



**Nzyusyo v Mbithuka & another (Environment and Land Appeal
41 of 2019) [2023] KEELC 21738 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 41 OF 2019
A NYUKURI, J
NOVEMBER 22, 2023**

BETWEEN

JOSPHAT FREDRICK MBEVI NZYUSYO APPELLANT

AND

JAMES MUTISO MBITHUKA 1ST RESPONDENT

SYOWAI MUTWIWA NDAMBUKI 2ND RESPONDENT

*(Being an appeal from the judgment of the Principle Magistrate at Machakos
Honourable Anne Nyoike dated 25th July 2019 in ELC No. 312 of 2015)*

JUDGMENT

Introduction

1. This is an appeal filed by Josphat Fredrick Mbevi Nzyusyo, against the judgment of Honourable Anne Nyoike (Principle Magistrate) delivered on 25th July 2019 in Machakos Magistrates Court ELC No. 312 of 2015. In that judgment, the learned trial magistrate dismissed the appellant's claim on grounds that he failed to prove his case to the required standard. Aggrieved with the trial court's judgment, on 23rd August 2019, the appellant filed a Memorandum of Appeal dated even date, citing the following grounds;
 - a. The learned magistrate erred in law and fact by considering extraneous factors which were not material to the case.
 - b. The learned magistrate erred in law and fact by finding that there was no linkage between the plaintiff and the 2nd defendant when overwhelming evidence had been adduced by the plaintiff to prove the said linkage.



- c. The learned magistrate erred in law and fact by wholly disregarding submissions tendered by the appellant before arriving at her decision.
 - d. The learned magistrate erred in law and in fact by making a finding that the appellants had not proved their case on a balance of probabilities and proceeding to dismiss the suit.
 - e. The learned magistrate erred in law and in fact in meting out a decision that was extremely harsh to the appellant without having due regard to intervening factors and the circumstances of the matter before her.
 - f. The learned magistrate erred in law and in fact by dismissing the appellant's suit against the weight of evidence on record.
2. Consequently, he prayed for the following orders;
- a. The court do set aside the judgment of the learned magistrate dismissing the suit with no order as to costs and do proceed to allow the same with costs to the appellant.
 - b. The court do award the appellant costs of this appeal and costs in the trial court.

Background

3. By a plaint dated 30th November 2009 and filed on 3rd December 2009, the plaintiff, now appellant sued the defendants, now respondents, claiming to have purchased 2 acres of land from land known as Machakos/Mua/159 at a consideration of Kshs. 350,000/= . He stated that the suit property was renamed Machakos/Mua Hills/672. Further that the defendant declined to transfer the suit property to the plaintiff. He therefore sought orders, particularized as follows;
- a. A declaration that the plaintiff is entitled to quiet possession of two acres of land being part of L.R. No. Machakos/Mua Hills/ 672.
 - b. An order directing the transfer 2 acres of L.R No. Machakos/Mua Hills/672 to the plaintiff.
 - c. General damages for trespass and unlawful occupation.
 - d. The defendants themselves, their agents, or servants or whosoever be permanently restrained from trespassing on and /or interfering with 2 acres of land on L.R No. Machakos/Mua Hills/672 belonging to the plaintiff.
 - e. There be such further or other relief as the court deems fit and just in the circumstances of the case.
 - f. Costs of this suit.
4. No appearance was made by the defendants and the matter proceeded to hearing.

Plaintiff's evidence

5. At the hearing, the plaintiff's witness Shadrack Mutua Mutisya, who had power of attorney from the plaintiff testified by adopting the contents of his witness statement dated 7th September 2018 as his testimony in chief. He also produced documents attached to his list of documents filed on 23rd March 2012 and the documents attached to his supplementary list filed on 30th November 2015. According to his witness statement dated 7th September 2018, PW1 stated that the plaintiff resides in the United States of America and he was testifying on his behalf pursuant to a power of attorney dated 28th May 2015.



