



REPUBLIC OF KENYA



KENYA LAW
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**Maugambi v Kirera (Environment and Land Appeal E003 of 2021)
[2023] KEELC 21967 (KLR) (4 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 21967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E003 OF 2021
PM NJOROGE, J
DECEMBER 4, 2023**

BETWEEN

GLADYS KALAYU MAUGAMBI APPELLANT

AND

GEDION KABIKI KIRERA RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate at Isiolo (Hon. Samuel M Mungai Chief Magistrate) made and delivered on 23/11/2021 in Isiolo ELC Case No. 12 of 2017)

JUDGMENT

1. The Memorandum of Appeal in this suit states as follows;
 1. That the Learned Magistrate erred in law and in fact by rendering a decision that was not backed by any evidence.
 2. That the Learned Magistrate misdirected by granting damages to the Respondent in a non-existent parcel of land.
 3. That the Learned Magistrate misdirected himself by introducing extraneous prayers in the counter claim.
 4. That the Learned Magistrate failed and thus misdirected himself by granting to the Respondent prayers prayed for by the appellant in the face of overwhelming evidence.
 5. That the Learned Magistrate misdirected himself by granting the Respondent a parcel of land that does not exist on the ground and even in government records thus interfering with the Applicant's proprietary interest.



6. That the trial Magistrate failed to pronounce itself on the Appellant proprietary rights in the face of overwhelming documentary evidence, the effect of which has been to grant the Respondent title to property not backed by any documentation.
7. That the Judgment of the learned trial Magistrate is against in law and weight of evidence on record.
8. That the Learned Magistrate misdirected himself by rendering a judgment that is full of contradictions and incapable of enforcement.
9. That the Learned Magistrate misdirected himself by sitting in Appeal of ISIOLO ELC No. 47 of 2017 which is pending before another court and not yet finalized.
10. That the Learned Magistrate misdirected himself in law and fact by relying on unauthenticated photographs to proof owner ship of the suit land.

Dated At Isiolo This 1st Day Of December 2021

Nyamokeri Ombachi & Co.

Advocates For The Appellant

2. The appeal was canvassed by way of written submissions.
3. This being a first appeal, I am under Judicial Obligation to consider the totality of the evidence proffered in the lower court, to analyze it and to arrive at my own conclusion. I have carefully gone through the proceedings in the lower court including the judgment of the trial court.
4. A conspectus of the Appellant's case is that she was allocated an unsurveyed business cum residential Plot No.19 within Isiolo Municipality by the Commissioner of Lands. She says that despite producing overwhelming documentary evidence to prove ownership of the plot, the trial court ignored her evidence and decided in favour of the respondent. She further says that the respondent did not provide cogent and probative evidence to prove this case. Indeed she unequivocally states that the respondent did not prove ownership of any land and produced irrelevant documents such as OB numbers and advocates demand letters. She suggests that the decision reached by the trial court is rather absurd. She says that for damages in the nature of those awarded to the respondent by the trial court, a litigant must proof ownership and unequivocally states that pleadings, by themselves only, cannot be a substitute to ownership of land. Through these submissions she wants the court to allow the Appeal, set aside the trial court's Judgment and allow her case in the trial court.
5. The respondent gives a brief background to the suit. He says that the appellant filed a claim for trespass in the lower court and claimed ownership of Plot No. 19 which later became Plot No. Isiolo Municipality Block 6/89. She claimed damages for trespass and destruction of building materials. He says that he filed a defence and a counterclaim. He pleaded that he is the owner of Plot No.18, Isiolo had fenced it and had built a guard house which the appellant trespassed upon and destroyed. In his counterclaim he sought damages for the appellants' invasion of his land and for destruction of his property.

He says that at paragraph 4 of her amended plaint, the appellant had admitted that he (the respondent) was a neighbor and possibly the owner of a parcel of land bordering her plot.

