



**Siongo v Mwai (Environment and Land Appeal E017 of 2021)  
[2023] KEELC 20016 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20016 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E017 OF 2021  
LC KOMINGOI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**TABITHA WAMBUI SIONGO ..... APPELLANT**

**AND**

**LILIAN WAITHERA MWAI ..... RESPONDENT**

*(Being an Appeal against the Judgment of Kajiado Chief Magistrates Courts  
in CCMC No.231 of 2016 delivered by Hon. S.M. Shitubi (CM) on 6/5/2021)*

**JUDGMENT**

1. The Appellant being dissatisfied and aggrieved with the entire judgment of Honourable S.M Shitubi(CM) delivered on 6<sup>th</sup> May 2021 in Kajiado CMCC No. 231 of 2016, the Appellant filed a memorandum of Appeal dated 4<sup>th</sup> June, 2021 on 9<sup>th</sup> June,2021 seeking for Orders:
  - a. That the appeal be allowed.
  - b. That the judgment delivered on 6<sup>th</sup> May, 2021 by Hon. S.M Shitubi (CM) be set aside.
  - c. That the Respondent be ordered to pay the costs of this Appeal and costs incidental to this suit.
  - d. Such further or other orders to be made as this Honorable court may deem fit to grant.
2. The Memorandum is premised on eighteen (18) grounds namely:
  1. That the learned Magistrate erred in law and fact for not considering the Appellants counter-claim, evidence adduced during the hearing.
  2. The learned Magistrate erred in law and fact for not considering the fact that the suit property is an ancestral land for the late appellant's husband and where the Matrimonial home is



established and also where the late Musa Tintamei Pasha and the late Ibrahim Siongo were buried.

3. That the learned magistrate erred in law and fact by disregarding the Appellants evidence together with her submission and he therefor rendered the wrong decision.
4. That the learned Magistrate erred in law and fact by failing to find that the Plaintiff/ Respondent had failed to prosecute and proof her case and he therefor rendered a wrong decision.
5. That the learned Magistrate erred in law and fact by failing to find that the Appellant had an indefeasible title to the suit land and he therefor made a wrong decision.
6. That the learned Magistrate erred in law and in fact by failing to evaluate the evidence at the trial in its entirety.
7. That the leaned Magistrates erred in law and in fact in disregarding relevant evidence and instead considering extraneous matters and thereby arriving at a wrong decision.
8. That the learned Magistrate erred in law and fact in failing to warn himself of the sufficiency of evidence on the ownership, possession, acreage and occupation of Kajiado/Ole Kasasi/772.
9. That the learned Magistrate erred in law and fact in failing to appreciate the fact that the late Musa Tintamei Pasha had reported loss of his identity card and title some times in 2006 and had reported it with police.
10. That the learned Magistrates erred in fact by finding that the Appellants had not proved her claim while her statement and evidence remained uncontroverted.
11. That the learned Magistrate erred in law by raising the standard of proof other than the required standard of balance of probability.
12. The learned Magistrate erred by shying away from determining the suit before her and leaving the matter unsettled,
13. That the learned Magistrate erred in law by disregarding the numerous binding authorities cites by the Appellants counsel and thereby basing the judgment on the wrong principles, and he therefore made a wrong decision.
14. That all in all, the learned judge misdirected herself on matters of both law and facts to occasion a miscarriage of justice against the Appellants, and he therefor made a wrong decision.
15. That the court decision was manifestly unfair and prejudice to the Appellants, and he therefor made a wrong decision.
16. That the learned Magistrate erred in law and fact in failing to appreciate that the title deed had been lost sometimes back and the matter reported to police and that the title deed had been transferred within the same time the loss had been reported,
17. That the learned magistrate misapplied the law on when finding that the Plaintiff was not in court to prosecute their case while it was manifest by their conduct that they were never keen to prosecute the same immediately after they had been served with the statement of defence, counterclaim, witness statement and the bundle of document that they never filed defence to the counterclaim



