



REPUBLIC OF KENYA



**County Government of Kitui v Mutunga (Environment and Land Appeal E005 of 2021) [2023] KEELC 20400 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20400 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E005 OF 2021  
LG KIMANI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**COUNTY GOVERNMENT OF KITUI ..... APPELLANT**

**AND**

**KYUNDU MUTUNGA ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. P.M Mayova delivered on 23rd September 2021 in the Senior Principal Magistrate's Court Land Case No.9 of 2019 in the Senior Principal Magistrate's Court at Mutomo)*

**JUDGMENT**

1. Before the Court is an Appeal instituted vide Memorandum of Appeal dated 22<sup>nd</sup> October 2021 against the Judgment of Hon. P.M Mayova delivered on 23<sup>rd</sup> September 2021 in the Senior Principal Magistrate's Court at Mutomo Land Case No.9 of 2019 on the following grounds:
  1. That the Learned Trial Magistrate erred and misdirected himself on the law and fact by holding that the property, Plot Number 187 belonged to the Respondent contrary to the documentary evidence available showing that it belonged to Amos Munyai Ngunu
  2. That the Learned Trial Magistrate erred and misdirected himself on the law and fact by placing the blame on the Appellant and in ordering the Appellant to pay the costs of the suit.
2. The Appellant prays that;
  1. the whole judgment of the trial court P. M. Mayova(Mr.) delivered at Mutomo on 23<sup>rd</sup> September 2021 be set aside and be substituted with an order dismissing the suit with costs.
3. Before the trial court was an amended plaint dated 20<sup>th</sup> April 2015 where the Respondent in this appeal was the plaintiff. The Plaintiff Kyundu Mutunga claimed a parcel of land near Mutomo Market which



he states is his ancestral land. He subdivided and sold seven plots out of the land to willing buyers but reserved one plot (hereinafter referred to as the disputed plot) for himself.

4. The Plaintiff states that he came to learn in March 2010 that the 2<sup>nd</sup> Defendant was claiming ownership of the disputed plot as having been given by the former County Council of Kitui to persons who later sold to him as Plot 187 Mutomo Market.
5. The Plaintiff contended that the former County Council of Kitui (later became the 1<sup>st</sup> defendant) had never owned the disputed plot as it is not within the designated Mutomo Market area and has never surrendered it to them. He also stated that the plot is located in an area where land adjudication and registration has not taken place, whereas Mutomo market is an area where adjudication and registration of titles has taken place.
6. The plaintiff prayed for an order declaring that the disputed plot No. 187 Mutomo Market is not part of Mutomo Market but is the private property belonging to the plaintiff.
7. It is noted that the Appellant did not include in the Record of Appeal, the defences filed before the trial court by the two defendants. However, gleaned from the submissions by the Appellant who was the 1<sup>st</sup> defendant, it was claimed that the suit property Plot 187 Mutomo Market belonged to the 2<sup>nd</sup> Defendant and not the Plaintiff. It was further stated that it belonged to the larger adjudication parcel number 1231 within the Mutomo market designated area.
8. Further, the County Government averred that since Mutomo market is an adjudicated area, the suit was bad in law given the requirements of Section 30 of the [Land Adjudication Act](#) on consent to file suit by a Land Adjudication Officer.
9. The 2<sup>nd</sup> Defendant denied the contents of the plaint and averred that he acquired Plot No.187 lawfully and procedurally.

#### **Summary of the proceedings before the trial court**

10. The suit proceeded for hearing on 26<sup>th</sup> August 2019, when PW 1, Kyundu Mutunga, the plaintiff, testified and reiterated the facts contained in the plaint and further stated that the land was his ancestral land that belonged to his grandmother from whom he took over and started ploughing. He stated that when the local County Council declared the area near his shamba to be a market, he subdivided the land and sold to third parties but left the suit plot for himself intending to develop it. It was not until 2010 that the 2<sup>nd</sup> Defendant claimed that he owned the plot having been allocated as part of the local market.
11. The Plaintiff stated that there was previously a dispute over the land with one Mulwa Nguna who claimed he bought the plot from one Philip Musingi. He stated that Plot 187 is a portion of his land and is private property. Upon cross-examination, the Plaintiff stated that he had been told by the chief that the county government would issue them with forms to fill if one wanted to convert his/her land into a plot but he had not been issued with title yet. He denied knowing the 2<sup>nd</sup> Defendant but stated that Mulwa Nguna brought people to his land who dug foundation, and pit latrine, prompting him to report the matter to the police.
12. PW 2, Robert Kisilu Muyanga was the senior chief of Mutomo since the year 2000. He stated that he was aware of the dispute over the suit plot since he handled a dispute between the Plaintiff and Bonaventure Mulwa Nguna when he was trying to fence the plot. He identified the plot as part of the Plaintiff's farm and stated that he knew of the plots around and the people the Plaintiff sold to.



