



**Kinyanjui & 4 others v JNN & another (Environment & Land Case
E020 of 2022) [2023] KEELC 16233 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E020 OF 2022
BM EBOSO, J
FEBRUARY 16, 2023**

BETWEEN

**MICHAEL KINYANJUI 1ST APPELLANT
ROSEMARY WAMAITHA 2ND APPELLANT
HENRY NGUGI 3RD APPELLANT
PETER THIONGO 4TH APPELLANT
JOSEPH NJUGUNA 5TH APPELLANT**

AND

**JNN 1ST RESPONDENT
MWN (A MINOR SUING THROUGH HER FATHER AND NEXT FRIEND
JNN) 2ND RESPONDENT**

*(Being an Appeal against the Judgment of Hon J. A Agonda (PM) delivered in the Senior
Principal Magistrate Court at Ruiru on 1/3/2022 in Ruiru MCEL Case No E10 of 2020))*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon J. A Agonda (PM) on 1/3/2022 in Ruiru SPMC Environment & Land Case No E10 of 2020. The five appellants were defendants in the said suit. The two respondents were the plaintiffs in the suit. The two respondents are father and daughter. The 1st appellant is a brother to the 1st respondent and a husband to the 2nd appellant. The 3rd, 4th and 5th appellants are sons of the 1st and 2nd appellants, hence nephews of the 1st respondent and cousins of the 2nd respondent. The dispute in the trial court revolved around the question of ownership and occupancy of land parcel number Ruiru/Mugutha Block x/xxxx (hereinafter referred



to as the “suit property”]. I will outline a brief background to the appeal before I dispose the key issues that fall for determination in the appeal. The 1st appellant and the 1st respondent are brothers. For convenience purpose, I will refer to them simply as “the two siblings.”

2. Vide a plaint dated 26/11/2020, the respondents sought the following reliefs from the trial court: (i) a declaration that they were the legal owners of the suit property; (ii) a permanent injunction restraining the appellants against developing, destroying structure on, leasing or dealing with the suit property; (iii) an eviction order against the appellants; and (v) general damages for trespass. The respondents contended that the 1st respondent purchased the suit property from one Peter K Kiragu in 2001. In the year 2002, the 1st respondent allowed the 1st appellant to reside on the suit property to prevent dealings on the land by fraudulent brokers. In 2019, the 1st respondent wanted to develop the land and he decided to inform the 1st appellant to vacate the land together with his family. Despite initially asking for more time to vacate the land, the 1st appellant changed his mind and decided that they would not vacate the land. The 1st respondent contended that he reported the dispute to the Area Chief but he was dissatisfied with the decision of the Area Chief to grant the 1st appellant 5 years within which to vacate the suit property. At that point, he sought redress in the trial court.
3. The appellants filed a defence and a counterclaim dated 28/12/2020. Their case was that the suit property was family land gifted to the late mother of the two siblings by their brother –in-law, one John Mburu [PW3] [hereinafter referred to as “John”] as dowry for their sister, Julia Wambui [PW2] [hereinafter referred to simply as “Julia”]. They added that in the year 2003, the 1st respondent and Julia advised the 1st, 2nd and 3rd appellants to relocate from the squatters camp where they were living to go and reside on the suit property which they knew was family land gifted to the two siblings’ mother by John Mburu. They lived on the suit property and carried developments thereon knowing it to be family land. When the 1st respondent’s first wife died living the 2nd respondent as a toddler, they took the 2nd respondent and lived with her in their residence on the suit property. When the 1st respondent’s second wife died, they similarly took in the 1st respondent’s other daughter, Hope Wamaitha, who was 3 years old, and lived with her in their residence on the suit property.
4. The appellants contended that in 2016, they oversaw the construction of a house for the two siblings’ mother [hereinafter referred to as “the family matriarch”]. They added that when the family matriarch died in 2020, she was buried on the suit property. It was their case that the registration of the respondents as proprietors of the suit property in 2019 was fraudulent, contending that: (i) the registration was effected without execution of requisite conveyance documents by the original owner; (ii) the registration was procured without the consent of the land control board; and (iii) that the land was registered in the name of a non-existent person.
5. By way of counterclaim, the appellants contended that each and every one of them had lived on the suit property peacefully and uninterrupted from the year 2003. It was their case that they had a beneficial interest in the suit property. They prayed for: (i) an order of adverse possession; (ii) in the alternative, a declaration that they had acquired a beneficial interest in the suit property; and (iii) a permanent injunction restraining the respondents against evicting them, harassing them, demolishing their houses, blocking their gates or interfering with their cultivation activities.
6. Upon conclusion of trial, and upon considering the parties’ evidence and submissions, the trial court rendered the impugned Judgment in which it found that the respondents had proved their case against the appellants and granted the respondents the reliefs sought in the plaint. The trial court dismissed the appellants’ counterclaim for lack of merit.



