



**Kaberia v M’njogu & 4 others (Environment and Land Appeal
E083 of 2021) [2023] KEELC 17713 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E083 OF 2021**

CK NZILI, J

MAY 31, 2023

BETWEEN

ZAKAYO KABERIA APPELLANT

AND

VERONICA KANGONGE M’NJOGU 1ST RESPONDENT

PETER M’NJOGU 2ND RESPONDENT

BAITURI M’NJOGU 3RD RESPONDENT

THURANIRA M’NJOGU 4TH RESPONDENT

PAUL M’NJOGU 5TH RESPONDENT

*(Being an appeal against the Judgment of Maua PM Magistrate
A.G Munene in CMCC No. 277 of 2010 delivered on 23.6.2021.)*

JUDGMENT

1. By a memorandum of appeal dated July 8, 2021, the appellant, who was the plaintiff in the lower court, appeals against a ruling made on June 23, 2021 on the basis that the trial court erred in law and in fact in:
 - i. Referring back to the matter to the land adjudication officer Kangeta unit for resolution, the land adjudication process had been finalized, and the objections by the appellant dismissed with no option of an appeal or review and the land falling outside [Land Consolidation Act](#) (Cap 283).
 - ii. Failing to appreciate the land was registered, and the appellant had acquired an indefeasible title to the land, which the respondent had trespassed into making orders for eviction tenable.
 - iii. For directing parties to file a different suit, even though the court had jurisdiction to hear and determine the claim.



- iv. For failing to appreciate his submissions
 - v. For misdirecting itself on the evidence, facts, and the law.
2. As a first appeal, the court is duty-bound to re-appraise, re-hear and re-evaluate the lower court record and come up with independent findings regarding facts and the law. See *Peter vs Sunday Post Ltd (1958) EA 424*.
 3. At the trial court, the appellant had, by a plaint dated October 8, 2010, claimed to be the rightful owner of Parcel No 7727 Kangeta Adjudication sections measuring approximately 6 acres, which was a subdivision of a piece of land he had bought from him the husband and father to the respondents namely LR No 2973 Kangeta Adjudication Section. He averred that before the subdivision, a dispute had arisen and pitted his father and the respondent's husband and or father which was ruled in his favour further on account of purchase for value, but the defendant's respondent had unsuccessfully appealed by Objection No 104.
 4. Despite the two resolutions, the appellant averred that the respondent illegally continued to enter, cultivate and occupy approximately ¼ an acre of his land while he and his family lived and utilized the rest of the suit land. They, therefore, prayed for a mandatory injunction ordering the respondents to vacate the suit land. The plaint was accompanied by a consent to sue dated September 21, 2010 from the District Land Adjudication and Settlement Officer (DLASO) Igembe District and a list of exhibits and witness statements dated June 16, 2011.
 5. The respondents filed an amended defense and cross-claim dated September 9, 2011, accompanied by a list of witness statements. They denied the alleged sale, which they termed wrongful, illegal, and made without their father's consent, who was in jail. They have averred that they live in Parcel No 2973 Kangeta Adjudication Section with no elsewhere to live or go.
 6. Further, the respondent termed the claim time-barred, frivolous, and an abuse of the court. By way of a cross-claim, the 1st respondent then a plaintiff in the other claim sued the appellant as the 2nd defendant and one Johanna M'Ithigua and averred that Parcel No 2973 Kangeta Adjudication section had been gathered by her husband Joakim M'Njogu but erroneously recorded in the names of the plaintiff's husband while her husband was in jail following which an adjudication committee in 1982 ordered that the land be shared equally between her husband and the Johana M'Ithigua.
 7. The plaintiff in the cross-suit averred that the defendant in the cross-suit fraudulently colluded and subdivided Parcel No 2933 into two portions, namely Parcel No 2973 and 7727. She sought a declaration that Parcel No 2973 and 7727 Kangeta Adjudication Section belonged to her to the exclusion of the defendants in the cross-suit and an order canceling the subdivisions. In reply to the defense and defense of the counterclaim, the appellant termed the defense as a sham. He denied the alleged gathering of Parcel No 2973 and the reliefs sought.
 8. Through an application dated May 26, 2015, the appellant sought an interim injunction and for leave to amend the plaint. In the supporting affidavit, the appellant attached a letter dated July 25, 2014 from DLASO Igembe North/Central Sub-counties confirming that the adjudication section had been declared complete and all records/maps forwarded to the titling center for processing of the title deeds.
 9. By this time, the matter was already part heard. It appears from the record of November 11, 2015 that the application was compromised with orders that parties maintained the status quo with no new developments by the respondent and no destruction of trees until the matter was heard and determined. Further parties agreed to proceed with the case from where it had stopped. The record is



unclear on whether leave was granted to file and serve an amended plaint, by which time the matter was at the defense stage.

