



**Gituma v Thambo (Environment and Land Appeal E121 of 2021)
[2023] KEELC 21943 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E121 OF 2021
CK NZILI, J
NOVEMBER 29, 2023**

BETWEEN

MATHEW GITUMA APPELLANT

AND

COSMAS MURIUNGI THAMBO RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate's Court of Kenya at Tigania
by Hon. Wechuli – Principal Magistrate in ELC 203 OF 2017, delivered on 9.11.2021)*

JUDGMENT

1. The appellant, who was the 1st defendant at the lower court, appeals against the judgment on the grounds that the trial court:
 - i. Failed to consider his entire evidence but considered extraneous matters and, therefore, arrived at the wrong decision.
 - ii. Failed to appreciate that the respondent did not have credible evidence on plot ownership.
 - iii. Failed to find that he was a legally registered owner of the plot.
 - iv. Failed to consider the question of the ownership of the plot and found it did not have jurisdiction to adjudicate over the same.
 - v. Failed to consider the evidence of double allocation of the plot.
 - vi. He failed to consider that a third party was on occupation and use of the plot, yet he was not a party in the suit.
 - vii. It considered extraneous facts which had not been pleaded.



2. This being a first appeal, the court is expected to re-evaluate the lower court's record with a fresh perspective and independent mind while mindful that the trial court had the opportunity to see and hear the witnesses. See *Selle v Automotive Associated Motor Boat Co. Ltd & Others* [1968] E.A 123.
3. By a plaint dated 19.6.2017, the respondent had sued the appellant, Meru County Government, and the Hon. Attorney General as the 1st, 2nd, and 3rd defendants. He averred that by Application No. 4027, Arun Kathurima Thambu had sought permission to change Plot No. 69B Mikinduri market, which the council allowed, and registered the plot under his name through Min. No. TP & M 13/2007 B (a) 14.
4. Following the plot transfer, the respondent averred that he took actual possession and use of the plot after paying the requisite fee to the County Government of Meru. The respondent averred that the appellant and the county government of Meru, without his knowledge, colluded and illegally registered the appellant as the owner of the plot allegedly out of an objection lodged by the appellant. The respondent maintained he had not been served with such an objection; it was heard *ex parte* and hence was condemned unheard.
5. The respondent averred he continued occupying and paying land rates until he was notified that the property was no longer his on 26.3.2017. He termed the actions by the appellant and the County as an abuse of office aimed at depriving him of the plot. He sought a declaration that he was the legal owner of the plot, an order of eviction, and a permanent injunction restraining the appellant from entering the plot. Witness statements and documents dated 19.6.2017 accompanied the plaint.
6. By a statement of defense dated 7.12.2017, the appellant denied the contents of the plaint. Witness statements accompanied the defense.
7. The 3rd defendant opposed the suit by notice of preliminary objection dated 14.7.2017 because the suit offends Section 16 (1) (1) of *Government Proceedings* (Cap 40); it was wrong in law and disclosed no cause of action against it. In a statement of defense dated 14.7.2017, the 3rd defendant denied any occupation of the suit land as averred in paragraph 12 of the plaint.
8. The 2nd defendant opposed the suit through a statement of defense dated 23.10.2017. It was averred that the 2nd defendant received a copy of a certificate of confirmation of grant dated 11.3.2002 from the appellant, showing he was entitled to Plot No. 69B and duly believing the contents of the grant entered his name into its register as the owner of the subject matter. The 2nd defendant denied the respondent was in occupation of the suit land and could not be evicted. The 2nd defendant termed the orders sought as untenable.
9. In a ruling dated 14.11.2019, the trial court upheld the objection and struck out the claim against the 3rd defendant. The suit proceeded for a hearing against the rest of the defendants.
10. Cosmas Murungi Thambo testified as PW 1. He told the court that by an application dated 13.8.2007 by Ann Kathwana, Plot No. 69B Mikinduri market was transferred to him through Min No. TPM/3/2007/B (aa) 14. He said his grandfather Luka Thambo, before his death, told him he would give him a third of his properties, the plot included. Based on the promise, the respondent told the court an affidavit was drawn as requested by the land adjudication officers, and he transferred the plot through Application No. 4027 Nyambene County Council Town Market and Planning Committee. PW1 said he assumed actual possession and the user of the said parcel. Despite this, the respondents said his uncle, as a dependant, continued collecting rent income from the suit premises to his detriment. PW 1 said that unknown to him, the appellant colluded with the County Government and caused the plot to be registered in the appellant's name, by using two sets of grants to enrich himself unjustly. PW