13. Upon cross-examination, the witness testified he did not fully resolve the dispute referred to and that the 2<sup>nd</sup> Defendant was not involved in the dispute when it was before him. PW 2 further testified that he was not aware that the market was allocated a plot number during adjudication and stated that the plot is not yet developed.
14. PW 3, Gideon Syengo Munuve from Kyatune, Ndatani sub-location, Mutomo testified that he knew the plaintiff well and that the suit plot belonged to him. He further confirmed the plots location stating that it is private land. On cross-examination, the witness stated that he bought his parcel of land in 1999 as Plot 1354 Kawelu Adjudication Section which is near the plaintiff's plot of land after adjudication was already done.
15. A site visit was conducted on 19<sup>th</sup> November, 2020 when the Plaintiff identified his plot measuring 50 feet by 100 feet. He identified a plot with a storey building known as Cool Breeze on land he had sold to another person. He also identified land that he had donated where the court offices stood next to the county council offices.
16. Amos Munyau Nguna, the second defendant was present for the site visit and identified the same parcel of land in dispute as the one he bought in 1987 while the seller, Bonventure Nguna, had bought it in 1982. The 2<sup>nd</sup> Defendants stated to the Court that the plot is within the whole Mutomo Market plan.
17. The County government of Kitui did not call a witness.
18. DW 1, Amos Munyau Nguna, the 2<sup>nd</sup> Defendant testified on 15<sup>th</sup> April, 2021 Service as a driver at Meru law courts. He stated that he bought the suit land from his brother Bonaventure Nguna on 9<sup>th</sup> February, 1997 for the sum of Kshs. 65,000 and produced the agreement as an exhibit. His brother had bought land from one Benjamin Musingi who was deceased and he had been shown the transfer letter.
19. The Defendant produced land rate receipts to show that he has been paying the same to the County Council of Kitui though it was in the name of Benjamin Musingi. When he decided to fence the plot in May 2010, the Plaintiff opposed him. He confirmed that his brother had dug a foundation, pit latrine and had building stones and sand on the land. He was told by the OCS Mutomo to stop the construction and went to Kitui County Council offices to verify ownership. He stated that the County Council of Kitui replied vide letter dated 3<sup>rd</sup> March, 2010 and identified the plot as Plot 187 within Mutomo/Kawelu/1251 registered under Mutomo County. He produced in evidence development plan. He also produced a letter showing that Benjamin Musingi was allotted the land and sold the same to his brother Nguna, insisting that the plot was part of Mutomo Market in the plan.
20. Judgment was delivered by Hon. P.M Mayova, Senior Resident Magistrate on 23<sup>rd</sup> September, 2021. The trial court observed that the County government supported the claim of the 2<sup>nd</sup> Defendant but opted not to testify and show how it allocated the plot to Benjamin Musingi. The court further noted that no one seemed to know where parcel number 1231 and its co-ordinates as stated were. The Court found that on a balance of probabilities, the plot in question belonged to the plaintiff and was convinced that it formed part of his private ancestral land. The court allowed the Plaintiff's suit as prayed with costs and interest at court rates.

### **Appellant's written submissions**

21. Counsel for the Appellant submitted that the Learned Trial Magistrate leaned towards the oral evidence presented in court as opposed to the documentary evidence produced by the defendants as proof of ownership. He claimed that the Respondent did not produce any evidence to prove ownership or demonstrate that the disputed property was not part of Mutomo Market.



22. It is the Appellants' submission that the claim of conspiracy between the defendants was not proved and their view is that the Respondent should bear the costs of the appeal.

### **Respondent's submissions**

23. Counsel for the Respondent opposed the appeal and submitted that the Appellant claimed that the suit plot No. 187 Mutomo market belonged to the 2<sup>nd</sup> Defendant, yet the 2<sup>nd</sup> defendant is not a party to this appeal. They contend that the 2<sup>nd</sup> defendant testified and produced several exhibits but the Appellant did not call any witness nor produce a single exhibit.
24. The Respondent highlighted that the trial court conducted a site visit at the application and request of the parties, but the Appellant did not designate any of its officers to attend the visit and the proceedings.
25. It is the Respondent's submission that the Appellant had conspired with the alleged seller of the plot to allot it to another party. The Respondent submitted that the 2<sup>nd</sup> Defendant did not appeal against the trial court's judgment and the Appellant had not filed a counterclaim before the trial court, hence the Appellant cannot purport to speak on behalf of the 2<sup>nd</sup> Defendant. They submitted that ground 1 of appeal has no merit for this reason.
26. On 2<sup>nd</sup> ground of appeal Counsel relied on Section 27 of the [Civil Procedure Act](#) on costs and submitted that costs are awarded under the discretion of the Court. He submitted that the trial court decided on the party to pay costs of the suit as it ought to since it was the Appellant who occasioned the dispute and received rates from the 2<sup>nd</sup> Defendant and the seller giving them false hopes that they had rights over the suit property.

