



**Nyagah v Nzuki & another (Environment & Land Case 26 of 2021)
[2023] KEELC 17643 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 26 OF 2021**

**LG KIMANI, J
MAY 16, 2023**

BETWEEN

JOHN MATERE NYAGAH APPELLANT

AND

NGULI NZUKI 1ST RESPONDENT

KAKUSU MUSEMBI 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. John Aringo (SRM)
delivered on 26.05.2021 in Kyuso PMELC No. E003 of 2020)*

JUDGMENT

1. The appellant herein was the plaintiff in Kyuso PMELC No. E003 of 2020 *John Matere Nyagah v Nguli Nzuki & Kakusu Musembi*. The trial court Hon John Aringo (SRM) delivered judgement on May 26, 2021 dismissing the Plaintiffs suit with costs. The Plaintiff filed this appeal by way of Memorandum of Appeal dated June 25, 2021 on the following grounds:
 1. The learned trial magistrate erred in law and fact by making a finding that from the totality of the evidence, he was unable to establish any basis to grant the prayers sought in the plaint.
 2. The learned trial magistrate erred in law and fact by making a finding that the appellant's evidence fell short of the required standard of proof.
 3. The learned trial magistrate erred in law and fact by failing to consider that the respondents herein were not and had not been in occupation and/or possession of the suit land (an unsurveyed parcel of land) and that it is the appellant who has been in possession of the land since the year 2013 to date.



4. The learned trial magistrate erred in law and fact by failing to consider the evidence on record adduced by the appellant and his witnesses and documents produced by the appellant during the trial.
5. The learned trial magistrate erred in law and fact by failing to consider the submissions by the Appellant.
2. The appellant prays that the appeal be allowed and the judgment of the trial court be set aside and the same be substituted by this court's own judgment.
3. The plaintiff's claim was set out in the plaint dated October 21, 2020 where he claimed ownership of all that unsurveyed piece of land situated at Ituguru Village, Kamaindi sub-location, Thagicu Sub-County having inherited it from his late grandmother, one Nguta Ngonde. He claimed that on September 15, 2020 the Defendants without his consent and knowledge and while armed with bows and arrows trespassed upon his land and started planting crops.
4. When being summoned by the area Assistant Chief, the defendants claimed that the unsurveyed land belongs to them. The plaintiff therefore sought orders of permanent injunction restraining the defendants by themselves or through others from interfering with the suit land.
5. The defendants filed a joint statement of defence and denied the Plaintiff's claim. In particular they stated that the suit land did not belong to the Plaintiff and that each had his own land and their parcels of land do not have a common boundary. They stated that the Plaintiff's home is far from the suit land.

Evidence at the trial Court: The Plaintiff's Case

6. PW 1 John Matere Nyaga, the plaintiff, testified and reiterated the contents of the plaint and adopted his witness statement. He stated in his witness statement that he is now 72 years on the suit land since he was born, grew up, got married and bore all his children on the land and never had a dispute with the Defendants or their family members.
7. In his testimony in court the plaintiff stated that he inherited the suit land from his grandmother from his father's side in 1980. According to him, the land was being used by one Nzeu Manthi and he took possession in 2013 where he ploughed and grazed livestock. He also stated that the last time he used the land was in 2020 when the defendants brought a case against him at the sub-chief's office. The decision of the sub-chief was that the land belonged to him. The defendants later went to the chief and the elders were called and he was also awarded the land. He further stated he reported the two defendants to the police and they were arrested and told to vacate the land. He stated that the defendants trespassed on the land on September 15, 2020 when he went to plough it.
8. PW 2 Josephat Kirambya Gitau also testified that he has been the area sub-chief for 32 years and his home is about 1 km from the Plaintiff's home. He stated that he knew the 1st defendant and that his wife is a child to the 1st defendant's brother. He confirmed that the suit land belongs to the plaintiff. On cross-examination he stated that the suit land belonged to the plaintiff because Kitonga, a younger father to the Plaintiff, and the proprietor of the land, died and his son Mulinge also died, therefore there was no one else left to inherit the land.
9. PW 3 John Mwendwa testified that the Plaintiff is his neighbour and he has known him for more than 30 years. He also confirmed knowing the 1st and 2nd defendants and stated that he knew that the defendants were the ones using the land and that they got into the land when the plaintiff and Kiria his brother were away in 2017. That before that the land was used by Jane Muriithi. Upon cross-



examination by the 1st defendant, he denied seeing him on the suit land as a young child. He also stated that he knew the 1st defendant's brother's children have structures and live on the suit land

10. PW 4, Nyagah Kitonga stated that he is from Itira and that he worked as a herds man and knew the plaintiff through his father Kitanga. He stated that he was one of the elders during the dispute before the Chief and that he was told the land belongs to Kitonga who is the plaintiff's uncle. He outlined the plaintiff's family tree and stated that he went to the plaintiff with his father and the plaintiff gave him a portion of the land. On cross-examination, he identified the 1st defendant as his father but he was on the plaintiff's side because his grandmother Karia was given land by the plaintiff.

