



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Mukindia (Environment and Land Appeal E064 of 2021)
[2023] KEELC 17637 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E064 OF 2021**

CK NZILI, J

MAY 24, 2023

BETWEEN

DAVID KINYUA APPELLANT

AND

MOSES MUTHURI MUKINDIA RESPONDENT

*(An appeal from the Judgment at Githongo in ELC 1 'B' of 2019
delivered on 19.5.2021 by Principal Magistrate Hon S Ndegwa)*

JUDGMENT

1. The appellant, who was the defendant at the lower court, has, by a memorandum of appeal dated May 31, 2021, faulted the judgment delivered on May 17, 2021 on the basis that the learned trial court erred in facts and law in:
 - i Finding the case against him by the respondent as established.
 - ii Failing to appreciate that there was a pending case, Meru ELC Case No 20 of (2019), over the same subject matter.
 - iii Making a finding that the appellant was an encroacher, invader, and trespasser to the suit premises.
 - iv Filing to consider his evidence and the defense.
2. This being a first appeal, the role of this court is to re-hear, re-hearse, re-consider, and re-evaluate the lower court record, come up with its independent conclusion or finding on both facts and law while at the same time being mindful that the trial court had the opportunity to hear and watch the witnesses first hand. See *Peters vs Sunday Post Ltd* (1958) E A 424.



3. Before the trial court, the respondent approached the court through a plaint dated January 11, 2019. His claim was that the appellant in 2013 filed a suit against him at the High Court Meru over the ownership of L R No Abothuguchi/Katheri/4046, where the court, in a judgment dated July 26, 2017, declared him as the rightful owner, but the appellant refused to hand over vacant possession, erected semi-permanent structures and brought in his family to stay on the land.
4. The respondent averred that the appellant assaulted him on October 7, 2017, and charges were preferred against the appellant in Githongo SRMC Cr Case No 932 of 2018. He sought for a permanent injunction, eviction order, and a mandatory injunction to demolish and remove structures on the land and costs. The plaint was accompanied by a list of witness statements and documents including Meru ELC No 234 of 2013, the decree dated September 28, 2018, and a further list of documents dated August 19, 2019.
5. In a defense dated March 8, 2019, the appellant opposed the claim stating that he occupies the suit premises as a matter of right and that the registration in the respondent's name was actuated by fraud and false representation. The appellant averred that he had not exhausted all the legal avenues to claim his entitlement in the family land and proprietary rights in L R No Abothuguchi/Katheri/4046 had commenced a claim on adverse possession. The defense was accompanied by a list of witnesses dated November 11, 2020 and documents dated March 8, 2019.
6. At the trial, the respondent testified as PW 1 and adopted his witness statement dated January 11, 2019 as evidence in chief; he produced a title deed for L R No Abothuguchi/Katheri/4046 as P Exh No (1) a Meru ELC No 234/13 judgment as P Exh No (2) and a decree as P Exh No (3). His documents in the additional list dated August 19, 2020 were objected to.
7. In cross-examination, PW 1 admitted that Zachary Karuntimi was brought up by his mother, Zipporah, as part of the family. He said that the original parcel L R No 2593, a resultant subdivision of L R No 2758, was subdivided into parcel L R No 4045 – 4047 with L R No's 4045 and 4047 going to Allan Kithinji and Eric Mwenda Matiba respectively, the two being sons of Zachary Karuntimi. PW 1 denied that he wanted to dispossess Zachary since L R No 2593 was meant for his mother, a wife to the late Jacob M'Mukindia who had two wives and four sons. He denied that Zachary was a beneficiary of the initial L R No 758.
8. In re-examination, PW 1 told the court that Zipporah subdivided L R No 2593 into L R No's 4045-4048, acquired L R No 4046, and transferred the portions to him on October 14, 2019. PW 1 clarified that all that information had been captured in P Exh No (2). David Kinyua testified as D W 1. He adopted his witness statement dated November 20, 2019 as his evidence in chief. He also produced a bundle of photos as D Exh No (1) a certificate of official searches for L R No's 2594, 2595, 2596, 5055, 4045, 4046, and 4047 as D Exh No (2) and lastly, a survey map as D Exh No (3).
9. In cross-examination, D W 1 told the court that he was born and lived in Katheri, whose title deed was in the respondent's name. D W 1 testified that he had extensively developed the land as per D Exh No (1) he produced no receipts or proof of the developments before the court. He confirmed that his homestead was connected to water and electricity in 1989 and 1991, before the respondent obtained the title deed.
10. D W 1 said that after his wife died in 2011, she was buried on the suit land. Before the land was registered under the respondent's name. DW1 noted that the respondent never ordered him to vacate the land. D W 1 denied that an assistant chief was sent to inform him to leave the land.



