



**Kiplagat v Nyakora (Environment and Land Appeal E003 of 2023)
[2023] KEELC 21898 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E003 OF 2023
LA OMOLLO, J
NOVEMBER 30, 2023**

BETWEEN

PAUL KIBET KIPLAGAT APPELLANT

AND

NEMUEL NYAKORA RESPONDENT

*(Being an appeal arising from the judgement of Hon. A. Mukenya
SRM delivered on 8th February, 2023 in Molo ELC NO. E009 OF 2020)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 17th February, 2023 the Appellant appeals against the judgment by Hon. A. Mukenya Senior Resident Magistrate, Molo which was delivered on 8th February, 2023 in ELC No. E009 of 2020, Molo.
2. The grounds of appeal are as follows:
 1. That the Learned Magistrate erred in law and in fact in finding that the land parcel No. Nakuru/Ngongongeri/157 is owned by the Defendant herein Nemuel Nyaroko.
 2. That the Learned Honourable Magistrate erred in law and in fact in failing to appreciate that the alleged suit land No. Nakuru/Ngongongeri/157 does not exist on the ground as the land is situated in the Trust Land and or in the forest - Eastern Mau.
 3. That the Learned Honourable Magistrate erred in law and in fact in failing to correctly appreciate that the government has to date maintained a Caveat on the Trust land forming part of Eastern Mau where the suit alleged piece of land is situated.



4. That the Learned Honourable Magistrate erred in law and in fact in failing to appreciate that the suit land is part of a forest and therefore Trust Land illegally delineated fraudulently without due process of law being adhered to or followed.
 5. That the Learned Honourable Magistrate erred in law and in fact in failing to apply the law properly as regard the Trust Land and or a forest in existence even during colonial (pre-independence) era to date.
 6. That the Learned Honourable Magistrate erred in law and in fact in failing to correctly apply the law and degazettment of a government forest hence arriving at a wholly erroneous judgement.
3. The Appellant prays that the appeal be allowed and the judgement dated 8th February, 2023 set aside. He also prays that he be awarded costs of the appeal.

Factual Background

4. The suit before the Magistrate's court was commenced by the Appellant vide a plaint dated 10th November, 2020. The Appellant claimed that he is the owner of land parcel number Nakuru/Ngongongeri/157.
5. The Appellant further claimed that the Respondent had trespassed onto his property and built a house claiming ownership on the said parcel of land.
6. He sought for the following prayers against the Respondent:
 - a. A permanent injunction restraining the Defendant by himself, servants, agents and or his employees from entering, remaining, transferring, subdividing or any other way interfering with the suit land No. Nakuru/Ngongongeri/157.
 - b. An order confirming ownership of the suit land.
 - c. Costs of the suit.
7. The Respondent filed his statement of defence dated 8th December, 2020. He stated that he was the beneficial owner of the suit property from which his two wives are the absolute owners.
8. He stated that his two wives have been the registered owners of the suit property since 2005.
9. The Respondent urged the court to dismiss the Appellant's case with costs.
10. The Learned Trial Magistrate delivered the judgment on 8th February, 2023 and found that the Appellant failed to prove his case against the Respondent to the required standard.
11. On 21st June, 2023, the court directed that the appeal be disposed by way of written submissions.
12. On 26th September, 2023 parties confirmed having filed their written submissions and the appeal was reserved for judgment.

Issues for Determination

13. The Appellant filed his submissions on 29th June, 2023 while the Respondent filed his submissions on 2nd August, 2023.
14. The Appellant Identified the following issues for determination:



- a. The disputed land being Nakuru/Ngongongeri/157 is in Eastern Mau Forest.
 - b. Was Eastern Mau, a Trust Land or Forest Land?
 - c. Has anyone legally acquired land in Eastern Mau including the disputed Nakuru/Ngongongeri/157?
 - d. Was title deed issued to parcel Nakuru/Ngongongeri/157 unlawfully processed and issued?
 - e. Whether Eastern Mau is a trust land or forest or private land.
15. On the first issue, the Appellant submits that the suit property is a portion within Eastern Mau forest which is part of Nakuru County Trust/forest land.
 16. He submits that the government has maintained a caveat on the Easter Mau so as to protect it from illegal claims of ownership.
 17. He relies on the *Land Adjudication Act* and submits that no land adjudication had been declared on the Eastern Mau by the government. He added that there was no further degazettment for creation of human settlements for individual ownership.
 18. On the second issue, he submits that the matter had already been determined by a three-judge bench case in *Mapelu & 3 Ohters Vs CS Lands & 164 Others ELC Petitions 12 & 13 of 2018*. The court declared that titles acquired fraudulently and/or unprocedurally are void and ought to be cancelled.
 19. He submits that the suit land being part of the Eastern Mau Forest must revert to Trust land/Forest. The Appellant also submits that the title ought to be declared void.
 20. The Appellant noted that the other grounds of appeal dealt with the same issued as already addressed above.
 21. In conclusion, the Appellant submits that he came to the realization that the suit land is within Eastern Mau Forest. He adds that he had no reservations if the government repossesses it as part of the Trust land/forest and he be relocated.
 22. The Respondent on the other hand argues that in line with the grounds of appeal, the Appellant submitted on what was not pleaded in the subordinate court.
 23. The Respondent submits that the Appellant only submitted on ground 1 with regard to ownership of the suit land which he claimed to be the owner and that the Respondent had allegedly trespassed.
 24. He submits that the Respondent in support of his defence produced a copy of the title deed as well as the current search. He added that the Defence witnesses DW1-DW4 by all testified that the suit land belonged to the Respondent.
 25. The Respondent submits that the Trial Magistrate correctly found that the suit land belonged to the Respondent. He further submits that the learned Trial Magistrate correctly evaluated the evidence adduced by both parties to reach the said conclusion.
 26. He relies on the Court of Appeal case of *Munyu Maina V Hiram Gathiha Maina [2013] eKLR*. He submits that the Appellant never led any evidence of proof to support the allegation that the title deed he produced was genuine as against the one held by the Respondent.
 27. He further submits that on grounds 2 to 6 of the memorandum of appeal, the same are extraneous and that they were not issues before the Trial Magistrate.



28. The Respondent submits that what was before the subordinate court was the issue of the alleged trespass to the suit by the Respondent. He further submits that the Trial Magistrate addressed the issue of ownership which the Appellant failed to prove.
29. He also submits that it is more surprising for the Appellant to submit that the land in his pleadings as averred in paragraphs 3 and 5 of his Plaint does not exist yet he claimed to own it.
30. In conclusion, he submits that the grounds 2 to 6 of the appeal were not issued for determination before the subordinate court and ought to be dismissed.
31. The Respondent submits that this appeal lacks merit and urges this court to dismiss it with costs.

Analysis and Determination

32. I have considered the grounds of Appeal and the rival submissions filed in respect of this Appeal. In my view, the issues for determination are as follows:
 - a. Whether the appeal is merited.
 - b. Which party should bear the costs of appeal?
33. The first ground of appeal is that the Learned Magistrate erred in law and in fact in finding that the land parcel No. Nakuru/Ngongongeri/157 is owned by the Respondent, Nemuel Nyaroko.
34. The Appellant's claim before the trial court was that he has been the absolute owner of Nakuru/Ngongongeri/157 measuring approximately 4.04ha and that the Respondent trespassed upon the suit land and claimed that it belonged to him.
35. The Appellant in his plaint sought orders of permanent injunction restraining the Respondent from entering, remaining, transferring, subdividing or any other way interfering with the suit land. He also sought an order confirming ownership of the suit land and costs of the suit.
36. During trial, the Appellant never raised the issue of the suit land being trust land situated in the Eastern Mau forest. Instead he averred that he was the owner of the suit property and that the Respondent had in fact trespassed onto it.
37. The Appellant testified that the suit land belonged to him, that it was allocated to him by the government in 1997 and upon allocation, he fenced it off and build a semi-permanent house thereon. His further evidence was that he was issued with a title deed in his names. He went on to state that in the year 2007 during post-election violence, he was forced out of the suit parcel after the Respondent burnt down his house and that he returned in the year 2019. He stated that he reported the incident to the police on 9th November, 2020.
38. In the Court of Appeal judicial case of Caltex Oil Kenya Limited vs. Rono Limited (2016) eKLR, the court had this to say about pleadings;

