Mwasaru v Nyange (Environment and Land Appeal E016 of 2024)
[2025] KEELC 1360 (KLR) (Environment and Land) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1360 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E016 OF 2024

EK WABWOTO, J

MARCH 20, 2025

BETWEEN

MADLINE WAKESHO MWASARU ..... APPELLANT

AND

CAXTONE HUMPHREY MWIKAMBA NYANGE ..... RESPONDENT

(Being and Appeal from the judgment of Hon. A.M. Obura (Mrs) C.M in the CMELC No. E006 of 2022 delivered on 16th day of August 2024)

JUDGMENT

1. This judgment is in respect to the appeal from the decision of Hon. A. M. Obura (Mrs.) – CM in CMCC No. E006 of 2022 delivered on 16th day of August 2024 where the Learned Magistrate granted the following orders in favour of the Respondent herein:-

    i. A permanent injunction is hereby issued restraining the Defendant, her agents, servants and/ or workers from trespassing, constructing or interfering with the suit property Taita Taveta/ voi Bomani Phase1/737 in any manner whatsoever.

    ii. The Defendant is hereby directed to remove or demolish the semi permanent structure erected on the suit property and give vacant possession of the land to the Plaintiff within the next three (3) months failing which the Plaintiff shall be at liberty to apply for eviction orders.

    iii. General damages for trespass in the sum of Kshs. 100,000/= (One hundred thousand shillings.).

    iv. Costs of this suit.

2. The Appellant being aggrieved by the said decree filed the instant appeal vide a Memorandum of Appeal dated 16th September 2024. She sought to have the entire judgment set aside, costs of the appeal and also to have the appeal allowed.

3. The appeal was contested by the Respondent and pursuant to the directions issued by this court, it was directed that the same be canvassed by way of written submissions. The Appellant filed written submissions dated 14th March 2025 through Mosioma & Company Advocates while the Respondent filed written submissions dated 24th January 2025 through Mwazighe & Company Advocates.

4. The Appellant submitted on the following five issues;-

   i. Whether the Respondent lawfully obtained the property title number Taita Taveta/Voi Bomani Phase 1/737.

   ii. Whether the Appellant had any rights over the said title.

   iii. Whether the Magistrate erred in law in ordering the Appellant to demolish the semi-permanent structures erected on the suit property and give vacant possession to the Respondent within the next three months failing to which the Respondent be at liberty to apply for eviction orders.

   iv. Whether the Respondent was entitled to general damages for trespass.

   v. Whether the Respondent was entitled to costs of the suit.

5. It was submitted that the Respondents never demonstrated to the court on how the property changed from Number 758 to 737. There was no official document or a letter reallocating the said portion to the Respondent and as such the property was acquired through fraud and further the fact that the land was reserved for squatters who were occupying the land yet the Respondent himself admitted not to have been living in the area.

6. On whether the Appellant had any right over the property title number, it was submitted that the evidence before court was that the Appellant who was 37 years at the time of trial had been staying at the property since she was born which testimony was supported by her neighbours who testified that they had known the Appellant who was residing in the property for over 18 years.

7. It was also submitted that the Respondent brought this action against the Appellant on 6th September 20222 as evidenced in the Amended Plaint dated 2nd September 2022 and that was more than 12 years since the cause of action arose. According to the Appellant, the Respondent produced an allotment letter dated 5th November 2009 and receipt dated 6th January 2010 and hence therefore the property ceased to belong to the Respondent on 6th January 2022 and was holding the same in trust of adverse possession or trespass. The cases of Chevron (K) Ltd =Versus= Harrison Chao wa Shutu (2016) KECA 248 (KLR) and Mweu =Versus= Kiiu Ranching & Farming Cooperative Society Ltd (1985) KLR 430 were cited in support.

8. On whether the Magistrate erred in law in ordering the Appellant to demolish the semi-permanent structures erected on the suit property and give vacant possession to the Respondent within the next 3 months, it was submitted that the Learned Magistrate erred since the Appellant had been living on the suit property since she was born and further no notices had been served on her pursuant to the provisions of Section 152E of the *Land Act*.

