Njoroge v Njoroge & 2 others (Environment and Land Appeal 14 of 2021) [2023] KEELC 17806 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 17806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 14 OF 2021

YM ANGIMA, J

FEBRUARY 23, 2023

BETWEEN

SAMUEL NDIRANGU NJOROGE ..... APPELLANT

AND

MOHAMMED KARANJA NJOROGE ..... 1ST RESPONDENT

JOYCE MUTHONI NJOROGE ..... 2ND RESPONDENT

JOHN MUGO KANDIRI ..... 3RD RESPONDENT

(An appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 18.08.2021 in Nyahururu CM ELC No. 163 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated and delivered on 18.08.2021 in Nyahururu CM ELC No. 163 of 2018 – Mohammed Karanja Njoroge –vs- Samuel Ndirangu Njoroge & 2 Others. By the said judgment the trial court allowed the 1st Respondent's suit for a permanent injunction restraining the Appellant and the 2nd Respondent from disposing of, alienating or interfering in any manner with the 1st Respondent's 5 acres of land in Parcel No. 9195 Sabugo Settlement Scheme. The 1st Respondent was also awarded costs of the suit.

B. Background

2. The record shows that by a plaint dated 28.06.2011 the 1st Respondent sued the Appellant and the 2nd Respondent seeking the following reliefs against them:

    a. A permanent injunction restraining the defendants by themselves, their agents and/or assignees from disposing, constructing, alienating and/or interfering in any manner whatsoever with the plaintiff's five acres of land parcel No. 9195 Sabugo Settlement Scheme.

    b. In the alternative, the defendant jointly and severally be evicted from the five acres on which the second defendant's house is built.

    c. Costs of this suit.

    d. Interest on (b) above at the court's rates.

3. The 1st Respondent pleaded that he and the Appellant were beneficiaries of the estate of the late Peter Njoroge Karanja (the deceased) and that he was entitled to 115 acres out of LR. No. 9195 Sabugo Settlement Scheme whereas the 2nd Respondent was entitled to 190 acres as per the certificate of confirmation of grant issued in Nakuru High Court Succession Cause No. 296 of 1989 (the Succession Cause). He further pleaded that during subdivision of the said land it was found that the 2nd Respondent's homestead fell within his entitlement and that in order to avoid her eviction, they agreed to have her retain the 5 acres comprised in her homestead in exchange for another 5 acres within the portion of 190 acres meant for her.

4. It was the 1st Respondent's case that the consent of the relevant Land Control Board was obtained for the exchange but the Appellant and the 2nd Respondent had encroached upon his portion of 5 acres with a view to defeating his interest therein.

5. The Appellant and the 2nd Respondent filed separate defences denying liability for the 1st Respondent's claim. The Appellant pleaded that the said exchange was null and void since the 2nd Respondent was holding the land the subject of the exchange in trust for her children. The Appellant further pleaded that the subject portion of 5 acres was, in fact, meant for him since he had already settled thereon and developed it extensively. The 2nd Respondent pleaded that she was holding 190 acres out of LR. No. 9195 in trust for her 14 children. She denied any exchange of 5 acres as pleaded by the 1st Respondent and stated that the portion of 5 acres was neither sub-divided nor specifically identified on the ground.

C. The Decision of the Trial Court

6. The record shows that upon a full hearing of the suit, the trial court entered judgment for the 1st Respondent by granting a permanent injunction sought on 18.08.2021 with respect to the 5 acres the subject of the exchange. In the event, the trial court did not grant an order for the eviction of the 2nd Respondent from the location on which she had already settled. The trial court found that the land exchange was legally and procedurally executed and that the 1st Respondent was entitled to be protected by law from the persons who were interfering with his rights over the 5 acres the subject of the dispute. It was the trial court's opinion that if the 2nd Respondent was guilty of breach of trust then the Appellant should have taken legal action against her including seeking her removal as an administrator.

