



**Kililo v Mwaigho (Environment and Land Appeal 16 of 2022)  
[2023] KEELC 20136 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20136 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 16 OF 2022  
NA MATHEKA, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**BATHOLOMEW KILILO ..... APPELLANT**

**AND**

**ZIPPORAH MALEMBA MWAIGHO ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the judgment of the Chief Magistrate, the Honorable Obura, appeals, respectfully, to this honorable Court against the whole of the said Judgment on the following grounds;
  1. That the Learned Chief Magistrate erred in law and fact in holding that the Defendant's title to the suit plot No 177 and the Plaintiff's title to plot 105 be revoked;
  2. That the Learned Chief Magistrate erred in law and fact by failing to appreciate that the separation of the two plots would deny the 1<sup>st</sup> Defendant any road access;
  3. That the Learned Chief Magistrate erred law and fact ignoring the Defendants compensation for the lost part of the plot and road access;
  4. That the teamed Chief Magistrate erred in law and fact by failing to appreciate that the 1<sup>st</sup> Defendant stood to lose part of the plot he had purchased legally, as reflected in documents of purchase;
  5. That the Learned Chief Magistrate erred in law and fact in failing to condemn the Plaintiff to pay the costs of the suit;

The Appellant seeks the following orders that;

- a. The appeal be allowed;



- b. The Judgment of the Hon Chief Magistrate be quashed and the consequential orders granted be set aside;
  - c. Costs of the appeal be provided for
2. This court has considered the appeal and the submissions therein. This is an appeal from a judgement delivered on 5<sup>th</sup> April 2022 by A.M Obura (Mrs) CM in Voi CMELC No 2 of 2018 Zipporah Malemba Mwaigho vs Bartholomew Kililo and anor. The Learned Magistrate found that there was a Plot No 177A and 177B existed on the ground and directed the Land Registrar, Taita Taveta to amend the land register to reflect Batholomew Kilili (Appellant herein) as the owner of Plot No 177B only while Zipporah Malemba Mwaigho (respondent herein) as the owner of Plot No 177A.
3. The Appellant dissatisfied with the judgement, filed a Memorandum of Appeal dated 27<sup>th</sup> April 2022 seeking to set aside the judgement. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the Learned Magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shab* (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
4. It was the Respondent’s case in the lower court that she was the owner of Plot No 177B within Mwakigali and that the Appellant has trespassed onto it with the intention of building permanent structures. In 2000 the Respondent bought Plot No 177 from one Mzee Shaban (deceased) for Kshs 17,000/= and paid Kshs 2,000/= as registration fees to the settlement scheme committee. In 2002 when survey was carried out to ascertain the exact area occupied by each member of the settlement scheme. The surveyors laid beacons as each member stood inside their plots. It was first thought that the Appellant’s plot and the Respondent’s plots was one plot but the surveyor was informed by the other members that they were different plots, he then proceeded to name the Plots No 177A and 177B belonging to the Appellant and Respondent respectively. At the end of the survey exercise each member knew their plot number, however the Respondent was issued with a title which had her name misspelled and the plot number not the one she was in occupation. Upon following up, with the relevant offices and making a visit to the suit land the Appellant found out that the Appellant was issued with a title to Plot No 177 and began construction. The Respondent accused the Appellant of fraud and maintained that he had connived with the land office in Voi to amalgamate her Plot No 177B, into his Plot No 177A and created Plot No 177.
5. The Appellant maintained that he bought the whole Plot No 177 from Mlekenyi Settlement Scheme A on 18<sup>th</sup> February 2001 for Kshs 50,000/= and was issued with a certificate of title deed on 7<sup>th</sup> July 2017. He argued that the said plot did not have part A and B as contended by the Respondent. He argued that the plot borders the scheme’s road reserve and that the Respondent’s plot became part of the road reserve and was later relocated to Plot No 105 and issued with a certificate of title to the same. He maintained that the Respondent does not have any claim over the suit land and urged court to dismiss the suit with costs.



6. The trial court ordered for a site visit to be conducted by the County Surveyor to determine the existence of Plot No 177A and 177B. The Land Surveyor incharge of Taita Taveta County, Mr. Korir Justice produced the site visit report dated 31<sup>st</sup> March 2021. He testified that on the ground Plot No 177 is in two parts, one claimed by the Respondent marked as 'A' and part 'B' as seen in the map published in July 2017 by the Survey of Kenya. He clarified that there were three beacons on the ground separating the two plots, the Appellant's plot was already developed and the Respondent's plot with a heap of building blocks. When cross examined by the Appellant, he maintained that there are beacons separating the plots since July 2017. The evidence adduced by the Land Surveyor was solid, the Appellant did not in any way dispute the existence of the beacons separating the two plots, or that he had developed his portion and the Respondent had laid down stones for construction. I find that the Learned Magistrate did not err in law or in facts by relying on the evidence of the County Surveyor and his report to make a finding that Plot No 177 was divided into two portions, 'A' and 'B'.
7. On the question of fraud, the Learned magistrate found that the 1<sup>st</sup> Defendant cannot claim to be a bonafide purchaser with indefeasible title to both Plot No 177A and 177B. The Learned Magistrate was of the view that there may have been fraud or some serious irregularity for the Appellant to be issued with a title deed for the entire plot before the dispute raised by the Plaintiff was resolved by the committee members. In *Katende vs Haridas and Company Limited* (2008) EA 173 the Court of Appeal in Uganda held,

“Fraud is a very serious allegation. It means actual fraud which means dishonesty of some sort but not constructive fraud. Fraud must be pleaded specifically and proved. The standard of proof required is higher than the usual balance of probabilities in civil matters. However, the standard of proof is not so high to require proof beyond reasonable doubt.”
8. The Court also stated that fraud are actions seeking to effect registration of title in a dishonesty manner. The court stated that;

“Fraud can be participatory by this I mean the party participates in the fraudulent dealings. However fraud can be imputed on a person that is when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud.”
9. The Learned Magistrate established that Plot No 177 was in two parts 'A' and 'B' the Appellant could not explain to the satisfaction of the Court how he came to be in possession of one title deed for the entire Plot No 177. The County Surveyor established that the map creating Plot No 177A and 177B was created in July 2017. This was around the same time that the Appellant was issued with a certificate of title deed on 7<sup>th</sup> July 2017, despite having bought the suit premises back in 18<sup>th</sup> February 2001. It is evident from the facts that the Appellant was aware of the fact that Plot 177 was in two parts, since he was on ground since its acquisition in 2001 but proceeded to acquire a title for the entire plot to the detriment of the Respondent. The evidence adduced by Mike Sego Manyali, the Land Registrar also supports this position, he testified that during the site visit to the suit land registered in the name of the Appellant, the Respondent was able to positively identify her portion in the land parcel. Further to that he confirmed that the former Land Surveyor, one Mr. Wilson Sinyale confirmed during the site visit that Plot No 177 was recommended for subdivision to create Plot No 177A and 177B, but did not clarify why the same was not implemented.



10. It is therefore the findings of this court that the Learned Magistrate did not err in law or in facts by finding that the Appellant's title was tainted by serious irregularities and the Appellant cannot be said to be a bonafide purchase of value without notice of fraud. The Appellant's title to Plot No 177 issued on 7<sup>th</sup> July 2017 cannot be protected by the sanctity of a title as stated in Section 26 of the [Land Registration Act](#), 2012. In light of the above findings reached by this court, I do find that the Appeal herein is unmerited and cannot be sustained and is dismissed with costs to the Respondent.
11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

