



**Kamau & another v Ndungu (Environment and Land Appeal
34 of 2022) [2023] KEELC 16734 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 34 OF 2022**

JG KEMEI, J

MARCH 29, 2023

BETWEEN

JOSEPH KAINDO KAMAU 1ST APPELLANT

TABITHA KARINGI KAINDO 2ND APPELLANT

AND

GEORGE KOIMBURI NDUNGU RESPONDENT

JUDGMENT

Introduction and Background of Appeal

1. This judgment has a taste of lament as I have had to bear the burden of deciphering an illegible record of appeal on account of unclear photocopies of pleadings. Although I must credit the Appellant with complying with the provisions of Order 42 rule 13 of the *Civil Procedure Rules*, more diligence as to the orderly flow and legibility of documents would have made the work of this Court lighter. That said I shall proceed to determine the appeal with what has been placed before the Court.
2. Vide a Complaint dated 4/11/2020 filed in the trial Court at Ruiru SPMCC ELC No 131 of 2020 the Respondent (then Plaintiff) sued the defendants (now Appellants) for Orders inter alia that; a permanent injunction do issue against the Appellants from interfering with land known as L.R No Ruiru/Ruiru East Block 2/1336 (hereinafter the suit land); a declaration that the Respondent is entitled to exclusive use of the suit land and an order of specific performance of the sale agreement dated October 29, 2012 requiring the Appellants to transfer the suit land to the Respondent.
3. The Respondent's case was that at all material times he was the bona fide purchaser for value of the suit land measuring approx. 0.400ha having bought it from the administrators (the Appellants) of the estate of Mary Njeri Kamau (Mary) on October 29, 2012. Mary died on the 18/1/2008. That the sale was premised on the promise that the Respondent would be included as a debtor in the estate of the late Mary and the consideration would be used to defray debts and expenses of the estate of



- Mary. However, the sale agreement would not see light of the day as the Appellants were accused of fraudulently failing to include the Respondent as a debtor/beneficiary in the confirmed grant despite the Appellants giving him the original title deed of the suit land as a sign of good faith in fulfilling the transaction. The Appellants averred that with the consent of the Respondents and in contemplation of the transfer of the suit land to him, he proceeded to subdivide the land and sold it to third parties.
4. Denying the Respondent's claim, the Appellants filed a joint Statement of Defence dated November 16, 2020. They contended that that the estate of Mary Njeri Kamau had fully been distributed in accordance with the law and the contract between the Respondent and 1st Appellant was void ab initio as it did not confer any rights on the parties. The Appellants averred that they were not the administrators of the estate of Mary to allow them confer any interests by way of sale as at October 29, 2012. They maintained that indeed they did not lie about the whereabouts of the title to the suit land prompting them to advertise it as lost hence its replacement. Further they accused the Respondent of illegally subdividing the suit land and putting third parties on it resulting in trespass.
 5. Upon hearing the parties and evidence adduced before it, the Trial Court proceeded to pronounce its Judgment on 28/3/2022 in favour of the Respondent by ordering the Appellants to refund Kshs 1,620,000/= being the part payment of the Purchase price to the Respondent with interests and the Respondent to appoint an independent valuer to carry out valuation of the developments on the suit land. Dissatisfied with the said Judgment, the Appellants lodged the instant appeal through the Memorandum of Appeal dated 19/4/2022 on grounds that the Learned Magistrate;
 - a. Misdirected herself on law in so far it relates to contracts void ab initio.
 - b. Misdirected herself in making a finding for developments when no such evidence was tendered in Court.
 - c. Erred in bringing into the suit issues of valuations which are matters between the Plaintiff and third parties.
 - d. Misdirected herself on the issue of costs.
 - e. The judgment is not in tandem with the evidence.
 6. The Appellants urge this Court to set aside the impugned Judgment and dismiss the Respondent's case with costs.
 7. On 9/11/2022 directions were taken and parties agreed to dispose the appeal by way of written submissions.

