



REPUBLIC OF KENYA



Nkuruna (Suing as the Legal Representative of the Estate of Ipano Meeli Nkurunah) v Mpuki (Environment and Land Appeal E037 of 2022) [2023] KEELC 22258 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E037 OF 2022
LC KOMINGOI, J
DECEMBER 14, 2023**

BETWEEN

MOSES MEELI NKURUNA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF IPANO MEELI NKURUNAH) APPELLANT

AND

JOHNSTONE OLE MPUKI RESPONDENT

(Being an Appeal from the Judgement of the Chief Magistrate's Court of Kenya at Kajiado by the Hon. Kahuya I.M, Principal Magistrate delivered on 13th July 2022 in Kajiado ELC 116 of 2018)

JUDGMENT

1. In the Judgement dated 13th July 2022 Hon. I.M. Kahuya (PM) granted the following Orders;
 - “a) a) An Order for demolition of the Plaintiffs structures erected on Plot No. A512 (formerly Plot NO. 8 Jua Kali Section commercial) by the Interested Party within 60 days of the service of this Order by the Court bailiff.
 - b. An Order directing the OCS Kajiado Police Station to ensure smooth compliance of Order (a) above.
 - c. There shall be no orders at to costs.”
2. Aggrieved by the said Judgement the Appellant in the Memorandum of Appeal dated 12th August 2022 seeks quashing of the decision and consequent orders made in the Judgement dated 13th July 2022 on grounds that:



1. The learned trial magistrate erred in law and fact by dismissing the Plaintiff's case solely on the basis of different numbers describing the property yet a plausible explanation was tendered by the Plaintiff for the difference as the plot was unsurveyed at the time of allotment and was subsequently surveyed and assigned a new number. The learned trial magistrate failed to apply the same test to the Defendant's case even though the Defendant described the property as Plot No. A512 (formerly known as Plot No. 8 Jua Kali section Commercial).
 2. The learned trial magistrate erred in law and fact by finding in favour solely on the basis of different numbers describing the property yet a plausible explanation was tendered by the Plaintiff for the difference as the plot was unsurveyed at the time of allotment and was subsequently surveyed and assigned a new number.
 3. The learned trial magistrate erred in law and fact by finding in favour of the Defendant even after making a finding that DW5 and DW6 who purportedly sold the subject property to the Defendant had no capacity to transfer ownership to the Defendant which explained why the land office failed to act on the request to transfer ownership in favour of the Defendant.
 4. The learned trial magistrate erred by making contradictory findings on the ownership of the subject property by DW5 and DW6 in one paragraph finding that there were no documents to prove ownership and that they had no capacity to transfer the property to the Defendant and in another paragraph finding that ownership of the subject property remained with DW5 and DW6.
 5. The learned trial magistrate erred in law and fact by making findings that were not supported by evidence produced in court.
 6. The learned trial magistrate erred in law and fact by finding in favour of the interested party when there was no interested party impleaded in the proceedings before the court and no such party participated in the case.
 7. The learned trial magistrate erred in law and fact by impartially and arbitrarily applying the law thereby arriving at the impugned judgement.
3. On the 18th April 2023, the court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

The Appellant's Submissions.

4. They are dated 6th July 2023, Counsel submitted that the trial magistrate neglected to consider the plaintiff's explanation that at the time of allocation, the suit property had not yet been surveyed. Further that the letter of Allotment dated 7th October 1982 refers to the parcel Light Industrial Plot "E" Kajiado. That the Land was subsequently surveyed and assigned a new reference number being Kajiado Light Industrial Plot No. 9923/E.
5. Counsel also submitted that merely relying on the disparity in identification numbers assigned to the parcel of Land since 1982 is in sufficient ground for the Learned trial magistrate to dismiss the Appellants claim to the suit property as the root of the title was substantively established.
She has put forward the case of Festo Ogeda Agutu Vs. Richard Odumbe & Another (2022) Eklr.
6. She further submitted that the Appellant before the trial court gave a plausible explanation for the change in plot No from Light Industrial Plot "E" Kajiado (Unsurveyed) to Kajiado Light Industrial Plot No. 9923/"E".



7. Counsel also submitted that the trial court ought to have summoned the County Land Administrator / Surveyor to provide a history of the plots in that area from the allotment of the unsurveyed plots to the current surveyed status. That in the absence there was not before court sufficient evidence to warrant the finding of the court.

She has put forward the case of Harishabhai Nemchad Zakharia Vs. County Government of Nakuru & Another (2021) eKLR.