9. On whether the Respondent was entitled to any damages and costs of the suit, it was submitted that the Respondent did not plead that he had suffered any legal right or any duty as the result of the Appellant's actions and the claim for mesne profit failed and as such his claim had not been proved to the required

standard. On the issue for costs, it was submitted that no demand was issued to the Appellant and no summons were taken out and hence the court should not have issued any costs to the Appellant.

10. The Appellant concluded her submissions by urging the court to allow the appeal.

11. The Respondent submitted on the following 12 issues:-

    i. Whether the trial Magistrate erred in law and in fact in finding that the Respondent proved on a balance of probability that they acquired the suit plot through the process.

    ii. Whether the trial Magistrate erred in both law and in fact in issuing orders restraining the Defendant/Appellant, their agents, servants and/or workers from trespassing, constructing or interfering with the suit property Taita Taveta/Voi Bomani Phase 1/737 in any manner whatsoever despite the Appellant and her family having resided in the property since her birth.

    iii. Whether the trial Magistrate erred in law and fact in directing the Appellant to remove or demolish the semi permanent structure erected on the suit property and give vacant possession of the land to the Respondent within three months failing which the Respondent shall be at liberty to apply for eviction orders.

    iv. Whether the trial Magistrate erred in both law and in fact in granting order for general damages for trespass in sum of Kshs. 100,000/=

    v. Whether the trial Magistrate erred in both law and in fact in granting prayer for costs of the suit.

    vi. Whether the trial Magistrate erred in dismissing the Appellant's suit.

    vii. Whether the trial Magistrate erred in both law and in fact in considering issues that were not pleaded in the plaint.

    viii. Whether the trial Magistrate erred in both law and in fact in observing and upholding that the number of plots within Bomani were reduced based on the number of people who met the requirements of paying 10% of the allotment fees within 90 days without presentation of evidence by the Plaintiff.

    ix. Whether the trial Magistrate erred in law and in fact in finding the Respondent allotment number 758 referred to his title number 737.

    x. Whether the trial Magistrate erred in making conclusion of the case without giving opportunity to the defendant to file her submissions.

    xi. Whether the trial Magistrate erred summing up main issues for determining without consideration of the Defendant's position as ownership by way of commercial identify inheritance.

    xii. Whether the trial Magistrate erred in law without considering the constitutional rights of the Appellant that had accrued on the said parcel of land without the knowledge of the Appellant and her family that had resided on the land since 1986.

12. It was submitted that the Respondent proved on a balance of probability to have acquired the suit property through the right process. In defending his claim, the Respondent produced a copy of certificate of official search (PEXT3) that showed that he was the registered proprietor of the suit Plot No. 737. He further produced a settlement plot letter of offer which was issued on 5th November 2009 (PEXT4). He also produced an official receipt evidencing payment of Kshs. 5,765/= within 90 days.

13. It was also submitted that having established that the Respondent owns the suit plot, the Appellant was therefore a trespasser. The Respondent tendered photographic evidence illustrating that the Appellant had constructed semi-permanent structures on the suit plot. It was the Respondent's evidence that despite him demanding for the appellant to vacate the suit plot, the Appellant continued to trespass and continued to interfere with the suit property. The Respondent was entitled to protection of law as he met all the requirements for the issuance of permanent injunctions. The learned trial Magistrate therefore neither erred in law nor in fact by issuing restraining orders against the Appellant.

14. It was further submitted that the Respondent had tendered evidence to prove he is the registered proprietor of the suit land and he was with a Certificate of Title to that effect, which he produced as an exhibit. It was his testimony that the Appellant had encroached on the suit land and declined to vacate. Further, the Appellant proceeded to put up a temporary structure on the suit land.

