



REPUBLIC OF KENYA



KENYA LAW

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**Jembe & another v Mulewa; County Executive Committee Physical
Planning, Kilifi (Third party) (Environment and Land Appeal
13 of 2022) [2023] KEELC 17743 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 13 OF 2022**

EK MAKORI, J

MAY 25, 2023

BETWEEN

ALPHONCE WANJE JEMBE 1ST APPELLANT

BONIFACE MBOGO 2ND APPELLANT

AND

ESTHER KANZE MULEWA RESPONDENT

AND

**COUNTY EXECUTIVE COMMITTEE PHYSICAL PLANNING,
KILIFI THIRD PARTY**

*(Appeal against the judgment of Hon L W Wasige the Principal Magistrate
at Kaloleni (PMC. ELC No 2 of 2015 delivered on 15th March 2022)*

JUDGMENT

1. The Appellants in this appeal seek to upset the judgement and decree of the Principal Magistrate Kaloleni ELC No. 2 of 2015.
2. The mandate of a first Appellate Court is to re-evaluate the evidence before the trial court as well as the judgment and arrive at an independent decision on whether or not to allow or disallow the appeal. A first appellate court is vested with authority to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123.
3. The 1st and 2nd Appellants have levelled the following grounds of appeal:



- a. The Learned Magistrate erred in law and fact by failing to consider the counter claim filed by the Appellants and proceeded to dismiss the same.
 - b. The Learned magistrate erred in law and fact by failing to consider the evidence tendered by the Appellants.
 - c. The Learned Magistrate erred in law and fact by failing to consider that the suit was time barred by virtue of limitation of actions since the 1st Appellant had become owner of the said parcel of land by way of adverse possession and letter of allotment was issued to him in 1995.
 - d. The Learned Magistrate erred in law and fact by allowing all the prayers in the plaint dated 14th May, 2019 sought by the respondent herein.
 - e. The Learned Magistrate erred in law and fact by failing to consider the evidence of the 3rd party.
 - f. The Learned Magistrate erred in law and fact by failing to consider that the title deed had been secured fraudulently since the plaintiff did not follow the laid down procedures.
 - g. The Learned Magistrate erred in law and fact to base its judgment only on the production of the title deed and search by the respondent.
 - h. The Learned Magistrate erred in law and fact by failing to consider that evidence tendered by the chief land surveyor.
 - i. The Learned Magistrate erred in law and fact by failing to consider that the 1st appellants had proved their counter claim on a balance of probability.
 - j. The Learned Magistrate erred in Law and fact by failing to consider that the 1st appellant occupied the suit property when it was empty and without any structures.
 - k. The Learned Magistrate erred in law and fact by failing to consider that one Herbert Lewa is the one who complained that the property belongs to him instead of the Respondent.
 - l. The learned magistrate erred in law and fact by failing to consider that the 1st appellant followed the right procedures in acquiring the said property known as No. 10227/30.
 - m. The Learned Magistrate erred in law and fact by failing to consider that the Municipal Council of Kilifi now County Government of Kilifi allocated the property to the 1st Appellant.
4. The Respondent has opposed the appeal. The court directed that the appeal be disposed of by way of written submissions.
 5. The Appellants submitted that the Lower Court erred in making a finding that the suit property belongs to the Respondent herein when the 1st Appellant had properly demonstrated that he is the rightful owner of the said plot having been allocated to him since September 1995. The allocation was not cancelled by the County Government of Kilifi and all necessary documents and evidence were produced to prove the same.
 6. That Lower Court misguided itself by simply considering only the Title Deed and Search produced by the Respondent without considering the defence, counter claim, submissions and list of documents produced by the 1st Appellant and the witnesses who testified on behalf of the Appellants herein from the Ministry of Lands.



