



Kanake v Karambu (Suing on behalf of the Estate of James Meeme (Deceased) (Environment and Land Appeal 113 of 2021) [2023] KEELC 20423 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 113 OF 2021
CK NZILI, J
SEPTEMBER 27, 2023**

BETWEEN

REUBEN KINOTI KANAKE APPELLANT

AND

EUNICE KARAMBU (SUING ON BEHALF OF THE ESTATE OF JAMES MEEME (DECEASED) RESPONDENT

(An appeal against the ruling of Chief Magistrate's Court Maua Hon. Tito Gesora delivered on 7.10.2021 in Civil Case No.34 of 2020)

JUDGMENT

1. Through a memorandum of appeal dated 19.10.2021, the appellant faults the decision by the trial court dated 7.10.2021 for:
 - i. Not recognizing that the issue in contention was not the ownership of the parcels of land in question but their positioning on the ground.
 - ii. Not carefully considering the applicant's defence against the contradictory maps and the other evidence before it.
 - iii. Relying on a land surveyor's report but reaching a decision contradictory to the report.
 - iv. Failing to properly understand and interpret the law by awarding costs to the respondent without evidence of the alleged trespass.
2. As a first appellate court, the mandate is to re-appraise, rehearse and re-evaluate the lower court record and come up with independent findings on both facts and law while at the same time giving due allowance to the trial court, which had the opportunity and benefit of hearing and observing the witnesses first hand. See *Selle & another v Associated Motor Boat Company Limited* (1968) EA 123.



3. By a plaint dated 28.5.2020, the respondent, as the plaintiff at the trial court, had sued the appellant herein as the defendant. She had filed the suit as the widow and legal representative of the estate of the late James Meme Kobia, the registered owner of LR No. Igembe/Ndoleli/Athiru/Ruujine/3925, which land she had developed and put under food crops from 1998, to the filing of the suit. The respondent complained that upon the death of her husband, the appellant in 2019 started unjustifiably laying a claim to the land and allegedly blocked her use and access to it with effect from 27.3.2020, while committing acts of wastage on the land. She sought a declaration that she was the rightful owner of the land and a permanent injunction restraining the appellant, his agents, servants or employees from interfering with her quiet possession and occupation of the suit land. The plaint was accompanied by a list of witness statements and documents dated 28.5.2020 and 8.12.2020, a notice of motion dated 28.5.2020, seeking an interim injunction pending hearing and determination of the suit. A further list of documents was also filed dated 4.2.2020.
4. Through a statement of defence dated 16.6.2020, the appellant denied the contents of the plaint. The appellant stated that he had never set foot on the respondent's land, nor was he aware of where it was located, for his land LR No. Igembe/Ndoleli/Athiru Ruujine/3924 was not neighbouring the respondent's land. He denied any service of a notice of intention to sue served upon him. The defence was accompanied by a replying affidavit by Reuben Kinoti Kanake on 16.6.2020 to the notice of motion dated 28.5.2020. Later, the appellant filed a list of 2 witnesses and documents dated 9.12.2020 and 15.2.2021, respectively. Out of a request by the parties and through an order dated 3.6.2020, the trial court directed that the Sub-County Land Surveyor visit the disputed parcels of land to ascertain who was on the ground, whether the two parcels of land were separate, their locality and file a report with the court within seven days from the date of the order. By a letter dated 15.7.2020, the County surveyor Meru North filed a report on 15.7.2020. Following which the parties opted to abandon the application for a temporary injunction and went for the main hearing of the suit.
5. At the trial, Eunice Karambu, the plaintiff, testified as PW 1. She adopted her witness statement dated 18.5.2020. Her testimony was that the suit land belonged to her late husband, who had planted seasonal food crops on it until his death in December 2020, when she took over the farming activities only for the appellant without lawful cause started interfering with her peaceful occupation of the suit land by purporting to begin preparing the land for farming activities without her consent or approval. She produced a copy of the registration certificate as P. Exh No. (1), a record of ownership as P. Exh No. (2), land sale agreement as P. Exh No. (3) a letter dated 21.10.2015 as P. Exh No. (4), a letter dated 30.9.2015 as P. Exh No. (5), an application for the land transfer as P. Exh No. (6), copy of the title deed as P. Exh No. (7) and letters of grant as P. Exh No. (8).
6. In cross-examination, PW 1 told the court she knew where her land was situated but could not ascertain on the map before court which land they had bought in 2015, during her late husband's lifetime. She denied that the appellant had a dispute with the land seller. The respondent vehemently denied that the appellant had erected any developments on the land before they acquired it. PW 1 said that the appellant interfered with her activities on the ground on 21.10.2019, following which the police officers from Kiutine Police Station arrested him.
7. Cypriano Kaluai Muchiri testified as PW 2 and adopted his witness statement dated 8.12.2020, as his evidence in chief. He testified that he sold the suit land, which used to belong to his father, to the respondent's late husband. He denied knowing or being a neighbour to the appellant, who claimed to have never occupied the land nor raised any objection to the ownership. He believed the appellant's parcel number was located elsewhere, away from the locality of the suit land.



