



**Ngilas v Muneryia (Appeal 2 of 2022) [2023] KEELC 58 (KLR) (16 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 58 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
APPEAL 2 OF 2022  
EM WASHE, J  
JANUARY 16, 2023**

**BETWEEN**

**JULIUS LEPERES NGILAS ..... APPELLANT**

**AND**

**JONATHAN NKARO MUNERYIA ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein being aggrieved by the judgement of Hon Robert M Oanda ,Principal Magistrate (hereinafter referred as “the Trial Court”)pronounced in the proceedings known as Kilgoris PMC ELC Case No 50 of 2018 (hereinafter referred to as “The Trial Court proceedings”) on the 3<sup>rd</sup> of October 2019 filed a Memorandum of Appeal dated 13<sup>th</sup> October 2019.
2. The memorandum of appeal dated 13<sup>th</sup> October 2019 was premised on three substantive grounds as outlined below; -
  - i. The trial court erred in law and fact in disallowing the appellant’s claim on account that he had not sought a declaration for nullification of an alleged sale agreement between the parties whereas the appellant had neither pleaded nor based his claim on such an agreement.
  - ii. The trial court misapplied the law governing transactions affecting agricultural land under the *Land Control Act*(cap 302) Laws of Kenya thereby failing to conclusively and correctly determine the issue as to who between the litigants has the right of ownership, possession, occupation, use and quiet enjoyment of the suit land.
  - iii. The decision of the trial court is contrary to the law and weight of evidence on record.
3. Premised on the above grounds, the appellant is seeking this court sitting as an Appeal’s Court to do the following; -
  - a. Allow the appeal.



- b. Set-aside the judgement of the trial court and allow the appellants claims as prayed in thepleaint.
  - c. Costs of this appeal to be borne by the respondents.
  - d. Grant any further orders as may deem necessary.
4. The provisions of section 26 (4) of the *Environment & Land Act*, No.19 of 2011 provides as follows; -
- “Appeals on matters from the designated magistrate’s court shall lie with the Environment & Land Court.”
5. In other words, the Environment & Land Court while handling appeals from the Magistrates Courts shall be deemed as the first Appeal’s Court.
6. As a first Appellate Court, it is required to familiarise itself with the pleadings and evidence adduced at the trialcourt and evaluate afresh both the facts and the law to be able to arrive at its own conclusion.
7. However, the Appellate Court should be cautious during the examination of the evidence that it did not have an opportunity to hear the witnesses first hand.
8. In the case of *Elizabeth Njambi Kimemia v Florence Ngina Banga* [2018] eKLR, The Court of Appeal held the following in respect of the duties of a first appellate court:
- “This is a first appeal and as such, the Court is enjoined by law to proceed by way of re-appraising all the evidence on record before arriving at its own independent conclusion. This was aptly summed up in the case of *Selle vs. Associates Motor Boat & Co.* [1968] EA 123 where the predecessor of this Court stated as follows:
- “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 (*Abdul Hameed Saif – vs-Ali Mohamed Sholan* [1955], 22 E.A.C.A.270).”
- Further, in the case of *Ramji Ratna And Company Limited v Wood Products (kenya Limited)* Civil Appeal Number 117 of 2001 this Court further stated that in a first appeal it will interfere with the decision of the trial judge only where it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
9. This court having appreciated the manner and extent in which it should exercise its jurisdiction as the first appellant court, it now takes the liberty to deal with the present Appeal at hand.
10. Theappellant herein commenced the trial proceedings by way of plaint dated 23<sup>rd</sup> July 2009 seeking for the following orders; -
- i. That the defendants (respondents), his agents or servants be ordered to vacate the suit land forthwith or within such period the court may fix and in default they be evicted from the suit land by the District Commissioner, Transmara District.