18. That the learned magistrate erred in law and fact by not considering the submissions and authorities filed by the Appellants
3. The Appeal was canvassed by way of written submissions pursuant to the court's directions given on 30<sup>th</sup> May 2022. The Respondent did not participate in these proceedings.
4. Before making a determination on the salient issues for determination based on the submissions and record of appeal placed before this court, it is important to first provide a background of the claim before the trial court. The Respondent approached the trial court on 11<sup>th</sup> April, 2016 through a plaint dated 8<sup>th</sup> April, 2016 seeking a declaration that she is entitled to exclusive and unimpeded right of possession and occupation of L.R. No. Kajiado/Ole Kasasai/772 and therefore a declaration be made that the Defendant whether by herself or her family members, servants, agents and or otherwise however are wrongfully in occupation of the suit property and are accordingly, trespassers on the same and as such are not entitled to remain in the suit property. Other orders sought included vacant possession of the suit property, general damages for trespass and costs of the suit together with interest thereon at such rate and for such period of time as the honorable occur fit to grant and any such other or further relief as may deem appropriate. An order exhuming the remains of Ibrahim Pasha buried at the suit property was also sought.
5. The Respondent claimed she was the lawfully registered owner of the disputed property wrongfully and illegally acquired, possessed and occupied by the Appellant without her express consent and authority by erecting illegal structures and cultivating it. This occasioned her loss and damages since she would not move into the property therefore being deprived of its quite use, possession, occupation and enjoyment. It was her claim that the Respondent also fell trees for charcoal and firewood, flora and fauna which led to environmental degradation.
6. Through a statement of defence and counterclaim dated 9<sup>th</sup> May, 2016 filed on 10<sup>th</sup> May, 2016, the Appellant insisted she is the rightful and registered owner where she undertook development cultivation, had constructed matrimonial home and even buried her husband. That the property was inherited by her husband from his father Ibrahim Sionyo Musa, who was issued with a title on 28<sup>th</sup> August, 2002. Unfortunately, he lost the title alongside his Identity card, upon which he reported the matter to Ngong Police Station vide OB/No.12/19/7/006. Succession proceedings commenced in respect of his estate upon his death on 29<sup>th</sup> December, 2011 which led to appointment of Ibrahim Siongo Musa and Sofia Sarayiani as the legal representatives on 20<sup>th</sup> November, 2013. The suit property was bequeathed on Ibrahim Sionya Musa according to the Grant issued on 22<sup>nd</sup> November, 2013. When Ibrahim Siongo Musa commenced the processing of the title in his name as the rightful beneficiary, he discovered it had illegally, unlawfully and fraudulently been transferred to the Respondent. The Appellant pleaded that she followed up the matter with Ongata Rongai Police Station OB.56/27/10/2015 upon the death of her husband on 30<sup>th</sup> May, 2013. She accused the Respondent of refusing to honor summons from the DCI to record a statement. Further, she did not disclose how she acquired the suit property considering Musa Tintamei Pasha never sold, disposed, gifted or transferred it any person during his lifetime. She therefor sought the following prayers before the trial court.
  - “(a) A declaration that the Plaintiff caused an illegal entry to be entered and the suit property to be transferred into her name without any color and or justification or right onto L.R. Kajiado/Ole Kasasi/772 which parcels belongs to the Defendant by deed of being the rightful beneficiary of the Estate.



- b. A declaration that entries No.3 and 4 in respect to Parcel No. are illegal, unlawful and or fraudulently and that the same was cancelled and the Plaintiff be compelled to surrender the title issued thereof failure to which the Land Registrar does cancel the same and reissue one in favor of the Defendant herein.
  - (c) A permanent injunction restraining the Plaintiff by herself her agents, servants from encroaching into, alienating any part of, or in any way dealing with L.R Kajiado/Ole Kasasi/772.
  - (d) Compensation to the Defendant in mense profits for the period the Plaintiff has been in possession of the illegal, fraudulence and unlawful title to the suit property.
  - (e) Costs of this suit and any other or further relief this honorable court may deem fit and just to grant”.
7. The Respondent through a reply dated 16<sup>th</sup> June,2016 maintained she bought the property from the late Musa Tintamei Pasha vide a sale agreement dated 13<sup>th</sup> March,2009 for a consideration of Ksh.2,400,000/= .In addition, land control board consent, execution of transfer forms and payment of the requisite fee was duly obtained before acquisition of the suit property title.
8. While dismissing the Appellants counterclaim, the trial court was of the view that the Appellant had not demonstrated nor proved fraud allegations leveled against the Respondent.

