



**Njuguna v Wamiti (Environment and Land Appeal 18 of 2022)
[2023] KEELC 22392 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 18 OF 2022
A NYUKURI, J
DECEMBER 13, 2023**

BETWEEN

DUNCAN NDEGWA NJUGUNA APPELLANT

AND

JOYCE GATHONI WAMITI RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Mavoko in ELC Case No. 51 of 2018 delivered on 19th May 2022 by Hon. Stephen Jalang'o, Principal Magistrate)

JUDGMENT

Introduction

1. The appellant, who was the defendant in the lower court, filed this appeal against the judgment of Honourable Stephen Jalang'o, Principal Magistrate delivered on 19th May 2022 in Mavoko ELC Case No. 51 of 2018. In the impugned judgment, the learned trial magistrate dismissed both the plaintiff's case and the defendant's counterclaim on the ground that none of the parties had discharged their burden of proof of ownership of parcel No. Mavoko Town Block 3/5355 (the suit property). He did not issue any orders as to costs.

Background

2. Joyce Gathoni Wamiti, the Plaintiff in Mavoko ELC No. 51 of 2018, filed suit vide plaint dated 12th November 2018 and amended on 12th November 2021, against Duncan Ndegwa Njuguna the defendant therein. She sought for a declaration that the plaintiff was the rightful owner of the suit property, namely Mavoko Town Block 3/5355; a permanent injunction against the Defendants either by themselves or their agents from interfering with the Plaintiff's use of the suit property; and an order directed to the Land Registrar to cancel the name of the defendant from the title deed of the suit property and in its place, the name of the plaintiff be inserted.



3. She alleged that on 16th April 2008, she purchased a portion of the parcel of land known as Mavoko Town Block 3/7081 at a consideration of Kshs. 140, 000/= from Daudi Nzioka Ndolo, (deceased), which sum she paid in full. She stated that upon purchase, the deceased showed her the purchased portion which was later excised from parcel Mavoko Town Block 3/7081 to create her parcel Mavoko Town Block 3/5355, where she put up buildings and started living. She averred that in January 2014, the defendant appeared on the suit property and demanded that she vacates as he was the registered owner of Mavoko Town Block 3/5355. She alleged that the defendant and the deceased had colluded to fraudulently, irregularly and illegally register the suit property in the defendant's name in blatant disregard of her rights over the suit property.
4. In a statement of defence dated 18th February 2021 and amended on 10th December 2021, the defendant averred that on 8th September 2007, he purchased 2 acres from a parcel of land known as Mavoko Town Block 3/4621 for Ksh.140,000/= and fenced the same immediately, and that on 4th February 2013, he obtained a title deed for a parcel of land known as Mavoko Town Block 3/5355. He also stated that in the year 2007-2008, the deceased's agent had requested him to purchase another half-acre from the mother title, which was adjacent to the defendant's land but that he declined. He also stated that this is the land that the plaintiff is likely to have bought and constructed a house thereon while the 2nd defendant was on transfer to Nakuru, and that he had asked her to vacate but that she refused. He also stated that the parties had attempted an out of court settlement. He stated further that resurvey, by county land surveyor indicated that the plaintiff had trespassed on the defendant's land parcel Mavoko Town Block 3/5355.
5. In his counterclaim, he prayed for an order of eviction of the plaintiff from the suit property; a permanent injunction restraining the plaintiff or any person claiming through her, her agents, employees; and personal representatives from trespassing onto the suit property and an order that the land registrar Machakos does remove the restriction on the suit property.
6. The matter proceeded for a full hearing. Consequently, upon considering the pleadings and evidence, the trial court found that both parties had failed to satisfactorily discharge the burden of proof of ownership over the suit property since they had all gotten into sale agreements for purchase of different parcel numbers and not parcel Mavoko Town Block 3/5355 which is the suit property.
7. Aggrieved with the findings of the trial court, the appellant filed a Memorandum of appeal dated 10th day of May 2022 against the judgment on the following grounds;
 1. That the learned Magistrate erred in fact and law by arriving at a conclusion that the appellant had failed to prove ownership of the suit land despite acknowledging and having found that the appellant is the registered owner of property known as Mavoko Town Block 3/5355.
 2. That the learned Magistrate erred in fact and law by failing to appreciate the provisions of section 26 of the *Land Registration Act* that title was prima facie proof of ownership hence arriving at a wrong conclusion in the circumstances.
 3. That the learned Magistrate erred in fact and law by failing to appreciate that the respondent did not file any defence to the appellant's counterclaim and therefore the same remained undefended and uncontroverted.
 4. That the learned Magistrate erred in fact and law by disregarding the appellant's evidence and failing to appreciate that the respondent had encroached on part of the plaintiff's land.
 5. That the learned Magistrate erred in fact and law by failing to appreciate that no ground has been adduced to defeat or challenge the appellant's title.



