



**Kenya Forest Service v Otieno & another (Environment and Land Appeal
43 of 2021) [2023] KEELC 18019 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 43 OF 2021**

MN KULLOW, J

MAY 25, 2023

BETWEEN

KENYA FOREST SERVICE APPELLANT

AND

KENNEDY OCHIENG OTIENO 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. M. Obiero delivered on 14th October, 2021 in Migori CMELC Case No. 134 of 2018, in which the Plaintiff's claim against the Defendant was allowed as prayed. The grounds in the Memorandum of Appeal dated 08/11/2021 are that: -
 - i. The Honourable Learned Magistrate erred in fact and law by finding that the 1st Respondent had proved his case that parcel number Suna East/ Wasweta I/12108 belongs to him despite making a finding that the green card and the mutation form tendered as evidence by the 1st Respondent had contradicting parcel numbers that were sub-divided to give rise to parcel number Suna East/ Wasweta I/12108.
 - ii. The Honourable Learned Magistrate erred in fact and law by finding that the 1st Respondent had proved his case that parcel number Suna East/ Wasweta I/12108 belongs to him despite making a finding that the 1st Respondent had not tabled any evidence to prove that there was consent of the Land Control Board prior to the sub-division of the parcel of land that gave rise to parcel number Suna East/ Wasweta I/12108.
 - iii. The Honourable Learned Magistrate erred in fact by ignoring the 1st Respondent's second witness testimony (the surveyor) that the suit land Suna East/ Wasweta I/12108 is situated within Aroso Hill and that there was encroachment on Aroso Hills by individuals.



- iv. The Honourable Learned Magistrate erred in fact and law by disregarding the Appellant's evidence and submission that Aroso Hill within which the suit land Suna East/ Wasweta I/12108 is situated had been set aside for gazettement as forest land as early as 1983 through a special resolution by the then South Nyanza County Council.
 - v. The Honourable Learned Magistrate erred in fact and law by finding that the disputed parcel of land Suna East/ Wasweta I/12108 was not part of the gazetted forest land despite the evidence tendered by the Appellant in the form of the Migori town forest block boundary plan number 175/486 that consists of five forest blocks whereby Aroso Hill is one of the blocks and which is denoted as block 1 on the boundary plan and which was gazetted as forest land vide Legal Notice Number 200 dated 14th August, 2017.
 - vi. The Honourable Learned Magistrate erred in fact and law in finding that the 1st Respondent had proved that the suit property Suna East/ Wasweta I/12108 belongs to him despite the overwhelming evidence by the by the Appellant and the submissions that casted doubt on the root of the title for parcel of land known as Suna East/ Wasweta I/12108.
 - vii. The Honourable Learned Magistrate erred in fact and law by finding that the matter before it was not a boundary dispute and that it had the requisite jurisdiction to hear and determine the matter despite the 1st Respondent's own prayer in the plaint for fixing of boundaries and his oral testimony that there were no boundaries delineating his parcel of land and that of the Appellant and that he would like to have the boundaries fixed.
 - viii. The Honourable Learned Magistrate erred in fact and law by basing his decision on the oral testimony of the 1st Respondent's second witness (the surveyor) that there existed boundaries between the Appellant's parcel of land and that of the 1st Respondent and that the Appellant had encroached onto the 1st Respondent's parcel of land despite there being no formal report being filed by the Surveyor in court as well as ignoring the contradicting testimony by the 1st Respondent and that of the surveyor regarding encroachment on the suit property Suna East/ Wasweta I/12108
 - ix. The Honourable Learned Magistrate erred in fact and law by disregarding the Appellant's submission on the issue whether an instrument of title is sufficient proof as to the ownership of property.
2. Consequently, the Appellant is seeking the following orders: -
 - a. The Appeal be allowed.
 - b. The Learned Magistrate Honourable M. Obiero's decision contained in the judgment and order dated 14/10/2021 in Migori Chief Magistrates ELC No. 134 of 2018 between Kennedy Ochieng Otieno vs Kenya Forest Service and another be set aside.
 - c. The Appellant's prayers contained in its Statement of Defence and Counter- claim dated 18th April, 2018 and filed on 19th April, 2018 be allowed.
 - d. Costs of the Appeal and those in Migori Chief Magistrates ELC No. 134 of 2018 between Kennedy Ochieng Otieno vs Kenya Forest Service and another be paid by the Respondents.
 3. On 08.11.2022, this court issued directions that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 30 days. Both parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision.