D. The Grounds of Appeal

7. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 02.09.2021 raising the following 8 grounds of appeal:

    a. That the learned magistrate erred in law and in fact in finding that the 1st Respondent is entitled to be protected by the law from the Appellant and the 2nd Respondent as the legal owner of the 5 acres of land the subject matter of the suit.

    b. That the learned trial magistrate erred in law and in fact in finding that the 1st Respondent had legally and lawfully acquired a portion of 5 acres of land the subject matter of the suit by way of exchange from the 2nd Respondent.

    c. That the learned trial magistrate erred in law and in fact in failing to find that the 2nd Respondent had no capacity and acted in breach of trust while agreeing to transfer a portion of 5 acres of land which she was holding in trust for the Appellant and 13 others to the 1st Respondent and that the Appellant was not consulted and did not consent to the transfer.

    d. That the learned trial magistrate erred in law and in fact in failing to find that there was no written agreement for the exchange of the 5 acres of land between the 1st and 2nd Respondents and the exchange was thus null and void.

    e. That the learned trial magistrate erred in law and in fact in failing to find that the sale transaction between the 1st and 3rd Respondents for sale of the 5 acres of land the subject matter of the suit was illegal, null and void.

    f. That the learned trial magistrate erred in law and in fact in failing to find that there was no evidence on record to prove that the 2nd Respondent's residential house fell on the portion to be inherited by the 1st Respondent thus necessitating the exchange agreement.

    g. That the learned trial magistrate erred in law and in fact in failing to find that the estate of Peter Njoroge Karanja was yet to be distributed, the Appellant was in occupation of the 5 acres the subject matter of the suit and that he stood to be evicted.

    h. That the learned trial magistrate erred in law and in fact in allowing the 1st Respondent's suit, granting a permanent injunction and for disregarding the pleadings and written submissions by the Appellant while deciding the suit.

8. As a result, the Appellant prayed for the appeal to be allowed and for the 1st Respondent's suit before the trial court to be dismissed with costs. He also prayed that the costs of the appeal be awarded to him.

E. Directions on Submissions

9. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 02.12.2022 whereas the 1st and 3rd Respondents filed theirs on 31.01.2023. However, the 2nd Respondent's submissions were not on record by the time of preparation of the judgment.

F. The Issues for Determination

10. Although the Appellant raised 8 grounds of appeal in his memorandum of appeal, the court is of the opinion that resolution of the following two issues shall effectively determine the appeal:

    a. Whether the trial court erred in law and in fact in allowing the 1st Respondent's suit.

    b. Who shall bear costs of the appeal.

G. The Applicable Legal Principles

11. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at p.126 as follows:

> " ...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

13. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on

> conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

H. Analysis and Determination

a. Whether the trial court erred in law and in fact in allowing the 1st Respondent's suit

14. The court has considered the material and submissions on record. It is evident that the Appellant and the 1st Respondent are step brothers by reason of being children of the late Peter Njoroge Karanja (the deceased). The 2nd Respondent is the mother of the Appellant whereas the 3rd Respondent was a buyer of the disputed portion of 5 acres who was joined as an Interested Party before the trial court.

15. The Appellant and the 1st and the 2nd Respondents were beneficiaries of the estate of the deceased as per the certificate of confirmation grant dated 04.03.2005. According to the certificate, the Appellant was to get 95 acres out of L.R. No.9195; the 1st Respondent was to get 115 acres out of L.R. No. 9195 whereas the 2nd Respondent was to hold 190 acres out of L.R. No. 9195 in trust for herself and her 14 children.

16. It is evident from the record that the distribution of Parcel 9195 among the three has not yet been finalized. However, it would appear that when the parties attempted to do so, it was found that the 2nd Respondent's homestead fell into the portion of 115 acres meant for the 1st Respondent. In order to avert the demolition of any of the 2nd Respondent's structures, the 1st and 2nd Respondents agreed to conduct an exchange of 5 acres, that is, the 2nd Respondent was given the 5 acres where her compound stood in exchange for the 1st Respondent getting 5 acres from her entitlement.