Defence Case

11. DW 1 Peter Nguli Nzuki the 1st Defendant, testified that he inherited the land from his father Nzuki Mutisya and started using it in 1948 when he was a young boy. He stated that he has known that the land belongs to his father all his years and that he acquired it in 1961 from his father before he died in 1965. That in 1982 they subdivided the land to five people and in the year 2000 the five divided the land to their children. In his witness statement he stated that the plaintiff started claiming the land on December 24, 2018. That he reported the dispute to the assistant chief but the dispute was ruled in the plaintiff's favour. That he never had any dispute with the plaintiff's family and they don't have a common boundary. That he shared and/or subdivided the land among his sons and they are using the land up to now. On cross-examination, he stated that the case at the sub-chief was not determined for the reason that he refused to take the traditional oath.
12. DW 2, Steven Kakusu Musembi, the 2nd defendant stated that he knew the plaintiff. In his witness statement he testified that he started farming on the land in the year 2000 after his father shared the land to his children. In 2020, the plaintiff had the police arrest him yet he has been using the land since the year 2000. He also stated that he did not agree to taking the traditional oath at the chief and that the matter was not resolved.
13. DW 3 Stephen Nzuki Nguli stated that he has known the plaintiff for 20 years and that Nguli Nzuki, the 1st defendant is his father. His testimony was that the 1st and 2nd defendants have been using the suit land. He denied ever seeing the plaintiff on the land.
14. DW 4 Julius Nthiga Mutege stated that he comes from the same area as the plaintiff and has known him all his life. He was given work by the 2nd defendant at the suit land and no one stopped him. He stated that the 2nd defendant inherited the land from his father and that he has been using the parcel of land all along. On cross-examination he named the neighbours on all sides of the land.
15. DW 5 Nyamu Kanyoro gave evidence that he is a neighbour to the 1st defendant and also knows the 2nd defendant and that their fathers were neighbours and the 1st defendant has been using the land since they were young.
16. DW 6 Peter Mutua Maithya stated that the plaintiff is his neighbour to the west and he has known him since the year 1994 and that the 1st and 2nd defendants are also his neighbours. He confirmed that that his own father was using his land and Matere the plaintiff has never developed the land and that he came to the land the preceding year. The plaintiff stated to the court that all the witnesses were sons of the 1st defendant.
17. Judgment was delivered by the trial court on May 26, 2021 when the Court found that the evidence tendered fell short of the requisite standard of proof and was unable to establish any basis to grant the prayers sought. The court thus dismissed the suit with costs to the defendants.



The Appellant's submissions

18. The appellant made oral submissions during the hearing of the appeal and he reiterated that the suit land belongs to him and he was given the land by his grandmother, who used to cultivate the land with one Kitonga. He stated that he used to take care of the land but went to work in Nairobi and when he came back he found the land had been invaded. The 1st defendant took him to the sub-chief and later to the clan where it was stated that they could not decide on the case as it was private land. The appellant stated that he had brought 2 elders and the 1st respondent also brought 2 elders to testify for them and the decision was that the land belonged to him. After the 1st respondent took the case to the chief the 1st respondent and his witnesses refused to take oath.
19. The appellant confirmed that the land had not been adjudicated and was therefore unsurveyed. He insisted that the matter be heard by the Court instead of through the adjudication process since adjudication has not yet started and he prayed that the land should not be taken from him since he has always used it.

The 1st Respondent's submissions

20. The 1st respondent submitted that the suit land belonged to him as it came from his father and he has been cultivating the land since the year 1961 until 1999 when he divided the land and no one ever came to claim it.
21. After the case was heard by the sub-chief, he went to the District Commissioner who directed that the elders should hear the dispute. He then got the summons from Kyuso Law Courts and according to him, the court had stated that the land was his. He also confirmed that adjudication has not stopped and that he has not yet lodged his claim in adjudication.

