



REPUBLIC OF KENYA



**Chigulu v Gwabi (Environment and Land Appeal 80 of 2021)
[2023] KEELC 20096 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20096 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 80 OF 2021
NA MATHEKA, J
SEPTEMBER 27, 2023**

BETWEEN

TSUMA NGALA CHIGULU APPELLANT

AND

TUNJE MWALIMU GWABI RESPONDENT

JUDGMENT

1. The appellant herein, being aggrieved and dissatisfied by the entire Judgment of the Learned Hon. Magistrate, Mr. Francis Kyambia (CM) delivered at Mombasa on 1st October, 2021 in Civil (MELC) No. 58 of 2021 appeals to this Honourable Court against the whole of the said Judgment on the following grounds;
 1. That the Learned Hon. Magistrate erred in law and in fact by ignoring the Appellant's evidence which was strong and/or cogent, supporting his case.
 2. That the Learned Hon. Magistrate erred in law and in fact by not appreciating the fact that the Respondent did not have any defence against the Appellant's case and more so when he failed to provide particulars of the parcels of land he allegedly bought from the Appellant.
 3. That the Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent was a trespasser onto the Appellant's parcel of land.
 4. That the Learned Hon. Magistrate erred in law and in fact by dismissing the Appellant's case, yet the evidence tendered in its favour warranted its success.
2. The appellant seeks the following orders;
 1. That the appeal be allowed by setting aside the judgment of the Learned Magistrate, Mr. Kyambia CM delivered at Mombasa on October 1, 2012 in Civil (MELC) No. 58 of 2020 and substituting the same with an order allowing the said suit.



2. That the costs of this appeal be borne by the respondent.
3. This court has considered the appeal and the submissions therein. This is an Appeal from a judgement delivered on October 1, 2021 by F.Kyambia (CM) in Mombasa ELC CM No. 58 of 2020. The Learned Magistrate dismissed the appellant's case with costs to the respondent. The Learned Magistrate held that the appellant's reliance on his physical occupation of the Plots No. 828 and 830 Vitwatani, Junda could not amount to ownership of the suit premises. Further to that he found that the respondent had adduced evidence to prove that he had conducted some land dealings with the appellant.
4. The appellant dissatisfied with the judgement, filed a memorandum of appeal dated November 26, 2021 seeking to set aside the judgement and allow the suit as prayed. 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 Shah* (1968) EA 93 where it was held that;

" 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."

5. In the plaint dated July 6, 2020 the appellant averred that he is the beneficial owner of the suit land because he entered and occupied the suit land in 1992 and has been in occupation ever since. The appellant did not produce any document capable of proving ownership to the suit premises. The Learned Magistrate did not err by finding that the appellant did not produce any document of title to show that he is the owner of the suit premises, and that entry into the suit premises in 1992 is not proof of ownership. It is trite law that that possession is not title and it is not proof of ownership. The burden of proof laid with the appellant to prove he was the lawful and/or beneficial owner of Plots No. 828 and 830 Vikwatani Junda. He did not produce any document to prove as such. In [*James Muigai Thungu vs County Government of Trans-Nzoia & 2 others*](#) (2022) eKLR it was held that,

" It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the [*Evidence Act*](#) chapter 80 Laws of Kenya succinctly states:

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.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



6. The appellant has submitted that the Learned Magistrate erred in law and in facts by relying on sale agreements to demonstrate that the Respondent purchased the suit premises from the Appellant. Counsel for the appellant argued that the said agreement did not meet the threshold set out in section 3 (3) of the Law of Contract Act and Section 38 of the Land Act which required any land transaction dealings must be reduced into writing, executed by the respective parties and signed by witnesses. Counsel further submitted that the appellant never signed the alleged sale agreement dated November 20, 2010, which amounted to an ambiguous agreement that could not pass title.
7. It was upon the appellant as the plaintiff therein to prove his case and not demonstrate how weak the respondent's case was. At no point did the evidential burden shift from the appellant to the respondent in terms of proving ownership of the suit premises. The burden was cast upon the appellant who had the burden of proving the fact that he was the legal or beneficial owner of the suit premises, since he was the one who desired for the court to believe the existence of that fact. The well-known mantra "he who asserts must prove." Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

" We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."
9. I find and hold that the Learned Magistrate did not err in finding that the appellant did not make a case for a grant of the prayers sought and in dismissing the suit with costs to the respondent. In the totality of my re-evaluation of the evidence and applicable law herein, I fully agree with the Learned Magistrate and find that the appellant failed to prove his case on a balance of probabilities. Accordingly, the appeal herein is devoid of merit and is dismissed with costs to the Respondent.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