Appellant's Submission

4. The Appellant's counsel condensed all the 9 grounds of Appeal into one main issue for determination; whether the 1st Respondent had proved his case on a balance of probabilities. It was counsel's submission that based on the evidence tendered, the 1st Respondent did not meet the evidentiary threshold that was required of him to persuade the trial court to enter judgment in his favor. That the 1st Respondent solely relied on the certificate of title to show that he is the absolute proprietor of the suit property.
5. It was also his submission that according to the 1st Respondent, the suit land was registered in his name by way of transmission on 08/09/2011 vide Succession Cause No. 109 of 2008 and that his father, John Otieno Omolo, was the first registered proprietor of the suit land, however no evidence was adduced to support the said averments.
6. On the creation of the suit land No. 12108; it was his submission that the 1st Respondent produced a Green Card dated 10/07/2000; which showed that the suit parcel was created pursuant to the subdivision of plot No. 3457 on the one hand and a Mutation Form dated 10/7/2000 and which showed that the suit land was a subdivision of parcel No. 3452. He thus maintained that the Green Card and the Mutation Form gave contradicting information as to the subdivision of the suit land. Further, there was no copy of the title which was subject of the subdivision.
7. Counsel further submitted that the 1st Respondent did not tender evidence to prove the prerequisites for the subdivision process of the title that gave rise to the suit land as provided under section 6 of the Land Control Act and Regulation 2 of the Land Control Regulations (1967). That his failure to adduce the necessary evidence thereof shows that the said process of subdivision was illegal and there was no way to ascertain the said subdivision or that the land in question was registered in the name of his father as alleged.
8. It was counsel's submission that the Appellant had proved that the suit property was illegally acquired as the same was declared Forest Land vide Legal Notice No. 200 of 14th August, 2017. It was his contention that vide a special resolution held at Homabay on 28/01/1983; the then South Nyanza Municipal Council passed a resolution to gazette as forest land certain parcels of land in South Nyanza. The Appellants produced as evidence, the minutes together with the letter dated 19/03/1990 that forwarded the said resolutions to the Ministry of Environment and Natural Resources for gazette of the forest land and Aroso Hill was listed therein as number 19.
9. He further submitted that despite the fact that Aroso Hill was only declared a forest land vide Legal Notice No. 200 of 14th August, 2017; the resolution declaring the same as forest land was passed on 28/01/1983. On the other hand, there was no proof tendered that the 1st Respondent's father was the registered proprietor of the suit land that was subdivided to give rise to the suit land at the time/ prior to the resolution being passed.
10. He thus maintained that the suit parcel was within Aroso Hill and the said hill was delineated as Block 1 on Boundary Plan No. 175/ 486 which was produced as Dexh. 3 and supported by the testimony of PW2, who stated on oath that the suit land was within Aroso Hill. It was his claim that the entire process of declaring Aroso Hill as forest land commenced in 1990 before the 1st Respondent acquired the land.
11. He contends that allowing the 1st Respondent to remain in possession of the suit land would defeat the Appellant's efforts to protect and conserve forests. It is his claim that the 1st Respondent could not lawfully acquire title to public land which had been set aside for government use as forest land. It was



therefore counsel's position that the title issued in favor of the 1st Respondent was null and void, as the entire Aroso Hill or any part thereof was not available for allocation to any individual from 28/01/1983 when the resolution was passed by the then South Nyanza Municipal Council, declaring the said hill as forest land.