15. On whether the trial Magistrate erred in granting general damages for trespass, it was submitted that it is trite law that where trespass is proved a party need not prove that he/she suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. In this case, the Respondent proved that the Appellant had trespassed on the suit plot by producing photographs showing erected semi-permanent structures belonging to the Appellant and the court had a duty to determine and award general damages. Reliance was placed in the case of Willesden Investments Limited =Versus= Kenya Hotel Properties Limited Nairobi H.C.C No. 367 of 2000

16. According to the Respondent, the trial Magistrate therefore did not err in law and in fact in granting general damages for trespass in the sum of Kshs. 100,000 as the Appellant had trespassed on to the suit property.

17. In respect to costs it was argued that costs ordinarily follow the event and the trial Magistrate was not at fault in awarding costs to the Respondent.

18. On whether the trial Magistrate erred in both law and fact in observing and upholding that the number of plots within Bomani were reduced based on the number of people who met the requirements of paying 10% of the allotment fees within 90 days without presentation of evidence of the Plaintiff. It was submitted that it is trite law that a letter of offer is not conclusive evidence for land ownership unless the correct procedure is followed to acquire a certificate of title. The land adjudication and settlement officer was called as a witness to court to offer a clarification for the difference between the plot number in the letter of offer and the title deed issued to the Respondent. The adjudication officer attributed the difference in number of plots to a reduction in 31 parcels in comparison with the RIM which was occasioned by repossession of some of the parcels whose allottees failed to comply with payment of ten per cent (10%) requirement leading to merger of the same with some public utilizes hence the translation from old numbers herein referred to as PDP numbers and RIM numbers.

19. It was also submitted that based on the testimony of the Land Adjudication Officer which explained and accounted on the difference, the trial Magistrate was therefore not at fault in upholding the same as enough evidence was tendered.

20. On whether the trial Magistrate erred in law and in fact in finding the Respondent allotment Number 758 referred to his title number 737 it was submitted that the Land Adjudication and Settlement Officer was brought to court to offer a clarification for the difference between the plot number in the letter of offer and the title deed issued to the Respondent.

21. It was further submitted that the Appellant was indeed give a chance to file her submissions but failed to do so.

22. On whether the trial Magistrate erred in law without considering the Constitutional rights of the Appellant that had accrued on the said parcel of land without the knowledge of the Appellant and her family that had resided on the land since 1986 it was submitted that the Appellant did not prove ownership of the suit plot and her case to the required standards to warrant granting of the orders sought.

23. The Respondent concluded his submissions by urging the court to dismiss the Appeal with costs.

24. The court has considered the entire record of appeal and submissions filed and is of the view that the following are the salient issues for determination in this appeal:-

    i. Whether the Respondent's case was proved to the required standard before the trial court.

    ii. Whether the Learned Magistrate erred in law and fact in arriving at her decision.

    iii. Whether this appeal is merited.

    iv. What are the appropriate reliefs that this court can grant.

25. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:
>
> First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

26. The Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in Peters vs Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484."

27. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

28. The Respondent's case before the trial court was that he is the registered owner of the suit property being Taita/Taveta/Voi Bomani Phase 1/737 measuring approximately 0.1Ha. Sometimes in the year 2019 when he learnt that the Appellant had trespassed onto the suit property and she declined to leave despite being requested to do so as she claimed that the land belongs to her.

29. The Appellant's case on the other hand was that she owns the suit plot by virtue of inheritance from her parents who even constructed a dwelling house thereupon which she had to renovate. It was also her case that it was only in the year April 2018 when the Respondent came and found her on the land and claimed ownership of the same.

30. It was also the Appellant's case that upon perusal of the Respondent's documents, she discovered that the copy of official receipt No. 37, 56, 476 related to Plot NO. 758 while the copy of the letter of offer from the Ministry of Lands to the Respondent was in relation to Plot No. 758 and that the Respondent did not state how he acquired the property.

