Njuki alias Judy Waithera Njuki v Mwangi & another (Environment and Land Appeal E022 of 2023) [2025] KEELC 3245 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3245 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E022 OF 2023

JM ONYANGO, J

APRIL 7, 2025

BETWEEN

JUDY WAITHIRA NJUKI ALIAS JUDY WAITHERA NJUKI ..... APPELLANT

AND

DUNCAN GICHOHI MWANGI ..... 1ST RESPONDENT

PAUL NGANGA MWAURA ..... 2ND RESPONDENT

(Being an appeal against the judgment and decree issued on 19th July 2023 by the Chief Magistrate's Court at Thika (Hon. M.W Kurumbu P. M) in MCL&E Case No. 21 of 2020 delivered on 19th July 2023)

JUDGMENT

1. This appeal arises from the Judgment of Hon. M.W Kurumbu Principal Magistrate, delivered on 19th July 2023 in Thika Chief Magistrate's Court E& L Case No. 21 of 2023. In the said case the Appellant who was the Plaintiff filed suit against the Respondents claiming that she was the registered proprietor of Land Reference number 4953/2746 (hereinafter referred to as the suit property) to which the Respondent was also laying claim. She prayed for a permanent injunction to restrain the Respondent from interfering with her land.

2. In his Defence and Counterclaim the 2nd Defendant denied the Plaintiff's claim and stated he and the 1st Defendant were jointly registered as the owners of the suit property. He claimed that the plaintiff had trespassed on their land. He prayed for an eviction order against the Plaintiff.

3. After hearing the parties, the trial magistrate dismissed the Plaintiff's case and entered judgment for the 2nd defendant on his Counterclaim. During the hearing it emerged that the 1st Defendant had died, although it is not clear when he died.

4. Aggrieved by the said judgment the Appellant filed this appeal citing 12 grounds of appeal as follows:

i. That the learned Trial Magistrate erred in law by failing to determine whether she had jurisdiction to hear and determine the suit before her on account of its monetary value and the court's pecuniary jurisdiction contrary to section 7(1) (c) of the Magistrates Court Act 2015.

ii. That the learned Trial Magistrate erred in law in entertaining a matter in which she lacked pecuniary jurisdiction.

iii. That the Trial Magistrate erred in law and in fact when she failed to determine suo moto whether the subject matter of the suit was within her pecuniary jurisdiction and make a finding that the trial court was not clothed with the jurisdiction to hear and determine the suit.

iv. That the learned Trial Magistrate erred in law and fact when she failed to hold that it is necessary to determine the jurisdictional question which must be determined by a court of law at the very outset of a matter before proceedings to hear and finally determine the matter and as such she expanded the pecuniary jurisdiction of the Trial Court through judicial innovation and craft contrary to law.

v. That the Honourable Court erred by arrogating to itself jurisdiction or matters whose pecuniary jurisdiction is exclusively reserved for the Environment and Land court contrary to law.

vi. That the Honourable Court erred in law and in fact in holding that the Appellant had not proved her case when in fact the evidence adduced by the Appellant was sufficient and not contradicted by the 2nd Respondent.

vii. That the Honourable Court erred in law and in fact in holding that the 2nd Respondent had proved its case when in fact the evidence adduced by the 2nd Respondent was insufficient and of no probative value.

viii. That the learned Trial Court erred in law in holding that the Respondents had proved their case in the counterclaim when in fact no evidence was adduced to sufficiently demonstrate the manner they acquired the suit land (sic).

ix. That the learned Trial Magistrate erred in law and in fact when it allowed the Respondents' counterclaim when the Appellant demonstrated that she had been in occupation and use of the land for close to thirty two (32) years.

x. That the learned Trial Magistrate erred in law and in fact when she failed to take into account that the Appellant had since sub-divided the suit land and disposed it off to third parties who took possession of the land and built permanent structures thereon.

xi. That the learned Trial Magistrate erred in law and in fact in determining the suit without hearing from the affected persons who reside on and have brought the suit land.

xii. That the Honourable Trial Court erred in law in dismissing the suit and allowing the counterclaim without valid legal reasons known in law.

