



**Katiti v Mutisya (Environment and Land Appeal 47 of 2021)
[2023] KEELC 17822 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 47 OF 2021**

**A NYUKURI, J
MAY 17, 2023**

BETWEEN

CHRISTINE MUKULU KATITI APPELLANT

AND

BENARD MUTISYA RESPONDENT

(Being an Appeal from the Judgment of Honourable D. Orimba, Senior Principal Magistrate, Kangundo, delivered on the 22nd day of September 2021 in SPMCC ELC CASE NO. 47 of 2019)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated October 19, 2021, the Appellant appealed against the judgment of Honourable D Orimba Senior Principal Magistrate delivered on September 22, 2021 in Kangundo SPM CC ELC Case No 47 of 2019. The grounds of appeal are stated as follows;
 1. The trial court erred both in law and fact by dismissing the Appellant’s suit despite the fact that the same had been proved against the Respondent on balance of probabilities.
 2. The trial court erred both in law and fact by dismissing the Appellant’s case as lacking merit yet in its analysis and finding, the court had appreciated the fact that the Appellant lawfully and justifiably owns a piece containing by measurements 40 x 100 ft which piece is contained in Title Number Donyo Sabuk/Donyo Sabuk West Block 1/167.
 3. The trial court erred both in law and fact for failing to enter judgment for the Appellant notwithstanding the fact that the Appellant’s pleadings and evidence on record had established a strong case to warrant grant of the reliefs sought.
 4. The trial court misdirected itself by relying on extraneous matters and/or factors to dismiss an otherwise illegally tenable claim by the Appellant.



2. Subsequently, the Appellant sought the following orders;
 - a. The judgment delivered on September 22, 2021 be set aside and be substituted therefore with a judgment of this Honourable Court allowing the Appellant's suit in the subordinate court.
 - b. The Respondent do bear the cost of the appeal.

Background

3. On July 11, 2018, the Appellant, herein who was the Plaintiff in the lower court, filed a plaint dated July 10, 2018 against the Respondent, seeking the following orders;
 - a. A permanent order of injunction stopping him, his agents, family and anybody claiming under him from trespassing, constructing or in any way dealing with Plot No. 3 measuring approximately 0.038 Ha within Donyo Sabuk/Donyo Sabuk West Block 1/167.
 - b. General damages for trespass.
 - c. Costs and interest of the suit.
4. The Plaintiff averred that she was the beneficial and legal owner of a plot measuring approximately 40 feet by 100 feet (measuring 0.0384 Ha), within Donyo Sabuk/Donyo Sabuk West 167 (suit property). She further stated that on May 20, 2018, the Defendant unlawfully and without any legal right trespassed on the suit property and began putting up semi-permanent structures therein.
5. The Defendant filed a statement of defence on August 7, 2018. He denied the Plaintiff's claim and stated that he was a stranger to the allegations made. He stated that the Plaintiff's claim was a fraudulent and corrupt scheme designed to defraud him of the suit land. He also stated that he was the beneficial and legal owner in actual possession of two portions of land measuring 32 feet by 120 feet and 80 feet by 40 feet respectively, within Plot Number 5-138, which he purchased for value and transfer effected to him at Muka Mukuu Farmers Cooperative Society offices. He sought for the dismissal of the Plaintiff's suit.

Plaintiff's Evidence

6. At the trial, three witnesses testified for the Plaintiff, while two witnesses testified to the Defendant. In giving their evidence in chief, parties adopted their witness statements. PW1, who was the Plaintiff told the court that the Defendant had taken half of her plot which she bought from Muka Mukuu Farmers Cooperative Society and from Margaret Mukonyo Kitheka (deceased). She stated that she bought a plot measuring 40 feet by 100 feet and signed an agreement in that regard dated July 14, 2001. Further that upon purchase, she was shown the land and a sisal boundary placed in the land where she put up a simple structure. She stated that the seller did not transfer the land to her but the same was transferred to her by one James Mulwa Kitheka who was the son of the seller. She also stated that subsequently, the Defendant trespassed on the land and put up constructions thereon. She further stated that the agreement did not have the plot number and the same was not witnessed by the seller's children and that the seller never showed her any ownership documents and nobody else was present when the land was shown to her.
7. PW2 was James Mulwa Kitheka. He testified that Margret Mukonyo (deceased) sold the land to the Plaintiff. He stated that he was the one who transferred the Plot to the Plaintiff. He also stated that he also sold a plot to the Defendant and transferred it to him. He stated that he showed the Defendant his portion. He maintained that the Defendant was using his plot and that he did not know the portion the Defendant was shown by his brother. He also stated that his brother had given the Defendant an



