



**Githuka v Waitherero (Environment and Land Appeal E005 of 2020)
[2023] KEELC 16966 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E005 OF 2020
MN GICHERU, J
APRIL 17, 2023**

BETWEEN

CHARLES NJONJO GITHUKA APPELLANT

AND

PURITY WAMUYU WAITHERERO RESPONDENT

*(Being an appeal against the Ruling and order of Hon. Nthuku J.N (Mrs.)
Senior Resident Magistrate made and delivered on 21st October, 2020)*

JUDGMENT

1. This Judgment is in respect to ELC No 1 of 2019 at Loitoktok Magistrates' Court. In that case, the learned trial magistrate delivered a judgment on October 21, 2020 in which she found that the disputed plot was 511B Ongata Rongai belonging to the Respondent and not 108 belonging to the Appellant. The dispute was simply who between the two parties owned the disputed land. The learned Magistrate found in favor of the Respondent.
2. Aggrieved by the verdict, the Appellant filed a memorandum of appeal dated November 20, 2022 listing nine (9) grounds of appeal. They are as follows. The learned trial Magistrate erred in law and fact by-
 - i. failing to evaluate and consider the Appellant's evidence, the evidence on record and submissions in totality, hence arrived at a wrong decision,
 - ii. finding that the Respondent had proved her claim against the Appellant on a balance of probabilities, when the contrary was the case,
 - iii. finding that the Appellant had not proved his counterclaim to the required standard despite the dispute concerning the competing interests of the Appellant and the Respondent over



the suit property, and the Appellant's claim superseded the Respondent's in the light of the existing documentation produced in evidence,

- iv. in arriving at a decision that was against the weight of evidence on record and as a result, arrived at an erroneous decision,
 - v. and misdirected herself when she disregarded the order issued on August 9, 2007, allowing the Defendants Application to join the Defunct Ol Kejuado County Council and its successors in title,
 - vi. failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case and as a result, arrived at the wrong conclusion,
 - vii. in entering judgment in favor of the Respondent as prayed without addressing every issue raised,
 - viii. misdirecting herself by disregarding the fact that the Appellant's ownership and or claim to the suit property was superior or superseded the Respondent's.
 - ix. misdirecting herself by relying on a surveyor's report which was neither produced as evidence by the surveyor or tested through cross examination hence lacked probative value.
3. For the above-mentioned reasons, the Appellant prays that the Appeal be allowed, judgment and decree of the learned Magistrate be set aside and substituted with an order dismissing the Respondent's case with costs to the Appellant, and allowing the Appellant's counterclaim with costs to the Appellant.
 4. Counsel for the parties filed written submissions on October 31, 2022 and December 16, 2023 respectively. I have carefully considered the appeal in its entirety including the record, the grounds, the submissions by both sides and the law cited therein.

This being a first appeal, I am duty bound to revisit and exhaustively re-evaluate the evidence presented before the trial court and arrive at my own independent conclusions but bearing in mind that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses first hand and give due allowance for that disadvantage. See *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123*. I will treat the nine grounds of appeal as the issues that will determine this appeal.

5. On the first ground, I find that the trial Magistrate did not err. The Appellant's evidence was very short. It is to be found at pages 152 and 153 of the record of appeal. The documentary evidence is at pages 92 to 107 of the record of appeal. Most of what the Appellant said is not disputed by the Respondent or the court. The only dispute is where his land plot No 108 is located. The Appellants' evidence is well-evaluated in the judgment at pages 112,113 and 114.
6. On the second ground, I find that the Respondent preponderated her case to the required standard because the county council of Olkejuado confirmed vide their letter dated April 30, 2007 that the disputed site was the Respondent's land and not the Appellant's land. The same letter asked the Appellant to see the County Surveyor who would show him the correct site of his plot No 108 as per the County Council records. It is therefore not correct to say that the Respondents case was not proved on a balance of probabilities.
7. Regarding the third ground, I find that the trial Magistrate did not err because the counterclaim could not be proved if the Appellants plot was officially confirmed to be elsewhere and not where the Respondent's plot was located.



8. As for the fourth ground, the weight of evidence pointed to one conclusion which is that the disputed plot belonged to the Respondent and not the Appellant. The Appellant did not produce any evidence to the contrary. The trial Magistrate did not therefore err.
9. When it comes to the sixth ground, one of the documents tendered by the Appellants was the letter dated April 30, 2007 confirming that the disputed site did not belong to him. As I said before, his other documents are not disputed. The only dispute is on the location of his plot. The Appellant cannot therefore be heard to say that his documentary evidence was not appreciated when he himself filed a document saying that his plot was located elsewhere and not at the disputed site. The trial Magistrate did not therefore fail in anyway.
10. On the fifth ground, trial Magistrate did not misdirect herself on the issue of joinder of the defunct Olkejuado County Council. It is the appellant who sought to have the county council of Olkejuado joined as a third party in this case. The Court allowed the Appellants' Application. Thereafter, it was incumbent upon the Appellant to serve the third-party notice in accordance with Order 1 Rule 15 of the *Civil Procedure Rules*. He did not do this. The trial court at pages 112 of the record of appeal dealt with this issue wondering why the appellant went quiet. The trial Magistrate did the right thing.
11. On the seventh issue, I find no fault on the part of the trial Magistrate. A look at the Appellants' submissions found at pages 108 and 109 of the record of Appeal will show that the Appellant did not identify any issues for determination. In my view, there was only one issue and it is whether the disputed site was plot No 511B or 108. The Magistrate arrived at the correct decision in this single-issue case.
12. On the penultimate issue, I find no misdirection at all on the part of the trial Magistrate because the evidence is overwhelming that the Respondents' claim to the suit plot was superior to that of the Appellant.
13. Finally, on the issue of the Surveyor's report, I find that the trial Magistrate did not misdirect herself because the report was prepared by consent of both parties. The Appellant was at liberty to call any better evidence if he had it. He did not do so. He cannot be heard to fault the surveyors' report when he was party to it.
14. In conclusion, I find that for the reasons given hereinbefore, the Appellant's appeal has no merit and I dismiss it with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF APRIL, 2023.

M N GICHERU

JUDGE