Appeal

7. Aggrieved by the Judgment of the trial court, the appellants brought this appeal, advancing the following 18 verbatim grounds of appeal:
 1. The Learned Trial Magistrate erred in law and fact in making a decision purely relying on a single document that is an agreement from sale of the suit property without analyzing the entire evidence of the appellants thereby arising at a wrong position [sic].
 2. The Learned Principal Magistrate erred in law and fact in finding that the plaintiffs appeared before court the lawful owners of the suit property LR Ruiru/Mugutha Block x/xxxx without enquiring about how the appellants developed the property.
 3. The Learned Principal Magistrate erred in law and fact in dismissing the appellants' counterclaim and placing no value to the appellants' evidence.
 4. The Learned Principal Magistrate did not hear the testimony of the 3rd appellant Henry Ngugi which immensely prejudiced the third appellant and his family's proprietary interests.
 5. The Learned Principal Magistrate erred in law and fact in accepting the evidence of Plaintiff No 1 (PW1) when the court heard that the appellants were the siblings of the first plaintiff and they were given the suit property belonging to the 1st and 2nd respondents to build houses for residential purposes which the company Nyakinyua Investments wound up and their houses were demolished which was not even proved by way of winding up course.
 6. The Learned Principal Magistrate erred in law and fact in not directing that any witness from Nyakinyua Investments be summoned to testify and give credence to the evidence/testimony of the witnesses.
 7. The Learned Principal Magistrate erred in law and fact in placing reliance on a document being a sale agreement written in the Kikuyu language where there was no translation into English or Kiswahili languages and therefore misunderstood the contents.
 8. The Learned Principal Magistrate erred in law and fact in not considering that the 2nd respondent herein (a minor) did not appear in the purported sale agreement.
 9. The Learned Principal Magistrate did not consider that the first respondent Mary Wamaitha according to PW1 was born in the year 2003 and she could not have owned the suit property in the year 2001 before she was born as per the sale agreement dated 19/5/2001 (2 years before she was born)
 10. The Learned Principal Magistrate erred in law and fact in disregarding that if the plaintiff was the absolute owner of Ruiru/Mugutha Block 1/3887 he could not be believed that he filed the case so that he could develop it and he was free to develop if it had no third party claims.



11. The Learned Principal Magistrate erred in law and fact in not finding that the respondents' evidence was fabricated and contained false holds particularly the plaintiff stated falsely that the 3rd defendant was his elder brother and thereby the court erroneously arrived at a wrong decision.
 12. The Learned Principal Magistrate failed to analyse the evidence presented by the plaintiffs and she did not address the real issues and further never noticed as per her Judgment that the 3rd defendant never testified and was not cross examined nor his witness statement adopted yet the name of the 3rd defendant features throughout the judgement.
 13. The Learned Principal Magistrate in her judgment refers to the 3rd defendant mother as late (deceased) when she is still alive.
 14. The Learned Principal Magistrate dismissed the defendant's counter-claim stating that the 3rd defendant's counter claim had no basis whereas the 3rd defendant had not counterclaimed as stated.
 15. The Learned Principal Magistrate does not recognize the terms she kept exchanging as "grandmother and mother" of the 3rd defendant and thereby arrived at a decision that was devoid of merit with grave errors.
 16. The learned trial court stated in the Judgment that the dispute was between the plaintiff and the 3rd defendant which court framed issues and determination whether the 3rd defendant had acquired a legal title to the suit land thereby arriving at a grave wrong decision.
 17. The Learned Principal Magistrate failed to make enquiries sufficient to dispel with the issue that the suit land was family land and whoever obtained a title should have been presumed a trustee for the defendants and also his trustee.
 18. The Learned Principal Magistrate erred in law and fact in arriving at a wrong decision against all the available evidence.
8. The above grounds of appeal have been reproduced verbatim as presented to this court. The apparent errors in them are not errors of this court. This court has reproduced the grounds verbatim to avoid giving them interpretation that may be contrary to what the appellants' parties intended.

Submissions

9. The appeal was canvassed through written submissions dated 23/5/2022, filed by M/s P K Njoroge & Co Advocates. In what counsel for the appellants described as "Opening Address", counsel stated that this court was expected to determine whether the registrations of the 1st and 2nd respondents as proprietors of the suit property encompassed an implied customary trust in favour of the appellants and their children. Counsel subsequently addressed the court on 13 points under the caption "Pre-supposed Merits Of The Appeal Before The Honourable Court Based On The Memorandum Of Appeal". I will not rehash the 13 points. I will instead consider each of them in my brief analysis that will follow.
10. On their part, the respondents filed written submissions dated 10/10/2022 through M/s Lokitano & Company Advocates. They identified the following as the two key issues that fall for determination in the appeal: (i) Whether the Learned Magistrate erred in finding that the respondents (the plaintiffs)



were the legitimate owners of the suit property; and (ii) Whether the Learned Magistrate erred in dismissing the defendant's counterclaim. It was the position of counsel that the trial court did not error in its findings on the above two issues.