5. The appeal was canvassed by way of written submissions and both parties duly complied by filing their respective submissions and lists of authorities.

6. The Appellant's submissions are dated 6th November 2024 and they were filed by the firm of KWEW Advocates LLP. On the question of the court's jurisdiction, learned counsel for the Appellant submitted that jurisdiction is so fundamental that it can be raised at any time including on appeal. He

relied on the case of Kenya Ports Authority v Modern Holding (EA) Limited Mombasa Civil Appeal No. 108 of 2016 (2017) eKLR.

7. He submitted that Section 9 of the Magistrates Act No. 26 of the 2015 provides that the court shall hear and determine land and environment cases that are within its pecuniary jurisdiction. It was his submission that at the time of hearing, the trial magistrate was of the rank of Principal Magistrate whose jurisdiction was capped at Kshs. 10 million. He submitted that the Appellant conducted a valuation of the suit property on 11th September 2023 and it was established that the suit property valued at Kshs. 13 million as at 2020 and Kshs. 15 million as at the date of judgment.

8. He submitted that the court ought to have satisfied itself that it had the pecuniary jurisdiction to hear and determine the matter and in the instant case it lacked the jurisdiction to hear the case. He relied on the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others (2012) eKLR for the proposition that a court's jurisdiction flows from either *the Constitution* or legislation or both thus a court can only exercise jurisdiction conferred on it by law. He was of the view that the court acted ultra vires and urged this court to set aside the judgment.

9. Regarding the question of the weight of evidence counsel submitted the 2nd Respondent had not proved that his title had been lawfully obtained. He took issue with the date of the allotment letter in relation to the date of the Grant and submitted that although the Grant was stamped 25th October 1994 it was issued for a term of 99 years from 1.10.92 yet the letter of allotment was issued on 12th October 1992. He was of the view that the grant was backdated to perpetuate fraud against the Appellant.

10. It was his submission that the Appellant was challenging the 2nd Respondent's title on the ground that he did not acquire a good title. He submitted that Joyce Muhanda who was issued with the allotment letter did not meet the conditions in the said allotment letter and therefore the transfer of the said letter to the Respondent was of no legal effect. He relied on the case of Tarino Enterprises Limited v Hon. Attorney General Petition No. 5 (E006) of 2022 (unreported) where the Supreme Court held that an allotment letter is incapable of conferring an interest in land as it is nothing but an offer awaiting the fulfilment of the conditions therein.

11. Counsel submitted that Joyce Muhanda could not transfer title to the 2nd Respondent as she had not obtained one herself. It was therefore his contention that the Respondents did not prove his case to the required standard. He relied on the case of Kennedy Masinde v Anne Wanja T/A Kaniani Merchants (2020)eKLR where Kasango J cited Denning J's explanation of the burden of proof in Miller v Minister of Pensions (1747) 2 All ER 372 as follows:

> " The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not" then the burden is discharged, but if the probabilities are equal, it is not. Thus proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept. Where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose because the standard will not have been met."

12. On her part, learned counsel for the 2nd Respondent submitted that the question of jurisdiction is so fundamental that it must be determined at the earliest possible opportunity so that if the court finds that it has no jurisdiction, it must down its tools. It was her further submission that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. She relied on the

decision of the South African Constitutional Court In The Matter of Vuyile Jackson Gcaba v Minister for Safety & Security First & Others-CCT 64/08(2009) ZAAC 26 where the Court held as follows:

> "Jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. In the event of the court's jurisdiction being challenged at eh outset, (in limine), the Applicant's pleadings are the determining factor. They contain the legal basis the claim under which the Application has chosen to invoke the court's competence."

13. She submitted that it was surprising that the Appellant who set the wheels of justice in motion was the one challenging the jurisdiction of the court yet she had pleaded that the cause of action arose within the jurisdiction of this court. She wondered whether the Appellant would have challenged the court's pecuniary jurisdiction if the case had been decided in her favour.

