



**Mwirigi & 2 others v Peter (Environment and Land Appeal
016 of 2021) [2023] KEELC 18849 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 016 OF 2021**

PM NJOROGE, J

JULY 17, 2023

BETWEEN

SILAS MWIRIGI 1ST APPELLANT

COLLETA MUKAMI 2ND APPELLANT

CHRISTOPHER MIRITI 3RD APPELLANT

AND

STANLEY KIMATHI PETER RESPONDENT

*(Being an Appeal from the Judgement of Hon. S. Samuel M. Mungai,
Chief Magistrate in Isiolo ELC Case No. 31 of 2015 dated 8th June, 2021)*

JUDGMENT

1. The Memorandum of Appeal in this Appeal takes the following format:

Memorandum Of Appeal

1. That the learned magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities when the plaintiff failed to prove ownership of the suit land.
2. That the learned magistrate erred in law and in fact in relying on the documents of the plaintiff and more particularly the beacon certificate and PDP plan yet the same were never produced but were only marked for production by the makers.
3. That the learned magistrate erred in law and in fact in finding that the plaintiff's evidence was corroborated by the evidence of PW2 & PW3 yet the evidence of PW2 was discredited upon cross examination.



4. That the learned magistrate erred in law and in fact in disregarding the evidence of the appellant in the counterclaim simply because the codefendants did not testify yet he had the consent and authority of the codefendants to give evidence on their behalf.
5. That the judgement of the lower court is against the weight of evidence thus bad in law.
2. The appeal was canvassed by way of Written Submissions.
3. The appellant combined grounds 1,2 and 3. Regarding the granting of a permanent injunction, the appellant says that the respondents had not proved a right to be protected by the court which had been infringed by the appellant and which could not be taken care of by an award of damages. He also said that the documents relied upon by the respondent were merely marked for identification and were not produced as exhibits by their makers. These documents were a beacon certified and a PDP plan. He proffered the case of *Kenneth Nyaga Mwiye Versus Justin Kiguta & 2 Others*, eKLR for the assertion that documents marked for identification were not admitted as exhibits unless they were produced by the makers.
4. Regarding ground 3, the appellant says that the evidence produced by the respondent had glaring contradictions which were discredited during cross-examination. I have gone through the proceedings in the lower court and will come back to this issue later on in this judgement.
5. Concerning ground 4, the appellant says that the learned Magistrate erred in law and in fact by dismissing the appellants counter claim for the reason that the co-defendants did not testify yet there was authority given by them allowing the 1st appellant to give evidence on their behalf.
6. The Respondent in his submissions categorically denied the assertions made by the appellant. He opined that he had by a balance of probabilities proved his case in the lower court. He submits that the Judgement of the Hon. Chief Magistrate in the lower court was well founded in facts and law.
7. As a first appeal, I am required to consider the totality of the evidence proffered in the lower court and after that to arrive at my own decisions. This I have done.
8. This is a case where both parties are basing their claims on inchoate documents. There are no letters of allotment and no leases. There is a lot of informality in the allocation of the subject land. This being the case determination of the issues in question is reliant upon the evidence proffered in the lower court. As always, in Civil matters it is the preponderance of evidence on a balance of probabilities that leads a Judicial officer to make his decision or decisions.
9. Having carefully gone through the proceedings, I find that the plaintiff in the lower court, who is the respondent in this appeal, proved his case on a balance of probabilities to the required standard. The identification of some of the respondent's documents without their eventual production by the makers, is only one of the considerations to be taken into account. It is not fatal to the final decision made by the Chief Magistrate in his Judgement. In my view, the Chief Magistrate's Judgement took into account the totality of the evidence proffered by the parties. On a balance of probabilities, he rightly found in favour of the respondent.
10. I find that the Judgement of the Chief Magistrate had eruditely set out the issues and ably analyzed them. I find that he did not disregard the Petitioner's evidence. I also find that the impugned Judgement was not against the weight of the evidence tendered.
11. In the circumstances, I issue the following orders;
 - a. This appeal is hereby dismissed.



b. Costs shall follow the event and are awarded to the respondent.

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

Court assistant: Balazi

Mr Mokuu for the Respondent.

Miss Nyasani holding brief for Nelima for the Appellant.

HON. JUSTICE P.M. NJOROGE

JUDGE

