



**Bundi v Angaine & 2 others (Environment and Land Appeal
E060 of 2021) [2023] KEELC 725 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E060 OF 2021
CK YANO, J
FEBRUARY 15, 2023**

BETWEEN

JULIUS BUNDI APPELLANT

AND

MARY NTHIORI ANGAINE 1ST RESPONDENT

ISABELLA MWENDWA 2ND RESPONDENT

COUNTY GOVERNMENT OF MERU 3RD RESPONDENT

JUDGMENT

A. Introduction

1. The proceedings leading to this appeal were commenced by Mary Nthiori Angaine, who is now the 1st respondent, through a plaint dated July 14, 2019 and filed on July 15, 2019 in the chief Magistrate's court at Meru ELC No 77 of 2019. The suit was against Isabella Mwendwa who is now the 2nd respondent, Julius Bundi, who is now the appellant and the County Government of Meru, the 3rd respondent herein. The reliefs sought by the 1st respondent included a declaration that she is the lawful and/or equitable owner of the property known as Plot No BP/MCM/23(17) situate within Meru County, an order directing the 2nd respondent and the appellant to transfer the said property to the 1st respondent, an order directing the 3rd respondent to register the property in favour of the 1st respondent as well as permanent injunction and costs of the suit and interest.
2. According to her plaint, the 1st respondent averred that by dint of an agreement for sale dated February 11, 2005, she purchased the suit property from the appellant and the 2nd respondent who are husband and wife but separated. The 1st respondent is the sister to the 2nd respondent and therefore is sister-in-law to the appellant.



3. The 1st respondent averred that at the time of acquisition of the suit property, the appellant and the 2nd respondent were in a marital union and the property was jointly held by themselves.
4. The 1st respondent averred that she subsequently took possession of the suit property and has been enjoying quiet possession thereof for over 14 years though the same was not transferred in her name owing to the close family ties and mutual trust between the parties, adding that she has been religiously paying attendant rent and rates to the 3rd respondent since the subject property is an allotment from the 3rd respondent.
5. It was the 1st respondent's case that notwithstanding her rights appertaining to the property, the 2nd respondent and the appellant have been scheduling meetings with the 3rd respondent with a view to transferring the property to third parties and/or otherwise alienating the same to defeat the 1st respondent's interest. The 1st respondent was apprehensive that since the 2nd respondent and the appellant were divorced and/or separated, there was real likelihood that her interests in the property will be defeated in the contentious process of division of matrimonial property. The 1st respondent gave an example of attempted alienation of the suit property which was nullified/quashed by the court in Meru ELC case No 19 of 2017 vide an order given on October 31, 2018.
6. To assert her ownership, the 1st respondent sought to rely on the equitable concept of constructive trust and averred that a constructive trust exists over the suit property in her favour by virtue of payment of the full consideration, payment of rates/rents and extensive occupation of the same.
7. The 2nd respondent filed her written statement of defence dated 21/2/2019 and stated in part that she was willing and has always been ready to sign the transfer documents in favour of the 1st respondent, but blamed the appellant for frustrating the transfer. The 2nd respondent gave as example the filing of High civil case No 68 of 2011 filed by the appellant claiming half a share in the said land but which suit was dismissed vide a judgment dated April 8, 2018, and an application made by the appellant to the County Council of Meru to have the suit plot registered in their joint names and those of their children, but the 2nd respondent challenged that decision by filing Judicial review case No 19 of 2017 and which quashed the decision vide a judgment dated October 31, 2018.
8. In his statement of defence dated July 29, 2019, the appellant alleged inter alia, that the suit was filed in collusion between the 1st respondent and the 2nd respondent.
9. The 3rd respondent filed its statement of defence dated September 3, 2019 denying the allegations in the plaint.
10. After considering the pleadings, the evidence and the submissions by parties, the trial magistrate in his judgment delivered on April 29, 2021 identified four issues for determination: Whether DW 1 was a party to the agreement dated February 10, 2005, if the answer was in the affirmative, whether the agreement dated February 10, 2005 became void for failure to complete it within 90 years (sic) as stipulated in the agreement, whether there was collusion between Pw 1 and the 2nd respondent to fraudulently take away from DW 1 his part ownership of suit plot, and whether Pw 1 was deserving of prayers made in the plaint.
11. The trial court in that context determined the first issue in the affirmative, found that the agreement was not vitiated for non completion within 90 days that there was no collusion and concluded that the 1st respondent had proved her case on a balance of probabilities. The court for the reasons proceeded to enter judgment in favour of the 1st respondent as prayed for in the plaint, except that each party was to bear own costs of the suit.



