



**Nyaboke v Gesora & another (Environment and Land Appeal  
13(E002) of 2020) [2023] KEELC 16547 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16547 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 13(E002) OF 2020**

**M SILA, J**

**MARCH 23, 2023**

**BETWEEN**

**RACHAEL NYABOKE ..... PLAINTIFF**

**AND**

**VIOLET GESORA ..... 1<sup>ST</sup> DEFENDANT**

**JOSPHAT GESORA ..... 2<sup>ND</sup> DEFENDANT**

*(Being an appeal against the judgment of Hon. S. K. Onjoro, Senior Resident Magistrate, delivered on 6 March 2020 in the suit Kisii CMCC/ELC No. 307 of 2018 Rachael Nyaboke -vs- Josephat Gesora and Violet Nyaboke)*

**JUDGMENT**

1. At the trial court and before this court, the appellant has all along acted in person. She commenced suit by way of a plaint which was filed in this court on 22 June 2015. The suit was however transferred by Mutungi J for hearing at the Magistrates' Court for the latter had jurisdiction to hear it. On 3 May 2016, when the matter was still before Mutungi J, he informed the appellant that the pleadings as drawn are incompetent and asked the appellant to either withdraw the suit or make comprehensive amendments to salvage it. When the appellant appeared next before Mutungi J on 12 November 2018, the judge observed that no amendments had been done and extended the period to amend by up to 31 December 2018. It was also on that day that the judge transferred the case to the Magistrates' Court. As it turned out, no amendment to the plaint was ever effected and the appellant soldiered on with the plaint as filed.
2. The plaint is certainly pretty convoluted, but from what I can decipher, the appellant averred that she is wife of one who was insane and that the respondents tricked her husband to sell some land to them. Notably, the land in issue was never described and it was never mentioned when this sale took place. The appellant asked for the following orders which I replicate as drawn :-



- (a) An order of permanent injunction c/o issue to restrain the respondent/defendant by themselves husband wife agents, servant from cultivating the land portion on dispute.
  - (b) Costs of this suit.
  - (c) Any further relief this honourable court may discern fit and just to grant.
3. Prior to filing defence, the respondents raised a preliminary objection that the appellant had no locus standi as she was not registered owner of the land. At this juncture no particular land had been singled out. In a short ruling delivered on 28 February 2019, Hon. Oketch, who was then handling the matter, dismissed the preliminary objection being of opinion that a spouse may have rights to land. After the preliminary objection was dismissed, the respondent filed defence. Inter alia, it was pleaded that the plaintiff discloses no cause of action. The respondents denied tricking the owner of the land and pleaded that the appellant did not deserve the orders sought.
4. The evidence at the Magistrates' Court was taken before Hon. W. Oketch, Senior Resident Magistrate, but the matter was completed by Hon S.K. Onjoro, Senior Resident Magistrate, who delivered judgment on 6 March 2020.
5. The plaintiff testified and called two witnesses. She never produced any exhibits in support of her case. It is not easy to fully understand the evidence of the plaintiff but I will do the best I can. She did mention that in 1995 she and her husband purchased a plot from one William Moguti and Teresa Kemunto and they paid Kshs. 45,000/=. The seller did not have a title deed. In 2014, she realized that the respondents are claiming the land saying that it was sold to them by her husband. She went to the Sub-Chief but they failed to attend to his summons. She claimed there was sale of the land to a third party and the agreement went before the Directorate of Criminal Investigations. She stated two strange women were used as a decoy to sell the land via her husband. Cross-examined, she said that the land bought was a parcel No. 235 in name of Francisca Nyaboke Onkwani.
6. PW-2 was one Francisca Nyaboke (Francisca) who claimed that the first respondent came to her and her co-wife, one Rebecca Nyakangi, and asked for their IDs. Her co-wife did not have her ID but she gave out her's. She mentioned that Rebecca is deceased. She stated that their names were on the plot. They denied selling the land to William Onguti who was her grandchild and she stated that William Onguti sold the land to the appellant. She denied transferring the land to the 1<sup>st</sup> respondent who apparently purchased the land from the husband of the appellant.
7. PW-3 was Teresa Kemunto who stated that because she had a sick child, she and her husband, one William Onguti sold land to the appellant and her husband. She complained that the 1<sup>st</sup> respondent gives her husband alcohol and he assaults her. They did not have the title deed.
8. The respondents testified and called two witnesses. The first respondent did testify that he purchased land from the husband of the appellant on 1 February 2008. He did not have title at the time. Title was with Rebecca and Francisca who signed the relevant documents. What they bought was a portion of 63 feet by 100 feet from the land parcel Central Kitutu/Mwamosioma/2035 which was subdivided into three portions. What he got was the parcel No. 1771. Cross-examined, he testified that the seller had a wife called Hellen Kemunto and the appellant was not present. He stated that there was no document to show that the appellant's claimed husband was not of sound mind. DW-2, the 2<sup>nd</sup> respondent, more or less gave the same evidence as DW-1. DW-3 was one Hellen Kemunto, who said that she was wife to Benedict Achika having gotten married to him in the year 2003. She said her husband sold the land and she signed the agreement. She did not know of the mental status of the said Benedict though she said that he got ill and was treated. DW-4 was one Pascalia Kemunto, who mentioned that Benedict was at



