



**Chepkorir v Ngeno (Environment and Land Appeal E06 of 2022)
[2023] KEELC 16414 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E06 OF 2022
LA OMOLLO, J
MARCH 23, 2023**

BETWEEN

CAROLINE CHEPKORIR APPELLANT

AND

DAVID CHERUIYOT NGENO RESPONDENT

JUDGMENT

INTRODUCTION.

1. By the Memorandum of Appeal dated March 24, 2022, the Appellant Appeals against the judgment of Hon E Nderitu delivered on March 1, 2022 in Molo CMCC No 324 of 2014.
2. The Grounds of appeal are:
 - a. That the Learned Trial Magistrate erred in law and in fact in entertaining the Plaintiff's suit which suit was clearly statute barred having been filed after 12 years from the date when the cause of action arose.
 - b. That the Learned Trial Magistrate erred in law and fact in relying on pexh-2 being an expired certificate of search, in determination ownership of the suit property in the Respondent's favour.
 - c. That the Trial Magistrate erred in law and fact in misapprehending and or overlooking the evidence of the Appellant to wit failing to note that Dexh-1 dated 17-06-1997 was endorsed at the back thereof by the surveyor on May 26, 2004 and that the two dates did not refer to two different allocation cards.
 - d. That the Trial Magistrate erred in law and in fact in disregarding the Appellant's evidence adduced in support of the application.



- e. That in determination of ownership of the suit property in the Respondent's favour, the learned Trial Magistrate erred in law and fact in relying on Pexh-1 as proof of the Respondent's ownership of the suit land, despite a glaring discrepancy between the name and identity card number appearing thereon on the one hand and the name and identity card number appearing on the Respondent's identity card on the other hand, which discrepancy was not resolved and or cured by the Respondent.
- f. That the Learned Magistrate's finding is totally unsupported in law.

Factual Background.

3. The suit before the Magistrate's Court was instituted by the Respondent vide a Complaint dated December 17, 2014. He claimed that he is the registered owner of land parcel No Nakuru/Ndoinet Settlement Scheme/214.
4. The Respondent, in his complaint, averred that the Defendant (now Appellant) without any color of right entered onto the suit property claiming ownership and sought the following prayers;
 - a. An order to evict the Defendant, his servants, workers, employees, agents, heirs and/or those claiming through or under her from cultivating, remaining and/or entering, or re-entering, occupying, using, developing, leasing, and/or in any way dealing with all that piece or parcel of land known as Nakuru/Ndoinet Settlement Scheme/214 and the Defendant be barred from entering or re-entering unto the same, and the Defendant be ordered to pay damages aforesaid.
 - b. Costs of the suit.
 - c. Any other or further relief as may seem fit to this honorable court to grant.
5. The Appellant filed her Statement of Defence on February 15, 2015 where she denied the Respondent's claim and stated that she has been in occupation of the suit property since the year 2004 and sought that the suit be dismissed.
6. The Learned Trial Magistrate delivered judgement on March 1, 2022 in the following terms:
 - a. That the Defendant, her servant, workers, employees, agents, heirs and those claiming through or under her are permanently restrained from cultivating, remaining and entering or re-entering, occupying, using, developing, leasing and or in any way dealing with all that piece or parcel of land known as Nakuru/Ndoinet Settlement Scheme/214.
 - b. The Defendant to within 60 days from the date of this judgement to vacate the suit land Nakuru/Ndoinet Settlement Scheme/214 failure to which eviction order shall issue.
 - c. The Plaintiff will have costs of this suit.
7. The Appeal came up for directions on October 3, 2022 and directions were given that the appeal shall be disposed of by way of written submissions. On November 21, 2022, parties confirmed having filed their submissions and the appeal was reserved for judgment.

Respondent's Response To The Appeal.

8. In response to the Memorandum of Appeal, the Respondent filed Grounds of Opposition dated June 10, 2022.
9. The grounds are as follows:



- a. That there is no merit or cause disclosed therein.
- b. That the Learned Magistrate fully apprehended the issues and the Appellant has not shown any tangible grounds to warrant a reversal of the judgement.
- c. That the Learned Magistrate correctly found, on law facts that the land in dispute belongs to the Respondent.
- d. That the Learned Magistrate applied the law correctly based on the evidence adduced by the parties.
- e. That the Respondent shall also rely on grounds to be adduced at the hearing.

The Appellant's Response To The Respondent's Grounds Of Opposition.

