



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lumadede v Aroni (Environment and Land Appeal 14 of 2021)
[2023] KEELC 19991 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 14 OF 2021
LA OMOLLO, J
SEPTEMBER 21, 2023**

BETWEEN

ROBERT MWISANI LUMADEDE APPELLANT

AND

PHILEMON OMWEGA ARONI RESPONDENT

*(Being an appeal arising from the judgement of Hon. Limo. B. Benjamin
SRM delivered on 21st May 2021 in Nakuru CMC ELC NO. 73 OF 2019)*

JUDGMENT

Introduction.

1. By the Memorandum of Appeal filed on 18th June, 2021, the Appellant appeals from the judgement of Hon. Limo B. Benjamin delivered on 21st May, 2021 in Nakuru CMC ELC No. 73 OF 2019.
2. The grounds of appeal are as follows;
 - a. The learned Chief Magistrate failed to appreciate the submissions of the learned Counsel for the Appellant and choices pledging in favor of the Respondent herein. (SIC)
 - b. The Learned Magistrate erred in law and in facts by not finding that the Appellant Register of his title deed from the company was not kept pursuant to Section 112 of the Company Act of Kalenjii Enterprise Limited. (SIC)
 - c. The Learned Magistrate erred in law and facts by not allowing both most required witnesses from both respondent and appellant to testifying and being cross examined. (SIC)
 - d. The learned Chief Magistrate erred in both considering the problem could be solved by surveyor and registrar hence they were the originator of the problem. (SIC)



- e. The Learned Magistrate erred in law and fact by ignoring the Company Act meaning the Company Act Cap 486 Laws of Kenya in the Articles and Memorandum of Association.
 - f. The Learned Magistrate failed to appreciate the company Kalenjin Enterprises Ltd protocol which is Limited with share of member who contributed to the capital which formed the company to acquire land and subdivide it among themselves in accordance to their share without bullies selling other members' land. (SIC)
 - g. That in all the circumstances appellant did a prejudice and prejudice on verifying affidavit also on list of document in consistency to police OB 9/22/03/2019 of witness No. 2 the finding of the learned Magistrate are insupportable in law or on the basis of the defence adduced. (SIC)
3. The Appellant also filed another Memorandum of Appeal on 9th July, 2021, where he appeals from the same judgement of Hon. Limo B. Benjamin delivered on 21st May, 2021 in Nakuru CMC ELC No. 73 OF 2019. The grounds of appeal are;
- a. The learned Resident Magistrate failed to appreciate the submission in favour of respondent herein by dismissing appellant defence.
 - b. The learned resident magistrate erred in law and in fact not finding that respondent register of his title deed from the company was not kept pursuant to section 112 of the company act of Kalenjin enterprises register.
 - c. The learned resident magistrate erred in law and facts by not allowing the tittle deed seller in the OB 9/22/03/2019 police file. Mr Shem Osiago and in the register D. Doka both witnesses to testify more so about company document and be cross examined.
 - d. The learned resident magistrate erred in considering getting solutions from surveyor and registrar who were originator of the problems by ignoring court order of 10th Jan 1996 which restrained intruders and the company Kalenjin enterprises from issuing tittle deeds interfering with restrained Area.
 - e. The learned resident magistrate erred in law and fact by ignoring the company law and the Act meaning, the Company Act Cap 486 Law of Kenya and the Memorandum and Article of association.
 - f. The learned resident magistrate failed to appreciate the company Kalenjin enterprises protocol and the fact that land is limited to registered shareholders and members who contributed to the capital which formed the company to acquired land and subdivide it among themselves in accordance with their shares without-bullies selling other member land.
 - g. The learned resident magistrate failed to appreciate company protocol by checking land acquiring document which are self-check e.g. share certificate numbers, green card number in the register allotment chit with two numbers old and new and a general survey receipt of 1986 and lastly a title deed.” but this area of sewerage member where restrained to have title deed. (SIC)
 - h. That the learned resident magistrate erred by ignoring travesty of justice by respondent signing a verifying affidavit also a list of documents in consistency to police OB 9/22/03/2021 which were supportable in law or on the basis of the defense adduced and more so the negligence of court orders of 1994 on case RMCC 1341 OF 1994 and also 1997 the two have never challenged in a competent court for appellant to make application for mutation as is evident- in the separate Registrar. Different from company register of 1,200 members also mutation for



register and map plan. To subdivide the 56 acres at sewerage which is purely greed grabbing. (SIC)