11. Counsel for the respondents pointed out that counsel for the appellants had in their written submissions canvassed the issue of customary trust yet the issue was neither pleaded nor canvassed in the trial court. Counsel added that the issue of customary trust was not one of the issues that were determined by the trial court and could not fall for canvassing nor determination in this appeal.

Analysis & Determination

12. I have perused and considered the original record of the trial court; the record of appeal in this appeal, including the 18 grounds of appeal; and the parties' respective submissions in this appeal. I have also considered the relevant legal frameworks and jurisprudence. The appellants itemized 18 grounds of appeal. In their subsequent written submissions, their counsel itemized 13 points titled Pre-supposed Merits Of The Appeal Before The Honourable Court Based On The Memorandum Of Appeal. Counsel for the appellants did not itemize specific issues to be determined. Taking into account the foregoing, it is my view that the broad issue to be determined in this appeal is whether the trial court committed any of the errors alluded to in the appellants' submissions that would warrant the orders sought in this appeal. The above broad issue will be analyzed and disposed in relation to each of the 13 points that the appellants raised in their written submissions. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
13. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
14. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:

“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.”
15. The appellants' case in the trial court was that the suit property was a family land gifted to the parents of the two siblings [the 1st appellant and the 1st respondent] by the duo's brother-in-law, John Mburu, in lieu of dowry for the duo's sister, Julia Wambui. They contended that the registration of the respondents as proprietors of the suit property was procured fraudulently. It was their case that they had a beneficial interest in the suit property on the above account. By way of counterclaim, they contended that they had lived on the suit property “peacefully and uninterrupted for 17 years” from the time the respondents allegedly acquired interest in the land. Their first relief which they sought



from the trial court through the counterclaim was an order of adverse possession. Their second relief was an alternative to the first prayer. It read as follows:

“In the alternative and without prejudice to the foregoing, the property LR. Ruiru/Mugutha BlocK x/xxxx having been gifted to the patriarchs of the parties herein by their son-in-law the court to declare that the plaintiffs herein have beneficial interest.”

16. The third prayer was a plea for a permanent injunction. The last prayer was a plea for costs of the suit.
17. What position have the appellants taken in this appeal with regard to the plea for orders of adverse possession? They have abandoned their claim for orders of adverse possession. At paragraph (f) of their written submissions, the appellants’ counsel submitted thus:

“Your Lordship although the appellants have lived on the suit property with their respective families for close to 20 years, a claim for adverse possession we submit may not have applied since the land as alleged is family property held in trust notwithstanding the person appearing in the land registry documents is a relative.”
18. It is clear from the appellants’ above submissions that they have abandoned their claim for title under the doctrine of adverse possession. Yet the plea for orders of adverse possession was their primary prayer in the trial court.
19. It is also clear from the appellants’ defence and counterclaim that they did not expressly plead and canvass the claim of customary trust in relation to the title held by the respondents. They contended that the title had been procured fraudulently over what they termed as land that belonged to the two siblings’ parents. To the extent that the issue of customary trust has been introduced as a new issue in this appeal, this court agrees with the respondents that it would be improper to consider it as an issue for determination when it was neither pleaded nor canvassed in the trial court. I now turn to the issues that were canvassed by counsel for the appellants under paragraphs (a) to (m) of their written submissions.
20. Counsel for the appellants contended that the trial court failed to appreciate and analyze the evidence of the appellants who testified before it. Counsel added that the trial court failed to “give any evidential value” to the testimony of the appellants’ witnesses. I have looked at the Judgment of the trial court. The trial magistrate summarized the evidence of each of the witnesses who testified. She thereafter framed issues and analyzed the evidence in relation to the framed issues. The analysis is elaborate. I do not, in the circumstances, see a proper basis for the above contention by the appellants.
21. Counsel faulted the trial court for not summoning witnesses suo motto to prove and disapprove the claims that had been presented by the parties. Kenya’s civil justice system is an adversarial one. Our courts serve as impartial umpires. It was the duty of the party alleging certain facts to present witnesses to prove those allegations. The duty of the court in this regard was to facilitate the parties through issuance of witness summonses. The court record does not bear any evidence of abdication of the duty of an impartial umpire by the trial court. If certain witnesses were not called, leading to collapse of the appellants’ case, it is the appellants who failed in their duty to present witnesses and lead evidence.
22. The appellants’ counsel faulted the trial court for the fact that the 3rd appellant did not give evidence and that there was no indication why he did not give evidence. The trial court record shows that all the appellants were represented by M/s E. W Kamuyu & Co Advocates. Throughout the trial, they were represented by counsel. It is the appellants and their counsel who decided which witnesses to present to the court. There is no evidence to suggest that the 3rd appellant offered his evidence to the court