8. It is further submitted that the learned trial magistrate erred in finding that the land legally belonged to the Respondent considering the vendors who sold him the plot did not have capacity to sell. She has put forward the cases of Hurbert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others (2016) eKLR; Richard Kipkemboi Ngeny Vs. Hassan Kipkemboi Ngeny & 4 Others (2019) eKLR .
9. It is also submitted that the absence of legal authority on the part of Mr. Mohammed Noor Hassan and Mr. Abdi Salim Haji Ahmed regarding the conveyance of the subject property to the Respondent renders them in capable of owning the land in their names. They could not pass a legal title to the Respondent. She has put forward the case of Titus Muiruri Doge Vs. Kenya Cannery Ltd (1988) eKLR.
10. It is submitted that the trial court committed an error in its determination that the disparity in reference numbers alone constituted sufficient ground to infer that the reference parcel of land was distinct. It is also erred in failing to find that there was no clear root of title to establish and verify the Respondents claim despite having found so in its analysis of the evidence.
11. Counsel also submitted that the trial court issued further orders in favour of an Interested Party who is unnamed as no such party was joined in the suit. The order so granted cannot be executed as the court could not make an order in favour of a non party to the suit.

She has put forward the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 Others Vs. Attorney General & 4 Others (2017)eKLR.

12. It is also submitted that there was absence of conclusive evidence demonstrating that the reference numbers presented by the parties pertained to distinct plots and that DW5 and DW6 were the lawful owners of the parcel identified by the Respondent.

She prays that the Appeal be allowed and that the Judgement dated 13th July 2022 be quashed and or set aside.

The Respondent's submissions

13. Counsel for the Respondent in the submissions dated 25th July 2023 highlighted the issues for determination were whether the Appeal should be allowed and who should bear costs for the suit.
14. On whether the Memorandum of Appeal should be allowed and the lower court's judgement be quashed and set aside, counsel submitted that the Appeal lacked merit and should be dismissed with costs to the Respondent. This is because from evidence tendered, it was clear the Respondent was the rightful owner of property parcel No. A512 formerly plot No. 8 Jua Kali section commercial having purchased it on 13th March 2014 from Mohamed Noor Hassan and Abdissalam Haji Ahmed. And the parcel was different from the Appellant's parcel no. Kajiado Light Industrial Plot No. 9923/E Kajiado. Counsel submitted that the lower court also found that the Appellant's parcel Kajiado Light Industrial Plot No. 9923/E or Light Industrial Plot E or Kaj/9923/E was full of discrepancies. Counsel added that there was also map evidence that clearly showed existence of the Respondent's parcel and non-existence of the Appellant's parcel. Counsel sought this court to reconsider the evidence tabled at the



lower court and draw its own conclusions as was held in the case of Pius Mbogo Oduma vs Brian Ochieng’ Owino & 2 others [2022] eKLR.

15. On who should bear costs of the suit, counsel submitted that since the Appeal ought to be dismissed for lack of merit and the lower court’s judgement upheld this meant that costs should follow the cause as articulated in Section 27(1) of the *Civil Procedure Act*. Counsel thus submitted that costs of the Appeal and the lower court’s judgement should be to the Respondent.

Analysis and Determination

16. I have considered the appeal, the rival submissions, and the authorities cited. The issues for determination are:
- i. Whether the trial court erred by dismissing the Plaintiff’s case CMCC No. ELC 116 of 2018;
 - ii. Whether the trial court erred in finding in favour of the Defendant;
 - iii. Whether the trial court erred in finding in favour of the interested party when there was no interested party in the proceedings
 - iv. Who should bear costs of the Appeal?
17. This being the first appeal, the court bears the responsibility of re-examining the evidence presented in the lower court and arriving at its own independent conclusion, while considering that it did not have the opportunity to see or hear the witnesses. This was pronounced by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR where it stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

18. The court shall address all the issues for determination together since they are intertwined.
19. The appellant claims that the trial court’s determination and dismissal of his suit on the basis of the discrepancy of the suit property’s number was erroneous stating that he had explained that the plot was initially unsurveyed at the time of allocation and later surveyed resulting in a new number.
20. The Appellant’s Complaint dated 19th April 2018 filed at the lower court makes reference to plot number Kajiado Light Industrial Plot No. 9923/E Kajiado Town allotted to the late Ipano Meeli Nkurrumah in 1982 but the Appellant put up his construction in 2016. On page 9 of the Record of Appeal, is an allotment letter with a stamp date 14th October 1982 to Ipano Nkurrumah. On page 22 though mostly illegible is a letter making reference to Unsurveyed Industrial Plot No. E Kajiado. H