The respondent says that the appellant was the owner of Plot No. 18 and he was the owner of Plot No. 19. He says that this fact was corroborated by the appellant's pleadings. He says that Isiolo ELC No. 47 of 2017, which is the subject of prayer No. 9 in the Memorandum of Appeal, involved the appellant



and one justice Kirimi over alleged trespass on her land and illegal conversion of her building materials. He says that this concerns the appellants Plot No.19 over which he has no claim or any interest. He further states that the development plan produced as part of her documents clearly shows both plots No. 18 and 19 existed. He proffered the case of Elizabeth O. Odhiambo Versus South Nyanza Sugar Co. Ltd [2019] eKLR for his assertion that parties are bound by their pleadings. He further says that the court of Appeal in the Case of David Sirona Ole Tukai Versus Francis Arap Muge & 2 Others, Civil Appeal No. 76 of 2014 [2014]eKLR confirmed and reaffirmed this assertion. He therefore says that ground 1 in the appeal that the trial magistrate erred in law and in fact by rendering a decision that was not backed by any evidence should be dismissed.

6. Concerning grounds 2, 5, 6 and 10, the respondent says that they raise the existence of Parcel No. 18 on the ground. He says that upon consideration of the evidence before it, the trial court found that both plots No. 18 and 19 existed and belonged to different people, respectively the respondent and the plaintiff. The respondents asks the court to dismiss these grounds.
7. The Respondent consolidates grounds 3 and 4 and says that they relate to the reliefs sought. He says that in his counterclaim he had set out his claim as being for
 - a. A duly constructed stone perimeter fence.
 - b. Posts and barbed fence.
 - c. A duly constructed guard house.
 - d. Electrical fillings.

The Respondent says that the appellants dug a trench into his land and as a result committed trespass. He says that he had prayed for costs of constructing the destroyed wall, replacing the posts, barbed wire, electrical fillings and rebuilding the guard house. He also prayed for special and general damages.

The respondent submits that the trial court correctly awarded damages for trespass amounting to a total of Kshs. 700,000/=.

8. Regarding grounds 7, 8 and 9, the respondent says that the main issue was existence of Plot Nos. 18 and 19. He says that the trial court found that both Plots existed.

Therefore, the claim that the trial courts Judgment was full of contradictions and was incapable of enforcement was untrue and tendentious. Regarding reference to Isiolo ELC No. 47 of 2017, the respondent says that this case was referred to, to prove that the appellant's plot was number 19 and not number 18. The respondent asks the court to dismiss the 2 grounds.
9. The respondent concludes that the trial court had rightly found that the appellant had not proved her case in the lower court on a balance of probability and the trial magistrate was not sitting in Appeal of Isiolo ELC No. 47 which is pending before another court and had not been finalized. He asked the court to dismiss grounds 7, 8 and 9.
10. As I said earlier on. As a first appellate court, this court is duty bound to consider the totality of the evidence proffered in the trial court, to analyze it and to arrive at its own independent decision. I do find that both plots No. 18 and 19 Isiolo Municipality existed. The claim by the Petitioner that the trial magistrate had granted the respondent a non-existent parcel of land is not true. I also find that the trial magistrate rightly found both the appellants and the respondent each owned a separate and distinct plot and therefore eruditely pronounced himself regarding the parties' respective proprietary rights. I do not find that the trial magistrate had introduced extraneous prayers in the counterclaim



or in any other way. I do find that the trial magistrate could only grant deserved orders and could not grant undeserved orders to the appellant.

I find that on a balance of probability, the trial magistrate rendered a judgment that considered the evidence before him, properly analyzed it and properly came to his findings. The upshot of what this court is saying is that all grounds in the Memorandum of Appeal deserve to be dismissed.

11. In the circumstances, I issue the following orders:

- a. This appeal is dismissed.
- b. Costs shall follow the event and are awarded to the respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 4TH DAY OF DECEMBER, 2023 IN THE PRESENCE OF:

Court assistant: Balozi/Rahma

Kimani Mwangi holding brief for Nyamokeri for the Applicant

Respondent and Advocate – Absent

HON. JUSTICE P.M NJOROGE

JUDGE

