



REPUBLIC OF KENYA



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Kabuku v Githunguri Ranching Company Limited & 2 others (Environment and Land Appeal E051 of 2021) [2023] KEELC 21096 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21096 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E051 OF 2021
BM EBOSO, J
OCTOBER 17, 2023

BETWEEN

REGINA KANYI KABUKU APPELLANT

AND

GITHUNGURI RANCHING COMPANY LIMITED 1ST RESPONDENT

SAMUEL MBOGO KURIA 2ND RESPONDENT

LAND REGISTRAR, RUIRU 3RD RESPONDENT

(Being an Appeal against the Judgment of Hon C. K Kisiangani, Senior Resident Magistrate, delivered in the Senior Principal Magistrate Court at Ruiru on 19/5/2021 in Ruiru MCL & E Case No 159 of 2019)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 19/5/2021 by Hon C. K Kisiangani (SRM) in Ruiru SPMC Environment and Land Case No 159 of 2019. The appellant was the plaintiff in the said case. The three respondents in this appeal were the 1st, 2nd and 3rd defendants respectively. The appellant sought the following reliefs in the subordinate court: (i) a declaration that she was the proprietor of land parcel number Ruiru West/Block 1/881 [hereinafter referred to as “the suit property”]; (ii) an order cancelling the 2nd respondent’s title relating to the suit property; (iii) an order directing the 3rd respondent to register her as

Proprietor of the suit property.

2. The 2nd respondent, whose title the appellant challenged, did not enter appearance and did not contest the appellant’s claim. Upon conclusion of trial, and upon taking submissions, the trial court found



that the appellant had failed to prove her claim to the required standard. The trial court dismissed the appellant's suit

Appeal

3. Aggrieved by the Judgment of the trial court, the appellant brought this appeal. She advanced the following seven verbatim grounds of appeal:
 1. The learned magistrate erred in fact and in law in disallowing the plaintiff/appellant's suit while overwhelming evidence and materials were tendered in support of the same.
 2. The learned magistrate erred in fact and in law by partially disregarding the plaintiff's submissions on the evidence, facts and issues before court.
 - 3.**** The learned magistrate erred in fact and in law by partially disregarding the 3rd defendant's submissions on the evidence, facts and issues before court.
 4. The learned magistrate erred in law and in fact in finding that the plaintiff/appellant failed to bring a witness from the 1st defendant.
 5. That the learned magistrate erred in fact and in law in disregarding the clearance certificate by the 1st defendant.
 6. The learned magistrate erred in fact and in law by finding that the plaintiff/appellant had not proved her case on a balance of probabilities.
 7. The learned magistrate erred in fact and in law by leaving the issue before her unresolved despite the evidence before her.
4. The appellant sought the following verbatim reliefs in the memorandum of appeal: (i) the appeal be allowed and the court does enter judgment as prayed in the plaint; (ii) in the result the orders made by the learned magistrate be varied to this extent; and (iii) costs of the appeal be granted to the appellant against the respondents.

Appellant's Submissions

5. The appeal was canvassed through written submissions dated 25/5/2023, filed by M/s Njuguna Ng'ang'a & Associates Advocates. Counsel for the appellants identified the following as the sole issue that fell for determination in the appeal: Who the rightful owner of parcel of land no. Ruiru / Block 1/881 was.
6. Counsel for the appellant cited Sections 107,108 and 109 of the *Evidence Act* and submitted that the burden of proving a claim on a balance of probabilities lies on the claimant. Counsel contended that it was apparent from the record of appeal that the suit land belonged to Githunguri Constituency Ranching Company Limited [the 1st respondent] which was a company owned through membership and allotment of shares. Counsel added that the appellant bought the suit property from one Antony Njenga Njogu who was a shareholder of the 1st respondent. Counsel submitted that the appellant had produced a clearance certificate that was issued by the 1st respondent upon purchase of the suit property from Antony Njenga Njogu who was a shareholder of the 1st respondent. Counsel added



that the said clearance certificate was part of the documents submitted at the Land Registry to procure a registration of the suit property in the name of the appellant.

7. Counsel for the appellant further submitted that, during the hearing at the trial court, the Land Registrar informed the court that he did not know how the 2nd respondent acquired his title given that the parcel file was missing. Counsel added that the 1st respondent confirmed that the appellant was the rightful owner of the suit property through the following documents contained in the appellant's further list of documents dated 25/5/2023: (i) excerpt from the 1st respondent's record; (ii) authority to swear; (iii) affidavit sworn by the chairman of the 1st respondent; (iv) and a search from the Registrar of Companies relating to the 1st respondent. Counsel further submitted that the 2nd respondent's title was acquired illegally, unprocedurally or through a corrupt scheme and was therefore invalid. Counsel relied on the decisions in the cases of *Lucia Wambui Kariuki & Another v Grace Wanjiru & Another* [2022]eKLR and *Sara Leitich v Joshua Rutto & 2 Others* [2021]eKLR.