10. In response to the Respondent's Grounds of Opposition, the Appellant filed a Replying Affidavit sworn on July 25, 2022.
11. The Appellant deposes that the Grounds of opposition dated June 10, 2022 are misconceived, unnecessary, frivolous, vexatious, mischievous, retrogressive, an abuse of the court process, and incompetent, and as such only capable of dismissal.
12. The Appellant also deposes that the Respondents' Grounds of Opposition are not premised on any known legal provision or Rule of procedure. As such, the same is not grounded on any known provision of the Laws of Kenya and must be dismissed.
13. The Appellant further deposes that she is advised by her advocates on record that the filing of Grounds of opposition in response to an Appeal is alien to the laws of Kenya. The rule of procedure governing Appeals in Kenya is found in Order 42 of the [Civil Procedure Rules 2010](#).
14. The Appellant ends her deposition by stating that a thorough perusal of Order 42 does not reveal any provision for filing of grounds of opposition as in the case with the Respondent's grounds of opposition dated June 10, 2022.

Submissions.

15. The Respondent filed his submissions dated November 15, 2022 on November 18, 2022 while the Appellant did not file any submissions.
16. The Respondent submits that it is the duty of the court to analyze and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness of the decision of the trial court.
17. The Respondent also submits that the Trial Magistrate captured in his judgement his evidence and that of the Appellant.
18. On whether the suit was statute barred, the Respondent submits that he complained when the Appellant trespassed onto the suit property immediately after 1996 until the Appellant was charged in court.
19. The Respondent concludes his submissions by seeking that the Appellant's Appeal be dismissed with costs.



Analysis and Determination.

20. Before delving into the issues for determination, this court notes that the Appellant's Memorandum of Appeal does not contain prayers.
21. I also choose to ignore the fact of filing grounds of opposition and replying affidavit in this appeal.
22. The Appellant's Statement of Defence filed before the lower court dated February 12, 2015 and filed on 1February 6, 2015 sought dismissal of the Respondent's suit.
23. It is therefore logical to deduce that the Appellant is seeking that the learned Trial Magistrate's judgement be set aside.
24. This court is guided by Section 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of the *Constitution of Kenya* which obligates the court to administer justice without undue regard to technicalities. Further this court is obligated to determine the appeal on its merits by considering the grounds raised in the Memorandum of Appeal.
25. Section 1A of the *Civil Procedure Act* provides as follows:
 - "1A. Objective of Act
 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)."
26. Section 1B of the *Civil Procedure Act* provides as follows:
 - "1B. Duty of Court
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology."
27. Section 3A of the *Civil Procedure Act* provides as follows:
 - "3A. Saving of inherent powers of court.



Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

28. Article 159 (2) (d) of the [Constitution of Kenya](#) provides reminds us that in exercising judicial authority, the courts and tribunals shall be guided by certain principles one of which is that justice shall be administered without undue regard to procedural technicalities.
29. After considering the Grounds of Appeal, it is my view the following issues arise for determination:
 - a. Whether the Respondent's suit before the trial court was statute barred.
 - b. Whether the learned Trial Magistrate disregarded the evidence of the Appellant.
 - c. Whether the learned Trial Magistrate erred in law and in fact in relying on the title deed of the suit property as proof of the Respondent's ownership.
 - d. Who should bear costs of this Appeal.
30. The role of the appellate court was stated as follows by the Court of Appeal in the case of [Gitobu Imanyara & 2 others Vs Attorney General](#) [2016] eKLR where it was held:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."
31. The Court also in the case of [Abok James Odera T/A AJ Odera & Associates Vs John Patrick Machira T/A Machira & Co Advocates](#) [2013] eKLR held 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 reanalyze 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."

A. Whether the Respondent's suit before the trial court was statute barred.

32. A perusal of the pleadings and evidence before the trial court shows that the question whether the suit was statute barred was not raised.
33. The Court of Appeal in the case of [Republic Vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto](#) [2018] eKLR held as follows:

"As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the Appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See North Staffordhire Railway Co Vs Edge [1920] AC 254)."
34. Considering that the question of bar on limitation was not raised before the trial court, I decline to consider it.



B. Whether the learned Trial Magistrate erred in law and in fact in overlooking the evidence of the Appellant.

35. The Appellant alleges that the Trial Magistrate overlooked her evidence by failing to note that the allotment card dated June 17, 1997 was endorsed at the back by the surveyor on May 26, 2004. The Appellant produced in evidence the allotment card in her name for allocation of Plot No 16244 at Ndoinet comprising of five acres.

36. The allotment card forming part of the record of Appeal bears no endorsement at its back. I have not found any document bearing the date “May 26, 2004”. The judgment at pg 4 recounts the evidence of the Appellant on cross-examination ie

“That she was given an allocation card which was dated June 17, 1997. That she had another also dated 26th May, 2004 which was when the survey was done, and when the surveyor noted that she had entered onto the land.”

There is no further mention of the date May 26, 2004 whether as an endorsement or a second allotment card.

37. The evidence as tendered during cross examination of the Appellant is that she has an allotment card issued on May 17, 1997 and that it also bears another date May 26, 2004. She explains that the date May 26, 2004 is the date the surveyor made a note on the allotment card. She goes on to state that the surveyor noted that she entered upon the land in 1997 and the survey was done in 2004.