31. During trial, 2 witnesses testified on behalf of the Respondent. The Respondent testified as PW1 and stated that the suit property was in a settlement scheme, he got his title on 8th August 2013 and produced several documents to support his claim to the said parcel. He also stated that during the adjudication process, the Appellant never objected to the process.

32. On cross-examination, he stated that he found the Respondent on the land towards the end of 2018, he also stated that he had not produced any survey report and that the lands officer was better placed to explain the disparity in the numbering of Plot 737 and Plot 758. He also stated that he was not living on the plot before he got the title deed. He also stated that he had instructed a Surveyor to help him identify the location of the plot since there was no person residing in the same.

33. When re-examined, he reiterated that the lands officer was better placed to explain the numbering even though the same referred to one and the same plot.

34. Okeno Okiro the County Land Adjudication Officer testified as PW2 and stated that the number of the plots were reduced because several people failed to pay the 10% fees and did not comply with the other requirements within 90 days. He also stated that Plot number 758 was the old number which became 737 and that refers to the same plot.

35. When cross-examined, he stated that Plot 737 and Plot 758 refer to the same plot. There was public participation and a notice had been issued that those who failed to pay the 10% would lose their plots.

36. The Appellant testified as DW1 and she called two other witnesses to support her case. It was her testimony that she used to live in the suit premises with her parents until when her father became ill and they moved out. She also stated that she had been bequeathed the land by her father before he died. The land was surveyed in 2002 in the presence of both of her parents. In April 2018 she returned to the land only to find the Respondents with his wife and the Surveyor. When he asked the Respondent for his documents, he claimed to own Plot 758 yet his father's plot was Plot 737.

37. When cross-examined, she stated that his father died in 2013 and he did not find his name in the records and she did not write any complaint. She did not have any documents from the committee. His father was not issued with any allotment letter. There was no announcement made in 2013 that titles were issued.

38. On re-examination, she stated that the land was being sold at Wundanyi Office without the knowledge of the residents and people on the ground.

39. Veronicah Mwashau testified as DW2 and stated that the Respondent was not known to her, she has known the Appellant since 2018 and they had lived in the property together with her parents for some time.

40. On cross-examination, she stated that a title document proves ownership, she has known the Appellant for about 18 years and was surprised to learn that the Appellant was claiming ownership to the said property.

41. Valentine Mgunya testified as DW3 and stated that she as the sister in law to the Appellant, the disputed plot belonged to the Appellant's father. When cross-examined, she stated that she was not aware when the titles were issued.

42. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

    1. 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."

43. From the evidence that was tendered herein, the Respondent was able to demonstrate how he acquired the suit property. The Respondent produced the letter of offer issued on 5th November 2009 in respect to Plot No. 758 at Bomani Phase 1 Settlement Scheme in Voi measuring approximately 0.1Ha. The Respondent also adduced evidence to show that he paid the sum of Kshs. 5,765/= within 90 days failing which the offer would be cancelled without notice. The Respondent also adduced evidence that indeed he complied within the stipulated 90 days.

44. While the Appellant claimed that she had been staying on the property and inherited the same, the Appellant conceded in cross-examination that her father did not acquire any title to the suit parcel, she never raised any objection to the process even after being made aware that the Respondent was the owner of the land.

45. The Appellant did not adduce any evidence demonstrating that the Respondent's title was issued and or acquired irregularly and unlawfully and in view of the foregoing it is the finding of this court that the Respondent's case was proved to the required standard and the Learned Magistrate did not err in law and in fact in arriving at her decision.

46. Having considered the totality and weight of evidence tendered herein it is the finding of this court that the Appeal lacks merit and the same is hereby dismissed with an order that each party bears own costs of the appeal.

Conclusion

47. In conclusion, the Appeal is hereby determined as follows:-

    i. The Appeal is devoid of merit and is dismissed.

    ii. Each party to bear own costs of the Appeal.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 20TH DAY OF MARCH 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mosioma for the Appellant.

Mr. Mwandoto for the Respondent.

Court Assistant: Mary Ngoira.