12. Aggrieved by the decision of the learned trial magistrate, the appellant filed this appeal and set out the following 5 grounds of appeal;
 1. That the learned trial magistrate erred in law and fact by failing to find that the suit was without basis as against the appellant in view of the position of the appellant and therefore made an erroneous decision.
 2. That the learned trial magistrate erred in law and fact in failing to consider the appellant's defence and his evidence and therefore erred a wrong finding.
 3. That the trial magistrate erred in law and fact in finding for the respondent in a suit where the facts and evidence did not support her case and therefore entered a wrong finding.
 4. That the trial magistrate's decision was erroneous regard being had to the issues before him and the evidence tendered.
 5. That the learned magistrate's analysis of the evidence was flawed as no independent tribunal properly exercising its mind on the facts of the case would arrive at the conclusion by the court.
13. Consequently, the appellant seeks for the appeal to be allowed with costs of this court and the subordinate court to be awarded to the appellant.
14. The appeal was canvassed by way of written submissions.

B. The Appellant's Submissions

15. The appellant's written submissions are dated and filed on September 29, 2022. Therein, the appellant gave brief facts of the case and submitted that he came to see the agreement dated February 11, 2005 when it was served on him with the plaint dated July 14, 2019. That the appellant made a report at the police station vide OB No 40/25/7/2019 over the said agreement on the basis that it was a forgery.
16. The appellant further submitted that the 2nd respondent had filed a Judicial review application No 19 of 2017 at the High Court of Kenya at Meru seeking to quash the decision of the Municipal Council when the appellant had moved the special town planning works and housing committee to add his children as joint proprietors of the said plot in issue arguing that she had not been consulted by the appellant, and that at no time did she state that she and the appellant had sold the plot to the 1st respondent. That the court agreed with the 2nd respondent and the decision was quashed effectively leaving the appellant and his estranged wife as joint proprietors and removing the children. The appellant pointed out that the 2nd respondent did not mention to court at any given time that the said plot had been bought by the 1st respondent in 2005. The appellant submitted that this buttresses his position that the claim in the trial court was baseless.
17. The appellant submitted that to show that the 1st respondent was lying to court, he did exhibit a letter dated August 1, 2012 by the 1st respondent's advocates to a sale agreement of 2006 and an appropriate rejoinder was put. The appellant argued that he maintained in his evidence that he did not sell the property and that his father in law used it with his permission. He referred to the testimony of the appellant's father in law, one Gerald who, he submitted, stated that he occupied the plot until 2016 when it was sold. That there was a clear contradiction as the plot is alleged to have been sold in 2005.
18. The appellant also referred to the testimony of a witness who is a tenant who stated that she pays rent to the appellant's father in law arguing that this points out to the fact that the suit was made up to deceive the court. It is therefore the appellant's submissions that the trial court erred in law and fact in the manner it analyzed the evidence and reached its decision.



19. The appellant further submitted that the trial court did not appreciate the defence by the appellant, adding that the 1st respondent's suit was without foundation either in law and in fact and that it should have been dismissed. That the 1st respondent could not assert the doctrine of constructive trust where none existed. It is the appellant's submissions that the trial court did not appreciate the evidence and therefore arrived at an erroneous conclusion and urged the court to set aside the judgment of the trial court so that the appellant retains his property. He concluded by stating that the collusion and deceit can be inferred from the evidence of the 1st respondent's witnesses adding that it is apparent that they had planned to wrestle the plot from the appellant thus the case which is without basis.

C. 1st Respondent's Submission

20. The 1st respondent's written submissions are dated September 30, 2022 and filed on November 15, 2022 wherein she submitted that for a suit to be considered without basis and subsequently struck out, it must meet the threshold set out under Order 2, Rule 15 of the *Civil Procedure Rules* which states;

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-;

- a. It discloses no reasonable cause of action or defence in law, or
- b. It is scandalous, frivolous or vexatious, or
- c. It may prejudice or delay the fair trial of the action, or
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

21. It is the 1st respondent's submissions that the suit raised a reasonable cause of action and it was not scandalous, frivolous or vexatious and did not prejudice, embarrass or delay the fair trial, nor was it an abuse process of the court. The 1st respondent relied on the case of *DT Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & another* [1989] eKLR in which the Court of Appeal stated as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of Justice ought not to act in darkness without the full facts of a case before it”

22. The 1st respondent also relied on the case of *Job Kilach vs Nation Media Group Ltd & Others* [2015] eKLR as referred in *Gladys Jepkosgei Boss V Star Publication Limitation* [2021] eKLR and submitted that the plaint dated July 14, 2019 raised triable issues such as whether the appellant and 2nd respondent sold the suit property to the 1st respondent, and whether the 1st respondent should be vested with ownership by dint of the doctrine of constructive trust.