8. Samwel Kaberia testified as PW 3. He adopted his witness statement dated 8.12.2020 as his evidence in chief. His testimony was that the late James Meme gave him the suit land to till with effect from 2016 to 2018, when PW 1 took over and continued farming. He refuted any claims that the appellant used to occupy or own the land since he only came to stake a claim after James Meme passed on.
9. The appellant testified as D.W. 1 and adopted his witness statement dated 9.12.2020 as his evidence in chief. His testimony was that he became the registered owner of LR No. Igembe/Ndoleli/Athiru Ruujine/3924, after he acquired it in 2015 from the family of Muchiri Ndiira. The appellant said he had undertaken extensive developments, including erecting a temporary house, planting a miraa plantation and fruit trees. He denied that the respondent was his neighbour since she had only come to him sometime in 2019 with police officers from Kiutine Police Post, who purported to arrest his farm workers, but were later released on bond awaiting arraignment in court.
10. D.W. 1 told the court that he had no disputes with neighbours on both sides of his land. Further, he said he had neither set foot on the respondent's land nor knew where it was situated. Further, D.W. 1 testified that all his developments were on land rightfully belonging to him and not the respondent as alleged. He produced a copy of his title deed as D. Exh No. (1), a copy of the official search as D. Exh (2), a map showing its location as D. Exh No. (3), copy of the receipt from the Director of Surveys dated 5.10.2023 as D. Exh No. (4), a copy of the green card dated 22.10.2020 as D. Exh No. (5), photographs as D. Exh No. (8), a copy of the death certificate for Muchiri Ndiira as D. Exh no. (7) and lastly, a Chief's letter as D. Exh No. (8). In cross-examination, D.W. 1 told the court that he bought his land from the late Muchiri Ndiira, though he had no documents, such as an adjudication record to prove that the seller used to own the land or sold or transferred it to him.
11. Similarly, D.W. 1 testified that he had no expert report to prove that the locality of his title deed was on the position on the ground that the respondent claimed. Further, D.W. 1 said that the seller of his land had died before transferring the land to him, but after a succession cause was filed, his firstborn affected the transfer to him. However, DW1 did not produce a copy of a grant or the succession case number.
12. Tarcisio Gichunge testified as D.W. 2. He adopted his witness statement filed on 15.2.2021 as his evidence in chief. He told the court that in 2012, he bought LR No. Athiru Ruujine/Ndoleli/3918, measuring 8 ½ acres from Stanley Mugaa M'Aluma neighbouring LR No. 3924, belonging to the late Muchiri Ndiira, which he opted to sell to the appellant since he did not have money to buy it. D.W. 2 also told the court that afterwards, he started supplying the appellant with water from his borehole, who eventually purchased a water tank of 10,000 litres.
13. D.W. 2 testified that around February 2015, someone uprooted fencing poles belonging to the appellant, which were replaced around May 2015 and a temporary house erected on the land by the appellant. D.W. 2 stated that the appellant also requested him to lend him one farm worker named Laban Nkunja. He said DW1 eventually planted miraa trees on half of his land, which he has cared for, for many years. D.W. 2 confirmed that he was not a party to or aware of the contents of the sale agreement, including the purchase price, date or particulars thereof. Further, D.W. 3 testified that he could not know how the seller had acquired his land, nor was he aware of the seller's parents since he was a resident of the Kangeta area.
14. Samson Kamande Muiruri was DW 3. His testimony, as per his witness statement filed on 15.2.2021, was that the late Muchiri Ndiira, a relative, used to own the land, which he later sold to the appellants in 2014 but passed on before he effected the transfer. His view was that the son of Muchiri Ndiira, one Gitonga Muchiri, eventually signed the transfer letter, after which the appellant fenced off the land. D.W. 3 told the court that after three days, the appellant called him to report that one Cyprian Kaluai had allegedly destroyed the fence, claiming that the land was his, yet during the lifetime of the