The 2nd Respondent's submissions

22. The 2nd respondent submitted that he inherited the suit land from his father Musembi Maithya in the year 2000 but they were cultivating and grazing on the land beforehand. He also stated that he neighbours the 1st respondent who has given the land to his children and his brother Pius Maithya.
23. The 2nd respondent is a party to this case because as he stated to the court, the appellant pointed to a point in the 2nd respondent's land saying that it was his. On adjudication, he noted that there were barazas being done and they were asked to lodge their claims.

Analysis and determination

24. This being a first appeal, the role of an appellate court has been restated in various cases. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
25. The Court has considered the grounds of appeal, proceedings and judgment of the trial court and submissions by the parties and is of the view that the grounds of Appeal can be summarized into



the question of whether the trial court erred and misdirected itself in facts and law by dismissing the Plaintiff's suit.

26. The appellant has contended that the trial court failed to consider that the respondents were not in occupation and/or possession of the suit land and that it is the appellant who has been in possession. The issue of possession and occupation of the suit land was the issue in contention before the trial court and before this court. The trial court found that from the testimonies and evidence on record, this appellant's possession and occupation was not established. In the courts view what was established during the trial was that the parties herein have been in dispute over the suit property.

27. In the course of this appeal it came to the Courts attention that the area where the suit land is located had been declared an adjudication section under Kyuso Adjudication area. The Appellant was directed to obtain consent to continue with the appeal under section 30(1) and (2) of the [Land Adjudication Act](#) cap 284. The appellant obtained consent and filed the same in court.

28. The [Land Adjudication Act](#) is the act of parliament meant to provide for ascertainment and recording of rights and interests in trust land. Once rights and interests are ascertained, the land becomes private land and title deeds are issued. Section 28 of the [Land Adjudication Act](#) provides that:

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register.” The land is later demarcated and surveyed and individual titles are issued. There is an elaborate dispute resolution mechanism that the Act provides.

29. The Court of Appeal in the case of [Athman Mbosio Mwakulu & another v National Land Commission & 4 others](#) [2021] eKLR observed that:

“The purpose of declaring an area an adjudication section is to make it possible to ascertain and record individual interest in Trust land. The Act requires any person who has an interest in land in an adjudication section to lodge his claim to the recording officer.

Once the interest is ascertained and confirmed after determination of any objections, it is entered into the adjudication register, which when completed is open to the public for inspection. Throughout the entire adjudication process, the Act provides elaborate dispute resolution mechanisms, including appeals, if there are any competing claims. Once all the objections have been settled, the adjudication register is finalized and the Chief Land Registrar registers the land in favour of the claimant in accordance with the adjudication register.”

30. Ideally the forum for ascertainment of rights and interests in the suit land is the adjudication process. In the absence of adjudication having been carried out, the Trial Court proceeded to hear the suit herein and rely on the evidence as presented by the parties. Angote, J in the case of [Murandi Kaburunya v Gitonga Makindi & 2 others](#) [2017] eKLR decided to dismiss the application for injunction before him, holding as follows:

“Considering that the both the plaintiff and the defendants are claiming that the land is their ancestral land, it is the Chief and the elders of the area who can deliberate on the extent of each parties' ancestral land. The defendants have annexed letters from the Chief of the area dated August 29, 2016. According to the said letter, the Chief informed the parties to choose elders who can resolve the dispute. However, the plaintiff's advocates objected to the arrangement. In view of the unwarranted objection by the plaintiff to have the elders



deliberate on the dispute, and in the absence of any document showing that he is the one entitled to the suit land, I find that the Plaintiff has not established a *prima facie* case with chances of success.”

31. Section 107 of the *Evidence Act* cap 80 provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

32. The Plaintiff in the trial court had the burden of proof to show that the suit land belonged to him. Both parties called witnesses and adduced evidence and produced documents.

33. It is the courts view that the plaintiff’s evidence on ownership of the suit land had several contradictions and some of them were pointed out by the trial court. The plaintiff stated in the plaint that he inherited the suit land from his grandmother Nguta Ngonde from his father’s side in 1980. When cross-examined it came out that the person he claims to have inherited the land from, one Kitonga Ngonde, was not his father. It also came out that the said Kitonga had children. According to PW 2 Josphat Kirambya Gitau and PW 3 John Mwendwa the land belonged to Kitonga Ngode whose son was called Mulinge. When the said witness was cross-examined he stated that Kitonga was the younger father of the Plaintiff and the reason the land belongs to the plaintiff is because Kitonga and his son died and there is no one to inherit from them.