- i. The learned resident magistrate erred in law and fact purposively by ignoring restraining orders in high court of case ELC 10 OF 2019 order specifying that until the case is heard and determined Order which restrained not only the intrudes but also restrained company Kalenjin enterprises from issuing title deeds. (SIC)
 - j. The learned Senior Resident Magistrate erred by not finding the Respondent in this case a stranger of the company Kalenjin Enterprises Limited hence both Philemon Omwega, Shem Osiogo and Mr D Doka are strangers confused on 2nd July 2019 before Hon. F. Munye and on 24th Nov 2020 before Hon Limo B Benjamine while rejecting to call the two witnesses also Mr Melly Shadrack from DCI. (SIC)
 - k. That when confusing that he is a purchase for value from Kalenjin Enterprises Ltd and ask from whom did you buy he declined to name Shem Murumbwa and D Doka in the register the confusion made his counsel Mr Kabogo to withdraw hence ethnic on travesty of justice by ignoring the High Court case ELC 10 of 2019. And the restraining orders of 1994, 1995 and 1997-200. (SIC)
4. The Appellant seeks the following orders;
- a. The appeal be allowed.
 - b. The judgement in favors of the cost Appellant be self aside.
 - c. The appellant be compensated damages and awarded the cost of this appeal.
5. There are two Memoranda of Appeal on record. The first one filed on 18th June, 2021 and the other one filed on 9th July, 2021.
6. This court in its ruling delivered on 24th March, 2022, which ruling was on on the Appellant's application seeking stay of execution pending appeal, noted that there were two Memoranda of Appeal on record. One of the questions for determination in that application was whether the appeal should be struck out for being filed out of time and without leave of the court. This Court found that the Memorandum of Appeal filed on 18th June, 2021 was filed within time and proceeded to determine the application on its merit.
7. Bearing this in mind, the Memorandum of Appeal filed on 18th June, 2021 shall form the basis for determination of this appeal.
8. It is also important to point out that the proceedings before the Learned Trial Magistrate were between the Appellant Robert Mwisani Lumadede and Philemon Omwega Aroni the Respondent. These are the same parties in the Memorandum of Appeal filed on 18th June, 2021.
9. Even though Margaret Ikutwa Otera is listed as the 2nd Appellant in the submissions filed in the present appeal, I take the view that the parties in the Appeal are Robert Mwisani Lumadede the Appellant and Philemon Omwega Aroni as the Respondent.
10. I must also point out that the Appellant was not represented by counsel. The grounds of appeal are difficult to comprehend. What remains clear, however, is that the Appellant is dissatisfied with the decision of the Trial Magistrate and has filed this appeal.



Factual Background.

11. The suit before the Magistrate's court was instituted by the Respondent vide a Plaint dated 29th March, 2019. The Respondent claimed that he was the owner of land parcel number Nakuru Municipality Block 29/1478 and 1479 (Ronda).
12. The Respondent also claimed that the Appellant was his neighbour and had trespassed onto his properties and further that he stopped him from fencing them.
13. The Respondent then sought the following prayers against the Appellant;
 - a. An order of a permanent injunction to issue against the Defendant by himself, his agents, relatives or any other person whatsoever from trespassing preventing and/or stopping the Plaintiff from carrying out development or in any way adversely interfering with the Plaintiff's parcels of land known as Nakuru Municipality Block 29/1479 (Ronda) and Nakuru Municipality Block 29/1478 (Ronda).
 - b. General damages, costs and interest.
 - c. Any other further relief as may deem fit to this honorable court to grant.
14. The Appellant filed his 'Defence Statement of Respondent' (sic) dated 13th May, 2019. He stated that he acquired land in the year 1974 from Kalenjin Enterprises and that he was issued with Share Certificate No. 586 and a green card bearing Plot No. 817 new 908.
15. He also stated that the map relied on by the Respondent was introduced by the Municipality of Nakuru and yet the suit property belonged to Kalenjin Enterprises Limited.
16. He prayed that the court orders the Land Registrar to ascertain the acquisition of title deed no.1478 and 1479.
17. The Learned Trial Magistrate delivered his judgement on 21st May, 2021 and found in favour of the Respondent in terms of prayer No. 1 in the Plaint and dismissed the Appellant's Statement of Defence.
18. On 18th January, 2023, the Appeal came up for directions and it was directed that the appeal would be disposed of by way of written submissions.
19. On 8th March, 2023, parties confirmed having filed their written submissions and the appeal was reserved for judgement.

Submissions.

20. The Appellant filed his submissions on 8th March, 2023 while the Respondent filed his submissions on 30th January, 2023.
21. The Appellant's submissions. Just like his grounds of appeal are for the most part difficult to comprehend.
22. The Appellant submits on the authentication of a title deed and goes into detail on various minutes of Kalenjin Enterprises, its register and the Memorandum and Articles of association.
23. The Appellant submits that he was given Ballot No. 908 old number and was later issued with new number 818. He also submits that he had been in occupation for over 49 years before the Respondent entered the suit property and fenced it off.