### **The Appellant’s submissions**

9. The Appellant’s counsel in submissions dated 21<sup>st</sup> November,2022 and 14<sup>th</sup> February,2023 filed on 22<sup>nd</sup> November,2022 and 15<sup>th</sup> February,2023 respectively submitted on the following issues;
- a. Whether the Appeal should be allowed?
  - b. Whether the honorable court erred in fact and law by finding that the Appellant failed to prove her claim without any evidence to support her claim?
  - c. Whether the honorable court erred in law by law and fact when it dismissing the Appellant claim without taking into consideration the weight of the evidence and that the suit proceeded uncontroverted therefor rendering a wrong decision?
10. On the first and second issue, it is submitted that the trial court, erred in law and fact when it failed to consider the Appellants testimony. The Appellant testified that upon the death of Musa Tintamei Pasha, owner of Kajiado/Ole Kasasai/772, his son, Ibrahim Siongo, the Appellant’s husband, was bequeathed with the suit property. He however lost the title and Identity card, a matter that he reported to the police. Counsel further submitted it was the Appellant’s evidence that, while her husband was in the process of transferring the suit land to himself, he discovered that it had been fraudulently, illegally and unlawfully transferred to the Respondent. Additionally, the Appellant had lived on disputed property where they had set up their matrimonial home and even raised their children. Her husband was also buried on the suit property. The suit property is therefore ancestral land inherited from her father-in-law, Musa Tintamei who is still the registered owner. This is for the reason that she never witnessed any meeting seeking that her children should not inherit the suit property but instead inherit from their cousin. Reference is made on Section 12(1) of the *Matrimonial Property Act* and decision in *Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 Others* (2016)eKLR to argue that the suit property is matrimonial property. The court is also urged to issue an order that the suit property should



be reverted to the Appellants upon cancelling the Respondent title which was fraudulently acquired as was held in *Alberta Mae Gacci v Attorney General & 4 others* (2006) eKLR.

11. The trial court is faulted for failing to take into consideration that the Respondent never attended the hearing to disclose how she acquired the suit property and got a title in her name. In addition, her claim was also not supported. The Appellants counsel beseeches this court to re-evaluate and consider the evidence while making its final determination in exercise of its appellant jurisdiction as was held in *Gitobu Imanyara & 2 Others v Attorney General* (2016)eKLR, , *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira* T/A Machira & Co. Advocates (2013)eKLR and *Peters v Sunday Post Ltd* (1958) EA 424 as quoted in *Jackson Kaio Kivuva v Penina Wanjiru Muchene* (2019)eKLR.
12. With regard to the third issue, the Appellant counsel puts forward the case of *Josephat Muthui Mwangi v Chief Land Registrar & 2 Others* (2015)eKLR and *M’Nyeri M’Rimunya v Beth Kaari & 2 Others* (2018)eKLR to submit that the evidence placed before the trial court indicated that the Respondent illegally and unprocedurally acquired the suit land title. In particular, signatures used to procure the transfer were fraudulently acquired as they were signed by different persons neither did they resemble that of Ibrahim Siongo Musa. The Appellant’s husband also filed a report that the title to the suit property together with his Identity card had been lost. Although the Respondent’s claimed to have purchased the property in 2009, the title was reported missing in 2006. The trial court is also faulted for failing to take into account the fact that the Respondent never disclosed how she acquired the suit property neither was spousal consent obtained as required by law.
13. The Appellant’s counsel sustained the argument that the trial court never appreciated the evidence placed before it showing that the suit land where her husband was buried was ancestral land. Her children were also raised on the land inherited from her father-in-law. Bearing in mind that the Respondent never responded to the Appellants Defence and counterclaim, the suit remained uncontroverted.
14. This court is therefore implored to re-evaluate the evidence before the trial court before making its conclusion as was held in *Selle Vs. Associated Motor Boat Co.* (1968) EA 123.

### **Analysis and Determination**

15. In *Selle Vs. Associated Motor Boat Company* (1968) EA 123 the court of Appeal stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put, they are, that this court must reconsider the evidence, evaluate it self and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence or if the impression based on the demenour of a witness is inconsistent with the evidence in the case generally”.
16. The above position was restated by Mrima J, in the case of *South Nyanza Sugar Company Ltd Vs. Leonard O. Arera* (2020) eKLR where he stated that;

“As the first appellate court, it is now well settled that the role of this court is to revisit the evidence, evaluate it and reach its conclusion in the matter”.