6. His testimony was that the late Mutwiwa Ndambuki was the registered owner of the parcel known as Machakos/Mua Hills/672, and that during his lifetime, he sold 2 acres of the aforesaid parcel to James Mutiso Mbithuka. That around July 1999, James Mutiso Mbithuka sold the said two acres of land from a parcel of land known as Machakos/Mua Hills/672 which he had bought from Mutwiwa Ndambuki at an agreed price of Kshs. 350,000/=. That vide an agreement dated 10th December 2007, it was agreed between the plaintiff and the defendants that the 2 acres he bought from the 1st defendant would be transferred to him by the 2nd defendant who is the administrator of the estate of Mutwiwa Ndambuki. He stated further that the plaintiff applied for consent of the land control board on 24th July 2008, but that the defendant herein never showed up. That to date the defendants have refused to transfer the 2 acres to the plaintiff. The documents produced by the plaintiff were agreements dated 5th July 1999 and 10th December 2007; official search; application for consent of the Land Control Board; consent; and power of attorney. That marked the close of the plaintiff's case.
7. Upon hearing the case and considering the plaintiff's submissions, the learned trial magistrate found that the plaintiff failed to prove his case and dismissed it on grounds that there was no explanation for the variance of the land reference numbers in the two agreements produced by the plaintiff, namely, Machakos/Mua/159 and Machakos/Mua Hills/672; and that there was no explanation, why, if at all the entire consideration of Kshs. 350,000/= was paid when the acknowledged balance of Kshs. 158,000/= was agreed to be paid on registration of the transfer to the plaintiff. The trial court further found that there was no evidence to show that the plaintiff purchased the suit property from the 2nd defendant as the title numbers are different and no agreement for the sale by the 2nd defendant to the 1st defendant was produced. The trial court further found that for a transaction that occurred in 1999, too much time had passed without any action from the plaintiff. The court also held that no irregularities were alleged as against the registered proprietor of the suit property.
8. It is that decision that provoked the instant appeal.
9. The appeal was canvassed by written submissions. On record are the appellant's submissions dated 3rd February 2022.

Appellant's submissions

10. Counsel for the appellant submitted that the trial court erred in making a finding that there was no evidence that the appellant purchased land from the 2nd respondent and no linkage had been proved by the appellant. Counsel argued that there was no moment the appellant alleged to have purchased the suit property from the 2nd respondent as the appellant's case has always been that he purchased the suit property from the 1st respondent as demonstrated in the agreement of 5th July 1999 between the appellant and the 1st respondent. Counsel submitted that the appellant's testimony was that the 1st respondent bought land parcel Machakos/Mua/159 from Mutwiwa Ndambuki and that upon the latter's demise the said land upon transfer of ownership, acquired a new title number and was henceforth known as L.R. Machakos/Mua Hills/672. Counsel further submitted that it was after the suit property was registered in the 2nd respondent's name that a sale agreement dated 10th December 2007 was entered into by the parties, where it was agreed that the 2nd respondent would transfer the land to the appellant. Counsel argued that it is the agreement dated 10th December 2007 that provided the linkage between the appellant and the 2nd respondent. On the issue of time, counsel faulted the findings of the trial court arguing that the parties entered into an agreement in 2007 and the suit was filed in 2009, which was just two years later.



11. On the 4th, 5th and 6th grounds of appeal, counsel contended that the trial court was wrong in finding that the appellant had not proved his case on a balance of probabilities when he had indeed proved his case which was not controverted by the respondents. Reliance was placed on the cases of *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR and *Gichiga Kibutha v Caroline Nduku* (2018) eKLR for the proposition that the evidence on record demonstrated that the appellant proved his case on the required standard.
12. On trespass, counsel relied on the cases of *Christine Nyanbama Oanda v Catholic Diocese of Homabay Registered Trustees* [2020] eKLR and *Park Towers Ltd v John Mithamo Njika & 7 Others* (2014) eKLR, among other authorities for the proposition that where trespass is proved, a party need not prove that they suffered any specific loss or damage to get an award of damages. In that regard, counsel submitted that the suit property was valued at Kshs. 350,000/= in 1999 as per the sale agreement and that therefore in twenty-three years, the value has appreciated. He sought for damages in the sum of Kshs. 1,000,000/= for trespass and unlawful occupation. Counsel sought that the appeal be allowed, the trial court's judgment set aside and judgment entered as prayed.