- late Muchiri Ndiira, such a claim had not arisen. His view was that the late Muchiri Ndiira had sold other plots on said land to one Wanduru Gatino. In cross-examination, D.W. 1 told the court that the deceased Muchiri Ndiira used to live with him in the vicinity but could not produce any records to show that he was a one-time owner of the land in the locality.
15. D.W. 3, however, told the court that he witnessed the sale of land, although he never saw any transfer forms being signed. He said the land was demarcated in favour of Muchiri Ndiira in 1991 and allocated parcel LR No. 3924. He, however, admitted that he was not a party to the land demarcation exercise, nor did he witness the exercise or perhaps take part in the succession process after the seller passed on.
 16. After considering the testimony and pleadings, the trial court allowed the respondents' claim, which judgment is the subject matter before this court.
 17. Under this court's ruling delivered on 25.1.2023, additional evidence was allowed. Joseph Mbai testified before this court as PW 1. As the Land Adjudication and Settlement Officer of the Igembe Land Adjudication Office, he admitted writing the letter dated 16.2.2022 to the effect that as per the demarcation register, parcels LR No's 3924 and 3925 belonged to the appellant and the respondent from the same Map No. 22/8, with no claim against each parcel, by either of the parties. His evidence was that during the adjudication process under the *Land Adjudication Act* (Cap 284), the demarcation was done to the land, and the person occupying it was not moved, unlike in the *Land Consolidation Act* (Cap 283). Therefore, as per the demarcation book, his view was that the two parcels of land bordered parcels LR No's 3924, 3918, 7440, 7439, 3922 and 6124. He produced the letter on page 92 of the appeal record as D. Exh No. (9). In cross-examination, PW 1 told the court that the two parcels of land existed in his adjudication records.
 18. With leave of court, parties were directed to put in written submissions to the appeal by 19.7.2023. The parties relied on written submissions dated 9.6.2023 and 3.7.2023.
 19. The court has carefully reviewed the pleadings, evidence tendered, grounds of appeal, written submissions and the law. The issues for court's determination are:
 - i. If the respondent proved his claim to the required standards
 - ii. If the respondent was entitled to the reliefs sought.
 - iii. If the appeal has merits.
 20. The primary pleadings in this matter are the plaint dated 28.5.2020 and the statement of defence dated 16.6.2020. In the said plaint, the respondent pleaded trespass to her LR No. Igembe/Ndoleli/Athiru-Ruujine/3925 measuring 1.58 ha with effect from 27.5.2020, by the appellant without any lawful cause, justification or authority. She prayed for declaratory orders that the land belonged to her and a permanent injunction stopping any interference by the appellant, his servants, agents or employees. In support of her claim, the respondent produced a certificate of registration, a record of ownership, a sale agreement, and three dated 21.10.2015, 30.9.2015 and an application for transfer as P. Exh No. 1-6, respectively.
 21. In the statement of defence dated 16.6.2020, the appellant denied the contents of the plaint. In particular, he averred that he had never set foot on the respondent's land, was not aware of its locality and that all his developments were on LR No. Igembe/Ndoleli/Athiru Ruujine/3924, that did not border LR No. Igembe/Ndoleli/Athiru Ruujine/3925. In support of his defence, the appellant produced a copy of his title as D. Exh No. (1) official search as D. Exh No. (2), map as D. Exh No. (3), copy of receipts, green card, photos, death certificate and chief's letter as D. Exh No's 3 – 8, respectively.



