



REPUBLIC OF KENYA



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

**Njeru v Gakonyo (Environment and Land Appeal E019 of 2021)
[2023] KEELC 22236 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 22236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E019 OF 2021
A KANIARU, J
OCTOBER 17, 2023**

BETWEEN

MALIETA MBUYA NJERU APPELLANT

AND

MICHAEL MUNYI GAKONYO RESPONDENT

*(Being an appeal from the judgement and decree of the Principal Magistrate at Siakago
Hon. W Ngumi dated 24th November 2021 in Siakago MCL&E CASE NO. 6 of 2018)*

JUDGMENT

1. This appeal arose from the Judgement of the lower court delivered on 24/11/2021 at Siakago in MCL&E CASE NO. 6 of 2018 - Michael Munyi Gakonyo vs Malieta Mbuya Njeru by Hon W. Ngumi, Principal Magistrate. The appellant – Malieta Mbuya Njeru– was the defendant while the respondent – Michael Munyi Gakonyo – was the plaintiff. In the lower court the Respondent had impleaded the appellant and asked for eviction orders in order to remove the Appellant from his Land parcel no. Mbeere/Mbita/4915, which he claimed he had acquired by way of public auction. He claimed to have been the highest bidder in the said auction and that he purchased the land in the sum of Kshs. 550,000/=. The appellant denied the claim by filing a defence in which she claimed that she was the rightful owner of the land and that if the Land is registered in the name of the Respondent, the it was fraudulently done and secretly transferred without her knowledge. That she had been in quiet and peaceful occupation of the said land with her husband who passed away on 1st July 2017. The lower court heard the matter and in its judgment held that the Respondent was the rightful owner of the land. It therefore proceeded to issue eviction orders against the Appellant. That is what provoked this appeal.
2. A memorandum of appeal was filed on 17th December 2021. It was formulated thus:



1. That the learned trial magistrate erred in law and in fact in that she failed to hold that the Plaintiff did not prove his case on a balance of probabilities.
 2. That the learned trial magistrate erred in law and in fact in ordering eviction within 30 days without considering that the Appellant has been on the suit land for over fifty years.
 3. That the learned trial magistrate erred in law and in fact in holding that the plaintiff purchased the suit property in the auction when there was no document produced for a public auction or amounts paid.
 4. That the learned trial magistrate erred in law and in fact when she failed to hold that there was no public auction as there was no certificate of sale produced by the Respondent nor filed any documents in court in support of the public auction.
 5. That the learned trial magistrate erred in law and in fact in failing to appreciate that the Appellant and her family have been in occupation of the subject parcel of land.
 6. That the entire judgement is unfair, inequitable and against the rules of natural justice.
3. The appellant then made the following prayers:
- a. The appeal be allowed and judgement of the Principal Magistrate's court be set aside.
 - b. Costs in the subordinate court and for the appeal.
4. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 11.04.2023. In her submissions, the appellant highlighted the background to this appeal and then gave an analysis of the issues for determination. According to the Appellant, the Respondent did not produce enough evidence to prove that he followed due procedure in acquiring the suit land. She submitted that the Respondents allegations that he acquired land by way of auction were not supported by any evidence as the Respondent did not produce the advertisement of the alleged auction or the memorandum of sale entered into between him and the auctioneers. It was her submission that the Respondent did not conduct due diligence when purchasing the suit land because had he done so, he would have discovered that the Appellant and her children were in possession of the suit land and therefore had an overriding interest over it.
5. The Appellant further submitted that the learned magistrate disregarded the above mentioned facts and determined that the Respondent is protected by Section 99 of the *Land Act* as a bonafide purchaser and that the only remedy for the Appellant was to file a claim for damages. She urged the court to allow the appeal herein as prayed. She sought to rely on the following decided cases to persuade the court;
- Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, Jane Wairimu Ngure vs The National Bank of Kenya Ltd & 2 others, ELC NO. 498 of 2017, MURANG'A, EWB vs SB & Mugo Investments Ltd, HCC 4709 of 1987 and Mugo Muiru Investments Ltd vs EWB & 2 Others, CA No. 262 of 2004 [2017] eKLR.
6. The Respondent's submissions were filed on 16.02.2023. The Respondent submitted that the trial court in passing its judgement evaluated all the evidence adduced in court and in allowing the suit applied the legal standard applied by courts in civil proceedings, that is a balance of probabilities. He submitted that in all civil practices and procedures, a party is bound by its pleadings and the trial court is not legally obligated to consider issues outside the scope of the litigant's pleadings. It was his submission that the Appellant did not plead and pray by way of counterclaim for an order of adverse possession



of the suit land. Therefore she must be estopped from blaming the court that she was not granted the relief stated in ground 2 of the appeal.

7. The Respondent submitted further that from the record of the trial court, the court was satisfied that there was an auction on 4th September 2015 based on the sworn testimony of PW1 and there was evidence of sale based on the Certificate of Sale. He submitted further that the issue of occupation of the suit land was not an issue for trial and that the only issue for trial was the lawful registration, ownership of the suit land and the issue of eviction. That the trial court was said to have properly framed the issues for trial based on the party's pleadings. It then properly analyzed the evidence on record and applied it upon the framed issues. He urged the court to dismiss the appeal and award costs to him.
8. I have considered the appeal as filed, the rival submissions, and the lower court record including the proceedings and the exhibits produced during trial. My considered view is that the issue for determination is whether the court should interfere with the findings of the trial court and set aside its judgement. This is a first appeal and as the first appellate court, the task ahead is as spelt out in *Selle vs Associated Motor Boat* (1968) EA 123 where the court observed:

“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 bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge 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.”