Written submissions

8. The Appellants filed submissions dated November 10, 2022 through the firm of Waithira Mwangi & Co. Advocates. Three issues were drawn for determination to wit; whether the agreement dated October 29, 2012 is void ab initio; whether the trial Court acted in excess of its jurisdiction by awarding unpleaded reliefs and whether the Court misdirected itself on the issue of costs.
9. On the first issue, it was submitted that the 1st Appellant lacked capacity to enter into a contract as the property did not vest in him nor was he acting as a bona fide agent of the owner. To that end the issue of legality would arise in light of Section 45 *Law of Succession Act* that creates the offence of intermeddling with a deceased person's property thereby vitiating the sale agreement dated October 29, 2012. The trial Court was faulted for finding that the sale agreement was null and void but went ahead to find the parties in breach of the said Agreement.



10. Secondly, the Appellants argued that in ordering valuation of the developments on the suit land, the trial Court acted in excess of its jurisdiction and contrary to the principle that parties are bound by their pleadings.
11. Lastly the Appellants argued that the award of costs was not justified because the Respondent's suit was filed to circumvent the letters of administration issued in Thika Succ. Cause No 733 of 2012 with a view to depriving the beneficiaries of the estate of Mary their interests in the suit land.
12. The law firm of Chege & Mageto Advocates filed submissions dated 6/2/2023 on behalf of the Respondent. Similarly, he drew three issues for determination namely; whether the trial Court Judgement was in excess of judicial discretion; whether this Court should set aside the impugned judgement and who bears the costs of appeal.
13. The Respondent submitted that judicial discretion is an integral ingredient for judicial officers to make decisions guided by principles of law and facts of the case. That the Court was at liberty to draw its opinion and order reliefs pursuant to prayer in their Plaint dated 4/11/2020. It was further submitted that the Court was correct in ordering for refund of the consideration already paid pursuant to Section 7 of Land Control Act to return the parties to the position they were in before the contract.
14. On the second issue, the Respondent was emphatic that this Court may set aside the impugned Judgement on ground of application of discretion upon being satisfied that the decision was whimsical, prejudicial or capricious.
15. Lastly the Respondent urged that costs follow the event and to that end beseeched the Court to dismiss the Appeal with costs to him.

Analysis & Determination

16. Having read and considered the record of appeal, the written submissions of the parties, the entire record of appeal and the material placed before the Court, the issues that commend themselves for determination are;
 - a. Whether there was a valid agreement of sale between the parties?
 - b. Whether developments on the land if any and their values were issues raised in the suit.
 - c. Whether the judgement is in tandem with the evidence of the parties in the suit.
 - d. What orders should the Court grant.
17. I am guided by the persuasive decision of Mr Justice Mativo in the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) when he stated as follows;

“A first appellate is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others*). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited*: -{1968} EA 123. {1958} E.A. page 424. “It is a 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 has 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 that 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.”

3. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. See *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179.
4. A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a Court of first appeal can appreciate the entire evidence and come to a different conclusion.”

18. Section 78 of the [Civil Procedure Act](#) provides as follows;

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power-
- a. to determine a case finally;
 - b. to remand a case;
 - c. to frame issues and refer them for trial;
 - d. to take additional evidence or to require the evidence to be taken;
 - e. to order a new trial.
- (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

19. Bearing in mind the above statutory duty I shall now reassess the evidence on record and make my own conclusions except that I must make allowance that unlike the trial Court, I did not see or watch the witnesses testify.
20. It is not disputed that parties entered into a sale agreement dated October 29, 2012 for sale of the suit land at a consideration of Kshs 4M. A glean of the agreement reveals that the Appellants are described as the vendors being beneficiaries of the suit land registered in the name of late Mary Njeri Kamau. The Appellants acknowledged receipt of Kshs 400,000/- at the time of executing Agreement; Kshs 1.6M



was to be paid upon acquisition of the Kenya Gazette and the balance of Kshs 2M was payable upon confirmation of Grant. The Respondent was granted immediate possession of the suit land and the Appellants undertook to facilitate the transfer in favour of the Respondent.