17. I will consider the grounds of Appeal together since they are intertwined. In my view the following issues arise for determination:
- i. Whether the learned trial magistrate erred in dismissing the Appellant's counter claim.
  - ii. Whether the learned trial magistrate erred in not considering that the suit property was ancestral land where the Appellant's husband and his father Musa Tintamei Pasha had been buried.
  - iii. Who should bear costs of this appeal?
18. Considering that this is a first appeal, this court has an obligation to reconsider the trial court evidence was held as follows by the Court of Appeal In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR,
19. Although the trial court record shows that the Respondent and Appellant actively participated in the proceedings, the Respondent did not participate in the hearing despite being served. In exercise of its discretion, the court dismissed the Appellant case with costs and directed that the Appellant to proceed to prove her counterclaim. According to the Appellants testimony, she adopted her witness statement and list of documents as her evidence and further reiterated her claim that the suit land was ancestral law where her husband was buried.
20. While the dismissing the Appellants counterclaim, the court noted that the Appellant had not demonstrated and proved fraud allegations leveled against the Respondent. It went further ahead to hold as follows
- “the basis of the Defendant’s counterclaim was the claim that the Plaintiff had fraudulently obtained registration. Fraud is a serious crime that must not only be specifically pleaded but it must also be proved on a balance of probability. The fact that the Plaintiff did not participate at the hearing did not remove this burden from the Defendant. There is no evidence that fraud was investigated to conclusion by the two police stations that allegedly received the complaint. Musa Tintamei is long deceased and cannot verify claims that he lost the title deed and Identity card and probably that is how the Plaintiff managed to change the register details, the land registrar was not called as a witness”
21. I fault the learned trial Magistrate’s findings in the preceding paragraph. This is because it is the Respondent who had filed the suit on the lower court claiming the Appellant herein is a trespasser on the suit property. She failed to attend court on the date of the hearing. Her claim was dismissed with costs to the Appellant. One wonders why the plaintiff failed to prosecute her claim.
22. She had the opportunity to reiterate her claim and to prove that she had bought the land from Musa Tintamei Pasha (deceased). In my view she squandered the opportunity.
23. On the other hand the Appellant while prosecuting her claim stated in her testimony;
- “When he died in 2011 my husband started succession process. My husband placed a caution on the land. Before my father in law had reported the loss of the title deed before he died. When we discovered my husband placed a caution on the land. He died in 2015 – 30<sup>th</sup> May 2015. I carried out succession upon my husband’s death. I reported the loss to the Police Ongata Rongai.



The O.B. Number is among my documents. Investigations were done. I was called to record a statement. The person in whose name the title was, was called to record a statement in vain”.

24. I find that the Appellant was able to prove that the suit property was listed as one of the assets of Musa Tintamei Pasha (Deceased).
25. In the lower court the Appellant produced a Certificate of Confirmation of Grant dated 22<sup>nd</sup> January 2014 and rectified on 20<sup>th</sup> February 2014 which shows that the suit property was distributed to Ibrahim Siongo Musa (the Appellants late husband).
26. This court takes judicial notice that succession proceedings are public in nature. There is period of gazettment where objections would be invited. The Respondent never contested ever after she was served with this confirmation of grant. Nothing could have prevented her from seeking the revocation of the grant as relates to the suit property.
27. This coupled with the lack of interest in prosecuting her claim leads to the conclusion that she was aware that the suit property had not been transferred to her procedurally. I find that she was award that this was ancestral land.
28. The Respondent is stated to have bought the land from the deceased (Musa Tintamei Pasha) on 13<sup>th</sup> January 2009. The deceased died on 29<sup>th</sup> December 2011. One wonders why the Respondent did not take possession until 2016 when she filed the suit in the lower court.
29. I find that the learned trial magistrate erred in dismissing the Appellants counter claim.
30. I find merit in this appeal and the same is allowed.
31. Accordingly, I make the following Orders:
  - a. That the Appeal is allowed.
  - b. That the Judgement delivered on 6<sup>th</sup> May, 2021 by Honourable S.M. Shitubi (CM) is hereby set aside.
  - c. That judgement is entered in favour of the Appellant as per the counter claim in the following except the prayer of mesne profits as the Appellant is in possession.
  - d. That Costs of this Appeal and of the original suit shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**L. KOMINGOI**

**JUDGE.**

**In The Presence Of:**

Mr. Kimani for the Appellant.

N/A for the Respondent.

Court Assistant – Mutisya.