6. That the learned Magistrate misdirected himself by failing to determine with finality the dispute pitting the appellant and the respondent.
7. That the learned Magistrate erred in fact and law by relying on conjuncture, supposition and on extraneous matters.
8. Consequently, the Appellant sought that the judgment by the lower court be set aside and the counterclaim allowed as prayed.
9. On the other hand, the Respondent filed a cross appeal dated 13th June 2022 based on the following grounds;
 - a. The learned trial magistrate erred in law and fact when he failed to observe that the evidence of the plaintiff in the lower court matter was that she was in actual occupation of land parcel no. Mavoko Town Block 3/7081 currently covered by title no. Mavoko Town Block 3/5355
 - b. The learned trial magistrate erred in law and fact in that he failed to find that the plaintiff at the lower court had indeed proved the nexus between a portion of land no. Mavoko Town Block 3/7081 which she bought in the year 2008 now covered by title deed no. Mavoko Town Block 3/5355.
 - c. The learned trial magistrate erred in law and fact when he failed to take note that the plaintiff had produced a map of the area which showed the area covered by title deed no. Mavoko Town Block 3/5355 which she confirmed that it is the land she is currently occupying.
 - d. The learned trial magistrate further erred in law and fact when he argued that the plaintiff had purchased land parcel no. Mavoko Town Block 3/7081 and that it was not clear whether it was the same plot as Mavoko Town Block 3/5355 contrary to clear evidence that the plaintiff had bought a portion of land parcel no. Mavoko Town Block 3/7081 which was subsequently subdivided and title deed no. Mavoko Town Block 3/5355 issued.
 - e. The learned trial magistrate erred in law and fact in that he failed to make a finding that the plaintiff at the lower court had indeed proved that she had occupied land parcel no. Mavoko Town Block 3/7081 from the year 2008 and that title deed no. Mavoko Town Block 3/5355 had been issued irregularly and illegally in the year 2013 without taking into account the plaintiff's fact of occupation and proprietary rights.
 - f. The learned magistrate erred in law and fact when he disregarded the evidence on record by arguing that there was no evidence on the existence of plot no. Mavoko Town Block 3/7081 whereas the plaintiff in lower court matter had produced a certificate of search on land parcel no. Mavoko Town Block 3/7081.
 - g. The learned magistrate erred in law and act when he argued that he could not determine who was the actual owner of plot no. Mavoko Town Block 3/5355.
 - h. The learned trial magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the plaintiff in the lower court matter had proved her case against the respondent on a balance of possibilities and thereby arrived on wrong findings on the issues before the court.



10. Subsequently she sought for orders that the appeal be allowed and the lower court's judgment be set aside; and that the court be pleased to reassess and re-evaluate the entire evidence on record and arrive at its own independent conclusion and enter judgment for the plaintiff in terms of the amended plaint dated 12/11/2021.
11. The court ordered that the appeal be canvassed by way of written submissions on record and the appellants submissions dated 28th March 2023 and the Respondents submissions filed on 9th February 2023.

Appellant's Submissions

12. Counsel for the appellant submitted that the appellant had established ownership of MAVOKO TOWN BLOCK 3/5355, by producing a copy of the title deed of the suit property registered in his name. To support this claim, he relied on provisions of sections 25 and 26 of the [Land Registration Act](#) which deems a certificate of title a prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner. It was their contention that the title was issued in 2013 when the said vendor, the late Nzioki was still alive and that the same was not challenged by anyone. He also contended that he had produced a survey report by the county surveyor dated 18th September 2019 wherein it was indicated that the respondent had encroached on the appellant's land. In support of this argument, they cited the cases of, Margaret Njeri Wachira vs Eliud Waweru Njenga (2018)eKLR and Gichinga Kibutha Vs Caoline Nduku (2018)Eklr.
13. On whether the respondent had proved the allegations of fraud against the appellant, counsel argued that the respondent did not report the matter to the police for further investigations and that the threshold for proving fraud was higher than ordinary civil cases, counsel relied on the cases of Ndolo v Ndolo [2008] 1 KLR (G &F) 742 and Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] amongst others.
14. On the prayer for permanent injunction, counsel contended that the appellant had proved a prima facie case since he had proved his ownership over the suit property whereas the respondent's claim of fraud was not proved.
15. On the cross appeal, he relied on the case of George Kinada v Judith Katumbi Kathenge [2018] eKLR where the court was of the view that each party ought to file their own appeal and seek for consolidation of the same. Counsel submitted that costs were at the discretion of the court.

Respondent's Submissions

16. Counsel for the respondent submitted that the respondent could file a cross appeal in the high court as provide under Order 42 Rule 32 of the Civil Procedure Rules, and that the same was filed on time, within the time stipulated for filing appeals from the subordinate court. Counsel also agreed that the cross appeal should be allowed by this court.