23. The 1st respondent submitted that in the appellant's defence and throughout the trial, the appellant made several accusations of collusion and forgery against the 1st and 2nd respondents but failed to tender any evidence to prove the said accusations. The 1st respondent referred to the principle law that he who alleges must prove and cited the provisions of Section 107 (1) of the *Evidence Act* which states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That the appellant bypassed the opportunity



to call a handwriting expert to speak to the validity of the signature alleged to have been forged, leaving the trial court with no option but to rely on comparison by naked eye of the signatures in the agreement for sale and in the pleadings signed by the appellant. The 1st respondent relied on the case of *Mursal & Another (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021 [2022]KEHC 282 (KLR) in which the Court of Appeal held that-;

“It is (an) established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved”

24. On the alleged report made to Meru Police Station on the alleged forged signature, the 1st respondent submitted that the appellant failed to provide the trial court with a copy of the report indicating the substance of the complaint but merely produced an alleged stamp with an OB number indicated. The 1st respondent cited Section 109 of the *Evidence Act* and relied on the case of *Mbuthia Macharia Vs Annah Mutua & Another* [2017] eKLR, adding that the 1st and 2nd respondents have never been summoned or charged to answer the allegations of forgery.
25. The 1st respondent further submitted that the proceedings of Judicial Review Application in Meru ELC No 19 of 2017 sought to quash the decision of the County Government of Meru to include the names of the children of the appellant and the 2nd respondent as owners of the suit plot without first according the 2nd respondent a fair hearing, which was a breach of her Constitutional right to a fair hearing and not collusion and/or malice as alleged by the appellant.
26. On the issue whether the trial magistrate erred in law and fact in finding for the 1st respondent in the suit, the 1st respondent submitted that she discharged her obligation to prove her case on a balance of probabilities. The 1st respondent further submitted that the trial court did not erroneously capture the issues for determination nor did it erroneously apply the evidence tendered towards reaching its conclusion. It is the 1st respondent’s submissions that the trial court’s analysis of the evidence and eventual judgment was beyond reproach and passed the test of impeccable judicial decisions.
27. In conclusion, the 1st respondent submitted that the appeal is brought in bad faith and is an attempt to frustrate and deny her an opportunity to enjoy the fruits of her judgment, and urged the court to dismiss it.

D. 2nd Respondent’s Submissions

28. The 2nd respondent written submissions are dated November 17, 2022 and filed on November 18, 2022 wherein she has given brief facts of the case which she submitted had basis and that it was properly analyzed by the learned magistrate who also arrived at the correct finding. The 2nd respondent’s submission is that from the evidence adduced by the 1st respondent, she proved her case to the required standard and was able to establish a constructive trust over the suit parcel that not only is she in possession of the suit land through her father and now a tenant by the name Cecilia Nkatha, but also paid the full purchase price. That the appellant on the other hand did not prove the assertions in his defence that the sale agreement was a forgery and that there was collusion between the 1st and 2nd respondents to deprive him of his interest in the suit land.
29. It was submitted that the learned magistrate properly analyzed and considered the case and that this appeal lacks merit and ought to be dismissed with costs to the respondents.



E. 3rd Respondent's Submissions.

30. In its submissions dated November 2, 2022 and filed on November 8, 2022, the 3rd respondent submitted that it was not a party to the sale agreement dated February 11, 2005 that formed the claim of customary trust and that the 3rd respondent acted in accordance with the law and the decision in *Republic V County Government of Meru & another ex-parte Isabela Mwendwa M'angaine* [2018] eKLR where the court declared Isabella Mwendwa and Julius Bundi as joint owners and that any transaction ought to be carried out with their involvement. The 3rd respondent submits that as the head lessor who had issued the confirmation letters to the joint owners, it was within its mandate in calling the meeting stated for July 15, 2019.
31. The 3rd respondent submits that the suit against them ought to have been dismissed. That the presence of the 3rd respondent was not necessary in solving the appeal or the customary trust issues at hand.