17. The material on record shows that the rest of the 2nd Respondent's 13 children had no objection to the exchange save for the Appellant who was claiming the 5 acres the subject of the exchange as his own. He contended that he had already developed that portion of land by planting trees and building structures and that he once operated a nursery school thereon. When the 2nd Respondent testified before the trial court, she stated that the only person who was blocking the process was the Appellant since the other 13 children were in agreement with her.

18. The gravamen of the Appellant's defence before the trial court was that the exchange was illegal and void because the 2nd Respondent was merely a trustee who had no legal capacity to undertake the exchange without his consent. In fact, he accused the 2nd Respondent of breach of trust in undertaking the exchange.

19. Before dealing with the said issue of the legal capacity of the 2nd Respondent to undertake the exchange, the court would like to dispose of an issue which appears to have been sneaked into the appeal by the Appellant for it was not pleaded in his defence or that of the 2nd Respondent before the trial court.

20. The Appellant contended in his memorandum of appeal and written submissions that the exchange transaction was illegal, null and void because it was not supported by a written agreement as required under Section 3(3) of the *Law of Contract Act* (Cap.23). The court has noted that the Appellant initially filed a joint statement of defence with the 2nd Respondent dated 26.07.2011 through the firm

of Gakuhi Chege & Co. Advocates. He did not raise that issue in his defence. He later on filed a separate statement of defence dated 27.11.2020 through the firm of Waichungo Martin & Co. Advocates but again he did not raise the issue of the alleged contravention of the *Law of Contract Act* as required under Order 2 rule 4(1) of the *Civil Procedure Rules*. The said rule stipulates that:

> A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality
>
> a. Which he alleges makes any claim or defence of the opposite party not maintainable.
>
> b. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> c. which raises issues of fact not arising out of the preceding pleading.

21. The court is thus of the opinion that the issue of the alleged contravention of the *Law of Contract Act* not having been pleaded by the Appellant could not be the subject of adjudication either before the trial court or before this court. It has been held times without number that parties are bound by their pleadings and that cases should be heard and determined on the basis of the pleadings as filed by the parties. See *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR.

22. Turning to the issue trust, it was the Appellant's submission that the 2nd Respondent was merely holding the disputed property as a trustee on behalf of her 14 children. The Appellant did not point out that she was holding the land in trust for herself in addition to the 14 children because her interest was recognized in the certificate of confirmation of grant. It was not contended that her own share in Parcel 9195 would be less than the 5 acres the subject of the exchange. The Appellant further submitted that the 2nd Respondent was in breach of trust by dealing with trust property and wasting the same. He cited the cases of *Stephens & 6 Others v Stephens & Another* [1987] eKLR, *F.W.G. v S.M.K. & 2 Others* [2012] eKLR, and *in Re – Estate of Samuel Wambugu Ngunyi (deceased)* [2015] eKLR in support of his submission.

23. The court has perused the said authorities cited by the Appellant. In the Stephen's Case, the 1st Respondent who was the administrator of the estate of the deceased and who was holding the suit property on behalf of some minors decided to dishonestly grab the trust property by causing it to be registered in his name and that of the 2nd Respondent. The Court of Appeal had no difficulty in holding that the 1st Respondent was in breach of his duty as a trustee by converting the property to his own use and that of the 2nd Respondent. The court held, inter alia, that:

> "...on the facts, the 1st Respondent did not only fail to do his duty of accounting to the beneficiaries and yielding up to them such part of the estate as they may be beneficially entitled to, but he wrongly converted the only substantial property of the estate to his own name and that of a confederate. In these circumstances, I should have thought that judgment in favour of the Appellants for the relief they prayed was a matter of course. They were entitled ex debito justitiae to the reliefs they sought on the plaint."

24. In the case of *F.W.G. v S.M.K. & 2 Others* the 3rd Respondent who was holding trust property on behalf of some minors fraudulently transferred ½ share of the suit property to himself and his wife to the detriment of the beneficiaries of the estate of the deceased. The High Court had no difficulty in nullifying the fraudulent transaction.

