**Ngari v Musa (Environment and Land Appeal 12 of 2021)**
**[2023] KEELC 21510 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21510 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ENVIRONMENT AND LAND APPEAL 12 OF 2021**

**A KANIARU, J**

**OCTOBER 26, 2023**

**BETWEEN**

**ISAIA NJIRU WILSON NGARI ..... APPELLANT**

**AND**

**SEBASTIAN RUNJI MUSA ..... RESPONDENT**

***(Being an appeal against the Judgement of the Principal Magistrate Hon. W. Ngumi dated 7th July 2021 in Siakago MCL & E No. 42 of 2020)***

## JUDGMENT

1. This appeal is essentially an escalated contest of the lower court dispute – MCL & E No. 42 of 2020 – where the respondent, Then As Plaintiff, Had Impleaded The Appellant, Then As Defendant, For Trespassing Into Land Parcel No. Evurore/nguthi/1674 ("disputed Land" Hereafter). He Was Asking, In The Main, That the appellant be evicted.

2. The lower court matter was brought *vide* a plaint dated 4/8/2020 and filed on 5/8/2020. the respondent – sebastian runji musa – pleaded, *interalia*, that the appellant – isaia njiru wilson ngari – had trespassed into the disputed land sometimes in the year 2011 and started erecting thereon a permanent house. He further pleaded that the appellant had denied him access to the land. The respondent averred that he was the registered owner of the land.

3. The appellant responded to the suit *vide* a defence dated 28/8/2020 and filed on 2/9/2020. He denied the respondents claim and averred that the disputed land was first registered in the name of his late father on 3/8/1978 and that the respondent had later on become the registered owner in a manner that was not very comprehensible to him. He further averred that he and his siblings were the ones in actual physical possession and occupation of the disputed land and that they had lived there since the death of their father in the year 2010. The court was urged to dismiss the respondents claim in the lower corut and award costs and interests to the appellant.

4. The lower court heard the matter and *vide* a judgement delivered on 7/7/2021, it found for the respondent and ordered appellant's voluntary self-removal from the disputed land within 30 days failing which eviction would be forcibly carried out. The outcome of the lower court dispute is what provoked this appeal.

5. The appellant based his appeal on eight (8) grounds as follows:

    1. That the learned trial magistrate grossly erred in law and fact by not considering the appellant's defence which had raised serious triable issues.

    2. That the learned trial magistrate erred both in law and fact in finding that the respondent was the alleged registered proprietor of evurore/nguthi/1674 but with no proper explanation as to how he had acquired the land.

    3. That the learned trial magistrate grossly erred in law and fact in finding that the defendants further list of documents of proceedings and Ruling of the Minister in Appeal No. 1 of 1976 was a forgery whereas the appellant had proved that although they looked similar the same were not authored by the Honorable J.H. Angaine, the then Minister for Land and settlement were (sic) therefore forged.

    4. That the learned trial magistrate grossly erred in law and fact in finding that since the year 1976 the appellants deceased father was the first registered owner of the land and the appellant acquired it from his father as inheritance and therefore was in physical possession of the land (sic) was a balance of probability.

    5. That the learned trial magistrate grossly erred in law and fact in finding that no transaction on land had taken place and it is by a mere letter from the Chief Land Registrar referenced as C/R/R/69/4/Vol...XI/150 of 18th December 1997 that was seeking removal of restriction on some parcels of land where the appellant's parcel of land was mentioned could not be traced anywhere and in the process the respondents acquired the land.

    6. That the learned trial magistrate erred in law and in fact by not realizing that the appellant had raised the issue in the year 2012 with the Chief Land Registrar at Nairobi and a response was sent to the Land Registry at Siakago about the missing letter under suspicious circumstances reverting the land back to the first registered proprietors (sic) of the land.

    7. That the learned trial magistrate erred in both law and fact by holding that a land title deed was produced by the respondent whereas he had no proof of how he had acquired the parcel of land from the appellant's deceased father.

    8. That the learned trial magistrate erred in law and fact by finding that the appellant had not proved adverse possession of the said land whereas they had been in occupation for over 43 years uninterrupted.

6. In light of the aforestated grounds, the appellant asked that the appeal be allowed; the judgement of the lower court and the orders arising from it be vacated and/or set aside; that the defence given be deemed proved; a declaration that the appellant had acquired the land from his father through inheritance and was therefore the rightful owner; that the respondent be ordered to revert the land back to the

appellant's late father for transmission to the appellant himself; that costs awarded to respondent be set aside; a declaration that the appellant's claim for adverse possession is valid and that the appellant be awarded ownership and occupation of the land; and that the respondent be ordered to pay costs of this appeal and "that of the superior" (sic) court and interests thereon.