- ii. A permanent injunction do issue restraining the defendant by himself, his agents or servants from re-entry and from any further trespass on the suit land or in any other manner whatsoever dealing with the suit land namely land parcel title number Transmara/Entonyo NkopiT/29.
  - iii. Costs of this suit be borne by the defendant.
  - iv. Any such further order or relief this court may deem fit and expedient to grant.
11. In addition to the complaint filed on the 23<sup>rd</sup> of July 2009, the appellant also filed a list of witnesses, their substantive witness statements and a List of documents together with the copies of the documents as well.
  12. After a prolonged delay, the respondent filed their statement of defence on the 20<sup>th</sup> of February 2015 together with their list of witnesses, the substantive witness statements and their bundle of documents attaching copies of their documentary evidence to be adduced at the hearing thereof.
  13. Upon service of the statement of defence filed on the 20<sup>th</sup> of February 2015, the appellants filed a reply to the statement of defence on the 6<sup>th</sup> July 2017.
  14. The substantive proceedings which resulted to this appeal commenced on the 08/11/2017.
  15. The 1<sup>st</sup> Witness was the appellant who introduced himself as a resident of Transmara County and the owner of the property known as L.R.No. TransmarA/Moyoi/29 (hereinafter referred to as “the suit property”).
  16. The appellant then adopted his witness statement dated 29<sup>th</sup> June 2015 as his evidence in chief.
  17. The appellant thereafter produced a Copy of the Title Deed of the suit property as plaintiff’s Exhibit 1 and a Copy of the official search of the suit property as Plaintiff’s Exhibit 2.
  18. The appellant’s main complaint against the respondent was that he had trespassed into the suit property in the year 1999 and taken possession thereof.
  19. The appellant then tried to evict the respondent but was not successful thereby necessitating the making of a formal report at Kilgoris Police Station and issuance of a demand letter from the appellant’s advocate.
  20. During the appellant’s evidence in chief, the appellant acknowledged selling a portion of approximately 3 acres of the suit property to one Konchellah Ole Muret for a value of KShs 40,400/-.
  21. The appellant further acknowledged receipt of KShs 20,000/- on execution of the agreement for sale dated 22/11/1995 and a further amount of KShs 10,000/- on the 30/12/2015 leaving a balance of KShs 14,000/-.
  22. The Appellant informed the court that the purchaser Konchellah Ole Muret was a brother to the respondent herein.
  23. During the appellant’s testimony, it was his evidence that upon execution of the agreement for sale on the 22/11/1995, the purchaser was granted permission to take possession and cultivate the portion acquired.
  24. According to the appellant, the agreement for sale was not concluded and the relevant Land Control Board Consents not obtained as required by law.
  25. In conclusion therefore, the respondent was illegally on the suit property and no form of trust existed on the suit property.



26. In essence therefore, the appellant's prayer was that the respondent be evicted from the suit property and permanently enjoined from entering, occupying and/or making any claims of ownership against the appellant's suit property.
27. In cross-examination, the appellant confirmed that the suit property is approximately 3.7 Hectares.
28. The appellant indicated that he had been in occupation of the suit property since 1997.
29. On the other hand, the appellant testified that the respondent herein invaded the suit property in the year 2009 and has adamantly refused to vacate until now.
30. The Appellant informed the trial court that he made a report of the invasion at Kilgoris Police Station but could not remember the O.B number of Extract.
31. The appellant reiterated that he sold a portion of the suit property to one Konchellah Ole Muret and there were witnesses to the said transaction.
32. However, the purchaser Konchellah Ole Muret failed to pay the balance of the purchase price.
33. The appellant further admitted that the agreement for sale did not restrict the manner in which the purchaser Konchellah Ole Muret would use the portion purchased.
34. According to the appellant's testimony, the respondent entered the land with his brother Konchellah Ole Muret in 1995.
35. In re-examination, the appellant indicated that he was not interested in the balance of the purchase price.
36. Similarly, the actions of the purchaser Konchellah Ole Muret to bring the respondent into the suit property was without his consent thereof.
37. The appellant having no other witness then closed his case.
38. The defence case began on the 22/11/2018 with the 1<sup>st</sup> defence witness being Konchellah Ole Muneria.
39. The 1<sup>st</sup> defence witness introduced himself as a farmer and a resident of Olonkopit Sub-location.
40. The 1<sup>st</sup> defence witness confirmed that the respondent was his brother.
41. Similarly, the 1<sup>st</sup> defence witness confirmed that the appellant was known to him having purchased a piece of land from him.
42. According to the 1<sup>st</sup> defence witness evidence, the appellant sold him a portion of 4 acres on the suit property on the 22/11/1995.
43. The 1<sup>st</sup> defence witness informed the court that the agreement for sale dated 22/11/1995 was witnessed by the appellant's father, wife and brother when it was being executed.
44. The 1<sup>st</sup> defence witness then produced the agreement for sale dated 22/11/1995 as defence exhibit No.1.
45. Upon execution of the agreement For Sale dated 22/11/1995, the 1<sup>st</sup> defence witness took possession of the portion he purchased and occupied it without any interference from anyone.
46. Later on, the 1<sup>st</sup> defence witness gave the said portion on the suit property to the respondent who continued occupation and use by building his home and keeping cattle thereon.



