



Outerspace Hotels Limited v Kariuki & 3 others (Environment and Land Appeal E004 of 2024) [2025] KEELC 3478 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E004 OF 2024**

MN GICHERU, J

APRIL 29, 2025

BETWEEN

OUTERSPACE HOTELS LIMITED APPELLANT

AND

DICKSON KARUME KARIUKI 1ST RESPONDENT

NGATA MUNYINYI DENIS 2ND RESPONDENT

GASTON MAINA NGONDI 3RD RESPONDENT

LAND REGISTRAR, KIRINYAGA 4TH RESPONDENT

(Appeal from the judgment of the learned Chief Magistrate Murang'a in CMCC 282 of 2014)

JUDGMENT

1. This appeal arises from the judgment of the learned Chief Magistrate Murang'a in CMCC 282 of 2014. In the judgment dated 14-12-2023, the court dismissed the Appellant's suit against the Respondents with costs.
2. In the lower court case, the Appellant who was the Plaintiff had sought the following orders.
 - a. The Defendants, their servants and/or agents do quit and vacate the Plaintiff's plot No. A68 Sagana Township and demolish any structures therein.
 - b. A permanent injunction restraining the Defendants, their servants and/or agents from entering, utilizing or in any other manner whatsoever interfering with the Plaintiff's suit land.
 - c. An order directing the 4th Defendant to cancel the registration of the parcel of land known as Kiine/Sagana/388/303 and consequently conduct a resurvey of the suit parcel.
 - d. An order of rectification of the register to reflect the Plaintiff's proprietary rights.



- e. Mesne profits/loss of user from January 2014.
 - f. Costs of the suit.
3. The facts of the case, according to the Plaintiff, are as follows. The Plaintiff is the owner of plot No. A68, suit land. It was sold to the Plaintiff by Lisper Muthoni Maina who bought it from Jason Njambiri who was allocated the plot by the County Council of Kirinyaga. Two, after the Plaintiff bought the plot from Lisper Muthoni in December 2000, the transaction was approved by he then Sagana Town Council vide minute No. 733/2000. Three, the Plaintiff prepared building plans for the construction of rental houses on the land. Four, the said plans were approved by the District Physical Planning Officer Kirinyaga, Kenya Rural Roads Authority and the District Public Health Officer. All the approvals were in the month of May 2011. Five, before the Appellant could start the project, the 1st Respondent fenced off the suit land. Six, earlier on 30/3/1999 and again on 31/7/2000, the 1st Respondent had written to the Clerk, Sagana Town Council complaining that the owner of the neighbouring plot had encroached on the 1st Respondent's plot No. Kiini/Sagana/388/303(size 138x100x157x138) by putting sewage thereon. Seven, Sagana Town Council had dealt with the dispute reported by the 1st Respondent and resolved that his plot measures 41 feet on the front side. This was further confirmed by a letter dated 18-10-2000 written to the 1st Respondent and Lisper Muthoni Maina. Lisper had not yet sold the suit plot to the Appellant. The letter of 18-10-2000 gives the frontage sizes of the plots as follows.

Plot No. Frontage Length

Plot No A 165 - 50 feet

Plot No A 68 - 50 feet

Plot No A 105 - 41 feet.

Eight, the 1st Respondent, dissatisfied with the decision of Sagana Town Council filed case No. 337 of 2004 at Kerugoya Magistrate's Court. His suit was dismissed because he was unable to prove that the size of his plot was more than 41 feet at the frontage. Nine, the 1st Respondent's plot No. 388/303 which borders the Plaintiff's has fully encroached on the Plaintiff's land such that the Plaintiff has no land on the ground. Finally, the Plaintiff filed the lower court suit so that the boundary between his land and that of the 1st Respondent could be determined.

4. The facts of the case, according to the Respondents are as follows. The 3rd Respondent purchased L.R. No. Kiine/Sagana/388/303 from the 1st Respondent in the year 2011. Before the purchase, the 1st Respondent showed him a certificate of lease which shows that it measures 0.1 Hectare. He was taken round the plot and he later obtained a copy of a map from the Director of Survey confirming the existence of the plot. He then developed the plot by constructing a storeyed building which is now complete.
5. In the judgment dated 14-12-23, the learned trial magistrate identified the following issues for determination at page 14 of the judgment.
- i. Whether the Defendants, without just cause unlawfully and fraudulently laid a claim over the suit property.



- ii. Whether the lower court could make an order of the cancellation and rectification of the registration in favour of the 2nd and 3rd Defendants in respect of parcel No. Kiine/Sagana/388/303 and then order a resurvey.
- iii. Whether the Plaintiff was entitled to the orders of injunction.
- iv. Whether the Plaintiff was entitled to mesne profit and costs.

The learned magistrate found against the Appellant on all the four issues and dismissed its case with costs to the Respondents.