9. From the court record, the lower court judgment was premised on two issues:
 - i. Whether the plaintiff is the legal owner of the land.
 - ii. Whether the plaintiff is entitled to the orders sought.

I hold the view that the issues for trial were correctly framed. I say so because from the pleadings in this case, it is clear that the plaintiff's case was that he was the registered owner of the land in dispute, having purchased it by way of public auction. He was desirous of getting eviction orders against the appellant whom he claimed had unlawfully settled on the land and was therefore a trespasser as she had no right of claim to it. The appellant's case on the other hand according to her defence in the lower court was that the registration of the suit land in favour of the respondent must have been fraudulently and secretly done as she had been in quiet occupation of the land for over 50 years. She claimed that an eviction order would render her destitute as the suit land was her matrimonial home and the only property she had been living on with her husband and children.

10. On the first issue which is whether the respondent was the legal owner of the land, the law is very clear that he who alleges must prove. In this case, the respondent's case during trial in the lower court was that he had acquired the land by way of a public auction held on 04.09.2015 vide Siakago CMCC No. 46/2008. He testified that he had found the land being sold while in Embu and that he had previously seen an advert in a newspaper. He testified that he was the highest bidder and had bought the land at Kshs. 550,000. He was subsequently issued with certificate of sale which he produced as Exhibit No.1. He testified further that he was later issued with a title deed dated 11.01.2017, which he also produced



as Exhibit No. 2. He further produced a search certificate from the land office which confirmed that the land belonged to him. The search was Exhibit No. 3.

11. On the other hand the only testimony that the appellant gave was that the suit land was registered in the name of Njeru Gakuya who was her husband. It was her testimony that she did not see when the land was sold by public auction on 15.09.2015 and that she had not heard her husband speak of any debt he owed. She further testified that the suit land belonged to her and that the respondent wanted to take it unlawfully from her. She said that she was not ready to leave the land and that she did not have the money to buy another land.
12. Under section 26 of the [Land Registration Act](#), a Certificate of title will normally be held as conclusive evidence of proprietorship. The section provides as follows;

26.
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
13. After evaluating the evidence adduced and the testimonies of each of the parties during trial, and the submissions hereof, I find that the Appellant did not adduce any evidence whatsoever in the lower court in support of her averments. She did not produce any evidence to challenge the validity of the Title Deed or certificate of official search relating to ownership of the Land. Again, the Appellant was challenging the Respondents title to the suit land on the ground that the same was fraudulently acquired. The law is very clear that allegations of fraud must be particularly pleaded and strictly proved. The Appellant did not plead any particulars of fraud in her defence. She did not produce any evidence to prove that the Respondent acquired title to the suit land by way of fraud or unprocedurally. Her assertions therefore remain mere unsubstantiated allegations without the necessary evidential back-up.
14. The Respondent on the other hand produced exhibits, that is: a copy of the Certificate of Sale issued by the Auctioneers, a copy of the Title Deed registered in his name, and a copy of the Certificate of Official Search. The Title Deed is conclusive evidence of proprietorship as provided under section 26 of the [Land Registration Act](#). The law is protective of titles and provides only two instances for the challenge of title viz: where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and/or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Both requirements have not been proved in the instant case. The Respondent's title therefore remains intact.
15. I also agree with the finding of the trial magistrate that pursuant to the provisions Section 26(1) (a) of the [Land Registration Act](#) 2012 there was no doubt that the plaintiff is the registered owner of the land parcel No. Mbeere/Mbita/4915. I concur with the trial court that the issue of the sale and the procedure in which the auction was done came late in the day as the same was not raised in the Appellant's defence. Parties are bound by their pleadings and in my opinion, it was not the trial courts duty to make determinations on an issue that was not raised in the party's pleadings.



16. On the issue whether the Plaintiff was entitled to the prayers sought, the court made the following findings;

“From the evidence on record, the defendant has been in occupation of the land which she says is her matrimonial home and cannot move from it. She has not in any way proved that she holds any right or claim to the land parcel upon it being sold and registered in the name of the plaintiff. Her presence on the land is hence illegal.” This finding is right in my view both from a legal and factual perspective.

17. Overall, my appreciation of this matter is that the lower court considered the evidence before it and the applicable law well. It is important to point out that though the appellant seemed to suggest that she owns the land by dint of her long possession, she only filed a defence in the lower court denying the respondent’s claim. She didn’t positively assert her claim through a counter-claim and given her approach, it seems like she would be content with continued possession of the land while the legal title thereof is held by the appellant. If the court allows this state of affairs to continue, it will be countenancing or abetting an incongruous situation where the registered owner of the land continues to hold the title but is denied the rights and privileges that go with such ownership. Such rights obviously include use, possession and/or occupation. A scenario like that is obviously untenable in Law.

18. Further, it is clear that Section 99 of the Lands Act actually protect the respondent from the kind of allegations being made by the appellant. It is clear that he bought the land at an auction and he was able to demonstrate that reasonably well in the lower court. A purchaser of land in such manner acquires a good title even where the lender or chargee or even the auctioneer has flouted the procedural law applicable to such sale. The only recourse that a person like the appellant has is to claim damages from the seller. To my mind, the only time the court may hold otherwise is when the whole process is so irredeemably flawed or so blatantly illegal that it sears the conscience of humanity and is therefore incompatible with justice. In a scenario like that, the court may, under the new constitutional dispensation, invoke the aid of the law of Equity. This is not the situation that obtains here.

19. The upshot, in light of the foregoing, is that the appeal herein lacks merit and I hereby dismiss it. Each side to bear its own costs of the appeal.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

In the presence of Ombachi for appellant and Eddie Njiru (absent) for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

17/10/2023

