



**Miheso v Kathuri & another (Environment and Land Appeal
E007 of 2022) [2023] KEELC 18759 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E007 OF 2022
PM NJOROGE, J
JULY 17, 2023**

BETWEEN

ALFRED MIHESO APPELLANT

AND

LYDIAH KATHURI 1ST RESPONDENT

DANIEL THURANIRA 2ND RESPONDENT

(An Appeal from the Judgement delivered on 31st August, 2002 by Hon. C Mutai, CM at Isiolo)

JUDGMENT

1. The Memorandum in this Appeal states as follows;

Memorandum Of Appeal

1. That learned Magistrate erred in Law and in fact by rendering a decision that was not backed by any evidence.
2. That the Learned Magistrate misdirected herself by introducing extraneous prayers in the case.
3. That the Learned Magistrate failed and thus misdirected herself by granting to the Respondent's prayers prayed for by the appellant in the face of overwhelming evidence.
4. That the Learned Magistrate misdirected herself by granting the respondent a parcel of land that does not exist on the ground and even in government records thus interfering with the applicant's proprietary interest.
5. That the Learned Magistrate erred in law and fact in failing to address the issue of the respondent's relationship with the deceased, if they had capacity to bring up this suit.



6. That the trial Magistrate failed to pronounce herself on the appellants proprietary rights in the face of overwhelming Documentary evidence, the effects of which has been to grant the respondent title to property not backed by any documentation.
7. That the Judgement of the Learned Trial Magistrate is against in (sic) law and weight of evidence on record.
8. That the Learned Magistrate Misdirected herself by rendering a Judgement that is full of contradictions and incapable of enforcement.
9. That the Learned Magistrate misdirected herself in law and fact by relying on unauthenticated documents to proof ownership of the suit land.

DATED AT ISIOLO THIS 4TH DAY OF OCTOBER, 2022

NYAMOKERI OMBACHI & CO.

ADVOCATES FOR THE APPLICANT

2. The appellant filed an application dated October 4, 2022 which sought a stay of execution of Judgement/Decree in Isiolo Civil Case No. 38 of 2018 pending hearing and determination of the application. This court on October 7, 2022 granted the appellant a conditional grant of stay Provided that the applicant deposited with court as security the sum of Kshs. 800,000/= Failing which the conditional stay would automatically lapse. As the applicant did not deposit the sum ordered by the court to be deposited as security, the application dated October 4, 2022 was dismissed by the court on October 24, 2022.
3. On January 10, 2023 advocate Nyamokeri, for the applicant, told the court that his client had been mute and this was the reason he had not communicated with the respondents' advocate. Interestingly, the respondents' advocate was in court for another matter and had not been made aware that this matter was being mentioned in court that day.

Advocate Sharton Wambua, for the respondents' informed the court that the Judgement being impugned in this suit had already been executed. Mr Nyamokeri, the applicant's advocate, although this assertion was made in his presence, did not in any way controvert advocate Sharton Wambua's statement.

4. This being a first appeal, it is my duty to examine the totality of the evidence proffered in the lower court and after that arrive at my own decision. This is what I have done. I have carefully gone through the proceedings in the lower court and the Judgement delivered in the lower court.
5. The Appeal was canvassed through written submissions. The appellants 3 pages submissions by and large reiterated the grounds in the Memorandum of Appeal and sought to prove that the respondent's evidence was insufficient to lead to the lower court awarding the suit land to them.
6. The respondents' advocate asked the court to note that though the Memorandum of Appeal had 10 grounds, the appellant abandoned grounds 1,2,3,4,6,7,8,9 AND only submitted on grounds 5: By and large the appellant's advocate sought to show that the respondents had proved their case in the lower court and rightly deserved the judgment which was delivered in their favour.

They urge the court to dismiss the appellants appeal with costs and interest.



7. I have juxtaposed the 10 grounds of Appeal in this case with the totality of the evidence contained in the lower court's proceedings, the pleadings, the submissions and the Judgement delivered in the lower court and I find as follows;
- a. On ground 1, I find that the decision made by the learned Chief Magistrate was erudite and was backed by the available evidence.
 - b. I do not agree that the learned Magistrate introduced extraneous matters in the case.
 - c. The orders granted by the learned Magistrate were predicated upon the preponderance of the available evidence.
 - d. The parcel of the land granted to the respondents existed in accordance with the evidence presented to court and on a balance of probabilities.
 - e. I dismiss grounds 5,6, and 7 and find that they have not been proved.
 - f. Regarding ground 9, I do not agree that the Learned Magistrate's Judgement was full of contradictions and was therefore incapable of enforcement. If this were the case, then how was the Judgement/Decree executed as stated by the respondents' advocate in court in the presence of the appellants' advocate on January 16, 2023?

The court notes that the appellants' advocate did not controvert this assertion.
 - g. Ground 10 is nebulous and has not in any way been substantiated.
8. On November 21, 2022 this court noted that there was an apparent lack of the intention to prosecute this case by the appellant. There was inordinate delay in serving the suit documents upon the respondents. Indeed, at one time in court, the appellants' advocate lamented that he was not getting instructions from the appellant. This may explain why, even before the parties had filed their submissions, the impugned Judgement/Decree had already been executed.
9. I find that this appeal has not been proved. In the circumstances, the following orders are hereby issued;
- a. This appeal is dismissed.
 - b. Costs shall follow the event and are awarded to the respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 17TH DAY OF JULY, 2023 IN THE PRESENCE OF:

Court Assistant; Balozi

Miss Nyasani holding brief for Nyamokeri for the Appellant.

Caleb Mwiti holding brief for Miss Rimita for the Respondent.

HON. JUSTICE P.M NJOROGE

JUDGE