47. According to the 1<sup>st</sup> defence witness, there was no prohibition or restriction that prevented the respondent from taking over the portion he had purchased on the suit property and utilising the same.
48. The 1<sup>st</sup> defence witness confirmed that he had sworn an affidavit detailing all the activities he had undertaken on the portion of the suit property which he had purchased and produced the said affidavit as defence exhibit No.2.
49. The 1<sup>st</sup> defence witness also indicated that prior to purchasing the portion of 4 acres from the appellant, he had obtained a copy of the title deed and undertaken a search.
50. The 1<sup>st</sup> defence witness then produced a copy of the title deed of the suit property as defence exhibit no. 3 and a copy of the official search as defence exhibit No. 4.
51. In concluding is evidence in chief, the 1<sup>st</sup> defence witness informed the court that the respondent had not encroached on the appellant's property and the respondent had all the right to occupy the portion purchased by him.
52. On cross-examination, the 1<sup>st</sup> defence witness reiterated that the suit property was in the name of the appellant.
53. However, the 1<sup>st</sup> defence witness confirmed that there was a valid agreement for sale whose consideration was KShs 44,000/-
54. According to the 1<sup>st</sup> defence witness, a sum of KShs 20,000/- was initially paid, then followed by Kshs 10,000/- and the balance cleared later although it was not recorded.
55. Unfortunately, even after the completion of the purchase price, the appellant and the 1<sup>st</sup> defence witness who is the purchaser have never gone to the Land Control Board.
56. The 1<sup>st</sup> defence witness admitted that the agreement for sale did not recognise the occupation of the respondent or grant him the right to transfer the portion purchased to a third party.
57. The 1<sup>st</sup> defence witness informed the court that the appellant's father's name was Ole Ngilas but could not remember the name of the wife.
58. The 1<sup>st</sup> defence witness confirmed that the house built on the portion he purchased on the suit property belonged to the respondent who is a police officer.
59. In re-examination, the 1<sup>st</sup> defence witness reiterated that he had paid the full purchase price to the appellant.
60. According to the 1<sup>st</sup> defence witness, the next step was to attend the land control board but instead the appellant instituted the Trial proceedings.
61. The 1<sup>st</sup> defence witness indicated that he had requested the appellant to transfer the portion he purchased but the same had not been done.
62. Indeed, the 1<sup>st</sup> defence witness stated that he had lawfully purchased a portion of the suit property and the house built on the said portion belonged to the respondent herein.
63. The 2<sup>nd</sup> defence witness was Jonathan Konchellah Munerya who is also the respondent in this Appeal.
64. The respondent informed the court that he hails from Oldonyo Nkopit Location (Ololchani) and is a Police Officer based in Kapedo.
65. The respondent stated that he knows the appellant as a neighbour.