21. The Respondent indicated that his plot is Plot No. A512 (formerly Plot No.8 Jua Kali Section Commercial). Having purchased it from Mohamed Noor Hassan and Abdisalam Haj Ahamed on 13th March 2014 and he consequently erected a fence which the Appellant brought down in 2016 and put up his structure against the Respondent's protest and during the pendency of the dispute which was filed at the National Land Commission. On 16th March 2018, the National Land Commission declared the Respondent the legal owner of the suit property.
22. As beseeched of this court, I have taken an in depth perusal of the Record of Appeal, the proceedings and evidence adduced by the parties at the trial court. It is trite law that in civil matters, the standard of proof is on a balance of probability which has been explained to mean which party has made a more probable case than the other. Similarly he who alleges must prove as stipulated in Section 107 of the *Evidence Act*. The Supreme Court in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment)* made the following pronouncement regarding this:
- “ 132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced..."
23. Looking at the evidence adduced at the lower court including witness testimonies, the Respondent's witnesses articulated the history of the suit property and all its owners up until the Respondent purchased it. They all acknowledged that they all became aware of the Appellant in 2016 when he brought down the Respondent's fence and put up his. This was after the Respondent purchased the plot and put up a fence. From the Appellant's claim and evidence adduced, this court is not convinced that he has established his case on a balance of probability. The Respondent on the other hand has shown the history of his title as was declared by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina [2013] eKLR*: “...We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”
24. In the judgement dated 13th July 2022 on page, Hon. Kahuya held:
- “... The main issue for determination is whether either party has discharged the burden of proof to warrant issuance of the prayers sought. According to the Plaintiff the suit property described as Kajiado Light Industrial Plot No. 9923/E Kajiado Town belongs to him as the administrator of the estate of Ipano Nkurrenah pursuant to the limited grant ad litem issued on 17th April 2018.
- Nonetheless, the documents relied upon describe the property differently with the acceptance letter by the deceased dated 3/10/1984 referring to it as 'unsurveyed Industrial Plot No. E Kajiado while the bundle of rates bills referred to it as 'Kajiado 9923/E'. Similarly, the letter of allotment dated 28/11/1984 in favour of the deceased referred to it as Light Industrial Plot E Kajiado while the latest document being the letter dated 6/7/2018 confirming full payment of rent and rates referred to it as Kaj/9923/E. It was evident that the plaintiff's land had not been validated otherwise the same would have reflected on the



letter of allotment. Furthermore, no search certificate was furnished to confirm the current ownership; neither was evidence from the land officials at Kajiado County Government called to verify the facts herein.

On his part, the Defendant describes the suit property as plot no. A512 (formerly Plot No.8 Jua Kali Section Commercial). This is the same description that features on all documents relied upon these being the area map from the physical planning dated 31/7/2018, agreement dated 13/3/2014, application for transfer of plot, confirmation letter dated 25/4/2018, letter of allotment dated 26/4/2018 together with the bundle of payment receipts for rates for the period 2010-2014...

Furthermore, ... both sides admitted the fact that the Plaintiff took possession of the suit property in June 2016, this being two years after the Defendant brought the said property...

It is therefore my finding that the defendant has provided overwhelming evidence that established the suit property is Plot A512 (formerly Plot No.8 Jua Kali Section Commercial) and not as described by the Plaintiff in his pleadings.”

25. I have gone through the record of the trial court as well as the Judgment. I am satisfied that the learned trial magistrate analysed the evidence adduced by the Appellant as well as that of the Respondent and his witnesses before arriving at the decision.

It was stated by Mwita J in Jackson Kiao Kivuva Vs. Penina Wanjiru Muchene (2019) eKLR that;

“There is no formula or specific mode of analyzing or evaluating evidence as long as the court has taken time to look at the evidence adduced before it and considered before making a determination based on such evidence.”

26. This court fully associates with the Learned Trial Magistrate’s determination and finds no reason whatsoever to waver from it.

27. However I note that the Learned Trial Magistrate observed thus;

“Turning to the Counter claim the substantive prayers therein refer to the defendant as the owner of the suit property. However as earlier stated, the contract dated 13th March 2014 was voidable due to the capacity issue but the vendor still had the opportunity to undo the errors by reapplying for the transfer of the plot in the defendant’s favour by following their Letter of Allotment dated 26th April 2018.”

28. Having observed thus, it is my view that the learned trial magistrate ought to have granted the Respondent the orders sought in the counter claim as the question of whether the plot was legally and procedurally transferred to the Respondent is a claim that should be brought by the party with locus standi to sustain the suit.

29. The Learned trial magistrate erred by granting orders to “the Interested Party” who was not a party to these proceedings. This is because the orders ought to flow from the pleadings and the evidence adduced.

I therefore set aside the orders granting demolition of the structures.

30. In essence the Appeal partly succeeds. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF DECEMBER 2023.



L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Kioge for Mrs Kayugira for the Appellant.

Mr. Kyule for the Respondent.

Court Assistant – Mutisya.