25. In the case of *Re – Estate of Samuel Wambugu Ngunyi* the beneficiaries of the estate had applied for the administrators of the estate to render an account in respect of the assets which were under their charge and those which had already been sold. They also sought termination of the trust so that each beneficiary could have his share of assets. The High Court, in ordering the administrators to render accounts held that:

> " Ideally, where assets are held in trust for minors, they are not to be disposed of without leave of the court. Where the beneficiaries are the age, it is prudent to obtain their written consent before any action, which is adverse to the interests of the beneficiaries, is taken on the assets."

26. It is thus clear that the circumstances of the first two cases are clearly distinguishable from those of the instant appeal. There is no land grab by the 2nd Respondent in the instant matter. She has not failed to account to the beneficiaries of the trust. In fact, there is evidence on record to demonstrate that 13 out of 14 beneficiaries of the 190 acres out of Parcel 9195 agreed to the impugned exchange. It is only the Appellant who objected on account of some domestic differences he had with the 2nd Respondent.

27. There is no evidence on record to demonstrate that the 2nd Respondent's impugned action was adverse or detrimental to the beneficiaries of the 190 acres. What happened was not an outright sale of land but merely an exchange. The 2nd Respondent gave out 5 acres and she received another 5 acres in return. There was no loss to the beneficiaries since the acreage of 190 acres remained intact. And there was a good reason for the exchange according to the evidence on record. The 2nd Respondent testified before the trial court that her homestead and compound fell within the portion of 115 acres belonging to the 1st Respondent hence if she had not sought the exchange she would have had to demolish her houses and rebuild them within the portion of 190 acres meant for her and her 14 children.

28. The court is far from satisfied that the 2nd Respondent was guilty of breach of trust or that she failed in her duty of protecting and preserving the trust property under her charge. It would have constituted wastage of trust property to allow demolition of a permanent house and other facilities and rebuild them elsewhere at great expense just to satisfy the ego of one beneficiary out of 14. The court is of the opinion that the action taken by the 2nd Respondent was prudent, reasonable and in the best interest of the beneficiaries of the trust.

29. The court is not satisfied that the action the 2nd Respondent took was adverse in any sense of the word and that it was detrimental to the trust. It was not even detrimental to the Appellant because there was no evidence to show that his entitlement in the portion of 190 acres had diminished in any way. There was no credible evidence on record to demonstrate that the Appellant had extensively developed the portion of 5 acres the subject of the exchange. The evidence on record showed that there were no developments thereon save for a small timber structure measuring about 10ft by 10ft. The evidence on record further showed that there was no nursery school on the property as claimed by the Appellant.

30. The court is therefore satisfied from the material on record that the trial court did not err in law in finding and holding that the 1st Respondent had proved his claim to the required standard. The trial court was also right in holding that the 2nd Respondent was entitled to undertake the exchange and that due process was followed in the exchange. The findings of the trial court were well supported by the evidence on record hence there is no reason to disturb the judgment of the trial court.

b. Who shall bear costs of the appeal

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21).

A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should not be awarded costs of the appeal. Accordingly, the 1st and 3rd Respondents shall be awarded costs of the appeal. However, the 2nd Respondent shall not be awarded any costs since she did not file any submissions in the appeal.

I. Conclusion and Disposal Order

32. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. Consequently, the court makes the following orders for disposal thereof:

    a. The appeal be and is hereby dismissed.

    b. The judgment of the trial court dated 18.08.2021 in Nyahururu CM ELC No. 173 of 2018 – Mohammed Karanja Njoroge v Samuel Ndirangu Njoroge & 2 Others is hereby affirmed.

    c. The 1st and 3rd Respondents are hereby awarded costs of the appeal to be borne by the Appellant.

    It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 23RD DAY OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mathea for the Appellant

N/A for the 1st Respondent

Ms. Ndegwa for the 2nd Respondent

N/A for the 3rd Respondent

C/A - Carol

.....

Y. M. ANGIMA

JUDGE