6. Dissatisfied with the judgment the appellant filed a memorandum of appeal dated 14-1-2024 seeking the following reliefs.
 1. The appeal be allowed.
 2. This Court do declare that the trial process of the Appellant's case amounted to a mistrial and consequently, remand the matter back to the Chief Magistrate at Murang'a and the same be place before any magistrate other than Hon. P N Maina for hearing on a priority basis.
 3. In the alternative to (2) above this court evaluates the pleadings and evidence and do set aside the judgment of the lower court and the same be substituted with a judgment allowing all the Appellant's suit as prayed in the Appellant's amended plaint dated 24-4-23.
 4. Costs of this appeal be borne by the Respondents.
 5. Such other or further relief as this court may deem appropriate to grant.
7. The memorandum of appeal has fifteen grounds. They are as follows.

The learned trial magistrate erred in fact and in law by-

- i. failing to accord the Appellant an opportunity to present its case and have a fair hearing in accordance with Article 50 of the Constitution,
- ii. denying the Appellant an opportunity to cross-examine the 1st Defendant,
- iii. declining to conduct a site visit request by the Appellant citing fear of violence and technicalities that would not assist the court, considering the nature of the case and subsequently in making a finding that plot No. A68 does not exist on the ground,
- iv. failing to fully appreciate and consider PW 2's testimony that she knew the location and size of her erstwhile plot A 68 and could identify the suit property as shown to her upon allocation,
- v. declining the Appellant's unopposed request to issue summons to the Kirinyaga County Surveyor,
- vi. failing to distinguish plot A 68 from Plot A105 which is now Kiine/Sagana/388/303 in 1991,
- vii. failing to appreciate that records of the allocation of plot A68 date back to 1988/1989 which is well before the alleged registration of Kiine/Sagana/388/303 in 1991,
- viii. combining/conflating separate and distinct issues of whether plot A68 exists, its dimensions, location on the ground, existence of plot A105 which is now Kiine/Sagana/388/303, its dimensions and location on the ground, whether plot A 105 which is now Kiine/Sagana/388/303 encroaches on plot No. A68 and if so, whether such encroachment was fraudulent and based on each and separate distinct finding, the commensurate relief thereto,



- ix. finding that the Plaintiff had “nothing to show” in total disregard and suppression of 32 exhibits tendered and admitted in evidence,
 - x. finding that the Plaintiff did not find it prudent to get copies of the Part Development Plan (PDP) yet the said PDP is contained in the Plaintiff’s list of documents as evidence and extensively referred to in the Plaintiff’s written submission up to the precise page location of the said PDP,
 - xi. failing to appreciate documentary evidence of public records of allocation as well as the PDP copies,
 - xii. by failing to appearance the provisions of sections 44,45,81,82(e), 83 and 84 of the Evidence Act,
 - xiii. failing to appreciate the principles laid down by the Supreme Court of Kenya in the case of Dina Management Limited Vs. County Government of Mombasa and 5 Others, Petition 8(E010) of 2021,
 - xiv. effectively suppressing the evidence of the Appellant contrary to fair trial principles in civil cases that include the right to adduce and challenge evidence, the right to equality of arms, production of expert material and a purposeful meaning to the right to a fair hearing,
 - xv. failing to consider the totality of the uncontroverted evidence of the Appellant being, inter alia, PDP, letters and minutes from the erstwhile Sagana Town Council confirming allotment and plot size, approval of transfer from previous allottees, the transfer itself, building approvals, multiple rates payment receipts evidencing payment of rates to the County Government of Kirinyaga upto an including the year 2023 and the certified proceedings and judgment in civil case no. 337 of 2004, at Kerugoya Magistrate’s Court.
8. Even though the Respondents were served with the memorandum of appeal, the record of appeal and the supplementary record of appeal, they did not respond, attend Court or even file any submissions.
9. The Appellant’s counsel filed written submissions dated 25-10-2024 and identified four (4) issues for determination as follows.
- a. Whether the Appellant was accorded a fair hearing. (Grounds 1,2,3,5 and 14).
 - b. Whether sections 44,45,81, 82(e) , 83 and 84 of the Evidence Act were applied.
 - c. Whether the Principles in Dina Management Ltd. vs. County Government of Mombasa and 5 others were applied.
 - d. Whether the totality of the Appellant’s evidence was considered (Grounds 4,6,7,8,9,10,11 and 15 of the memorandum of appeal).
10. I have carefully considered the appeal in its entirety including the record, the supplementary record, the grounds of appeal , the written submissions, the issues identified and the case law cited.

This being a first appeal, this court, by virtue of the decision in *Selle vs. Associated Motor Boat Company* (1968) EA, must reconsider the evidence in the lower court, evaluate it itself and draw its own conclusions though it should always being in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. I will look at each of the fifteen grounds individually and make a finding on each one of them.