66. The respondent further denied the allegation that he had trespassed and/or encroached into the appellant's property.
67. According to the respondent, the brother who is the 1<sup>st</sup> defence witness had purchased a portion of the suit property through an agreement for sale dated 22/11/1995.
68. Upon the 1<sup>st</sup> defence witness purchasing the said portion of land, he requested the respondent to relocate and build a house on the portion purchased because where he was staying in a volatile area.
69. The respondent confirmed moving into the portion purchased by the 1<sup>st</sup> defence witness in the year 1995 and built his home which he occupies up to date.
70. However, the respondent has denied threatening anyone and/or occupying the appellantsuit property by force as alleged.
71. The respondent reiterated that the agreement for sale dated 22/11/1995 was done in the presence of the appellant's father, elder brother and wife hence nobody forced him to sell the land.
72. According to the respondent's recollection, the purchase price for the entire 4 acres was KShs 44,000/- which was fully paid.
73. Consequently therefore, the respondent denied encroaching on the appellant's suit property and instead requested that he be assisted to get his title deed for the portion the brother purchased.
74. In cross-examination, the respondent admitted that he does not have any agreement for sale with the appellant.
75. Similarly, the respondent admitted that he does not own any title deed for the portion of land that he occupies.
76. The respondent further stated that he was not a witness to the agreement for sale dated 22/11/1995 between his brother the 1<sup>st</sup> defence witness and the appellant.
77. According to the respondent, the person who allowed him to stay on the portion of the suit property was the brother who is the 1<sup>st</sup> defence witness and not the appellant.
78. The respondent informed the court that the brother who is the 1<sup>st</sup> defence witness now lives in an area known as Oldonyati.
79. On the issue of the Land Control Board, the respondent confirmed that he was familiar with that law and further stated that a consent had been procured although it was not presented in court.
80. The respondent informed the court that he had placed a caution of the title of the suit property because he had built a house on a portion of it way before the trial proceedings began.
81. According to the respondent, he would not vacate the portion purchased because it was legally bought and the full purchase price paid.
82. In re-examination, the Respondent informed the court that the appellant was not demanding the balance of the purchase price.
83. According to the respondent, the 1<sup>st</sup> defence witness who is the brother had lawfully given him permission to enter and occupy the portion purchased from the appellant.
84. Consequently therefore, the respondent's occupation was not by use of force or taking advantage of the fact that he is a police officer.



85. The respondent further denied any attempts to influence the case in any manner whatsoever.
86. The defence after the evidence of the respondent closed their case as well.
87. The court then directed parties to file their written submission in support of their cases.
88. The appellant complied by filing their submission although not dated and the respondent filed their submissions dated 22<sup>nd</sup> February 2019.
89. The judgement was then pronounced on the 3<sup>rd</sup> of October 2019.
90. The court upon considering the pleadings filed herein by the parties, the oral evidence adduced at the trial proceedings and the documentary evidence produced, it is of the opinion that the main issues for determination at the trial court were as follows; -

Issue No. A- Was the Agreement for sale dated 22/11/1995 Binding between the Appellant And The Purchaser Konchellah Ole Muneria?

Issue No. B – If the Agreement for sale dated 22/11/1995 Was Binding, is the Suit filed on the 20<sup>th</sup> of August 2009 To Recover The Portion Sold Lawful?

Issue No.C- In The Event the Suit Filed on the 20<sup>th</sup> of August 2009 Is Lawful, is the Appellant Entitled to the Relief's Sought?

Issue No. D - Who Bears the Costs of the Suit & Appeal Herein?

91. The court having identified the above four issues for determination, then the same will now be discussed hereinbelow.

**Issue No. A- Was the Agreement for sale dated 22/11/1995 binding between the appellant and the purchaser Konchellah Ole Muneria?**

92. Referring to the plaint filed in the trial court on the 20<sup>th</sup> of august 2009, the appellant described himself as the legal and registered owner of the suit property measuring approximately 3.7 Hectares thereof.
93. In the statement of defence filed on the 20<sup>th</sup> of february 2015, the respondent admitted that his occupation on the suit property is limited to only a portion of 4 Acres of the suit property which was purchased through an agreement for sale on the 22/11/1995 by his brother Knonchellah Ole Menuria.
94. In the reply to statement of defence dated 6<sup>th</sup> july 2020, the appellant admits to the existence of the said agreement for sale dated 22/11/1995 but claims that the same has been rescinded and did not pass any ownership rights over the portion of 4 acres purchased by one Konchellah Ole Menuria who is a brother to the respondent.
95. According to the respondent's pleadings and the testimony of the defence witnesses, the occupation of 4 acres on the suit property is derived from the ownership acquired by one konchellah ole menuria on the suit property by virtue of the agreement for sale dated 22/11/1995.
96. Section 3(3) of the Law of Contract, Cap 23 Laws of Kenya provides as follows; -

“No suit shall be brought upon a contract for the disposition of an interest in land unless; -

- a. The contract upon which the suit is founded; -
  - i. Is in writing.