1st Respondent's Submissions

12. The 1st Respondent's counsel submitted on 4 issues. The first issue was whether the 1st Respondent was the bona fide proprietor of the suit land. Counsel submitted that the county surveyor confirmed that the title of the 1st Respondent was/ is still valid and further that the Appellant did not lead evidence to show that the said title was acquired fraudulently or through misrepresentation as provided under section 26 of the *Land Registration Act*.
13. The second issue was whether the Appellant had trespassed onto the suit property and it was submitted that the 1st Respondent testified that the Appellant had extended boundaries and trespassed into his land. PW2, the County Surveyor confirmed the said allegations and testified that he visited the suit land to determine the issue of encroachment and found that there was 100% encroachment of the forest into the suit land, that the entire parcel had been taken by the Appellant.
14. He thus maintained that the Appellant had trespassed into the suit land and continued to occupy the same and the allegations by the appellant that the claim between the parties was a boundary dispute was debunked by the county surveyor's testimony that the Appellant had totally taken over the suit land.
15. Issue no. (iii) was whether the 1st Respondent was entitled to an injunction against the Appellant and it was counsel's submission that DW1 confirmed that they did not challenge the title of the 1st Respondent and further that no record was adduced to show that the suit land was part of the forest.
16. On the last issue, counsel submitted that the Appellant's witness confirmed that the government had neither claimed the said land nor cancelled or recalled the title deed issued in the 1st Respondent's name. Further that there was no document which specifically listed the suit land as part of the forest.
17. He thus maintained that that the Appeal lacked evidential clarity and particularity and urged the court to dismiss the Appeal with costs.
18. I have looked at the grounds of Appeal and it is my considered opinion that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on 14.10.2021 and I will proceed to discuss the same on account of;
 - i. Ownership of the suit land L.R. No. Suna East/ Wasweta I/ 12108
 - ii. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
19. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This however does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial



judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

I. Ownership of the suit land L.R. No. Suna East/ Wasweta I/ 12108

20. The dispute between the parties herein is on the ownership of suit parcel No. Suna East/ Wasweta I/ 12108. The Appellant contends that the suit land forms part of the Forest Land within Aroso Hill. He adduced various documents in the form of minutes and correspondences between the various government departments and the Gazette Notice dated 14/08/2017 as Dexh. 1 and 2, in explaining the procedure followed in declaring the suit land as forest land. He also produced a copy of the Boundary Plan as Dexh. 3 and copy of PID No. 7 as Dexh. 4 in support of the averments that the suit land forms part of the Forest Land.
21. The 1st Respondent on the other hand maintained that the suit land is private land and the same does not form part of Forest Land as alleged by the Appellant. It is his submission that the Appellant did neither adduce any specific evidence as proof that the suit land formed part of Aroso Hill or was reserved as forest land in compliance with the rules of evidence nor challenged the title held by the 1st Respondent in accordance with the provisions of section 26 of the [Land Registration Act](#)
22. I have carefully reviewed, analysed and evaluated the factual details and evidence of each party as presented in the trial court and of interest is the Special Resolution passed in the year 1983 and Minutes of 1990 produced as Dexh. 1. It is my considered opinion that the Local Municipal Council; which was vested with the mandate to administer and hold forest land in trust for the area residents at the time, having deliberated and passed a resolution that the subject land should be declared forest land in 1983 and 1990, any subsequent dealings regarding the said land was therefore invalid and unenforceable. This is despite the Legal Notice declaring the said parcels as forest land having been gazetted in the year 2017.
23. Consequently, the registration of the 1st Respondent's father as the owner of the subject land in the year 2000 and subsequently in the name of 1st Respondent in the year 2011 prior to the gazettelement of the Legal Notice in the year 2017, such registration and title issued thereto is void, for the reason that the said subject land was not available for reallocation/ alienation.
24. Further, the 1st Respondent neither challenged any of the documents relied on by the Appellant to prove that the subject land is forest land nor raised any claim that the process followed in declaring the said parcels as forest land was unprocedural. It therefore follows that the Appellant complied with the relevant statutory provisions in declaring the respective parcels of land as forest land and which process led to the gazettelement of Legal Notice No. 200 of 14/08/2017.
25. The next question therefore is whether the suit land forms part of the forest land and if the 1st Respondent has any proprietary rights thereto. It is the 1st Respondent's claim that there was no specific evidence adduced by the Respondents to prove that the suit land No. Suna East/ Wasweta/ 12108 was part of the Aroso Hill or the forest land. According to him, the suit land is a private and/or ancestral land which is separate from the forest land but only shares a common boundary. He relied on his title deed (Pexh.1), the Green Card (Pexh. 2) and the Mutation Form (Pexh. 3) to prove the said averments.
26. The Appellant on the other hand maintained that the suit land is within Aroso Hill and it forms part of the delineated Forest Land, he produced a copy of the Boundary Plan No. 175/486 (Dexh.3) and copy of the PID No. 7 (Dexh. 4) in support of the said position.