### **Analysis and Determination**

27. This being a first appeal it is necessary to state the role of the first appellate court as was stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

28. The Respondent opposed the appeal and raised an issue of concern that the Record of Appeal dated 27<sup>th</sup> January 2023 does not contain the defence filed by the Appellant on 11<sup>th</sup> May 2010 and one filed by the 2<sup>nd</sup> Defendant on 12<sup>th</sup> May 2010. The documents that by law are supposed to be included in a record of appeal guided by Order 42 Rule 13 of the Civil Procedure Rules. The said Rule states that;

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them are not in the possession of either party have been served on that party, that is to say - QUOTE

- a. The memorandum of appeal
- b. the pleadings
- c. The notes of the trial magistrate made at the hearing



- d. the transcript of any official shorthand, typist notes electronic recording or
  - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate.”
29. The Supreme Court of Kenya in *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers Ltd & 4 others* (Petition 41 of 2019) [2021] KESC 26 (KLR) (26 November 2021) (Ruling) held that; “Failure to comply with section 33(4) of the Supreme Court Rules, 2012 (repealed) was fatal as the window for such compliance was closed. The petition was fatally defective and incurable.”
- “Rule 33(4) of the Supreme Court Rules, 2012 (repealed) which rules were applicable at the time of filing stated that for the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal had to contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and had to further contain the following documents relating to the appeal in the first appellate court being the certificate, if any, certifying that the matter was of general public importance; the memorandum of appeal; the record of proceedings; and the certified decree or order. The petitioners were obligated by law to include all the pleadings and documents relied upon during the hearing in the two superior courts.
30. The court record shows that after filing the memorandum of appeal this suit was mentioned before the Deputy Registrar on 19<sup>th</sup> October, 2022 when the Appellant was given 30 days to file a Record of Appeal. On 19<sup>th</sup> October, 2022 the time given was extended by 14 days. On 16<sup>th</sup> November, 2022 the Appellant was given a further 21 days after which the appeal was referred to the Judge for directions.
31. The appeal was listed for directions on 24<sup>th</sup> January, 2023 when the Record of Appeal had still not been filed. Counsel for the Appellant indicated to the court that he did not have all the documents they required for inclusion in the record of appeal. The Appellant was given 21 days to file and serve the record of appeal. The court noted that the trial court file had been forwarded and was part of the appellate court’s record and that counsel could make copies of any documents they required but did not have.
32. On 16<sup>th</sup> February, 2023 the counsel for the appellant confirmed that he had filed and served the record of appeal and sought directions that the appeal be heard by way of written submissions.
33. From the foregoing narration of the proceedings relating to filing a complete record of appeal, it is clear that the Appellant’s counsel was given adequate time and opportunity to comply with the rules and file a complete record of appeal in compliance with the rules of the court. They failed to comply.
34. The Court finds that failure to include in the record of Appeal some of the documents set out in Order 42 Rule 13 being the defences filed by the Appellant and the 2<sup>nd</sup> Defendant herein, renders the appeal herein incompetent. The Appellant was obligated by law to include all the pleadings and documents relied upon during the hearing before the trial court. Failure to comply with the rules was fatal as the window for such compliance was closed. The Record of Appeal is therefore fatally defective and incurable since the Appellant did not take advantage of the indulgences given by the court to file all the documents required. On this ground alone the appeal herein ought to be struck out with costs.
35. The court, however, proposes to deal also with the appeal on merit.



**Ground 1: That the Learned Trial Magistrate erred and misdirected himself on the law and fact by holding that the property, Plot Number 187 belonged to the Respondent contrary to the documentary evidence available showing that it belonged to Amos Munyau Nguna.**