22. The law and the courts have stated that parties are bound by their pleadings, and issues flow from them. In an adversarial system, the parties define their agenda, so a court of law has no other business save for what parties have isolated as the issues for determination. See *Raila v. IEBC* (2017) eKLR.
23. To this end, what was before the trial court and before this court is whether the respondent proved ownership of the land and the alleged encroachment by the appellant and, if so, if the appellant had any justification to occupy the suit land.
24. In P. Exh No (1), the title deed for LR No. Igembe/Ndoleli/Athiru Ruujine/3925 was issued on 6.6.2017. It measured 1.58 ha and was from Registry map Sheet No. 109/1/22/8. On the other hand, D. Exh No. 1 for LR No. Igembe Ndoleli/Athiru Ruujine/3924 for 1.75 ha was issued on 6.1.2019 under Map Sheet No. 109/1/22/8. When the trial court ordered for a scene visit, the report filed on 15.7.2020 indicated that there were two versions of maps showing different positions of the two parcels in question, even though the map for the adjudication section had not been published. The County Surveyor requested for more time to liaise with the Director of Surveys for an authentic map. From the two title deeds produced herein, it is evident that the map sheet indicated in D. Exh No. (1) was different from that in D. Exh No. (3). No witnesses were called to clarify this. James Mbai, who testified before this court, did not clarify if he had received any authentic map from the Director of Surveys confirming which of the maps was authentic. The mother of D.W. (3) was not called to testify. D. exh No. (9) was not certified, signed, stamped, or initiated as emanating from the Survey of Kenya. Assuming it was the correct one, parcels LR No's. 3936, 3935, 5027, and 3939, bordering the appellant's parcel of land as per the evidence of James Mbai, would appear on the same map.
25. Ground number 3 of this appeal is that, the trial court based its findings on a contradictory survey report and maps and reached a wrong finding. It is a trite law that when a land title is in question, all the paper trail towards its acquisition becomes paramount. See *Munyu Miana v Hiram Gathiba Maina* Civil Appeal No. 239 of 2009. Therefore, a party must go beyond a title deed and prove the legality of how he acquired the land, that it followed all legal formalities, and that the land was free of any encumbrances.
26. In this appeal, the respondent had traced the root of her title to the record of existing rights and called the person who had sold it to her during the adjudication process. P. Ex No's. 1, 2, 3, 4, 5 and 6 were produced to trace the respondent's title to the land in the land adjudication records and on the ground. The appellant never objected to these exhibits. He did not produce any document to show that he had a dispute over the land with the seller before the respondent acquired the same in 2015 or before the land became titled. Far from it, the appellant did not go beyond his title deed and produce evidence on when he acquired the land in 2015, from whom and whether the seller had any interest in the land, which had been ascertained and recorded in his favour during the adjudication process.
27. Exh No. (4) confirmed that PW 3 was the recorded owner of the land in the adjudication records. In his evidence before the trial court, PW 3 was clear that before disposing of his interest to PW 1, he was under occupation of the suit land on the ground. He also said that the appellant's land was not near the suit's land. He explained that the appellant only entered the land after he had sold and transferred the land to PW 1 and that there had never been any objection proceedings by the appellant during the adjudication process. The evidence of when the appellant gained entry was also confirmed by PW 3, who had been using the land between 2016 and 2018 with the authority of PW 1. The appellant never cross-examined the said witness on such facts as to when his alleged occupation occurred.
28. Even if the appellant had justified his actions on the suit land, the evidence of whoever had sold and transferred to him LR No. Igembe/Ndoleli/Athiru Ruujine/3924 was crucial. Even though listed as a witness, Mercy Kariuki, the widow of Muchiiri Ndiira and her son David Gitonga Muchiiri were



never called as witnesses to shed light on the exact land that was sold and transferred to the appellant in 2014, the nature, status, particulars, considerations, details of the transfer and the date of handing over vacant possession. The appellant also failed to produce documents showing his sale and transfer of the land in 2015. Since title deeds in the area were already out, there must have been a formal land transfer between the appellant and the seller. If the land was initially in the name of Muchiri Ndiira, there would obviously be a paper trail to that effect from the land's office. Without such documents, the evidence by D.W. 1, D.W. 2 and D.W. 3 remained weak, disjointed and unbelievable to justify a claim on the suit land based solely on a title deed which shows a map sheet number different from that of the respondent.

29. The upshot is that I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 27TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu

Appellant

Asuma for Mutembei for respondents

Mwirigi Kaburu for appellant

HON. CK NZILI

ELC JUDGE