11. On the first ground, I do not agree that the Appellant was not accorded ample opportunity to present its case. All the applications for adjournment were allowed. I combine this ground with the second one and find that the 1st Respondent could not be cross-examined because he did not record any evidence. Under section 145(2) of the Evidence Act, only a witness who has given evidence on oath can be cross-examined. I have looked at the record and I have not seen any request by the Appellant's counsel that there be a site visit. What was requested for on 8/9/2022 was a resurvey. This was objected to by the counsel for the 2nd and 3rd Respondents. The trial magistrate did not rule on this issue because the Appellant's counsel was also applying for an adjournment which was allowed. Counsel for the Appellant was given time to decide how to proceed. When the case proceeded on 23/8/2023, the Appellant's counsel called two witnesses and closed the Plaintiff's case. There is nothing at all on record to prove that an application for a site visit was made.

This finding applies to ground number five(5). No request is shown on record to have been made to summon the Kirinyaga County Surveyor.

12. Looking at grounds 4,6,7 and 8, I find that the trial magistrate failed to address the issue of the sizes of the plots in dispute. All the pleadings and the evidence were emphatic that the 1st Respondent owned a plot whose frontage was only 41 feet while the Plaintiff owned an adjacent plot with a frontage of 50 feet and when the 1st Respondent was fencing his plot, he fenced the whole plot belonging to the Appellant. That was an issue that should have been determined at the trial. How big was plot No. Kiine/Sagana/388/303? Did it envelope plot No. A68 belonging to the Appellant? What happened to the Appellant's plot such that it ceased to exist? After the decision in Kerugoya Magistrate's Court Case No. 337/2004 which found the 1st Defendant's plot to be no bigger than 41 feet at the frontage, how did it come to grow bigger in size to include the whole of the Appellant's plot? The issue of the current size of plot No. 388/303 was at the heart of the dispute. Without determining the size of the plots, the dispute was not resolved.
13. Since the 2nd and 3rd Respondent's acquired their land parcel from the 1st Defendant, the 1st Defendant was the key witness as to how his land grew in size to assimilate the Appellant's land to such an extent that it ceased to exist. His failure to testify on this crucial aspect of the dispute dealt a mortal blow to the Defendants' ownership of the bloated land. It is no wonder that the counsel for the 2nd and 3rd Defendants was opposed to the proposed resurvey on 8/9/2022 when he stated as follows.

“We are not comfortable with a resurvey. This is already surveyed area with specific boundaries.”

If the Defendants have nothing to hide, why would they oppose a resurvey? The fact that they were not comfortable with a resurvey shows that they have something to hide.

14. I am in agreement with the Appellant's Counsel submission that it was not enough for the 2nd and 3rd Defendants to merely say that they have a lease for L.R. No. Kiine/Sagana/388/303. They had a duty to prove that all the land that they occupy was lawfully acquired by the 1st Respondent. The case of Dina Management vs. The County Government of Mombasa and 5 Others is authority for the proposition that the protection of the right to own land does not extend to unlawfully acquired land. This is as per Article 40(6) of the Constitution of Kenya which provides as follows.

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”



At paragraph 111 of the judgment dated 21-4-2023 the Supreme court had this to say in the case of Dina Management (supra).

“ Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the Appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the Appellant could not benefit from the doctrine of bona fide purchaser.”

Similarly, in this case, the 2nd and 3rd Respondents cannot take comfort in the fact that they have a lease without explaining how such a lease incorporates the Appellant’s land into the land that they bought from the 1st Respondent.

15. Given the above findings, the judgment of the learned trial magistrate dated 14-12-2023 cannot be allowed to stand. That notwithstanding, most of the orders sought by the Appellant cannot be allowed before establishing if there is indeed any encroachment and the extend of such encroachment. The only prayers that can reasonably be granted are part of prayer (c) pertaining to resurvey of parcels numbers A68 Sagana Townships and Kiine/Sagana/388/303 and the prayer for costs.
16. In arriving at this decision, I have borne in mind the provision of Section 18(2) of the Land Registration Act which ousts the jurisdiction of the court in determination of boundaries of registered land. I have also considered regulation 40 of the Land Registration (General) Regulations under legal notice 278 of 2017 which deals with applications for re-establishing a missing boundary or ascertainment of a boundary in dispute. In particulars, regulation 40(6) of the said regulations provides as follows.

“ Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of the notification, appeal the decision to the Court”. This therefore means that after the boundary has been established, the chips will fall where they may and the parties will know what action to take depending on the outcome of the exercise.

17. In conclusion, I make the following orders.
 - a. The judgment in CMCC Murang’a 282 of 2014 dated 14-12-2023 and all consequential orders are hereby set aside.
 - b. There be a resurvey of plot numbers A68 Sagana Township and Kiine/Sagana 388/303 with a view to establishing their dimensions and ownership. The said resurvey to be carried out by the County Land Registrar Kirinyaga.
 - c. Costs of this appeal and those of the lower court to be borne by the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 29TH DAY OF APRIL , 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -



Court Assistant – Mwangi Njonjo
Appellant’s Counsel – Mr. Ndungo
Respondent’s Counsel - Absent