some point married to the appellant but the appellant went away and he later married Hellen (DW-3). She witnessed the sale of the land. Cross-examined, she did state that the appellant was present when Robert (who I think is also Benedict) bought the land but she left and Robert later sold it. Robert/Benedict is her nephew. She did state that Robert was unwell but was treated and was well at the time of sale though he had malaria. She acknowledged that the appellant had three children with Robert but he married again after she (appellant) left. He married Hellen.

9. In dismissing the case, Hon. Onjoro, Senior Resident Magistrate, inter alia held as follows :-

“I note from the pleadings that the suit parcel of land of which the plaintiff is seeking orders of injunction is not described. The plaintiff also in her testimony did not mention the suit parcel of land of which she seeks to injunct the defendants. If this court was to grant the prayers sought in the plaint the same would not be unenforceable as they would not be directed a particular parcel of land. Court orders must be specific and capable of implementation.

The plaintiff further failed to produce any documentary evidence e.g in form of a title deed or search certificate to show that she was the owner of the land she is claiming.

The plaintiff merely stated that she was the owner of the undescribed land. She alluded to a sale agreement but again the same was not produced in evidence. PW3, Teresa Kemunto also admitted that when she sold the land to the plaintiff she did not have any title since she herself was not given any title by the previous owner.

There was also no documentation produced to prove the insanity of the plaintiff's husband and no expert witness was called to testify on the said fact.

In the view of the forgoing I do not find the plaintiff to have proven her case on a balance of probabilities as the prayers sought does not specify the parcel of land and further there was no proof that she had the locus standi to institute this suit.

In the circumstances, I dismiss the plaintiff's case with costs to the defendants.”

10. Aggrieved by this judgment, the appellant has preferred an appeal to this court. It is not actually very clear what document constitutes her appeal for I have seen a “Notice of Appeal” filed on 9 June 2020 with twelve paragraphs, a Memorandum of Appeal having seven paragraphs as the grounds of appeal, and another Memorandum of appeal dated 31 December 2020 bearing eight paragraphs. There is also a supplementary Memorandum filed on 25 May 2021. Whatever would be deemed as constituting the appeal is filed hopelessly out of time and I have not seen any order extending the time to appeal. Be that as it may, I admitted the appeal for hearing on 23 January 2023 so that the appellant can be heard on her grievances related to the judgment. I will take it that the appellant complains about the whole of the judgment. Both appellant, and Mr. Soire, learned counsel for the respondents, made submissions in relation to the appeal.