“They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer, it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders”. (Emphasis is mine)



39. Upon perusal of the Complaint, I do not see any averment by the Appellant that the suit land is Trust land owned by the government. His averment is that he is the owner of the suit property and that the Respondent had trespassed upon it. The Appellant also failed to lead evidence on the fact that the suit land is trust land. It's interesting to note that he claimed ownership of it.
40. PW1 (the Appellant herein) despite stating in his examination-in chief that he acquired the suit land in 1997 from the government, admitted during cross-examination that he had not made any application to the government for allocation of the suit land, did not pay any amount to the government after allotment and also admitted that he did not have a search certificate in respect of the suit property. He however produced a copy of a title deed issued on 4th July, 2005.
41. The Respondent herein, called three witnesses. DW1, his wife, produced a copy of the title to the suit property which shows that it is jointly owned by herself and her co-wife after they purchased it from one Birir. DW2, the assistant chief within whose sub-location the suit land is situated, confirmed that the Respondent had not trespassed onto the suit property having known and lived next to the Respondent and the previous owner.
42. The Respondent testified as DW3 and stated that the suit land is owned by his two wives after he bought it from one Samson Kimaru Birir and had it registered in their names.
43. DW4, the land registrar, testified and gave the history of the suit parcel. He produced the green card and took the court through the entries made therein. The first entry is 16th July, 1997 being the registration of the suit land as belonging to the Government of Kenya. Entry No. 2 is dated 16th July, 1997 and is a transfer to Samson Kimaru Birir, Entry No. 3 bears the same date and being the issuance of a title deed to Samson Kimaru Birir. Entry No. 4 is dated 17th February, 2005 and is a transfer to Naomi Bonarei Machoka and Tabitha Kemunto and lastly Entry No. 5 bearing the same date is the issuance of a title to the two registered owners. He stated that the Appellant's name does not appear on their records.
44. The Learned Magistrate at paragraph 28 of the judgement states that the evidence tendered by both sides shows that each party has a title deed to the suit property allegedly issued by Nakuru Land Registry and by the same Land Registrar.
45. The Learned Magistrate goes on to state that the predicament facing the suit land is as enunciated in the decision of *Kamau James Njendi vs Serah Wanjiru & Another* [2018] eKLR and it is as follows;
- “ Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore, in this case, there must be one title deed which is genuine and one which was either issued unlawfully or through mistake and thus double allocation.”
46. In his concluding paragraphs, paragraph 33 to be more precise, the Learned Magistrate states thus;
- “ It is clear that the Title Deed exhibited by the Defendant is the one that was first in time. It is also the one whose root can be traced vide the green card. It therefore prevails over the one held by the Plaintiff.”
47. I therefore find that the Trial Magistrate did not error in making his determination solely on the issue of ownership of the suit property as between the Appellant and Respondent. I further agree with the Trial Magistrate's finding that the Appellant failed to prove his case on the required standard. Consequently, ground 1 of the appeal fails.



48. In Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR it was held as follows;

“... The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the Appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See North Staffordshire Railway Co. v. Edge [1920] AC 254).”

49. On a perusal of the plaint and the evidence tendered by the Appellant, I find no averment in respect of the suit land being Trust land forming part of the Eastern Mau Forest. Also, no evidence was led on this question. In the circumstances, I decline to consider grounds 2- to 6 of the Memorandum of Appeal for the reason that the said issues were not raised before the subordinate court.

Disposition

50. In the result, I find no merit in this appeal. It is hereby dismissed with costs to the Respondent.

51. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF NOVEMEBR, 2023.

L. A. OMOLLO

JUDGE.

In the presence of: -

No appearance for the Appellant.

Mr. Ochako for Respondent.

Court Assistant: Monica Wanjohi.