Analysis and Determination

17. Having considered the appeal, parties' rival submissions and the entire trial record, the following issues arise for determination, namely;
 - a. Whether the respondent is allowed in law to file a cross appeal
 - b. Who between the appellant and the respondent proved ownership of parcel Mavoko Town Block 3/5355



- c. Whether the trial court was justified in arriving at the judgment.
- d. Who should bear the costs of the appeal.
18. The duty of this court as a first appellate court is to re-evaluate, reconsider and re-analyse the evidence before the trial court and make its own independent conclusions bearing in mind that it had no opportunity to see or hear witnesses and give due allowance for that. (See *Selle v Associated Motor Boat Company Limited & Others* (1968) EA 123).
19. In the case of *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212 the Court of Appeal held 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
20. On whether the cross appeal is properly before this court, Order 42 Rule 32 of the Civil Procedure Rules recognizes that cross appeals may be filed before this court and provides as follows:
- The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal. [Emphasis added]
21. Therefore, the Civil Procedure Rules provide for filing of a cross appeals by the respondents in appeals before this court. It is the procedure for filing such cross appeal that is not provided for in law, and that alone cannot be reason to defeat the filing of a cross appeal.
22. In the case of *Bulsho Trading Company Ltd v Rosemary Lokholo Mutakha & Another* [2020]e KLR, the court held that Order 42 Rule 32 of the Civil Procedure Rules clearly provides for cross-appeal but the procedure to be followed is not provided for. I am in agreement with this decision and I disagree with the position taken by the court in *George Kianda v Judith Katumbi Kathenge & Another*, (supra) requiring a respondent to file a separate appeal for subsequent consolidation with the appeal as that would be cumbersome and untidy. In the premises, I hold and find that the cross appeal filed by the respondent herein is properly before this court.
23. In regard to who between the appellant and the respondent proved ownership of the suit property, Section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff. In this case, as both the appellant and respondent claimed ownership of parcel Mavoko Town Bloch 3/5355, they each had the burden of proving ownership. Therefore, the issue that ought to be addressed by court is whether the evidence presented before the trial court proved ownership of parcel Mavoko Town Block 3/5355 by any of the parties.
24. To demonstrate his ownership over the suit property, the appellant relied on the sale agreement dated 8th September 2007, a copy of the title in his name; a search certificate thereof and a report dated 18th September 2019 from the county surveyor. The appellant stated that he purchased a portion of two acres of the parcel known as Mavoko Town Block 3/4621 and that in 2013, he got title for parcel Mavoko Town Block 3/5355. On the other hand, the respondent stated that she purchased two acres



from title known as Mavoko Town Block 3/7081 but that when the two acres were excised therefrom title Mavoko Town Block 3/5355 was created where she constructed her buildings. In the face of this evidence, the trial court found that there was no evidence of existence of parcels Mavoko Town Block 3/7081 and Mavoko Town Block 3/4621 and that none of the two parties proved that they purchased parcel Mavoko Town Block 3/5355. Therefore, the trial court dismissed both the amended plaint and counterclaim.

25. I have reassessed the evidence presented by both parties. Clearly, the appellant presented a sale agreement in regard to parcel Mavoko Town Block 3/4621, a title deed in his name for parcel Mavoko Town Block 3/5355 and a county surveyor's boundary report for boundary identification for parcel Mavoko Town Block 3/5355. The map sheet attached to the surveyor's report has parcel No. 4956 on its own; then parcel Nos. 5353, 5354, and 5355 sequentially situated; parcel Nos. 7073, 7074, 7075, 7076, 7077, 7078, 7079, and 7080 also sequentially situated; and parcel Nos. 4622 and 4623 sequentially situated. Clearly, apart from parcel No. 4956, the plots shown in the surveyor's map are in the series of 53xx, 70xx and 46xx; and each series is independent and there is no evidence that one series was created as a result of subdivision of another series. Having considered the evidence presented on both sides, there is no evidence to show that parcel Mavoko Town Block 3/5355 was created pursuant to a subdivision of Mavoko Town Block 3/4621 or Mavoko Town Block 3/7081. In any event, it is not possible that a title no. 7081 being the mother title, upon subdivision can create a number lower than itself, like title No. 5355. In addition, the map produced by the surveyor does not show the existence or position of parcel numbers Mavoko Town Block 3/4621 and Mavoko Town Block 3/7081. None of the parties produced a map of those titles. For those reasons and for reasons that the parties herein having failed to demonstrate the nexus between their primary documents of acquisition of the property in dispute, which are the sale agreements, with the title for parcel No. Mavoko Town Block 3/5355, it is my view that both the appellant and the respondent herein failed to show ownership of parcel Mavoko Town Block 3/5355.
26. Although the appellant relied on section 26 of the *Land Registration Act* to argue that being the registered owner of the suit property, he was entitled to the prayers sought in the counterclaim, my view is that in Article 40 (6) of *the Constitution* of Kenya 2010, the protection of the right to property is restricted to property whose acquisition is lawful and can be explained. Where a person has title to property whose origin and acquisition they cannot explain, they cannot get legal protection thereto. Under section 26 of the *Land Registration Act*, a certificate of title is evidence of indefeasible and absolute ownership unless the title is acquired fraudulently, illegally, unprocedurally and through corrupt scheme. In this case, although the appellant has title to the suit property, he was unable to link the sale agreement with the title as the two documents refer to two different titles, which have not been shown to be related in any way.
27. For the above reasons I find and hold that the trial court was justified and did not err, in concluding that the parties herein failed to prove their respective claims. In the premises, I find no merit in both the appeal and the cross- appeal and I hereby dismiss the same with no order as to costs.
28. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Munyaka for Respondent

Mr. Munguti for Appellant