10. Going back to the testimony tendered, the appellant testified as PW 1 and called Saberria Gatura as PW 2, Julius Kipkorir, a land adjudication officer, as PW 3, and Zakayo Mutia as the chairman Njuri Ncheke Maua as PW 4. The appellant's evidence was that he acquired Parcel No 7727 from his father, John M'Ithigua, out of his land parcel No 2973 Kangeta Adjudication Section after it was subdivided into 7727 and 2972. He said that after a Njuri Ncheke hearing one, Joachin M'Njogu was ordered to vacate their land but continued to live on it and instead filed an Objection No 704, which was determined in his favor. He produced the consent to sue as P Exh No (3) and a letter dated October 8, 2010 confirming ownership of parcels No 7727, 7481, and 6605 Kangeta Adjudication Section as P Exh No (4) and a copy of a demand letter for the respondent to vacate the land as P Exh No (5). He prayed for eviction orders.
11. Cross-examined by respondent, PW 1 told the court that he bought the land from Joackim Ntonjogu between the year 1959 and 1960 for Kshs 1000/= plus bulls and sheep and that his father also gathered other lands which were joined with the portion bought during the adjudication section in 1967. He said the respondent only came to the land but was not living there. PW 2 was the wife of PW 1. She associated her evidence with that of PW 1. PW 3 told the court that all the objections in the area governed by Cap 283 and falling under the Adjudication Section 2 had been determined and implemented, and a letter forwarding all the objection registers for units sent to the Director of Land Adjudication and Settlement on June 16, 2011. He produced a certificate of finality and the forwarding letter as P Exh Nos 6 & 7. He also confirmed P. Exh No (3) as written and authored by E.K Kithambi DLASO. Similarly, PW3 confirmed the authenticity of P Exh No 4. Njuri Ncheke representative, the chairman PW 4, told the court that the Njuri Ncheke, by the proceedings dated 14.03.1991, handled the dispute as per PMFI. He produced the original record as P Exh No. 1.
12. The 6th defendant, Paul Kiangi M'Njogu, testified as DW 1. He told the court that the other defendants were his mother and brothers, who lived and worked on the land the appellant wanted to evict, yet it belonged to them. He said the appellant unlawfully obtained the land while their father was in jail in 1966. DW 1 told the court that upon release from prison, his father filed an objection and complained to the land office as per DMF 1 (1) and DMF1 (2). He denied being aware of the Njuri ncheke proceedings. He urged the court to allow the prayers in the counterclaim.
13. In cross-examination, DW 1 told the court that they had another Parcel No 1200 and that they were occupying approximately ½ an acre of the appellant's land, with a house on it. He said that they had no letters of administration over his father's estate. DW 1 clarified that the outcome of the objection was that the land be shared between Johanna and M'Njogu, Benjamin Karimi, a demarcation officer, testified as DW 2. He told the court that Objection No 704/1992 over parcel No.2973 by Joackim Ntonjogu, father to the 2nd – 8th respondents for fragment no (5) was dismissed, whose effect was that the land remains in the names of Johanna and Ntonjogu. He produced the proceedings and the records of existing rights record as D Exh No (1) and (2), respectively.
14. In cross-examination, DW 2 confirmed that the title deed for the sections was already out but could not establish if the parties to the suit had collected their title deeds since, with a certificate of finality, the area was already registered. He could not confirm if other cases involving the land were an issue. DW 2 said that the objection had not been implemented out of confusion on the proceedings since the officer had stated he dismissed the claims and later said the land to remain in the names of Johanna and M'Njogu, yet Johanna had lodged a written complaint.