14. She conceded that jurisdiction could be raised on appeal for the first time and that failure to raise it does not confer jurisdiction on a court that does not have it. It was her contention the parties in this case were only required to demonstrate that they had a title or a legal right to the suit property which had been infringed in order for the court to hear their case. She submitted that the court was not required to interrogate the value of the subject matter as the relief sought had nothing to do with the value of the suit property and the court could therefore not be blamed for assuming jurisdiction over this matter.

15. Counsel submitted that if the court was to be called upon to investigate the value of the subject matter, it would open a Pandora's box. It was her contention that based on the prayers sought in the Plaint and Counterclaim, the court had jurisdiction to hear and determine this matter.

16. On whether the Appellant had proved that she was in possession of the suit property, counsel submitted that there was no mention that the Appellant had been in continuous occupation of the suit property for more than 12 years to warrant a claim for adverse possession.

17. Regarding the allegation that the Appellant had sub-divided and sold the suit property to third parties who were not given a chance to be heard, counsel submitted that the Appellant had indicated that she was the one in possession of the suit property and she had not produced any sale agreement to demonstrate that she had sold the land. Furthermore, she had not called any of the alleged purchasers as witnesses nor had she joined them in the suit as interested parties.

Analysis and Determination

18. This being a first appeal, my primary role as a first appellate court is to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial magistrate are sound or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212."

19. Similarly, the principle was espoused in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, as follows:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

20. In essence, the role of this court is not to merely echo the conclusions of the lower court but to reexamine the evidence in its entirety, all the while being ever mindful of the inherent limitations imposed by the reliance on the record alone.

21. Having considered the Memorandum of Appeal, Grounds of Appeal and the entire Record of Appeal the following issues fall for determination:

    i. Whether the trial magistrate had jurisdiction to hear and determine this matter.

    ii. Whether the plaintiff proved her case to the required standard.

    iii. Whether the Defendant proved his Counterclaim.

    iv. Whether the appeal should be allowed.

22. With regard to question of jurisdiction, the Appellant has raised the ground that the trial magistrate did not have the pecuniary jurisdiction to hear and determine the suit as the value of the subject matter was Kshs. 13,000,000 whereas the pecuniary jurisdiction of a Principal magistrate is Kshs. 10,000,000. It is instructive to note that the issue of the value of the suit property did not arise in the trial court and I agree with learned counsel for the Respondent that the trial magistrate was not expected to investigate the value of the suit property as it was not one of the issues raised in the pleadings.

23. The Appellant bases her complaint on a valuation report dated 11th September 2023 which placed the value of the suit property at Kshs.13,000,000 in 2020. The Appellant filed an application seeking leave to adduce the said report as additional evidence on appeal but by its ruling dated 14th March 2024, the court dismissed the application. In the circumstances I am unable to fault the trial magistrate for having assumed jurisdiction in the matter.

24. I will now proceed to determine the second issue which is whether the trial magistrate erred in holding that the Plaintiff had failed to prove her case to the required standard.

25. The Plaintiff adopted her witness statement in which she stated that by an allotment letter dated 1.6.1991 she was allocated an unsurveyed residential plot No. "A" within Thika Municipality as per the survey plan attached to the said allotment letter. She subsequently paid the sum of Kshs. 135,370. The said plot was later given the number 4953/2746 after which it was converted to parcel number Thika Municipality Block 29/43 as per the cadastral map dated 28th January 2013.

26. The Plaintiff produced a copy of the letter of allotment letter dated 24.4.1991, a copy of her National Identity Card, an approved development plan, a copy of the cadastral survey plan and some photographs depicting the developments on the suit property.

27. She testified that she had been in possession of the suit property since she acquired it. It was her further testimony that sometime in 2020 the Defendant came to the suit property and started laying claim to it.

28. In cross examination she stated that she did not have a title deed. She said she had not paid the rates and land rent upto 2019 as she did not have money.

29. The Chief Land Registrar who testified as a neutral witness and produced the documents in their records stated that there were two files in respect of the suit property; File No. 145799 and File No.306596.

30. He raised suspicion with regard to file No. 306596 which contains the Appellant's documents stating that the letter of Allotment issued to the Appellant was suspicious as the signature on the letter which purportedly belongs to J.M.W Gikuri was not authentic.