- additional portion. According to him, the Plaintiff was claiming that the Defendant had encroached on her plot to the extend of 20 feet. He stated that the Defendant started using the land after beacons had been placed by the owner.
8. PW3 was Peter Mulili the Vice Chair of Muka Mukuu Cooperative Society. He produced a receipt issued to the Plaintiff in respect of the transfer of the land. He also produced a surveyor's report saying that the surveyor who prepared the report was Muka Mukuu's surveyor and that he subdivided the land for the Plaintiff. The witness confirmed that the transfer by the Defendant came from their office and that the same was valid. With that evidence, the Plaintiff's case was closed.
 9. DW1 was the Defendant. He denied taking the land belonging to the Plaintiff. He stated that he bought the first portion from one Francis Musyimi and that the agreement was witnessed by the Assistant Chief, Julius Kitheka and family members. That he was shown the land and the same which was vacant was transferred to him. He stated that the Plaintiff has her own Plot which is separate and next to his plot. He stated that Francis Musyimi who sold him land was a son to Margaret Mukonyo (deceased). That the land in issue has no title deed but that it had beacons. He stated that the person who transferred the land to him was James Mulwa and it was Francis Musyimi who showed him his portion.
 10. DW2 was Francis Musyimi Kitheka who confirmed that he sold the suit land to the Defendant and showed him the land on the ground. He told court that the Plaintiff's portion was different from the Defendant's portion. He confirmed that PW2 was his brother and Margaret Mukonyo (deceased) was his mother. He stated that he was present when his mother sold land to the Plaintiff and that PW2 and the area chief were present when he was showing the Defendant his land. Further he stated that the beacons had been placed by the surveyors. He maintained that the land he sold to the Defendant was different from the land the Plaintiff purchased. That marked the close of Defendant's case.
 11. Upon hearing the parties, the trial court found that both the Plaintiff and Defendant purchased land to be excised from Donyo Sabuk/Donyo Sabuk West Block 1/167 and were shown the land by different people. The court held that that was the genesis of the dispute and the sons of Margaret Mukonyo Kitheka (deceased) are to blame for the mess created. The trial court went further to state that the only solution now is for the surveyor to be called and each party to be shown what belongs to him/her in the presence of all the sons of the late Margaret Mukonyo Kitheka. In addition, the trial court held that it was not the Defendant's fault and it would not be fair to order the Defendant out of the portion he was shown when he paid for the land. Consequently, the trial court dismissed the suit and stated that each party to bear its own costs.
 12. It is the above decision that provoked this appeal. The appeal was disposed by way of written submissions. On record are the Appellant's submissions filed on March 30, 2022 and the Respondent's submissions filed on September 19, 2022.

Appellant's Submissions

13. Counsel for the Appellant submitted that the totality of the Appellant's evidence before the trial court confirmed beyond peradventure that she was the bonafide owner of plot measuring 40 feet by 100 feet contained in Donyo Sabuk/Donyo Sabuk West Block 1/167 which was transferred to her and which position was confirmed by the Respondent's witness DW2. Counsel submitted that in the trial court's analysis, the court agreed with the Appellant's factual position but proceeded to dismiss the claim.
14. Counsel held the view that the dismissal of the Appellant's suit was erroneous and ought to be reversed. It was submitted for the Appellant that the Respondent's evidence did not displace the Appellant's claim both on ownership and trespass. Counsel argued that the Respondent admitted that the land he



bought had not been surveyed while DW2 stated that the Appellant's portion had been surveyed and beacons. Counsel argued that the trial court having found that the Appellant was the rightful owner of the plot measuring 40 feet by 100 feet in Donyo Subuk/Donyo Sabuk West Block 1/167, ought to have entered judgment for the Appellant.