7. On 27/2/2023 it was agreed that the appeal be canvassed by way of written submissions. The appellant's submissions were filed on 16/3/2023 while the respondent had filed his own earlier on 2/3/2023.

8. The appellant's submissions started with a highlight of the background to the case. It was submitted, interalia, that the disputed land was first registered in the name of the appellant's late father but was however subsequently fraudulently registered in the respondent's name without the knowledge of the appellant's father. The appellant averred that he and his family have been living on the disputed land, have permanent dwellings there, and have developed it.

9. The respondent was said to have never set foot on the land and that the letter that led to the change of ownership was never made available to court. Further, it was stated that the disputed land was in Nguthi area and was among the parcels of land over which two clans – Nditi and Mukera – were disputing. The lower court was faulted for failing to appreciate that the appellant's father was the first registered owner and that the law applicable then was the now repealed *Registered Land Act* (Cap 300) which protected first registration from change or alteration except as provided by the Act itself.

10. The registration of the respondent as owner was said to be illegal. The appellant faulted the removal of a restriction placed on the land register and submitted that the removal was done pursuant to a letter that was never made available as evidence in the lower court. The respondent was said to have offered no proof as to how he became the registered owner and the lower court was said to have been wrong for accepting his title. According to the appellant, the respondent became owner "illegally, unprocedurally, or through a corrupt scheme" as the letter authorizing ownership was not made available and the appellant's late father was never consulted or informed. It was submitted that the long period of occupation of the disputed land by the appellant is proof that he is the lawful owner.

11. For guidance, the appellant cited the cases of *Elijah Makeri Nyagw'ra Vs Stephen Mungai & Another* [2013] eKLRand *Munyu Maina vs Hiram Gathiba* [2013] eKLR to make the point that a title acquired illegally can be defeated and that the owner of such title is duty-bound to demonstrate that his acquisition of such title was legal and above-board. The court was ultimately urged to allow the appeal.

12. The respondent on the other hand submitted that the appellant entered the disputed land in the year 2011 and started constructing on it. This prompted the respondent to move to court to stop him and also seek his eviction. The defence filed in the lower court was said to have raised no triable issues. The registration of the appellant's late father as owner was said to be cancelled pursuant to Minister's decision in Appeal No. 1 of 1976. There were other cases relating to the matter, the same being High court civil case No. 165 of 2008 and Court of Appeal Case No. 7 of 2011, in which the appellant's Mukera clan tried to challenge the Minister's decision but lost. Further, the fraud alleged by the appellant in this appeal was said not to have been pleaded in the lower court. Equally, the allegations of forgery were said to have been in this appeal only and, as it was not raised in the lower court, it was said to be misplaced.

13. Further still, the appellant was said to be in occupation of the disputed land as a trespasser. The respondent was said to have shown how he acquired the disputed land. It was pointed out that he acquired it from his Nditi clan after the clan won the dispute filed as appeal before the minister in 1976.

14. No adverse possession was pleaded in the lower court, the respondent submitted, and the respondent was raising it on appeal. The court was asked to dismiss the appeal.

15. I have considered the appeal as filed, rival submissions, and the lower court record made available to this court. this is a first appeal and the case of *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] 1 EA 123 offers useful guidance regarding the manner it should be handled. The court expressed itself as follows in the case:

> " An appeal to this court from a trial by the High court is by way of a 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 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 or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. With this in mind, I have endeavored to read the lower court record with a view to appreciating whether it spoke to that court the same way it speaks to this court. The issue before me is to find out if the merits of the appeal have been demonstrated.

17. The appellant faulted the lower court for not considering his defence, which, according to him, had serious triable issues. This position is not very much correct. The substance of the judgment delivered on 7/7/2021 shows that court concisely capturing the appellants defence, clearly stating that the appellant had denied the respondents case and had instead pleaded that the suit land was originally registered in the name of his late father and that he was in the dark as to how the respondent later became the registered owner. The lower court then cast its eyes on the appellants evidence and clearly stated a lot of what he told the court. Then in its analysis, the lower court took a clear position on the fraud alleged by the appellant and also addressed the issue of a letter dated 26/4/2012 made available by the appellant to show, *interalia*, that a restriction placed on the suit land had been erroneously removed.

