laws governing registration of land, Tete is not free to deal with it, as she must seek the approval of the Society and the transfer of her share can only be to a member or to an approved member.
42. It is also clear from Rule 10 above that the transfer of a share in a cooperative society cannot be said to be valid or effective unless and until such transfer has been recorded in the register of the society. Therefore, as long as the suit property was defined merely as Tete's share in Konza Ranching Society, that Society had the power to sanction a sale and or transfer thereof, meaning that Tete did not have absolute power to deal with the suit property.
43. The Appellant neither produced any evidence to show that she was a member of the Konza Ranching Society herein nor that her membership had been approved by the said Cooperative Society. She also



neither showed that the sale and or transfer of the suit property was approved by the Committee of Konza Ranching Society nor demonstrate that there was a transfer of Tete's share to her, which was recorded in the said Society's register.

44. Having found that there was no approval of transfer of Tete's share to the Appellant by the Committee of Konza Ranching Society, which approval was a necessary requirement to validate the sale of the suit property, it is my finding that there was no valid sale between the Appellant and Tete.
45. The trial court held that Tete had no capacity to sell the suit property because it was not registered in her name, and had no good title to the same. The Appellant has faulted this finding. I note that it is not disputed that Tete was the owner of the share defined as Plot Number 80 within Konza Ranch. As to whether she had capacity to sell her share, my considered view is that she did not lose capacity to sell the same merely because she was not the registered proprietor of the suit property under any written law. As long as Tete's ownership of that share was not challenged or shown that she was indebted to the society, she had the requisite capacity to sell the same, although the sale was subject to the Cooperative Society's approval. It is therefore my finding that the trial magistrate misdirected himself by holding that Tete had no capacity to sell the suit property.
46. Although Tete had capacity to sell her share in Konza Ranching Society, such sale transaction could only be deemed valid, effective and complete on the approval of the committee of the Cooperative Society. Since it is evident that no such approval by the committee of the Cooperative Society was obtained, therefore there was no valid sale or transfer of Tete's share to the Appellant. As the transaction between Tete and the Appellant in respect of Tete's share in Konza Ranching Society aborted for want of the Cooperative Society's approval, the Appellant cannot in law, seek to enforce her rights in respect of the said share. In other words, the suit property did not pass from Tete to the Appellant, the same does not belong to Appellant, hence she cannot enforce any rights in respect thereof as against anyone including the Respondent herein.
47. I am therefore in agreement with the trial court that the Appellant's claim lay in seeking redress from Tete who failed to facilitate the completion of their transaction by failing to obtain the necessary approval from the Konza Ranching Society. In my view, the agreement between Tete and the Appellant, which is in written, having not been denied by Tete or anyone lawfully representing her, was indeed entered into in the presence of witnesses and no evidence was tendered to show that Tete lacked capacity to enter into the agreement at the time the agreement was signed. But that agreement could only be effected and validated by an approval of the Konza Ranching Society herein, which was not done.
48. For the reasons given above, it is the finding of this court that the appeal lacks merit and the same is hereby dismissed with costs to the Respondent.
49. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Ngolya for Appellant

Ms Maina holding brief for Mr. Makundi for the Respondent



Josephine – Court Assistant