11. According to the appellant, the learned Magistrate erred by dismissing the suit yet there had earlier been a preliminary objection which was disallowed. She also complained that the land was sold by the respondents when the case was going on and that the respondents were also developing the land. She added that she has been served with a bill of costs before the appeal was heard. She submitted that she had documents showing that her husband was of unsound mind but these documents were removed. She continued to submit that a person came saying that she is her co-wife yet she has no co-wife. She submitted that the respondents cut trees on her land and the forest officers assessed the loss. She was of opinion that she did not get justice because she was representing herself. She relied on Articles 159



and 160 of the Constitution and asked this court to grant her the prayers sought which I believe are the prayers in the plaint.

12. Mr. Soire's rejoinder was that the trial Magistrate was alive to all issues. He submitted that property registered in name of the appellant's husband was sold to the respondents. He submitted that if the appellant's husband was of unsound mind, she had no capacity as she was not the manager of his affairs. He added that there was no unsoundness of mind. He supported the decision of the Magistrate.
13. I have considered the appeal and I see no merit in it.
14. The trial Magistrate was correct in his holding that the pleadings of the appellant were hopeless as the land in issue was never disclosed. This is probably what Mutungi J, had at the outset pointed out to the appellant, when the suit was before him, and why he advised the appellant to make amendments to the suit or withdraw it. Of course no amendments were undertaken. Without making disclosure of what land was being disputed, I actually do not think that there was any substance to go to trial, and in my opinion, this is a suit that ought to have been struck out summarily without the pain of going through a full hearing. Any hearing, based on the pleadings at hand, were only going to be speculative on what dispute was before court. Every plaintiff has a duty to present to court intelligible pleadings which can be understood and which would clearly present to court and to the defendant the cause of action. That duty does not go away because a plaintiff is acting in person. Even where a party is acting in person, there must be minimums as to what is expected in the pleadings, and the appellant cannot be heard to complain that she was not treated fairly because she was acting in person. I will reiterate that the pleadings presented by the appellant were not pleadings worthy of going to trial and her suit ought to have been summarily struck out.
15. Well, as it turned out the suit went to trial and evidence was taken. I have mentioned that any hearing would have been speculative and that is precisely what happened here. The respondents admitted having a dealing with the alleged husband of the appellant, which was over sale of a parcel of land that was however not in his name and they got title. There was mention of a land parcel Central Kitutu/Mwamosioma/2035 and a parcel No. 1771. What was in dispute is not very clear. It was also not very clear who was registered as proprietor for no exhibits of the titles were ever produced. The trial Magistrate was thus correct in his holding that the appellant failed to produce any documentary evidence in form of a title deed or search to show ownership of the land that she was claiming. He was also correct in finding that no sale agreement was produced.
16. In the trial court, and even in this appeal, the appellant did mention that her alleged husband, Robert/Benedict was not of sound mind. In his judgment, the trial magistrate held that there was no documentation produced to prove insanity and no expert witness was called to testify on this claim. The magistrate was correct in this finding for indeed no document was produced and no expert witness called to prove this allegation of insanity. If the appellant's claim was one where she was contending that her alleged husband could not have sold land to the respondents (forget for a moment that it is not even clear what land this is) owing to insanity, then the burden was upon her to prove insanity. She did submit in her appeal that documents providing the mental status of her alleged husband were plucked out of the court file. That cannot be true. The trial magistrate could only proceed on the basis of exhibits produced and there was no exhibit produced. There are some documents here indicating treatment of one Robert Mokaya as a psychiatric patient but they needed to be produced as exhibits if they were to be considered. Even this court cannot take them into account when deciding this appeal for they were never produced as exhibits. The appellant cannot complain that the trial court did not consider them. They could not be considered since they were never produced as exhibits.



17. The appellant has of course contended that she was treated unfairly because she is acting in person. That is a serious allegation. But I have seen nowhere that she was discriminated nor treated unfairly because she was acting in person. In fact, I think she was given too much leeway. She failed to present to court intelligible pleadings that disclosed a cause of action and failed to present crucial exhibits and evidence. She has nobody but herself to blame.
18. I find absolutely no merit in this appeal and it is hereby dismissed with costs.
19. Judgment accordingly.

**DATED AND DELIVERED THIS 23 DAY OF MARCH 2023.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