21. Prosecuting his claim, the Respondent solely testified as PW1 on November 26, 2021 and adopted his witness statement dated 4/11/2020 and produced P.ex1-7 as contained in his List of Documents of even date. PW1 produced copy of sale agreement dated October 29, 2012, copy of chief's letter dated November 26, 2012, copies of acknowledgement letters for part payments dated 2/1/2013 and 5/3/2014, copy of the suit land's title deed, copy of green card and copy of amended Grant issued on 30/8/2016. It was his testimony that the Appellants having lost their mother, sold him the suit land which he partially paid for in instalments. That it was mutually agreed that he was to be included in the Summons for Confirmation of Grant as a debtor of the estate of Mary in Thika CMCC Succ. Cause No 733 of 2012. That upon gazettelement of the Grant, he paid the Appellants Kshs 1.4M and Kshs 1.6M vide cheques Nos. 00683 and 00684 and a further Kshs 200,000/- in cash on 2/1/2013. Later on 5/3/2014 he made a further payment of Kshs 500,000/- via RTGS and Kshs 20,000/= cash leaving a balance of Kshs 1.48M. That the Appellants gave him the suit land original title deed and allowed him to subdivide the land and he sold it to third parties awaiting confirmation of the Grant. That the Appellants started threatening him and the third parties with eviction prompting him to engage his Advocates, S N Chege & Advocates. That the Advocates conducted a search and realized the administrators have transferred the suit land to other individuals contrary to their sale agreement.
22. On behalf of the Appellants, the 1st Appellant Joseph Kaindo Kamau testified as DW1. He relied on his witness statement dated 6/11/2020 and accused the Respondent for breaching the sale agreement. That he sold the suit land to the Plaintiff because he wanted to buy a bigger plot for his children. He did not give the title to the Plaintiff and he did not understand how the same found itself in the Plaintiff's hands. It was a term of the agreement that he would pay the purchase price in instalments which he paid intermittently with some cheques bouncing. He paid a total of Kshs 1.6 Million. Because of non-payment his children objected to the sale and filed a protest. The Plaintiff forcefully encroached onto the land and brought strangers who constructed on the suit land.
23. In cross he stated that the Plaintiff knew the suit land belonged to his late mother. He received the sum of Kshs 2 Million from the Plaintiff.
24. It is not in dispute that the parties entered into an agreement of sale on the 29/10/12 with respect of the suit land for the sum of Kshs 4 million. The vendors were the sellers while the Respondent was the buyer. The vendors are described as the beneficiaries of the suit land registered in the name of Mary Njeri Wairimu, deceased. It measured one acre. The title of the deceased was issued on 29/9/1992.
25. It is not in dispute that the deceased registered owner of the suit land died on the 18/1/2008 at Githunguchu location in Kiambu. She was survived by Joseph Kaindo Kamau, Tabitha Karingi Kaindo (the Appellants).
26. Joseph Kaindo Kamau was appointed the administrator of the estate and a certificate of confirmation of grant in the estate was issued on the 30/8/2016. In the said certificate of confirmation of grant, the suit land was distributed to Maria Njeri Wambugu, Philisira Wangui Kabucho, Emily Waithira Muthui, Philip Njoroge Kaindo and Mary Munyika Kaindo as beneficiaries to share the suit land equally.
27. From the above set of facts and the evidence led during the trial, it is not in dispute that the suit land was sold after the demise of the registered owner and before her estate was succeeded in law.



28. Section 45 of the said Act provides as follows:

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this Section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

29. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

30. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. *In Re Estate of M'Ngarithi M'Miriti* [2017] eKLR it was held that:

“..... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

31. In my view the persons who may be guilty of intermeddling include the potential beneficiaries of the estate, administrators and even third-party purchasers as is the case in this instant suit.

32. The act of distributing any capital assets of a deceased person is also provided in law under Section 55 of the *Law of Succession Act*. It states as follows;

“No distribution of capital before confirmation of grant”.