7. That the trial court did not consider in delivering the judgment how the Respondent acquired the suit property but simply favoured the Respondent for having produced the Title Deed and Search which documents were acquired fraudulently.
8. That the trial court disregarded the Respondent's submissions plus authorities dated 17th January 2022 and filed on the same day which forms party of the court record herein and found at page 108 – 117 and Appellants also rely on the same on this appeal.
9. That even from the evidence and documents produced by the 1st Appellant in the trial court, the Magistrate did not consider any of the evidence adduced by the Appellants and documents produced.
10. The Appellants rely on the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR, which held that adverse possession is proved when an aggregate of more than 12 years stay in a suit property, is reckoned in the terms of Limitations of Actions Act.
11. That the Appellants pray that the appeal be allowed with costs.
12. The Respondent on the other hand submitted that the thrust of Article 40 of the *Constitution* is to protect proprietary rights under the law. Statutes govern such rights; in this case, the provisions of the Registration of Titles Act govern the title issued herein. The Respondent's case is grounded on the fact that she has an absolute and indefeasible title under the *Registration of Titles Act*. The same is protected under Article 40 of the *Constitution* and that once a title is issued under the *Act*; the holder thereof acquires an indefeasible title that cannot be taken away except in accordance with the *Constitution* and the law, which procedure has not been followed in this case in order to deprive the respondent her title.
13. The respondent asserted that the issue in this case is whether the Government, which issued a title, can declare a right inconsistent with the title without following due process. The 1st appellant has pointed out that the property was fraudulently acquired and that it belongs to him because he has been paying rates for the suit plot but has failed to provide any other document showing legal ownership of the same.
14. The Respondent further submitted that trespass to land in essence constitutes the slightest disturbance to possession of land by a person who cannot show a better title or right to possession. The 1st Appellant has breached, violated and infringed the proprietary rights of the Respondent in the suit property by continued construction of structures without any color of right and or any legal right known in law.
15. Additionally, it is submitted that the appellants herein having continuously trespassed into the suit property, the trial court was correct in issuing the orders - more so a permanent injunction restraining the appellants from encroaching, trespassing, taking possession, developing and constructing structures on the suit property.
16. The Respondent stated that a person could only acquire proprietary rights in land through adverse possession if he has been in a continuous, open and exclusive uninterrupted occupation of the same. The 1st Appellant in his testimony found in Pages 12 -13 of the record of appeal adduced evidence that he saw an advertisement in the Kenya Gazette in 1994 advertising the land and proceeded to apply for it . In 1995 his application was successful and in the year 1998 he moved to occupy the plot but problems begun in 2015 when Herbert Mulewa husband to the Respondent herein claimed ownership of the suit property. It only took 7 years before the possession of the 1st appellant was disturbed that alone does not meet the threshold of adverse possession.
17. The respondent further averred that it can be concluded subtly that the 1st Appellant knew that the suit property belonged to someone else before he took possession of it. That the 1st Appellant cannot claim



to have acquired the plot through adverse possession. Several authorities are quoted to support the Respondent's assertion (the cases of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR and *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR which articulate that for a possessor to prove adverse possession the following ingredients have to be established:

- a. On what date he came into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party.
 - d. For how long his possession has continued and
 - e. That the possession was open and undisturbed for the requisite 12 years.
18. The Respondent continued to submit that in line with the above the Learned Magistrate did not err in law and in fact that the suit was not time barred by virtue of the *Limitations of Actions Act* and in fact, this was never an issue in the first place.
19. The Respondent averred that the appellants herein failed to prove elements of fraud hence the trial court was correct in dismissing such claims since the threshold to establish fraud was never achieved as held in the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR - that fraud must not only be pleaded but specifically proved.
20. The Respondent stated that pursuant to Section 23 of the *Repealed Registration of Title Act*, which provides that the Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the Title of that proprietor shall not be subject to challenge. That nobody can be deprived of his property except in accordance with the provisions of the *Constitution* or Statute. The Respondent herein is the registered proprietor of the suit property; she has government issued title document, which title is indefeasible unless fraud is established as a basis of its acquisition.
21. The Respondent further stated that 1st Appellant claimed to have been issued with an allocation letter however such letter does not evidence ownership. Additionally, the receipts produced as exhibits were not stamped by the relevant government bodies thus cannot be considered as official receipts. The trial Magistrate did not err in holding that the respondent herein had a title to the suit land thus the true registered owner.
22. The Respondent claimed that the Chief Land Surveyor failed to produce a notice for advertisement confirming that there was any of the suit property as alleged by the Appellants. In his testimony found in Pages 18-21 of the Record of Appeal he confirmed that the Appellant did not have an allotment letter and that the County Government/ third party does not issue allotment letters, the same is done by the National Land Commission.
23. The Respondent concluded by submitting that she proved her claim as against the Appellants on a balance of probabilities at the Magistrates Court and that the Appellants' appeal ought to be dismissed with costs.
24. What is in issue in this appeal is whether the trial court properly directed itself and reached a correct finding on the core issue which I can garner from the material before me - being the ownership of the



suit property herein. The question to answer is between the Appellants and the Respondent who is the rightful owner of the suit property.