3rd Respondent's Submissions

8. The 3rd respondent filed written submissions dated 11/2/2022, through Amelia Chesiyana, State Counsel. Counsel identified the following as the two issues that fell for determination in the appeal: (i) Whether the learned magistrate erred in fact and in law in disallowing the plaintiff's/appellant's suit; and (ii) Whether the appeal should be allowed.
9. On whether the learned magistrate erred in fact and in law in disallowing the plaintiff's/appellant's suit, counsel submitted that the appellant had failed to prove that she was the rightful owner of the suit property, given that she did not have a title. Counsel added that the appellant only produced the sale agreement yet according to the Land Registrar, the suit land had already been registered under the 2nd respondent's name. Counsel relied on Section 26 of the *Land Registration Act* and Section 107 of the *Evidence Act*. Counsel added that the court was mandated by statute to consider a title document as prima facie evidence of ownership of land and conclusive evidence of proprietorship that can only be challenged on the grounds set out under Section 26 of the *Land Registration Act*.
10. On whether the appeal should be allowed, counsel submitted that the appeal should be dismissed because the learned magistrate did not err in arriving at her decision, given that the appellant had not proved her case on a balance of probabilities. Counsel relied on the case of *Mbogo v Shah* [1968] EA at page 93. Counsel urged the court to dismiss the appeal with costs to the respondents.
11. The 1st and 2nd respondents did not file submissions.

Analysis and Determination

12. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in this appeal. The appellant itemized seven grounds of appeal. In her subsequent written submissions, she identified a single issue that, in her view, fell for determination in this appeal. The issue she identified is the question as to who is the rightful owner of land parcel number Ruiru West/Block 1/881. On his part, the 3rd respondent identified the following two issues: (i) Whether the trial court erred in disallowing the appellant's suit; and (ii) Whether the appeal should be allowed.
13. Taking into account the grounds of appeal and the parties' respective submissions, the following are the two key issues that fall for determination in this appeal: (i) Whether the trial court conclusively pronounced itself on the key issues before it; and (ii) Whether the appellant proved her case on the



balance of probabilities. I will dispose the two issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

14. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

15. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR 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 re-analyse 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.”

16. The first issue is whether the trial court conclusively pronounced itself on the key issues before it. One of the key questions that the trial court was required to determine was the correct survey number of the suit property. Why do I say so? In paragraph 5 of her plaint, the appellant averred that the 1st respondent was the registered owner of land parcel number Ruiru West Block 1/881. In paragraph 6 of the plaint, she averred that she purchased from the 1st respondent land parcel number Ruiru West Block 1 (Githunguri) 881. The lease and the clearance certificate which she produced during trial related to Ruiru West Block 1/ (Githunguri) /881 measuring 0.0511 hectares. The land register which the Land Registrar produced during trial related to Ruiru West/Block 1/881 measuring 0.0114 hectares. From the above contradictory survey particulars and acreage, it was not clear whether the land alleged to have been registered as Ruiru West/Block 1/881 measuring 0.0114 hectares was the same as the land alleged to have been surveyed as Ruiru West/Block 1/(Githunguri)/881 measuring 0.0511 hectares.

17. In my view, given the unhelpful evidence of the Land Registrar and given the fact that the owner/proponent of the subdivision scheme (Githunguri Constituency Ranching Company Limited) elected not to step forward and tender relevant survey evidence, this was a proper case in which the trial court should have invoked its jurisdiction under Order 1 rule 10(2) of the Civil Procedure Rules and joined both the Director of Survey and the Director of Land Administration in the Department of Lands as necessary parties for the purpose of effectually settling the question related to the correct identity and the correct acreage of the suit land. The trial court erroneously disposed the suit without determining this critical issue.

18. It does also emerge that whereas one of the key issues before the trial court was the question relating to ownership of the suit land, the trial court disposed the suit without pronouncing itself on this critical issue. The trial court was presented with a land register bearing Samuel Mbogo Kuria as the registered proprietor of 0.0114 hectares comprised in one of the survey numbers. The trial court was also presented with a lease bearing the appellant as the proprietor of 0.511 hectares comprised in the other survey number. Further, the appellant presented evidence indicating that she was in possession of the suit land; she had developed the suit land; and she had tenants living in the units developed on the suit land. Given the above circumstances, and assuming that the two survey numbers related to the same parcel of land, the trial court was obligated to pronounce itself on the question of ownership of



the land. Regrettably, the trial court did not make a pronouncement on the question of ownership. It dismissed the appellant's suit without determining the question of ownership of the land in dispute. The trial court left the parties in limbo. For this reason, I agree with the appellant that the trial court erred in leaving the issue of ownership unresolved.

19. The second issue that falls for determination in this appeal is the question as to whether the appellant proved her case on a balance of probabilities. I have said that two necessary parties were missing from the suit. In my view, the questions relating to the correct identity of the suit land and the question relating to ownership of the suit land could not be determined effectually in the absence of the the Directorate of Survey and the Directorate of Land Administration. For this reason, this court is inclined to allow this appeal and remit the suit back to the Senior Principal Magistrate Court for fresh trial after the two necessary parties have been joined to the suit. Consequently, I will refrain from making a conclusive pronouncement on the second issue because this may prejudice the parties when they go for fresh trial in the lower court.

Disposal Orders

20. In the end, this appeal is allowed in the following terms:
- a. The Judgment rendered in Ruiru Senior Principal Magistrate Court Land & Environment Case No 159 of 2019 on 19/5/2021 is set aside.
 - b. The suit is remitted to the Ruiru Senior Principal Magistrate Court for fresh trial before a different magistrate.
 - c. The plaintiff in the said suit shall amend the plaint to join the Director of Survey and the Director of Land Administration, both from the National Department of Land, as defendants in the suit.
 - d. Fresh summons shall be served on all the parties to the suit.
 - e. Parties shall bear their respective costs in this appeal.
 - f. Costs of the preceding proceedings in the lower court shall abide conclusion of fresh trial.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF OCTOBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Njuguna for the Appellant

Court Assistant: Osodo/ Hinga

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