36. It is noteworthy that the 2<sup>nd</sup> Defendant did not appeal the decision of the trial court. Even so, the Appellant urges that the suit land belongs to the 2<sup>nd</sup> Defendant. It is also notable that the Appellant did not call any witness during the hearing but relied on the 2<sup>nd</sup> Defendant's case.
37. During the hearing before the trial court, the Respondent herein called witnesses including the area chief who had presided over the dispute between the plaintiff and one B. Mulwa Nguna. He testified that when the said Nguna was asked to provide ownership documents he failed to avail the same.
38. The 2<sup>nd</sup> Defendant produced an Agreement for sale of the suit Plot dated 9<sup>th</sup> February, 1997 between himself and one B. Mulwa Nguna as well as an application to transfer the property from Benjamin M. Musingi to Amos Munyau Nguna, the 2<sup>nd</sup> Defendant. He stated that the plot was transferred directly since as he claimed Benjamin had not transferred the plot to Nguna. He also produced receipts for payment of plot rent, a plot development plan and receipt for fees paid for approval of plan, a letter confirming the sale of the plot by Benjamin Musingi, a complaint letter to the County Council and a letter of confirmation by the County Council dated 30<sup>th</sup> March, 2010.
39. According to the Appellant, the above documents consisted of overwhelming evidence that the plot was owned by the 2<sup>nd</sup> Defendant.
40. The Court notes that all the documents produced by the 2<sup>nd</sup> Defendant showed the process through which the 2<sup>nd</sup> defendant had acquired the land from Bonaventure Mulwa Nguna. However, neither the Appellant nor the 2<sup>nd</sup> Defendant produced evidence of the origin and/or root of ownership of the plot or show how the County Government of Kitui came to own the suit plot and to have the authority to allot the plot to Benjamin Musingi for him to be able sell to Bonaventure Mulwa Nguna who is said to have sold to the 2<sup>nd</sup> defendant.
41. The Respondent claimed ownership of the suit plot before the trial court and challenged the 2<sup>nd</sup> Defendant's documents. The trial court considered the two claims to ownership and stated that he was inclined to find that on a balance of probabilities the land belongs to the Plaintiff/Respondent herein having been private ancestral land. The trial court further concluded that the Respondent herein had never surrendered the land to the council and the same was not available for allocation to Benjamin Musingi. The court found that the acquisition by the Appellant herein was a mystery and any subsequent action taken by the Appellant herein was a nullity.
42. This court has looked at the documents produced by the 2<sup>nd</sup> Defendant as proof of ownership and agreed with the trial court that there was a gap in evidence since the Appellant did not show how it came to own the plot such that it could allocate the same to Benjamin Musingi who later is said to have sold to B. Mulwa Nguna.
43. The trial court further went for a scene visit and the proceedings at the scene are recorded. The Court concluded that "the plot cannot be part of Mutomo market when it is in the middle of several others which belonged to the Plaintiff and which no other person has claimed." The Court observed that it appeared that there was a conspiracy to deprive the Plaintiff of his property illegally.



44. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

45. In the present case, the root of the title or the documents held by the Appellant herein and the 2<sup>nd</sup> Defendant were challenged and it was incumbent upon them to go beyond the documents and show that the acquisition was legal. The Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows while commenting on the burden of proof in the Kenyan context:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not? Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: -

“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.”

46. It must be noted that the Appellant is the custodian of all land documents that it has allotted to individuals and thus it ought to have had in its custody documents showing the root of the impugned documents of ownership.

47. The 2<sup>nd</sup> Defendant claimed that he bought the disputed land from his brother, Mulwa Nguna and relied on an agreement for sale. It is trite law that one cannot give a better title than that which one possesses. The Court in the case of *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina* [2019] eKLR took note that:

“The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

**Ground 2: That the Learned Trial Magistrate erred and misdirected himself on the law and fact by placing the blame on the Appellant and in ordering the Appellant to pay the costs of the suit.**

48. On the issue of costs, the Court allowed the Respondent’s claim with costs and interest to be paid by the Appellant only since they were the cause of the mess. Section 27 of the *Civil Procedure Act* provides for costs in a suit and states that;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the



discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

49. In the case of *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR the court explained the circumstances under which an appellate court will interfere with a trial court’s discretion in awarding costs.

On my part, the law is that the appellate court will not interfere with the exercise of discretion by trial court on costs, except

- (1) where the discretion was not exercised judicially or was exercised on wrong principles, or
- (2) where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision was wrong; or
- (3) where reasons are given, the Appellant court considers those reasons not to constitute “good reason” within the meaning of section 27 of the *Civil Procedure Act*. There are ample judicial decisions as well as eminent works on this subject which I do not wish to multiply except I am content to refer to the case of *Supermarine Handling Service Ltd (Supra)* for it summarizes the applicable law on this matter.”

50. The trial court explained the reason it ordered that costs be paid by the Appellant herein. I am satisfied that the court exercised its discretion judiciously, and properly and did not err in any way. Further, the Supreme Court of Kenya in the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR had this to say on the question of upsetting a trial court discretion:

“(26) On appeal of this decision, the Court of Appeal P (in *Mbogo and Another v Shah* [1968] EA 93 at 96) affirmed the decision of the High Court thus:

“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles that have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been wrong in the exercise of his discretion and that as a result there has been mis-justice.”

51. For the foregoing reasons this court agrees with the decision of the trial court and finds the appeal herein to be lacking in merit and the same is hereby dismissed with costs to the Respondent.



**DATED AND DELIVERED AT KITUI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**Judgement read virtually in the presence of;**

Mwalimu for the Appellant

Kilonzi for the Respondent