25. In the Lower Court after hearing the Plaintiff (Respondent here) and the Defendants (Appellants here), the trial court concluded that Respondent was the rightful owner of the suit property and issued injunctive orders to restrain the Appellants from further trespass on the land and that the Appellants were directed to give vacant possession.
26. The trial court considered that the plaintiff had displayed a Certificate of Title (plaintiff exhibit 1) duly issued by the National Land Commission on behalf of the County Government of Kilifi on 5th October 2011, for a term of 99 years from 1st January 1999. A Certificate of Search (plaintiff exhibit 2) dated 8th January 2019, to indicate that the Plaintiff was the registered owner of the suit property. The trial court shot down the assertion of fraud in the acquisition of the Certificate of Title since in the findings of the court, it was a mere allegation that the husband of the plaintiff who was a senior government officer must have influenced in its acquisition.
27. On the other hand, the trial court made a finding that the 1st Defendant's Plot Allocation Letter, and not an Allotment Letter (defence exhibit 1) dated 6th September 1995 was not good enough to prove ownership. The list of Beneficiaries Audit Report showing 1st Defendant as one of the beneficiaries was not certified dated and signed by any Municipal Council of Kilifi officials and did not appear to have emanated from it. The documentation of documents held by 1st Defendant were suspect.
28. On the counterclaim, the trial court concluded that since the 1st Defendant had failed to establish ownership of the suit property, the counterclaim was not proved and stood dismissed.
29. I have perused and considered the material and evidence placed before the trial court, the situation we have, is that of two protagonists having ownership documents to the suit property claiming that each acquired the same legally and regularly with the 1st Appellant having an allocation letter from the defunct Municipal Council of Kilifi allocating the suit property to him and the Respondent, having a Certificate of Title issued by the National Land Commission on behalf of the County Government of Kilifi.
30. After reading and carefully evaluating the materials and evidence presented to the trial court, I have concluded that the situation involves two parties who both claim to have legally and regularly acquired the suit property. The 1st Appellant has an allocation letter from the now-defunct Municipal Council of Kilifi allocating the suit property to him, and the Respondent has a Certificate of Title issued by the National Land Commission on the subject property.
31. The trial court took into account how the two parallel ownership documents were issued, and it determined that the Respondent's document, which was accompanied by a Certificate of Title, was superior to that of the 1st Appellant because the 1st Appellant had an allocation letter as opposed to an allotment letter from the defunct Municipal Council of Kilifi. The court also found that the list of beneficiaries of the allocation was suspect and possibly could not come from the defunct County Council of Kilifi because it was not certified, dated or even signed by any of the officials from the Municipal Council of Kilifi.
32. The trial court further held that to challenge a title one has to prove fraud or misrepresentation in the acquisition of the title in which the holder of the title is party to pursuant to Section 23 of the *Repealed Registration of Title Act*. I find that the holding of the trial court was sound on this finding.



33. To impeach the title held by the Respondent on fraud, I am guided by the authority as cited by the Respondent in the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

34. The 1st Appellant in this case asserted that the Respondent's title was acquired through the influence of her husband, a high government employee. The Magistrate determined that this was only an allegation that was never even remotely proven. I cannot find fault with the trial court's conclusion. She focused on the same in the right way. According to the cited authority, one must expressly allege and prove fraud; the court cannot draw inferences on fraud from the evidence. The 1st Appellant could have been more explicit when alleging fraud on the part of the Respondent's husband and presenting evidence to support it in court. Fraud is a type of criminal offence that must be proven beyond a reasonable doubt. It should be taken seriously when pleaded in civil cases. The 1st Appellant did not succeed in achieving this before the trial court.

35. The documents produced by the 1st appellant being allocation letter and the Beneficiaries Audit Report from the defunct County Government of Kilifi were found to have been wanting. The trial court in my view correctly found that the mode of conferment of land by the Municipal Council ought to have been by way of allotment letter and not allocation letter. The list of the beneficiaries was also found wanting because it was not certified, dated nor signed by the relevant officials. The allocation ought to have followed the next step of issuance of title by the Commissioner of Lands then, now the National Land Commission. The 1st Appellant never followed this step. I cannot again fault the trial court on her findings on this issue.

36. The subject of adverse possession was brought up in this appeal. I did not see it appearing at the trial court based on the material placed before me. It was not prosecuted at the trial. The amended defence and counterclaim do not include the matter as well. In any case, claiming ownership by way of a gift from the government while also claiming adverse possession would be equivalent to attacking or defeating what you perceive to be yours. That is where I will stop my discussion on adverse possession.

37. The other grounds of appeal seem repetitive and are submerged on what I have already discussed.

38. The upshot is that the current appeal has no merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25TH DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the presence of:

M/s Angeline Omollo for Appellants

Court Clerk: Happy



In the absence of:

Mr. Omwenga Mogaka for Respondents