24. The Appellant further submits that the Respondent processed his title deeds in the year 2011 and took possession in the year 2019 and yet he has been in occupation since the year 1972.
25. The Appellant submits that his witnesses Daniel Maina Kirugui and Chepkemoi Arap Ruto were not allowed to give evidence.
26. The Appellant also submits that the Surveyor's Report dated 24th November, 2020 confirmed that his parcel of land exists and that both parcels of land are far apart and yet the Respondent claimed that the parcels of land were next to each other.
27. The Appellant makes reference to various court orders in cases whose full citation is not given and submits that the Respondent fraudulently acquired titles to the suit properties.
28. The Appellant then prays that his appeal be allowed as prayed.
29. The Respondent in his submissions, sets out the facts of the case, the evidence given before the trial court and relies on the cases of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123, *Zachary Omondi Odongo Vs Benard Stephen Omollo & 2 Others* [2022], Article 40(1) of [the Constitution](#) of Kenya and Section 24 (a), Section 26(1) of the [Land Registration Act](#).
30. The Respondent also relies on the case of *Arthi Highway Developers Limited Vs West End Butchery Limited* and others as was cited in the case of *Hassan Mohammed Haji Vs Mohammed Keynan & another* [2019] eKLR and submits that during the trial before the lower court, he produced copies of title deeds which showed that he was the registered owner.
31. The Respondent also submits that the 1st Appellant is laying claim to his properties on the basis that he was a member of Kalenjin Enterprises but he had nothing to show he was a member and that the parcel he laid claim to was No. 908.
32. On who should bear the costs of the Appeal, the Respondent relies on Section 27 of the [Civil procedure Act](#) and the case of *Republic vs Rosemary Wairimu Munene, Ex Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Limited* which was cited in *Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & another* [2016] eKLR and seeks that the appeal be dismissed with costs.
33. I have noted that the Respondent does not expressly answer to the grounds of appeal as set out in the memorandum of appeal.

Analysis And Determination.

34. Before delving into the issues for determination, this court notes that the Appellant's Memorandum of Appeal does not contain prayers.
35. As stated earlier in this Judgement, the Appellant in his 'Defence Statement of Respondent' (sic) sought orders that the Land Registrar be ordered to ascertain how the title deed for the suit properties was acquired.
36. It is therefore logical to deduce that the Appellant does not believe that the title held by the Respondent was acquired, legally and/or procedurally. He seeks that the Land Registrar be ordered to make an enquiry into how ascertain how the title deed for the suit properties was acquired.
37. This court is guided by Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Article 159 of [the Constitution](#) of Kenya which obligates this court to administer justice without undue regard to technicalities.



38. Section 1A of the [Civil Procedure Act](#) provides as follows;

“1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

39. Section 1B of the [Civil Procedure Act](#) provides as follows;

“1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

40. Section 3A of the [Civil Procedure Act](#) provides as follows;

“3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

41. Article 159 (2)(d) of [the Constitution](#) of Kenya provides that in exercising judicial authority, the courts should be guided by certain principles that include the principle that justice shall be administered without undue regard to procedural technicalities.

42. As I have stated before, the Grounds of Appeal on the Memorandum of Appeal filed on 18th June, 2021 are for the most part difficult to comprehend.

43. The issues for determination as I have understand them from a reading of the Grounds of Appeal are as follows;



- a. Whether the Learned Magistrate erred in not allowing the Appellants witnesses and those of the Respondent to give their evidence and whether he took into consideration the evidence of those who testified.
- b. Whether the Learned Trial Magistrate erred in considering the Surveyor and Registrar's report.
- c. Whether the Learned Magistrate had jurisdiction to make enquiries into the procedure and processes of Kalenjin enterprises Ltd
- d. Who should bear the costs of the Appeal.

A. Whether the Learned Magistrate erred in not allowing his witnesses and those of the Respondent to give their evidence and whether he took into consideration the evidence of those who testified.

44. The role of the Appellate Court was stated by the Court of Appeal in the case of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“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 itself and draw its own 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.”

45. The Court also in the decision of *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR held as follows:

“This being a first appeal, we are reminded of our primary role as a first Appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

46. The Appellant alleges that the Learned Trial Magistrate erred in not allowing his witnesses Daniel Maina Kirugui and Chepkemoi Arap Rutoto to give evidence.

47. The Respondent did not submit on this ground of the appeal.

48. A perusal of the court proceedings shows that on 27th October, 2020, the Appellant informed the court that he had two witnesses. The names of the said witnesses were not indicated. The learned trial magistrate ruled as follows;

“In view of the submissions and upon perusal of the court record, the Defendant did not file any list of witnesses to testify with their concurrent statements. That being the case, the Defendant's case shall stand closed. We have to proceed for written submissions. Before the court allows the issue of submissions, an order shall issue against the Registrar of Lands and District Surveyor to prepare a status report (within 30 days) of land parcel of land, Nakuru Municipality Block 29/1479 and 29/1478(Rhonda) and Defendant parcel of land No. 908. OCS Kaptembwa to facilitate the exercise...”