- 1 produced a chief's letter as P. Exh No. (1), application dated 13.8.2007 as P. Exh No. (2) an extract of County Council minutes as P. Exh No. (3), Misc receipts dated 18.9.2007 as P. Exh No. (4), letter dated 2.4.2016 from the county as P. Exh No. (5) and a notice of intention to sue dated 28.3.2017 as P. Exh No. (6).
11. In cross-examination, PW 1 told the court the appellant was his uncle who unprocedural took away his plot, which the grandfather had legally given him as per the rates payment receipts. He said every member of their family was given a plot, including the appellant, who acquired five plots. PW 1 said that when he went to pay his rates, he found his name had been canceled by the appellant, claiming to be an estate administrator. PW 1 said that although two grants were issued, one was unprocedurally issued.
 12. Benard Muriuki, a retired chief, testified as PW 2. He told the court the deceased, as his friend, had informed him of his wish to give his grandson, the respondent, a third of his properties. PW 2 said it was the respondent who used to take care of the deceased and his wife. PW 2 told the court that upon his death, the late Ann Kathwana Ithambu swore an affidavit as was demanded by the land adjudication officers and the county council officers through Application No. 4027, following which the lot was transferred to the plaintiff. PW 2 went on to say he learned from the respondent that the appellant filed a succession cause and included properties that were not available for distribution. He termed the appellant as a liar and a conman, to whom the court should not extend any discretion since he used fraud and deceit to transfer the land to his name. In cross-examination, PW 2 said the will was read by Robai and Munina, showing how the deceased's properties were to be shared. He said the transfer occurred without following the succession process.
 13. Mathew Gituma testified as DW 1. Adopting his witness statement dated 17.10.2017, he told the court his late father, Luka Thambu M'Rintangu, left a will dated 27.10.2019. DW 1 further told the court he filed Succession Cause No. 288 of 2000 and became an administrator of the estate, whose grant was confirmed, showing Plot No. 69B Mikinduri market as belonging to him. According to him, the respondent acquired Plot No. 9A Kunati, jointly with his brother Daniel Mwiti, 10 acres of land in Gatithine, and Plots 8 and 24 Gatithine. He denied that the suit land was intended to belong to the respondent; otherwise, he was using the court process to disinherit him. He produced D. Exh No. (1) and (2) being the copy of the will and certificate of confirmation of grant. In cross-examination, DW 1 denied there was an existence of a will by the grandfather of 1997 in which plot No. 69B was bequeathed to the respondent.
 14. Peter Kirema Thambu testified as DW 2. Adopting his witness statement dated 17.10.2017, he told the court that the appellant became a legal administrator of the estate of his late father and that the respondent was chased away from their home after he stole Kshs.358,000 belonging to the deceased grandfather. He said the plot was not among the properties the respondent inherited from the deceased estate. DW 2 said the will was made in 1999 and not in 1997, as alleged by the respondent.
 15. DW 3 was Salesio Mutua Thambu, adopting his witness statement dated 17.10.2017; he associated his evidence with that of DW 1 and DW 3, save to add to avoid family animosity, the status quo as per the mode of distribution in the confirmed grant should prevail. He denied the alleged will made in 1997, since it was overtaken by the one made in 1999, following a disagreement between the respondent and the deceased. It appears the county government of Meru did not participate in the hearing.
 16. The appellant relied on written submissions dated 19.10.2023. It was submitted that the court revoked the grant and ordered an investigation into the succession cause. Further, the appellant submitted that the respondent did not prove how and when the ownership of Plot No. 69B came to his name, its