11. In re-examination, D W 1 insisted that the land belonged to his father, and his two brothers acquired their shares, but the respondent took his share, so he had nowhere to move to if evicted. The court rendered its judgment on May 17, 2021, allowing the claim, which is now appealed against.
12. With leave of court and concurrence of parties, written submissions to dispose of the appeal were filed on March 15, 2023 and March 13, 2023, respectively. The appellant has isolated two issues for determination on whether the trial court should have given leeway for the pending suit in the superior court. The appellant submitted, guided by Article 165 (3) of the Constitution, that the trial court should not have proceeded with the suit; hence the judgment was premature.
13. On whether the trial court was wrong to find him a trespasser, encroacher, or invader, the appellant submitted that D Exh No (1) was a clear testimony of his long occupation, which was adverse to the owner's rights. Reliance was placed on Maweu vs Lin Ranching & Farming Cooperation Society (1985) KLR 430 and Samuel Miki Waweru vs Jane Njeru Richu Civil Appeal No 122 of 2001. The court was urged to find that adverse possession had been proved for a portion measuring 0.130 ha of the suit land under adverse possession.
14. The respondent submitted that the appeal lacked merits, for the trial court rightly found him as the valid and justified owner of the suit property, more so when such an issue had been litigated as per P Exh No (2), a decree issued to that effect which was not appealed against or set aside. Reliance was placed on Moses Ageya Kembe vs Washington Okello Sule (2022) eKLR, on the proposition that the title deed in his possession was valid without fraud or illegality. In this case, the respondent submitted that the appellant had failed to discharge his burden of proof under Sections 107-109 of the Evidence Act.
15. On the existence of a pending Meru ELC No 20 of (2019) on adverse possession, the respondent submitted that the appellant did not refute ownership or justify why he should not be evicted. Reliance was placed on MMA vs J G & another (2018) eKLR, on the proposition that eviction orders ought to be granted in the absence of legal and justifiable reasons or rights.
16. The court has carefully reviewed the record of appeal, grounds of appeal and the written submissions. The issues calling for my determination are:
 - i If the appellant's appeal has merits.
 - ii If the pendency of the suit before this court was a bar to the trial court in determining the claim.
 - iii What is the order as to costs?
17. In trite law, parties are bound by their pleadings, and issues flow from them. The primary pleadings in this suit are the plaint dated January 11, 2019 and March 8, 2019. In the plaint, the respondent pleaded that he was the registered owner of L R No 4046 whose ownership had been determined, and a decree issued by this court as per P Exh No's 2 & 3, which the appellant had failed to honor.
18. The respondent sued for vacant possession, mandatory injunction, or eviction orders. In response, the appellant claimed he was on the land as of right and had also filed Meru ELC No.2 (O S) of 2019 for adverse possession. He claimed that the trial court was sworn to proceed with the matter during the pendency of his case at a superior court. There is no evidence that the appellant applied for a stay of proceedings before the trial court or the superior court alongside an application for transfer or consolidation of the two matters. All these avenues were readily available to the appellant, but he failed to exploit them. Therefore, my finding is that this ground of appeal lacks merits.
19. The 2nd issue is whether the appellant proved his defense regarding fraud, misrepresentation, and adverse possession at the trial court. It is trite law that fraud and misrepresentation must be pleaded



and proved to the required standard see — *Arihi Highway Developers vs West End Butchery & 6 others* (2015) eKLR. In the defense dated March 8, 2019, other than stating fraud and misrepresentation, the particulars were not specified. No evidence was led by the appellant along those lines. The respondent had a definitive decision where the issue of ownership and the alleged justification of overriding rights based on customary trust had been determined.

20. The decision was binding on the trial court. The appellant did not appeal against it at all. Further, his claim before the court touched on adverse possession, yet in the statement of defense, the appellant merely averred that he had sought adverse possession at the superior court. As at the hearing of this appeal, the appellant has not clarified what became of the said suit. If the court had pronounced itself on customary trust, it is curious that the appellant would still go to the same court to have perhaps a second bite of the cherry wearing a different cap of adverse possession.
21. Litigation cannot be undertaken piecemeal and or in installments. One would be reminded of *Maina Kiai & 2 others vs IEBC & another* (2016) eKLR words on the doctrine of *res-judicata* and finality in litigation.
22. I hold that the respondent's claim was substantiated to the required standard. He produced legal documents and evidence to support his justification for vacant possession, eviction, and mandatory injunction. Unlike the appellant, the respondent had the paper trail showing the sanctity of his title deed for the court to confirm his ownership and possessory rights under Article 40 of the *Constitution* as read together with Sections 24, 25, 26, 27 & 28 of the *Land Registration Act*.
23. The onus was on the appellant to dislodge the legality and sanctity of the title deed held by the respondent. In the absence of cogent and tangible evidence on fraud, misrepresentation, unprocedural, and acquisition through corrupt schemes, the title held by the respondents remained unimpeachable. Under Section 3 of the *Trespass Act* (Cap 294), the appellant, for all intentions and purposes, remained an unwelcome guest in the suit premises. The trial court was justified in finding him as a trespasser.
24. In the premises, I find the appeal lacking merits. The same is, as a result of this, dismissed with costs. The appellant shall vacate the suit premises after 90 days from the date hereof, in default of which the appellant shall be evicted at his own expense as per the law.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 24TH DAY OF MAY 2023**

In presence of

C A John Paul

Gichunge for appellant

HON C K NZILI

ELC JUDGE