49. A perusal of the judgement of the court delivered on 21st May, 2021 identified the following issues for determination;



- a. Whether the Plaintiff has proved his case on a balance of probabilities.
 - b. And/or in the alternative, whether the Plaintiff is entitled to the prayer's sought.
50. The question of whether or not the Appellant was denied an opportunity to call his witnesses was not addressed in the judgement. My view is that this ground of the Appellant's appeal is essentially premised on the orders issued by the learned trial magistrate on 27th October, 2020.
51. If the Appellant desired to appeal the orders of the Learned Trial Magistrate issued on 27th October, 2020 (the order that closed his case without him calling any witnesses) then he ought to have filed an appeal from the said order as provided for under Section 79G of the *Civil Procedure Act*.
52. Section 79G of the *Civil Procedure Act* provides as follows;
- “79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
- Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
53. The Appellant cannot appeal from the judgement delivered on 21st May, 2021 on the ground that he was not given a chance to call his witnesses. If the order issued on 27th October, 2020 denied him an opportunity to have his witnesses tender evidence and if he was aggrieved by it, as he quite clearly is, he ought to have appealed against it. I find that this ground of appeal lacks merit.

B. Whether the Learned Trial Magistrate erred in considering the surveyor and registrar's report.

54. The Appellant alleges that the Learned Trial Magistrate erred in considering the surveyor and the registrar's report and yet 'they were the originator of the problem'.
55. The Appellant states that the Surveyor's Report dated 24th November, 2020 confirmed that the Appellant's parcel exists but they were far apart and yet the Respondent claimed that both parcels were next to each other.
56. The Respondent did not address this ground of the appeal.
57. As pointed out before under issue (a), the court on 27th October, 2020 ordered the Registrar of Lands and the District Surveyor to, within 30 days, prepare a status report with regard to the suit properties.
58. A perusal of the proceedings show that the Surveyor filed his report dated 24th November, 2020 on 7th January, 2021. In his report, the Surveyor found as follows:
- a. Parcel nos. 1478 and 1479 exist on the ground and their measurements and position tally with the RIM for Nakuru Municipality Block 29 Sheet 2.
 - b. Parcel nos. 1478 and 1479 were fenced with barbed wire.
 - c. Even though parcel no. 908 is found on the same RIM as 1478 and 1479, it is far away from the site and has been subdivided resulting in parcel No. (2703-2706).
59. The Learned Trial Magistrate at page 2 of the Judgment makes reference to the contents of the said report but in his analysis of the issues for determination, he relied on the Respondent's Certificates of Title. He found that the documents of title are evidence of ownership and can only be challenged in



accordance with the provisions of the law and for reasons set out in the law. Consequently, this ground of appeal also fails.

C. Whether the Learned Magistrate had jurisdiction to make enquiries into the procedure and processes of Kalenjin enterprises Ltd

60. The Appellant at ground (e) and (f) of the grounds of appeal states that the Learned Magistrate ignored the Articles and Memorandum of Association and makes reference to the Company Act Cap 486 Laws of Kenya. He also states that the Learned Magistrate failed to appreciate that Kalenjin Enterprises Ltd which is Limited liability company and formed after members contributed to its share capital, was formed with the object of acquiring land and subdividing it among its members, in accordance with shares held by them and not for “bullies” to sell members’ land.
61. First, Kalenjin Enterprises Ltd was not a party to the proceedings before the trial court and the Magistrate could not have made orders against a party not joined to the suit.
62. Secondly, the jurisdiction of the environment and land court is set out in *the Constitution* of Kenya 2010, at Article 162 (2) (b) and also in the *Environment and Land Court Act* at section 13. That jurisdiction does not include resolving of disputes between a company and its shareholders.
63. This ground of appeal also fails.

D. Who should bear costs of this Appeal?

64. Section 27 (1) of the *Civil Procedure Act* stipulates as follows;

“(1) 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 that 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 shall follow the event unless the court or judge shall for good reasons otherwise order.”

Disposition.

65. I find that the Learned Trial Magistrate correctly applied the facts to the law and made no mistake arriving at his determination. Nothing, therefore, warrants interference with his finding.
66. In the result, I find that this Appeal lacks merit and is hereby dismissed with costs to the Respondent.
67. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF SEPTMEBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Appellant in person (Absent)



Mr. Okiro for the Respondent.

Court Assistant; Ms. Monica Wanjohi.