27. The Appellant further challenged the registration of the 1st Respondent as the proprietor of the suit land and the allegations that the suit land was an ancestral land. It was his contention that no evidence was tendered to show the original land if any, the alleged registration in the name of the 1st Respondent's father, the process of subdivision and subsequent registration of the suit land in the name of the 1st Respondent.
28. I have carefully looked at the said Green Card (Pexh. 2) and Mutation Form (Pexh. 3) and I do note that the 2 documents contain contradictory information as to the subdivision of the original land and the creation of the suit land No. 12108. It is not clear whether the subdivision of the suit land was from parcel No. 3457 or No. 3452. I have also noted from the testimony of PW2; particularly on the location of the suit land, he confirmed that the land is situated within Aroso Hill. Dexh. 3 and 4 adduced by the Appellant further buttressed this assertion. The 1st Respondent did not adduce contrary evidence as to the location of the subject land to rebut the averments by the Appellant.
29. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR held that: -
- “where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register”
30. The fact that the Resolution was passed in the year 1983 and 1990 for the for the declaration of the suit land as forest land meant that the said land was reserved for public utility and was therefore not available for alienation or for use as a private land. While it is not in dispute that the 1st Respondent holds a title deed in respect of the suit land (the process of acquiring the said title having been discussed in the preceding paragraph), the question remains whether the said land was available for alienation and/or allocation. As was held in the case of *Niaz Mohamed Jan Mohamed Vs Commissioner for Lands & 4 Others* HCCC No. 423 of 1996, land acquired in public interest cannot be alienated and allocated to private individuals, even a portion thereof unless certain conditions such as degazettement are met.
31. As held by the Court of Appeal in *Selle* (supra) this court is not bound to necessarily follow the trial court's findings on fact if it appears that the trial court failed to take into account particular circumstances or probabilities. See also *Ephantus Mwangi & Anor vs Duncan Mwangi* [1982 – 1988]1 KAR 278.
32. In view of the foregoing, I find that the learned trial magistrate misdirected himself in allowing the plaintiff's claim and there is therefore need to interfere with the said decision.
33. Consequently, I find that the Appellant is entitled to the reliefs sought in the Memorandum of Appeal dated 8/11/2021.

Conclusion

34. In conclusion, I accordingly find that the Appeal is merited and Memorandum of Appeal dated 08/11/2021 is hereby allowed on the following terms: -
- a. The trial court judgment and order dated 14/10/2021 in *Migori Chief Magistrates CMELC* No. 134 of 2018 be and is hereby set aside.



- b. The Appellant's prayers contained in its Statement of Defence and Counter-claim dated 18th April, 2018 and filed on 19th April, 2018 be and is hereby allowed.
- c. The title issued in favor of the 1st Respondent be and is hereby revoked.
- d. Further, the Forest department (Appellant) is hereby directed to demarcate, fix boundaries and fence off the Forests Area within 90 days from the date of this Judgment.
- e. Further to order (d) above, the Appellant is directed to subsequently file a Compliance Report upon lapse of the 90 days.
- f. Costs of the Appeal and trial vide CMELC No. 134 of 2018 be borne by the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 25TH DAY OF MAY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellant

Nonappearance for the Respondent

Court Assistant- Tom Maurice/ Victor