Analysis and determination

13. The court has carefully considered the appeal, the entire record and the appellant's submissions. The issue that arises for determination is whether the trial court erred in finding that the appellant failed to prove his case on the required standard.
14. The duty of a first appellate court is one; to reassess, reconsider and reanalyse the evidence before the trial court and make its own conclusions bearing in mind that it had no advantage of seeing or hearing witnesses, and therefore make an allowance for that. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal held as follows;

An appeal to this court from a trial by the High Court is by way of 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.
15. The trial court having considered the pleadings and evidence presented before it, found that the appellant had failed to prove its claim on the required standard. The trial court found that the appellant had not proved any nexus between him and the 2nd respondent who is the registered proprietor of the suit property. The crux of the appeal faults that finding.
16. On the burden of proof in any suit, Section 107 of the *Evidence Act* places the burden of proof on the plaintiff to prove their claim, and it does not matter whether or not the suit was defended. In fact, in my view, where there is no appearance by the defence, the plaintiff will ordinarily be under greater obligation, because, without a defence, they must prove each and every allegation made in their pleadings, unlike in a case where the defendant files a defence which may in some instances contain admissions of some of the averments raised in the plaint. In the instant suit, the appellant having sought for transfer of the suit property, which is a claim for specific performance, was duty bound to prove that he purchased the suit property, paid the entire purchase price and that there was privity of contract between him and the person who is required to transfer the property to him, in this case, the 2nd respondent.
17. Specific performance is a discretionary order and an equitable relief, which can only be granted in deserving cases. It may be refused even where the plaintiff has demonstrated that they have performed



all the terms of the contract, if there is an alternative adequate remedy or if granting such order would lead to severe hardship on the defendant. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, the court held as follows;

Specific performance like any other equitable remedy is discretionary and the court will only grant it on well-known principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Specific performance will however not be ordered where there is an adequate alternative remedy. In this respect, damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted from another source. Even when damages are not an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

18. Similarly, in the case of *Amina Abdulkadir Hawa v Rabinder Nath Anand & Another* [2012] eKLR, the court cited *Chitty on contracts*, 28th Edition (Sweet & Maxwell, 1999) Chapter 28 paragraphs 27 and 28 where the authors stated as follows;

Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles..... specific performance may be refused on the ground that the order will cause severe hardship to the defendant where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the defendant can put himself into a position to perform by taking legal proceedings against the third party... severe hardship may be ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract which affect the person of the defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.

19. In the instant case, it is therefore upon the appellant to demonstrate that there was a valid enforceable contract between him and the respondents, that he performed all the terms of the contract and that an order for specific performance is the only adequate remedy in the circumstances of this case.
20. Having considered the plaint filed in the lower court, I note that the appellant pleaded that in July 1999 he purchased 2 acres of land known as land reference number Machakos/Mua/159 without notice for a consideration of Kshs. 350,000/=. According to the plaint, this land reference number was later renamed L.R. Machakos/Mua Hills/672. He also averred that the 1st respondent had threatened and intends to continue in the trespass on the suit property. He stated that “the defendant” had declined to transfer the suit property to him as agreed in the sale agreement.
21. The evidence presented to prove the averments in the plaint is contained in the appellant’s witness statement at pages 31 and 32 of the record. In that evidence, PW1 stated that Mutwiwa Ndambuki was the registered owner of a parcel known as Machakos/Mua Hills/672 and sold 2 acres of that land to James Mutiso Mbithuka. That in July 1999, James Mutiso Mbithuka sold the 2 acres to the appellant herein at Kshs. 350,000/=. He stated that in an agreement dated 10th December 2007, it was agreed