- history, and the demonstration of the authenticity of his grandfather's ownership through documents from the County Government of Meru.
17. As to fraud, the appellant submitted no evidence of the investigations officer, and a report was availed to sustain the allegations of fraud, more so implicating him. The appellant submitted to deprive him of property rights on an unproved allegation of fraud beyond reasonable evidence, which was against Article 40 of *the Constitution*. By written submissions filed on 11.10.2023, the respondent submitted the plot registration by the appellant was based on a forged confirmation of the grant.
18. The issues calling for determination are:
- i. If the record of appeal contains all the parties and pleadings before the trial court.
 - ii. If the omission of some of the parties and the pleadings is fatal.
 - iii. If the respondent proved his claim against the appellant before the trial court.
 - iv. If the appellant pleaded ownership and occupation of the suit land.
 - v. If the appellant raised any objection as to jurisdiction at the lower court.
 - vi. If the appellant raised the question of double allocation before the trial court.
 - vii. Whether the appeal has merits.
 - viii. What is the order as to costs?
19. The suit before the trial court was initially brought against the respondent, the County Government of Meru and the Hon. Attorney General. Following the striking out of the Hon. Attorney General, the County Government of Meru remained as a party until the judgment was delivered. Therefore, the County Government of Meru was a necessary party to the appeal. The record of appeal has omitted the statement of defense by the County Government of Meru. In *Zachariah Okoth Obado vs Edward Akong'o Oyugi & 2 others* (2014) eKLR, the court cited with approval *Nicholas Kiptoo Arap Salat vs IEBC & others* (2013) eKLR, that the court must never provide succor and cover to parties who exhibit scant respect for rules and timelines. The court said it would not aid in the bending or circumventing of rules and shifting of goalposts to prejudice one innocent party while hiding under the guise of Article 159 (2) (d) of *the Constitution* unless a court dispenses with certain documents under order 42 rule 13 (4) of the *Civil Procedure Rules* a record of appeal must contain all the pleadings in the lower court. In *United Finance Ltd vs Joel Muthui Kyambu* (2000) eKLR, the court struck out the incomplete record of appeal with incomprehensible parts. The court termed it as incurably defective to render the appeal incompetent.
20. In *Richard Leiyagu v IEBC* & Civil Appeal No. 18 of 2013, the court held that raising the issue of incomplete documents at the appeal hearing was too late as the pendulum had swung towards substantive justice. In *Bwana Mobamad Bwana v Silvana Buko Bonaya and 2 others* [2015] eKLR, the court said the appeal was incompetent and defective without requisite documents, making the court unable to adjudicate on the appeal.
21. At the appeal stage, I think it is good practice for parties to notify all the parties who had participated in the lower court, of the pendency of an appeal for an appellate court is not restricted to determining an appeal solely over the pleadings issues and the outcomes of only those parties who have appealed. The omission has not been explained, yet the issue of who colluded with the appellant and registered the appellant as a bonafide owner was the County government of Meru. The appellant deliberately



- omitted the statement of defense by the County Government of Meru and by extension, failed to include them in the appeal, yet the decree appealed against refers to them. I find the omission fatal to the appeal.
22. On whether the appellant has raised new issues which he had not pleaded, the issue of double allocation, the legality of the appellant's registration, the issue of jurisdiction of the trial court, occupation, and user of the plot by a third party were not pleaded in the statement of defense dated 7.12.2017. A party cannot raise new issues which were not pleaded and were never canvassed before the trial court at the appellate stage.
 23. Written submissions cannot replace pleadings or amount to evidence. See *Daniel Toroitich Arap Moi v Murithi* [2014] eKLR. Parties are bound by their pleadings. In *AG & others vs. Okiya Omtatah Okioti* [2020] eKLR, the court cited with approval *Jamal Salim v Yusuf Abdi & another* [2018] eKLR & *Nyaga vs Nyakwara* [1986] KLR 712, that jurisdictional issues must be raised at the earliest opportunity. The court cited with approval *KCB vs Osebe* [1982] KLR 296, that although an appeal must be confined to points of law raised and determined by the trial court, there were two exceptions to the general rule: where the trial court commits an illegality or acts without jurisdiction. I believe this appeal does not come within the exceptions to the general rule. There is no demonstration by the appellant that his appeal falls within the exceptions. The appellant's defense was a mere denial of facts.
 24. Where a land title is in question, every step toward its acquisition becomes critical. See Dr. *Joseph Ngok vs. Justice Moijo Ole Keiwua & 4 others* Nrb C.A No. 60 of 1997, *Hubert L. Martin & 2 others v. Margaret J Kamar & 5 others* [2016] eKLR and *Munyu Maina v Gatbiha Maina* C.A No. 239 of 2004. The respondent produced exhibits to sustain his pleadings that land registration in the county council records came after he had met the stipulated terms and conditions. The appellant did not object to the said documents. The probate court revoked the grant issued to the appellant.
 25. Fraud includes using deceitful means or a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to their detriment. See *Black's Law Dictionary* 9th edition, page 731. The appellant had represented a fake confirmation of grant. With such misrepresentation demonstrated by the respondent and in the absence of superior evidence, the appellant cannot be heard to say he held a better title than the respondent. See *Alice Chemutai Too v Nickson Kipkurui Korir and others* [2015] eKLR.
 26. The appellant wrongfully deprived the respondent of his property using a revoked confirmed grant. He cannot be heard to justify his illegal occupation. *AG vs Halal Meat Product Ltd* [2016] eKLR. The upshot is that the appeal is incompetent and lacks merits. It is hereby dismissed with costs.

Orders accordingly

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 29TH DAY OF NOVEMBER 2023**

In presence of

C.A Kananu/Mukami

Cosmas the respondent

HON. CK NZILI

JUDGE

