



REPUBLIC OF KENYA



**Mohamed v Ahmed (Environment and Land Appeal 16 of 2019)  
[2023] KEELC 16957 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16957 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 16 OF 2019**

**MAO ODENY, J**

**APRIL 24, 2023**

**BETWEEN**

**MANTHURA OMAR MOHAMED ..... APPELLANT**

**AND**

**ALI ABDALLA AHMED ..... RESPONDENT**

*(Being an appeal against the Judgment delivered by Hon. L. N. WASIGE  
(SRM) on 9th October 2019 on in Kilifi SPMCC No. 21 of 2012)*

**JUDGMENT**

1. This appeal arises from the Judgment dated 9<sup>th</sup> October 2019 by Hon. L N Wasige Senior Principal Magistrate Kilifi delivered in Kilifi SPMCC No 21 of 2012; The appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 9<sup>th</sup> November 2019 on the following grounds:
  - a. That the trial Magistrate erred in law and fact by finding that the agreement dated 9<sup>th</sup> March 2011 is lawful and enforceable despite overwhelming evidence on record hence occasional miscarriage of justice.
  - b. That the trial Magistrate erred in law and fact by failing to find that the Respondent was a trespasser to the Applicant's property.
  - c. That the trial Magistrate erred in law by failing to properly evaluate the evidence on record hence occasioned miscarriage of justice.
  - d. That the trial Magistrate erred in law and fact by finding that the plaintiff's suit lacks merit and thereby occasioned miscarriage of justice.
  - e. That the judgment as a whole was not supported by the evidence on record.



2. The appellant herein had sued the Respondent in the lower court vide a plaint dated 17<sup>th</sup> January 2012 seeking judgment against the defendant for;
  - a. Vacant possession
  - b. General damages
  - c. Costs of this suit
  - d. Any other and further relief this honourable court deems fit to grant.
3. The trial Magistrate heard the case and dismissed the plaintiff's suit thereby necessitating the filing of this appeal.
4. Counsel agreed to canvas the Appeal by way of written submissions of which only the Appellant filed.

### **Appellant's Submissions**

5. Counsel for the Appellant argued ground 1,3 ,3 together and submitted that the Appellant had a legitimate claim against the respondent. It was counsel's submission that the trial Court erred in finding that the agreement dated 9<sup>th</sup> March 2011 was lawful and enforceable.
6. Mr Khatib submitted that the Appellant had presented evidence to prove ownership of the land and that a certificate of title is conclusive evidence of ownership which the trial court overlooked.
7. Counsel relied on the cases of *Jackson v Royal Bank of Scotland* [2005] UKHL 3 and *Milan Kumar Shah & 2 others v City Council of Nairobi v another*.
8. Counsel further relied on the provisions of Section 24, 25 and 26 of the *Land Registration Act* on indefeasibility of title. Counsel also submitted that the trial Magistrate erred in not finding the Land officer coerced the Appellant into entering into the agreement dated 9<sup>th</sup> March 2011 with the respondent and urged the court to allow the appeal against the whole judgment.

### **Analysis And Determination**

9. The court is aware that this is a first appeal and therefore has a duty reconsider, evaluate the evidence and draw its own conclusions based on the evidence on record. The court is also cognizant of the fact that it did not benefit from observing the demeanor or the testimony of the witnesses as was held in the case of *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).



10. Similarly, in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated the duty of the first appellate court 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”

11. The Appellants case is that the impugned Agreement dated 9<sup>th</sup> March 2011 was executed under duress and/ or was coerced as raised in the submissions. The Appellant’s counsel submitted that the trial court ought to have investigated further the level of influence by the Land officer who allegedly used his position to influence the decision of the Appellant who had acquired a good title.
12. It is not in dispute that the Appellant herein was issued with an allotment letter in respect of the suit plot. The contention however, is that the Appellant was under undue influence by the Land officer in executing the agreement dated 9<sup>th</sup> March 2011 which gifted the respondent herein half of the suit land.
13. Noteworthy from the agreement the transfer of half of the suit land to the Respondent was in the absence of consideration which is the basis of the appellant seeking that the agreement be voided.
14. If the Appellant was coerced or was under duress to transfer part of the suit land to the respondent, then he was duty bound to prove the same as provided for under Section 107 (2) of the *Evidence Act* which states “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
15. The meaning of duress was explained in the case of *Ghandhi & another v Ruda* (1986) KLR 556, as follows:

“Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort.”

16. Similarly in the *Privy Council case of Pao & others v Lau Yiu & another* [1979] 3 ALL E.R. 65, stated thus:

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it”.

17. From the evidence on record the Appellant did not demonstrate or prove that he was coerced, whether he protested or what action he took after the alleged duress. It is not enough to shout that you were coerced without showing any evidence of such coercion.



18. It seems the Appellant after getting the title in her name wanted to vitiate the agreement with the respondent and rely on the doctrine of indefeasibility of title. This is why she brought in the issue of duress.

19. In the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR the court held that:

“Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds”

20. I have considered the record of Appeal, the submissions by counsel and the relevant judicial authorities and find that Learned Trial Magistrate did not err in her findings and the evaluation of the evidence. The upshot is that the appeal lacks merit and is dismissed with no orders as to costs as the respondent did not participate.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY of APRIL, 2023.**

**M.A. ODENY**

**JUDGE**