- between the appellant and the respondents herein that the 2nd respondent would transfer the 2 acres to the appellant. He stated that he applied for consent from the Land Control Board but the 2nd respondent failed to attend the board and that to date the respondents have refused to transfer the suit property to the appellant. The exhibits produced by the appellant were the agreements dated 5th July 1999 and 10th December 2007, application for consent, consent dated 24th July 2008, search certificate dated 26th August 2008 and power of attorney dated 28th May 2015.
22. From the agreement dated 9th July 1999, James Mutiso Mbithuka sold 2 acres of land to be excised from land parcel number Machakos/Mua/159 at Kshs. 350,000/= whereof the sum of Kshs. 192,000/= was paid leaving a balance of Kshs. 158,000/= which was to be paid upon successful registration of subdivision and transfer in the name of the purchaser (appellant). The agreement also stated that the property sold had been previously sold to James Mutiso Mbithuka by one Muli Mutwiwa. The agreement was signed by the parties save Muli Mutwiwa, whose name was stated but no signature appended. In the agreement dated 10th December 2007, the same was made between Syowai Mutwiwa Ndambuki and James Mutiso Mbithuka and Shadrack Mutua Mutisa on behalf of the appellant. The same stated that two acres had been sold by the late Mutwiwa Ndambuki to James Mutiso Mbithuka. Further that upon confirmation that James Mutiso Mbithuka had sold 2 acres to the appellant, Syowai Mutwiwa will transfer the two acres to the appellant.
23. I have considered the agreement dated 9th July 1999 and that of 10th December 2007. While the appellant argues that the agreement of 10th December 2007 creates the nexus between the appellant and the 2nd respondent, thereby creating an enforceable contract, I do not agree with him. The reasons are that while the agreement of 9th July 1999 concerns parcel of land known as Machakos/Mua/159, the agreement of 10th December 2007 refers to parcel number Machakos/Mua Hills/672. The appellant pleaded and argued in his submissions that parcel Machakos/Mua/159 was renamed Machakos/Mua Hills/672. The appellant did not however clarify and explain the circumstances and the legal process that resulted in the renaming of the parcel of land from one reference number to another. The appellant has all through been represented by counsel and therefore I do not think that there was any difficulty for him to state how parcel number Machakos/Mua/159 translated to parcel number Machakos/Mua Hills/672. While a title reference number may change due to subdivision or other legal processes, there was no suggestion from the appellant that the former was subdivided, or that the reference number was changed through any known legal process, and that being the case, it would suffice to state that this court cannot speculate. Stating that a parcel of land was renamed without explaining the circumstances and how that happened, that cannot be sufficient to show that a parcel known by one registration number is one and the same as land under another registration number. A property cannot lawfully be transformed from one registration number to another without a proper legal process known in law. In the premises, I find and hold that the evidence on record did not show that parcel number Machakos/Mua/159 is one and the same as parcel number Machakos/Mua Hills/672 and therefore the trial court did not err in arriving at that conclusion.
24. In addition, the agreement of 9th July 1999 stated that James Mutiso Mbithuka had purchased the 2 acres from one Muli Mutwiwa. Although the name of Muli Mutwiwa was stated in that agreement, that person did not sign the agreement. Interestingly, one Muli Mutwiwa signed the agreement of 10th December 2007 as a witness, where it is stated that the 2 acres were sold by the late Mutwiwa Ndambuki. Therefore, the oral evidence by the appellant that the 2 acres he bought from James Mutiso Mbithuka had previously been purchased by James Mutiso Mbithuka from the late Mutwiwa Ndambuki, is contradicted in the agreement dated 9th July 1999 and no explanation for that contradiction was availed to court. Besides, although the entire consideration for purchase of the suit property was stated as Kshs. 350,000/=, there is no record of payment of the balance Kshs. 158,000/=



which was supposed to be paid on transfer of the suit property to the appellant. This aspect of the suit is material because an enforceable contract of sale is only complete, and can only be enforced where the entire purchase price has been paid.

25. Moreover, clause 2 of the agreement of 10th December 2007 stated as follows;

Upon confirmation that the said James Mutiso Mbithuka had sold the 2 acres to Josphat Mbevi Nzusyo, the said Syowai Mutwiwa will transfer the 2 acres to Josphat Mbevi Nzusyo.

In my view, the confirmation of sale of 2 acres to James Mutiso Mbithuka was a future event, which was the condition to be fulfilled before the 2 acres were transferred to the appellant. The appellant did not give any evidence of such confirmation by James Mutiso Mbithuka to warrant the appellant to seek transfer or the circumstances of that condition.

26. For the above reasons, I am not satisfied that the appellant proved that he deserved orders of specific performance. I therefore find and hold that the trial court did not err in finding that no nexus was proved between the appellant and the 2nd respondent as the land registration numbers are at variance in the two agreements and no explanation for the variance was given by the appellant. There is also no evidence that the sale to the appellant was completed by payment of the entire purchase price, and there is no evidence that the condition for transfer in clause 2 of the agreement dated 10th December 2007 was fulfilled.

27. Therefore, the totality of the evidence in the suit did not prove the appellant's claim and it is the finding of this court that the trial court was right in making the conclusions it did, and therefore there is no basis for interfering with those conclusions.

28. In the premises, the appeal herein has no merit and the same is hereby dismissed. There is no order as to costs.

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Muema holding brief for Mr. Munyao for appellant

No appearance for respondent

Josephine - Court Assistant