15. DW 3 was Veronica Kangonge, the plaintiff in the cross-claim. Her evidence was that Johanna came to graze cows on their land in 1966 while her husband was in prison, gathered the land, and demarcated it under his name. DW 3 testified that after her husband exited jail, a dispute arose, and an order was that the land be shared among the two only for the land to be transferred to Johanna's son, the appellant. She confirmed she resides on the suit land with her children. Further, she confirmed that the 6th respondent was of unsound mind as per D Exh No (2). She also said that her husband was buried on the suit land.
16. Baitari M'Njogu testified as PW 4, while Thurania M'Njogu testified as DW 5, confirming that the committee's decision was clear that the land remains in the name of Johanna Ntonjogu.
17. The court recalled Benjamin Karemi District Land Adjudication and Settlement Officer (DLASO) DW2 to clarify objection No 704. He said that on Item No 171, the complaint was Joakim M'Njogu against Johanna Irigwa. According to him, the report said that the complainant had nothing to show as belonging to him; hence the claim was dismissed. He confirmed that no appeal had been lodged against the decision.
18. This was the evidence before the trial court when it rendered the decision on December 28, 2018 and made a finding that since the objection proceedings' verdict was unclear, yet it went to the very foundation of dispute resolution under Cap 283, objections No. 704 should be remitted to the Land Adjudication Officer (LAO) Kangeta unit to resolve the matter under the law and be implemented within 60 days because of the consent to sue issued to the appellant.
19. By an applications dated November 19, 2019 and February 4, 2019, the court was asked to cancel the title deed registered in the appellant's name for LR No Kangeta/Kangeta/772 or that the judgment and decree be complied with, or the suit land be registered in the joint names of Joakim M'Njogu and the appellant. The basis of the appellant was that the title deed had been illegally issued instead of coming out in the names of Zakayo Kaberia and John M'Njogu. On the 2nd application, the court was asked to review the judgment, dismiss the counterclaim and allow the appellant's case to protect the sanctity of the title. The trial court dismissed the two applications by a ruling dated June 23, 2021, which forms the basis of this appeal.
20. With leave of court, the parties opted to dispose of the appeal through written submissions dated April 4, 2023 ff and April 28, 2023, respectively. The appellant submitted that the trial court decision to refer the matter to the land adjudication officer when the title deed was already out was unlawful since the title deed held by the appellant had not been challenged under Section 26 of the *Land Registration Act*. Reliance was placed on *Margaret Njeri Wachira vs Eliud Waweru Njenga (2018) eKLR*. Further, the appellant submitted that since title deed came out; the land adjudication officer had no jurisdiction to deal with the dispute before the trial court unless in a different suit. As to the application filed by the appellant, it was submitted that the trial court ought to have granted the orders sought.
21. The respondents submitted that the application dated February 4, 2019 and that the decision should be upheld since the title deed was issued on October 30, 2013, with the judgment coming five years down the line. Therefore, the respondents submitted that the appellant at the time he testified on December 19, 2013 must have been aware of the title deed and hence could not amount to new evidence under Order 45 of the *Civil Procedure Rules*. Moreover, the respondents submitted that the appellant did not seek leave to adduce the evidence of the title deed or amend the pleadings to include the title deed.
22. As to the order sought for eviction, the respondents submitted that the trial court could not issue orders not sought in the primary suit over eviction. Reliance was placed on *Telecob Housing and Cooperative Sacco Ltd vs Qwetu Sacco Ltd (2021) eKLR*.



23. Additionally, the respondent submitted that by the time the case was concluded, evidence had been adduced that the adjudication process was complete, and since the DLASO had told the occur that there was a discrepancy in the objection proceedings, the trial court was correct to refer the objection proceedings to the land adjudication officer for the said irregularity to be resolved under Section 26 of the [Land Adjudication Act](#) but instead of complying the appellant filed an application and this appeal.
24. Additionally, the respondents submitted that the circumstances in which the title deed was issued and acquired were not explained to warrant any holding in favor of the appellant.
25. The respondents also submitted that since the objection proceedings were transparent that the subject land be shared, the court should order the subject land to be shared; otherwise, it would be irregular and fraudulent to have a title deed issued in favor of one party against a clear objection decision which was not reversed in any appeal under Section 29 of the [Land Adjudication Act](#).
26. Therefore, the respondents urged the court to find that such a title deed should be canceled and the land registrar to issue two title deeds with equal measurements per the objection proceedings.
27. The court has carefully reviewed the entire lower court file record of the appeal filed, the grounds of appeal, and the written submissions. The issues calling for my determination are:
 - i. If the appeal before the court is competent
 - ii. If the trial court had jurisdiction to entertain the post-judgment applications.
 - iii. If the trial court's judgment was appealed against and, by extension if it had powers to revisit such judgment as requested by the appellant without a substantive appeal against it.
 - iv. Whether the appeal has merits.
 - v. What is the order as to costs.
28. Order 42 rule 13 (4) of the Civil Procedure Rules provides for all the mandatory documents that should form part of the appeal record unless dispensed with by the court.
29. In this appeal, vital documents forming part of what was before the trial court are missing. For instance, the application dated November 19, 2019 is omitted, yet it is a material document for this court to determine the appeal. The record of appeal is also materially different from the contents of the lower court file. The exhibits produced by the parties and marked before the trial court are also missing in the appeal record. The lower court judgment is also left out. The appeal is thus fatally defective and incompetent.
30. The second issue is whether the trial court had jurisdiction to entertain post-judgment applications dated February 4, 2019 and November 19, 2019. There is no dispute that the trial court heard the case and rendered its judgment on December 28, 2018. None of the parties herein appealed against it. From the lower court proceedings, there is no doubt that as of 16.6.2011, a certificate of finality forwarding the adjudication record to the Director of Land Adjudication and Settlement had been issued. PW 3 produced P Exh No's (3), (4), (6) & (7); to that effect, he made it clear that the issuance of the title deed was at an advanced stage. DW 2, on January 20, 2016, confirmed before the trial court that title deeds for the area were already out but was unsure if the parties to the suit had collected them regarding the suit parcels of land. He clarified that only a court order could change the information on the adjudication register.