31. Section 107 of the *Evidence Act*, CAP 80 Laws of Kenya states that:

> " 107. Burden of proof.
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

32. Additionally, Section 108 and 109 of that same Act provides that:

> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

33. The Appellants desired this court to make a finding that she was the lawful proprietor of the suit property. Based on the evidence on record and the fact that the Appellant did not have a title to the suit property, the trial magistrate held that she had failed to prove her case. I cannot fault the trial magistrate for arriving at this finding as the Appellant failed to discharge the burden of proof since her evidence that she was the lawful owner of the suit property fell short of the standard required.

34. I will now proceed to determine if the 2nd Respondent proved his Counterclaim. The burden of proof placed on the 2nd Respondent as far as his Counterclaim was concerned was equally weighty.

35. He explained that an allotment letter dated 12.10.92 was issued to Joyce Muhanda, who accepted the offer and made a payment of Kshs. 13200 vide a receipt dated 17.9.1993. Another payment of Kshs. 64,080 was made vide a receipt dated 7.9.1994 after which a deed plan was prepared. Joyce Muhanda then applied for consent to transfer the plot to the Respondents. The Commissioner of Lands approved the transfer after which a title was prepared in the names of the Respondents.

36. The Appellant pleaded in her Defence to the Counterclaim that the Respondents had acquired their title irregularly as there were no documents from the Survey of Kenya to support their claim. Indeed, no such documents were produced. A close scrutiny of the payments made by Joyce Muhanda also reveal the payments were made way outside the period of 30 days stipulated in the allotment letter.

37. The Appellant has also taken issue with the fact that Joyce Muhanda transferred the suit property to the Respondents before she obtained a title.

38. In the case of Torino Enterprises v Attorney General Petition No. 5 (E006) of 2022 (Unreported) the Supreme Court observed as follows:

> " So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer , awaiting fulfillment of conditions stipulated therein. In Dr. Joseph N.K Arap Ng'ok v Justice Moijo Ole Keiyua & 4 Others C.A 60 of 1997 (Unreported) and Gladys Wanjiru Ngacha v Teresa Chepsaat

& 4 Others HC CiviL Case No. 182 of 1992 (2008) eKLR , the superior courts restated the principle as follows:

"It has been held severally that a letter of allotment perse is nothing but an invitation to treat. It does not constitutes a contract between the offerer and the offeree and does not confer an interest in land at all... (Emphasis added).

The pronouncement in Gladys Wanjiru and Dr. Joseph N.K Arap Ng'ok (Supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & Another, Environment and Land Ce No.471 of 2010; (2022) eKLR; John Elias Kirimi v Maina Nderitu & 4 Others Environment and Land Case No. 320 of 2011 (2021) eKLRl; and Kadzoyo Chombo Mwro v Ahmed Muhammed Osman & 11 Others Environment and Land Case No. 42 of 2021 (2021) eKLR to mention but a few.

Suffice is to say that an allotee in whose name the allotment letter is issued must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to the payment of Stand Premium and Ground Rent within prescribed timelines. But even after perfection of an allotment letter through fulfillment of the conditions stipulated therein, an allottee cannot pass a valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

39. In view of the binding decision of the Supreme Court, I am constrained to find and hold that the transaction between Joyce Muhanda and the Respondents was a nullity in law and no property passed between Joyce and the Respondents. Since Joyce had not acquired title to the suit property before she purported to transfer the same to the Respondents.

40. Consequently, it is my finding that there is sufficient justification to interfere with the decision of the trial magistrate. Absurd though it is, neither, the Appellant nor the Respondents are entitled to the suit property and the radical title reverts to the allotting authority which is the Ministry of Lands and Physical Planning.

41. The upshot is that the appeal has merit and I allow it, set aside the judgment of the lower court and substitute it with the following orders.

    a. Both the suit and the Counterclaim are hereby dismissed.

    b. Given the history of this matter, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Mr. Situma for the Appellant

Miss Waithera Mwangi for the 2nd Respondent

Court Assistant: Hinga