- ii. Is signed by all the parties thereto; and
  - b. The signatures of each party signing has been attested by a witness who is present when the contract was signed by such party.
97. The agreement for sale dated 22/11/1995 has actually been produced as defence Exhibit No.1.
  98. The agreement for sale dated 22/11/1995 confirms the vendor to be the appellant and the purchaser to be Konchellah Ole Muneria.
  99. The acreage of the transaction is defined as 3.4 Acres on parcel No. 29 within Entonyo Nkopit area.
  100. The consideration for the transaction was KShs 44,000/- out of which KShs 30,000/- was paid by 20/12/1995.
  101. The agreement for sale dated 22/11/1995 was then duly signed by all parties and witnesses accordingly.
  102. Consequently, applying the provisions of section 3 (3) of the Law of Contract, Cap 23 Laws of Kenya, the court is of the considered opinion that the agreement for sale dated 22/11/1995 was legally binding between the appellant and the purchaser Konchellah Ole Muneria.

**Issue No. B – If the agreement for sale dated 22/11/1995 was binding, is the suit filed on the 20<sup>th</sup> of August 2009 To Recover the portion sold lawful?**

103. Having arrived at the decision that the agreement for sale dated 22/11/1995 was indeed in compliance with the provisions of Section 3 (3) of the Law of Contract Act, Cap 23, then was the Plaintiff filed on the 20<sup>th</sup> of August 2009 lawfully before the trial court?
104. In other words, was the appellant entitled to recover the portion of 4 acres sold to Konchellah Ole Muneria and occupied by the respondent pursuant to the agreement for sale dated 22/11/1995?
105. Section 7 of the *Limitation of Actions Act*, Cap 22 provides as follows; -
 

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
106. During the appellant’s evidence in chief and cross-examination by the respondent’s counsel, the appellant confirmed that the portion which the plaintiff filed on the 20<sup>th</sup> August 2009 is seeking to recover and/or permanently injunct the respondent is the same one that the purchaser and the respondent took possession and occupation after execution of the agreement for sale on 22/11/1995.
107. It is therefore clear that as at the time the appellant was filing the plaintiff on the 20<sup>th</sup> of August 2009 to recover the portion sold in the year 1995, a period of 14 years had already lapsed.
108. The allegation that the defendant encroached the appellant’s suit property in May 2009 completely contradicts the evidence contained in Pages 22, 23 and 24 of the record of appeal which is actually the testimony of the appellant in the trial proceedings.
109. In conclusion therefore, this court does hereby make a finding that the plaintiff filed on the 20<sup>th</sup> of August 2009 is time barred in view of the provisions of section 7 of the *Limitation of Actions Act*, Cap 22.



**Issue No.c- In the event the suit filed on the 20<sup>th</sup> of August 2009 is lawful, is the appellant entitled to the relief's sought?**

110. Unfortunately, it is clear in the mind of the court that the plaint filed on the 20<sup>th</sup> of August 2009 was filed out of time and in contravention of section 7 of the Limitation of Actions Act, Cap 22.
111. Consequently therefore, in the case of Bosire Ongero vs Royal Media Services [2015] eKLR, the court was of the view that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.
112. Similarly, in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 Hon. Justice Nyarangi of the Court of Appeal held as follows

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

113. Indeed, the trial court from the very beginning did not have the jurisdiction to hear and grant any orders based on the plaint filed on the 20<sup>th</sup> August 2009.

**Issue No. C - Who bears the costs of the suit & appeal herein?**

114. Lastly, this court is of the considered view that the costs of the suit as well as this appeal should follow the outcome of the appeal.
115. In this instance, the appellant shall bear the costs of both the suit in the trial court as well as the costs of this appeal.
116. In conclusion therefore, the court hereby makes the following orders as appertains the memorandum of appeal filed on the October 15, 2019; -
1. The memorandum of appeal dated October 13, 2019 be and is hereby dismissed.
  2. The proceedings undertaken in Kilgoris PM ELC CASE No. 50 of 2018 and the subsequent judgement pronounced on the 3<sup>rd</sup> of October 2019 be and are hereby declared null and void for lack of jurisdiction.
  3. The costs of the suit and the present appeal shall be borne by the appellant herein.

**DATED, SIGNED & DELIVERED Virtually in KILGORIS ELC Court on 16<sup>TH</sup> JANUARY 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: NGENO

ADVOCATES FOR THE APPELLANT: NYASIMI

ADVOCATES FOR THE RESPONDENTS: WAFULA HOLDING

BRIEF FOR OCHWAL