38. The Defendant in her statement of defence have not pleaded the significance of the endorsement on the allotment card with the date May 26, 2004. The submissions by the Defendant also make no mention of the said endorsement. In my view the Learned Magistrate cannot be faulted for not giving it any significance, though he might have erred in stating that there are two allotment cards bearing different dates. His attention was not drawn to the importance of it, if at all. It is not enough to tender evidence without explaining why a particular piece of evidence is important or might be useful to the court in determining a matter before it.

39. Further, I take note that the evidence on record does not explain the nexus between Plot No 16244 at Ndoinet which is referenced in the allotment card and the suit property ie Nakuru/Ndoinet Settlement Scheme/214. It is my view that the evidence tendered does not support the defendant’s claim and a finding in her favour would have been erroneous.

40. Taking this into consideration, my view is that the Appellant has failed to satisfy this court that the Learned Trial Magistrate overlooked her evidence and/or that the evidence alleged to have been overlooked (in this case the endorsement on the allotment card with the date May 26, 2004) is of such importance as to have led to a different finding.

C. Whether the learned Trial Magistrate erred in law and in fact in relying on the title deed of the suit property as proof of the Respondent’s ownership.

41. The Appellant alleges that the learned Trial Magistrate erred in relying on the title deed of the suit property as proof of ownership of the suit property.

42. The title deed was produced as Exhibit P1 and is in the name of David Cheroiyot Ngeno (Respondent). It is issued on October 12, 2005 and the parcel of land measures approximately 2.04 Ha.



43. The Appellant alleges that the said title deed has a discrepancy between the name and the identity card number of the Respondent as compared to his identity card.
44. During cross examination before the trial court, the Respondent confirmed that his name is David Cheruiyot Ngeno and explained that it was misspelt on the said title deed.
45. The learned Trial Magistrate did not address the said discrepancy in the judgement but stated as follows:

“The Plaintiff has provided the court with a certificate of title together with a search confirming that he is the registered owner of the suit property. That certificate can only be legally defeated on the grounds set out under Section 26(1) of the Land Registration Act aforesated. It supersedes any other documents to wit allocation card.”
46. A perusal of the copy of the title deed shows that the suit property is registered in the name of David Cheruiyot Ngeno of ID No xxxx.
47. Attached to the copy of the title deed is a copy of the Respondent’s Identity Card which shows that his name is David Cheruiyot Ngeno of ID No xxxx.
48. It is apparent that the Respondent’s middle name is misspelt as “Cheruiyot”. I also note that the ID number on his Identity card has a slight variation. The number “0” is missing on the title deed. However, the Appellant did not tender any evidence to point to the fact that the misspelling in the names or the variation in number negated validity of the title held by the Respondent.
49. The Learned Magistrate rightly observed that the suit property is governed by the [Registered Land Act](#), cap 300 (Repealed) and also correctly observed that Section 27 of the [Registered Land Act](#) is in *pari materia* with Section 24 of the [Land Registration Act](#) which sections speak to registration conferring absolute ownership to a registered proprietor of any land registered in his favour.
50. The Learned Magistrate, also, correctly made observation that Section 28 of the repealed law provides that rights acquired by an owner of a parcel of land cannot be defeated except as provided by the law. This mirrors Section 26 of the [Land Registration Act](#).
51. Further, the Learned Magistrate correctly found and I reiterate, that a certificate of title issued by the Registrar upon registration, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. However, a person can challenge a title so issued on the grounds specified in Section 26 of the [Land Registration Act](#).
52. The Appellant in his defence set out particulars of fraud by the Plaintiff and the District Land registrar. The District Land Registrar was not a party to the suit. While fraud must be strictly proved, the Defendant failed to tender evidence challenging the title on any of the grounds set out in Section 26 of the [Land Registration Act](#). This was also the finding of the Learned Magistrate at page 8 of his judgement. Further, no evidence was tendered to show that the error in spelling of the name of the Respondent or the variation in the ID number fell within the categories specified under section 26 of the [Land Registration Act](#) so as to defeat the Respondent’s title.
53. I, therefore, find that this ground of Appeal is completely lacking in merit.



C. Who should bear costs of this Appeal?

54. It is now settled that costs shall follow the event. This is in accordance with the provisions of 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.

Disposition.

55. I find that the evidence before the trial court record supported the Respondent's claim. The Trial Magistrate in finding that the Appellant had not proved her case on a balance of probabilities and subsequently dismissing the suit was not erroneous.

56. Consequently, this appeal is hereby dismissed with costs to the Respondent.

57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Bore for the Appellant.

No appearance for the Respondent.

Court Assistant; Ms. Monica Wanjohi.