F. Analysis and Determination

32. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are-
- i. Whether the suit before the trial court was without any basis.
 - ii. Whether the trial magistrate failed to take into consideration the defence and evidence of the appellant.
 - iii. Whether the decision of the learned trial Magistrate was against the weight of the evidence.

i. Whether the suit was without any basis

33. From the pleadings, it is clear that the 1st respondent's case before the trial court was mainly to determine whether the appellant and the 2nd respondent sold the suit property to the 1st respondent and whether the 1st respondent should be vested with ownership by dint of the doctrine of constructive trust. Order 2 Rule 15 of the Civil Procedure Rules is instructive on whether a suit has a basis or not. In this case, the 1st respondent exhibited a sale agreement dated February 11, 2005 in which she claimed she purchased the suit property from the appellant and the 2nd respondent for a consideration of kshs 450,000/= which the 1st respondent averred she paid in full and subsequently took possession of the suit property and leased to a third party. The 2nd respondent admitted that indeed they sold the suit property to the 1st respondent. Having perused the pleadings in the record of appeal, it is clear to me that the suit is not one that can be said to have no basis. In my view, the 1st respondent's suit raised a reasonable cause of action. It was not scandalous, frivolous or vexatious and cannot therefore be termed as one that had no basis as submitted by the appellant. Looking at the pleadings as filed, it is quite clear that the same raised bona fide triable issues that require interrogation by the court at trial. The first issue for determination is therefore returned in the negative.

ii. Whether the trial court failed to take into consideration the defence and evidence of the appellant

34. The court has carefully perused the judgment delivered by the learned trial magistrate on April 29, 2021. It is clear that the trial court considered the defence filed by the appellant as well as his testimony when he testified as DW 1. The said defence alleged that there was collusion between the 1st respondent



and the 2nd respondent. The trial court further noted that the appellant made accusation of forgery against the 1st and 2nd respondents with regard to the said sale agreement dated February 11, 2005. The trial court clearly stated that he had carefully considered the pleadings and the evidence on record which included the witness statements and affidavits that the court was urged to admit as evidence. The court further looked at the various exhibits that were produced, including the disputed agreement and the purported OB report that was produced by the appellant. With all the above in mind, this is a clear demonstration that the trial magistrate considered the pleadings and evidence of all the parties, including the appellant.

iii. Whether the decision of the learned trial magistrate was against the weight of the evidence

35. As earlier stated, the case before the trial court was centered around the agreement for sale dated February 11, 2005. The 1st respondent's claim was that she purchased the suit property from the appellant and the 2nd respondent and executed the said agreement, paid the full purchase price after which she took possession of the property.
36. As part of her evidence, the 1st respondent produced the said agreement for sale. Further, and in support of the 1st respondent's claim, the 2nd respondent herein admitted the claim as expressed and outlined in the plaint and the same was recorded as an admission by the trial court. Whereas the appellant refuted the said agreement for sale, and claimed that his signature on it was forged, the appellant failed to tender any evidence to prove his averments. This left the trial court to make a comparison between the appellant's undisputed signature appended to his supporting affidavit sworn on July 29, 2019 and the disputed signature in the said agreement. The trial court noted that both signatures were similar and identical in every aspect "even to the naked eye". As rightly observed by the learned trial magistrate, it was incumbent upon the appellant who alleged that the signatures on the agreement was a forgery to bring forth evidence in support of his assertions. However, the appellant did not bring forward any evidence to disprove the fact that the disputed signature was his. It is trite law that he who alleges must prove, and therefore the onus was upon the appellant to disprove the evidence produced by the 1st respondent and which was supported by the 2nd respondent.
37. Having looked at the material on record, it is my considered opinion that the learned trial magistrate correctly addressed his mind to the issues in the case and rightly determined in favour of the 1st respondent. It is my considered view that based on the evidence that was adduced before the trial court, the learned trial magistrate was justified in arriving at the decision he made. The findings and holding by the learned magistrate were well founded and I find no basis to interfere with the same.
38. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondents.
39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF FEBRUARY, 2023

C.K YANO

JUDGE

In the presence of

C.A Kibagendi

Mwirigi Mwiti for 1st respondent

No appearance for appellant



No appearance for 2nd and 3rd respondent