- and was turned away. There is therefore no proper basis for faulting the trial court for the appellants' own decision not to present evidence by the 3rd appellant [3rd defendant].
23. The appellants further faulted the trial court for the 1st respondent's assertion that Nyakinyua Investments Company went bankrupt. This was a factual assertion which the appellants had the opportunity to controvert and counter through evidence. They did not do so. Secondly, there is nothing to suggest that the trial court's finding was solely based on the above assertion by the 1st respondent.
 24. Counsel for the appellants faulted the trial court for not upholding the appellants' defence of fraud. The duty to prove fraud was that of the appellants. They did not. They had no evidence to suggest that the suit property was purchased by Mr John Mburu as a gift to the two siblings' parents. Mr John Mburu testified to the effect that he did not purchase the suit property for the two siblings' parents as alleged by the appellants.
 25. On adverse possession, I have observed in one of the preceding paragraphs that at paragraph (f) of the appellants' written submissions, the appellants abandoned their claim for title under the doctrine of adverse possession.
 26. On the appellants' submissions raising the issue of customary trust, I have observed that the appellant had the opportunity to plead and canvass a claim anchored on customary trust. They neither pleaded nor canvassed it. They cannot be allowed to canvass it in this appeal. Even if this court were to consider the appellant's claim on the basis of customary trust, it is clear from the evidence of John and Julia that John did not purchase the suit property for the two siblings' parents as alleged by the appellants. Their contention that the suit property is family land purchased for the two siblings' parents by John has been demonstrated to be incorrect. John [the alleged benefactor] denied purchasing the suit property for the two siblings' parents.
 27. Learned counsel for the appellants faulted the trial court for referring to the title document relating to the suit property as "certificate of title" instead of "title deed". While the court agrees that the title document presented by the respondents as evidence of ownership of the suit property was a title deed, reference to the title document as "certificate of title" instead of "title deed" was a minor error that did not substantially change the weight of the rival evidence that was before the court and the ultimate findings of the court on the key issues that fell for determination in the trial court.
 28. The appellants further faulted the trial court for upholding the respondents' title on the basis of Section 25 (1) of the *Land Registration Act* and contended that the title was held subject to a customary trust in favour of the appellants. I have pronounced myself on the fact that the issue of customary trust was neither pleaded nor canvassed in the trial court. It cannot be canvassed in this appeal.
 29. Counsel for the appellants faulted the trial court for not appreciating that the 2nd respondent was born in 2003 and could not have been registered as proprietor of the suit property in 2001. There was no evidence of registration of the 2nd respondent as proprietor of the suit property in 2001. The evidence before the trial court was that the 1st appellant purchased the suit property in 2001 and caused it to be registered in the joint names of himself and his daughter in 2019.
 30. The learned counsel for the appellant submitted that the trial court ignored the evidence of PW1 to the effect that the 3rd appellant was his elder brother, contending that PW1 had lied to the court. Counsel did not point out where exactly the "lie" is contained in the record of appeal or in the record of the trial court. On my part, I have looked at the witness statement of PW1 together with his oral evidence. I have not been able to identify the said "lie".



31. Counsel faulted the trial magistrate for referring to the mother of the 3rd appellant as deceased yet she is still alive. Further, counsel faulted the trial court for interchanging the words “mother” and “grandmother” terming this as “a serious contradiction in law”. The view the court takes on these is that these are minor discrepancies which did not affect the totality of the evidence and the findings of the court on the substantive issues in the suit. The same position applies to the trial court’s reference to the 1st appellant as the “3rd defendant” instead of “1st defendant”.
32. I have said enough to demonstrate that the respondents proved their primary claim and the appellants failed to prove their counterclaim in the trial court. There is therefore no proper basis for faulting the trial court for allowing the respondents’ suit and rejecting the appellants’ defence and counterclaim. The result is that I do not find merit in this appeal.

Finding

33. My finding on the broad issue in this appeal is that given the pleadings and evidence that was presented to the trial court, the trial court did not commit any substantive error that would warrant the grant of the reliefs that are sought by the appellants in this appeal.

Disposal Order

34. Consequently, I do not find merit in this appeal. The appeal is dismissed. Because the appellants and the respondents are close family members and there is need to promote reconciliation in the family, parties will bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

Mr Mwangi holding brief for Mr P. K Njoroge for the Appellants

Mr Lokitano for the Respondents

Court Assistant: Hinga