34. Further, on the evidence of the time when the plaintiff started occupation and use of the suit land, there is varying and contradictory evidence from the Plaintiff and his witnesses. In his witness statement filed together with the plaint, the Plaintiff states that he is now 72 years in the land since he was born, grew up, got married and bore all his children on the land. This statement suggests that the Plaintiff has been in occupation of the land all his life yet in court he stated that he inherited the land in 1980. He stated that the land was being used by Nzeu Manthi and he stopped using it in 2013 and this is confirmed by PW 3 John Mwendwa. The Plaintiff also claimed that he took possession of the land in 2013. The Plaintiff stated that when he took possession he used to plough the land and graze animals. Again in contradiction to his evidence in the witness statement he stated that his home was 1 kilometer away from the suit land.

35. The plaintiff’s witness PW 3 John Mwendwa stated that the defendant is currently using the suit land and that the 2nd defendant started using the land in 2017 and before that it was June Muriithi who was using the land with the authority of Ngou Ngoki. He stated that it was after Muriithi moved to Kiambere that the Defendant occupied the land. On cross-examination by the 1st Defendant the witness confirmed that the 1st defendant’s brother’s children have structures on the suit land and have lived there since 2013 thus contradicting the Plaintiffs evidence that he took possession in 2013.

36. On the other hand, DW 1 Peter Nguli Nzuki the 1st Defendant testified that he inherited the land from his father Nzuki Mutisya and started using the land in 1948 when he was a young boy and has known that the land belongs to his father all his years. In his further witness statement, he claims that he acquired the land in 1961 from his father who died in 1965. That in 1982 they subdivided the land to five people and in the year 2000 the five divided the land to their children and that Mr. Muriithi who had encroached on the land vacated. In his witness statement he stated that the Plaintiff started claiming the land on December 24, 2018. That he reported the dispute to the Chief but the dispute



- was ruled in the Plaintiffs favour. He stated that he subdivided the land among his sons and they are using the land upto now.
37. DW 2, Steven Kakusu Musembi, the 2nd defendant stated that he started farming on the land in the year 2000 after his father shared the land to the children. He also stated that when the dispute herein was reported to the Chief they did not agree to take the traditional oath and that the matter was not resolved. The said two defendants were not shaken in their testimony during cross-examination.
38. Defence witnesses DW 3 Stephen Nzuki Nguli DW 4 Julius Nthiga Mutegi DW 5 Nyamu Kanyoro and DW 6 Peter Mutua Maithya all stated that the 2nd defendant is the one who has been using suit land. The trial Court observed that DW 4 had clear knowledge of the neighbours to the land and he proceeded to name all of them. The Trial Court further observed that the elderly DW 5 testified that since colonial times his father and the 1st Defendants father were neighbours and that it was the 1st Defendant who had been using the land since the days they were young.
39. It is the courts view that the trial court properly directed itself on the relevant questions arising for determination and found that though the land in dispute was unsurveyed and unregistered, the identity of the same was not in dispute. That the issue of ownership turned on the nature of the evidence adduced both congency and weight. The trial court further noted correctly that the burden was on the Plaintiff to show on a preponderance of evidence that he has proprietary rights over the suit parcel. The trial court further found that the issue of possession and/or occupation in contention and the court found that the plaintiff offered contradictory evidence.
40. After evaluating the evidence adduced, the trial court found;
- “From the totality of the evidence this court is unable to establish any basis to grant the prayers sought. The evidence falls short of the requisite standard of proof and the suit is dismissed with costs to the Defendants.”
41. After re-evaluating, re-assessing and re-analyzing the evidence adduced during the trial and considering the submissions made by the parties to this appeal, the Court finds that the Appellant did not discharge the burden of proof placed on him which is on a balance of probability. The Appellant failed to prove that he was the owner of the suit land and had possession, use and/or occupation of the same as claimed. It is the Courts view that the Appellant did not show that the trial court erred in arriving at the final decision and in dismissing the suit.
42. In the case of in *Makube v Nyamuro* [1983] KLR, 403-415, at 403 Kneller & Hancox Ag JJA stated as follows: -
- “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
43. In this case this court is satisfied that the trial court judgment was based on the evidence adduced and the court did not misapprehend the law or act on wrong principals in reaching its conclusion. The final orders of this court are that the appeal herein lacks merit and the same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF MAY, 2023.

L. G. KIMANI

ENVIRONMENT & LAND COURT JUDGE - KITUI



Judgement read in open in the presence of

C/A Musyoki

Appellant present in person

1st Respondent present in person

2nd Respondent present in person