31. Further, he indicated that any party seeking to know the status of the land would go to the Chief Land Registrar. He further said that a certificate of finality meant that the land was registered. DW 2 noted that his documents before the court were not final.
32. Benjamin Karemi DLASO, was eventually recalled to testify by the trial court. Even after he had said that what he had was not final, purported to introduce objection proceedings which were unclear, the trial court had earlier on been told by a different officer that all the adjudication records had been forwarded to the titling center. Where and how DW 2 obtained such an objection proceeding which the trial court eventually used as a basis for referring the matter to Land Adjudication Officer, remains unclear.
33. The trial court had already been supplied with a certificate of finality and a letter forwarding the same to the titling center. Evidence had also been produced that the title deed was already out. Therefore, the parties and the court knew the dice was already cast by 2013 and 2016.
34. The consent to sue was dated 21.9.2010, and therefore if P. Exh No. (4), 6 & (7) were for 2011, and the trial court was not justified in rewinding the clock and deferring the dispute, if any was in existence, to the Land Adjudication Officer.
35. As to whether the trial court could entertain the applications for review or stay by the appellant and protect the sanctity of the title deed held by the appellant and, by extension, the application by the 1st respondent dated September 19, 2019 to cancel the title deed, order its decree and judgment be complied with in terms of registering the land in the joint names of Johakim Ntonjogu and her it is trite law that parties are bound by their pleadings and issues flow from pleadings.
36. Cancellation of a title deed sought by the 1st respondent under Sections 26(1) (a) & (b) of the [Land Registration Act](#) did not form part of the pleadings made by the 1st respondent in the amended defense and counterclaim, before the judgment was delivered.
37. Similarly, when the judgment was rendered in 2018, the appellant had not disclosed before the trial court that he had in his possession a title deed which the court should protect its sanctity by way of a decree.
38. An attempt to amend the plaint in 2015 was abandoned by the appellant when he consented to maintain the status quo, the matter proceeded from where it had reached, and the respondents not to cut or effect new developments on the disputed land. His additional reliefs for eviction were also abandoned when the leave to amend was not included in the consent.
39. When the decree was signed on December 28, 2018 and extracted on July 2, 2021, title deeds were already out based on the final documents forwarded alongside the certificate of finality in 2011. If any of the parties were aggrieved by the issuance of the title deed, its sanctity, and on eviction from the suit land, those matters were already beyond the trial court's judgment and decree. The trial court was already functus officio in litigating new issues not supported by the pleading, evidence, and documentation before the judgment was rendered in 2018.
40. The appellant has complained that the trial court should have upheld the sanctity of the title and or declined jurisdiction to uphold his application. As it has been said, courts determine factual issues based on law and evidence but not speculations or suppositions. The appellant was aware between 2013 and 2016, that the land was awaiting the title deed. This information had been relayed to the court and the parties. It was not for the court to go and search for the title deed and disclose to the parties that the land was already titled. The title deeds attached to the application by the appellant was dated 2013. This was before the appellant's case had closed. He must have been aware that he had collected a title



deed when the respondents testified. The appellant did not bring it to the attention of the court that there was already a title deed. Courts do not fish for evidence or facts unless the parties bring them to it. Even in invoking the court's discretion under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*, the application must be made without undue delay and based on the parameters of fresh evidence obtained under the exercise of due diligence and for a sufficient cause. In my view, the trial court was justified in declining to grant the reliefs sought in the two applications since it was functus official unless moved in a different suit.

41. Similarly, counsel for the respondent has urged this court to find the title deed illegally obtained. It's a contradiction for the respondents to support the holding of the trial court while simultaneously seeking solace before this court to allow their application, which was dismissed alongside that of the appellants.
42. The respondents preferred no appeal against the dismissal of their application, seeking for the cancellation of the title deed held by the appellant. This court has no substantive appeal by the respondents with a specific request that the title deed be canceled, and the land be registered in the names of the first respondent and Joackim M'Njogu. The issue was never litigated before the trial court. The respondents had not pleaded such facts and led evidence to that effect in their amended defense and counterclaim dated September 9, 2011. Therefore, this court cannot issue reliefs on issues not litigated before the trial court.
43. The upshot is that I find the appeal incompetent and lacking merits. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 31ST DAY OF MAY 2023**

In presence of

C.A John Paul

Maranya for appellant

HON. CK NZILI

ELC JUDGE