1. No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net Estate, or to make



any division of property, unless and until the grant has been confirmed under Section 71.

2. The restriction on distribution under subSection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

33. Section 82 (b) (ii) of *Law of Succession Act* provides as follows;

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- ii. no immovable property shall be sold before confirmation of the grant;
- iii. to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- iv. to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that, except so far as otherwise expressly provided by any will-
 - i. no appropriation shall be made so as to affect adversely any specific legacy;
 - ii. No appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the Court shall be required.”

35. In this case the Appellants sold the land to the Respondent in 2012 before being appointed administrators of the estate and or without the leave of the Court.



36. The totality of the Courts finding is that the suit land was sold by the Appellants contra law and the act of depositing the land on the part of the Appellants and the occupation and payment of the same by the Respondent was pure intermeddling of the deceased suit land. It is prohibited in law, illegal null and void and nothing can be done to make it lawful.
37. In the case of *Nirmal Singh Dabnji Vs Joginder Singh Dhanji & 4 others* (2017)eKLR it was held that;
- “On the face of it therefore, the transfers were undertaken prior to the confirmation of grant and thus offended Section 55 aforesaid. Given this scenario where a party in blatant disregard of the requirements of the Law of Succession purported to transfer properties of the deceased before the grant of representation was confirmed, the learned Judge cannot be faulted for finding the transfers unlawful for having been executed by an unauthorized person. This much was held in the case of *Musa Nyaribari Gekone & 2 others v Peter Miyienda & Another* [2015] eKLR wherein any acts of distribution of the estate done prior to confirmation of grant were held to be void. The learned Judge’s finding that the “settlement agreement” was void, thus sound and this Court has not been shown any cause to interfere.”
38. I am guided by the decision of Lord Denning in the case *Mcfoy Limited vs Africa Co. Ltd.* (1961) 3 All ER 1169 at 1172 when he stated as follows;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
39. The finding of the Court with respect to the 1st issue is answered in the negative.
40. According to the Plaintiff the Respondent sought the following orders in his Plaintiff;
- a. That a permanent injunction do issue against the Defendants, their agents, servants, employees and/or representatives stopping them from trespassing on the suit property all that parcel of land known as LR No Ruiru/Ruiru East Block 2/1336 measuring approximately 0.400Ha. and the title deed issued thereof interfering with it whatsoever.
 - b. A declaration that the Plaintiff is entitled to exclusive, unimpeded right of possession and occupation of all that parcel of land known as LR No Ruiru/Ruiru East Block 2/1336 measuring approximately 0.400Ha. and the title deed issued thereof and that the persons registered thereon accordingly trespassers on the same.
 - c. An order of Specific Performance of the said sale agreement dated 29th October 2012 requiring the Defendants to transfer the property known as LR No Ruiru/Ruiru East Block 2/1336 measuring approximately 0.400Ha. to the Plaintiff.
41. It is trite that parties are bound by the pleadings in the case. The reason is advanced in the case of *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* Civil Appeal No 219 of 2013 [2014]eKLR where the Court of Appeal with approval the case of *Adetoun Oladeji (Nig) Ltd Vs Nigeria Breweries Plc S.C. 91/2002* that;
- “... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,



or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded ... As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial Court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her.”

42. In this case the trial Court having made a finding that the agreement was a nullity, there was no basis in law to order for the refunds of the purchase price or order the valuation of the developments on the land, more so when the Plaintiff did not (even in the alternative) plead for a refund of the said monies. Parties are bound by their pleadings.
43. In the upshot the appeal succeeds.
44. Final orders for disposal;
 - a. The appeal succeeds.
 - b. The judgment of the trial Court is set aside in its entirety and the same is substituted with the dismissal of the suit.
 - c. The Court having found that both parties intermeddled in the estate of the deceased registered owner, I order costs of the suit in the trial Court and the appeal to be borne by the parties in equal shares.
45. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of:

Waithira Mwangi for 1st and 2nd Appellants

Ms. Wanjiku HB Mageto for Respondent

Court Assistant – Lilian