15. Counsel relied on Sections 107 to 109 of the *Evidence Act* to argue that the Appellant had discharged her burden of proof. Counsel relied on the case of *Giella v Cassman Brown Co Ltd* [1973] EA 358, to contend that the Appellant's evidence had disclosed a prima facie case. Further that her evidence disclosed that she stood to suffer irreparable injury following dismissal of her suit. Counsel argued that her right to property had been violated and no amount of damages could remedy the violation. Counsel also argued that the balance of convenience tilted in favour of the Appellant.

Respondent's Submissions

16. Counsel for the Respondent submitted that the Respondent purchased two portions of land from James Mulwa Kitheka and Francis Musyimi Kitheka sons of the late Margaret Mukonyo Kitheka and that the evidence showed that both PW2 and DW2 legally placed the Respondent in possession of the purchased plots. Counsel argued that there was no relationship between the Appellant and the Respondent herein and that therefore the issue of trespass does not arise. Counsel further contended that PW2 who sold land to the Respondent did not object to the Respondent purchasing and developing his land.
17. It was further submitted for the Respondent that the Appellant ought to have sued the sons of Margaret Mukonyo and not the Respondent. Counsel also contended that the Respondent did not trespass on the Appellant's land as the sons of Margaret Mukonyo pointed out the 2 portions to the Respondent allowing him to buy and develop and therefore that the Respondent is entitled to his property. Counsel argued that the Respondent cannot be in trespass of his own parcel of land.

Analysis and Determination

18. This court is alive to its duty as the first appellate court, which is to re-analyse, re-evaluate and re-assess the evidence presented before the trial court and make its own independent conclusions bearing in mind that it had no advantage of hearing or seeing the witnesses and give due allowance for that. In that vein, the court will proceed to interrogate whether the trial court was justified in arriving at the findings it made.
19. The duty of the Appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal stated as follows:

"An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."
20. In this appeal, it is not disputed that the Appellant purchased land measuring 40 feet by 100 feet from Margaret Mukonyo in 2001. It is also not disputed that PW2 sold land to the Respondent while his brother DW2 also sold another portion of land to the Respondent. Therefore what is in dispute is whether the land upon which the Respondent constructed his structures belong to the Appellant. From the Appellant's evidence, it is not clear when she was shown her land, however from her witness statement dated July 10, 2018, which she adopted as her evidence in chief, she stated that survey was being undertaken by Muka Mukuu Cooperative Society. She produced a survey report dated January



19, 2018 by one P N Malonza. The report refers to the Appellant's parcel which was referred to as Parcel No 3 and that the same was measuring 0.0384 Ha as per the sketch that was attached to the report. Having considered the surveyor's report, I note that the surveyor did not refer to any document which was the basis of his report and therefore even the source of the numbering of the plot is not disclosed. It is not clear to the court as to when the plot was numbered as Plot No 3. It appears all that the surveyor did was to measure the land he was shown by the Appellant which the latter described as Plot No 3. This is key because the dispute is where is the Appellant's land? This is in view of the fact that the Respondent maintains that this land is separate from the Appellant's land and that everyone is on their parcel. PW2 testified in chief that he transferred land to both the Appellant and the Respondent and he showed the respondent his portion. He also stated that the respondent was using his plot and that the Appellant was claiming that the Respondent had used her 20 feet of land. PW3 who was Peter Mulili the Vice Chair of Muka Mukuu testified that the transfers signed by Muka Mukuu for both the Appellant and the Respondent were valid.

21. The Appellant who was the Plaintiff gave general statements without making it clear what ground belonged to her. Her own witness PW2 stated that the Appellant was on her portion while the Respondent was on his portion. The Respondent insisted that he had not trespassed on the Appellant's land and testified that he was in possession of the land he purchased from PW2 and DW2. The Respondent produced an agreement dated February 13, 2012, a transfer from Muka Mukuu dated March 17, 2018 and a resolution by 7 family members and from purchasers showing that that portion of the plot owned by the family of PW2 were sold to several purchasers. As the Appellant did not produce any other evidence on how much was exactly owned by Margaret Mukonyo Kitheka and at what point her land on the ground was ascertained, I am not convinced that the Appellant has proved that the ground on which the Respondent is in possession is owned by the Appellant, as she failed to give clear evidence on her claim.
22. In the premises, the appeal fails and the same is hereby dismissed with costs to the Respondent.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Ngolya for Appellant

Mr. Nzioki for Respondent

Ms Josephine – Court Assistant