18. It is not clear therefore to this court how one can allege that the defence was not considered. The truth of the matter is that the lower court addressed the appellants defence and evidence and made its position clear in the judgement it delivered.

19. It was also the appellants position that the lower court found the respondents to be the registered owner of the suit land but did not appreciate that the respondent "had no proper explanation as to how he had acquired the land" (ground 2 of the appeal). Again this is wrong. The judgement shows clearly that the respondent became a registered owner after various disputes were resolved in favour of his Nditi clan. The judgement is clear that the disputants belong to different clans, with the appellant belonging to Mukera clan and the respondent to Nditi clan. The suit land was among other parcels of land over which the two clans were disputing. The disputes existed at the Land Adjudication stage but later spilled into the courts. The clans were evidently handling the matter on behalf of their members. The lower court analyzed all this and pronounced itself thus: "The defendant can hence not say that the land was registered in the name of the plaintiff irregularly, procedurally (sic), fraudulently or even illegally as it was clearly shown that he was awarded the land in the Ministry (sic) Appeal No. 1 of 1976".

20. Issue was also taken with an alleged lower court finding relating to respondents further list of documents, which the appellants views as forgery as it was not authored by the then Minister for Lands

and settlement. I am constrained to observe that there is no such finding in the lower court judgment. It is not clear to me how the appellant attributes a finding like that to the lower court. There was really no mention of forgery at all in the judgement.

21. My reading of the lower court proceedings show that the court was alive to the salient issues surrounding or relating to the suit before it and the appellant seems wrong to me to fault it on how it handled the issue of the disputed land. That court was right in declining to treat it as an inheritance from his late father and also in disregarding his alleged occupation and possession of the same. It is clear that the lower court weighed the scenarious regarding ownership, possession, and occupation of the land and chose to agree with the respondent. In this appeal, the appellant has not presented good or convincing reasons to warrant a departure from the findings of the lower court.

22. There is yet another false finding attributed to the lower court by the appellant. The last ground of appeal alleges that the lower court made a finding on adverse possession. According to the appellant, the lower court made a finding that he had not proved adverse possession. It is important to state that there is no such finding in the lower court judgement. Further, adverse possession was not pleaded before that court and it is even debatable whether it could be raised given the jurisdictional issues that could possibly arise.

23. Further, a look at the prayers made in this appeal makes one doubt whether the appellant really appreciates well what an appeal should address. Ordinarily, an appeal is filed so that the appellant can get what the court below did not grant. In this matter, the appellant did not plead fraud in the lower court. He is well aware that he didn't do so for he tries to explain away the omission as follows:

> " And since it is trite law that ingredients of fraud must be specifically particularized, pleaded and proved, DW1 could not plead any particulars of fraud that were not within his personal knowledge and information since he would have had difficulties proving the same in this court."

24. The explanation given is not legally sound. It is legally untenable to say that one can fail to plead and particularize fraud in the court of first instance and yet seek to rely on it in the later stages of a case. The law takes allegations of fraud seriously and the requirement that it be pleaded, particularized, and strictly proved can not be pooh-poohed. Order 2 rule 10 of *Civil Procedure Rules* requires, *interalia*, that particulars of fraud be given. And while the appellant is urging this court to make a finding that his defence is proved on a balance of probabilities, he seems unaware of the fact that were fraud to be accepted as the basis of this court's decision, proof would be required on a standard higher than on a balance of probabilities.

25. Fraud therefore is not something you casually mention in a case and then rest easy believing that it is proved. Evidence of especially high quality and strength is required to prove fraud in civil cases. In *Jennifer Nyambura Kamau vs Humphrey Nandi*: Civil Appeal No. 342 of 2010, Nyeri, [2013] eKLR, the court of appeal emphasized that fraud must be proved as a fact by evidence; and, more importantly that the standard of proof is beyond a balance of probabilities.

26. At this point, it is sufficiently clear that the appellant has not done a good job of demonstrating the merits of his appeal. This court finds no good reason to depart from the findings of the lower court. Ultimately, the appeal herein is found unmeritorious and the same is dismissed with costs to the respondent.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF OCTOBER, 2023.**

**A.K. KANIARU**

**JUDGE**

**In the presence of** Mageto for Kenneth Kithinji for appellant and Ndolo for Muriuki Mureithi for respondent.

Court Assistant: Leadys

**26.10.2023**