



**Jama v Mohamed & another (Environment and Land Appeal
010 of 2010) [2022] KEELC 3692 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 010 OF 2010
PM NJOROGE, J
JULY 25, 2022**

BETWEEN

SHUKRI ISMAEL JAMA APPELLANT

AND

MARIAM MOHAMED 1ST RESPONDENT

ISIOLO COUNTY GOVERNMENT 2ND RESPONDENT

*(Being an appeal from the Judgment and/or decree of the learned
Hon. S M Mungai, Chief Magistrate, delivered on 13th December,
2018 in CM ELC Suit No. 7 of 2011 at Isiolo Law Courts)*

JUDGMENT

1. The memorandum of appeal in this suit states as follows:

Memorandum Of Appeal

The appellant Shukri Ismail Jama appeals to the Environment and Land court of Kenya at Meru against the entire Judgement and/or decree of the Learned Hon. S. M. Mungai (Mr.) Chief Magistrate delivered on the 13th day of December, 2018 in CM ELC NO. 7 of 2018 at Isiolo Law Courts, Isiolo and sets forth the following grounds of appeal namely: -

1. The learned Magistrate erred in law and in fact in failing to appreciate the appellant's exhibits produced during the trial.
2. The learned Magistrate erred in law and in fact in failing to appreciate that the appellant is the bonafide legal owner of the suit premises to wit plot no. 94 Kiwanjani Isiolo.
3. The learned Magistrate erred in law and in fact by holding that the plaintiff's evidence is/was contradictory.



4. The learned Magistrate erred in law and in fact in making a decision that was wholly against the weight of the evidence that had been adduced.
5. The learned Magistrate erred in law and in fact in his failure to take into consideration and appreciating the magnitude of the entire dispute and only selectively dealt with only some of the issues before the court.
6. That the learned Magistrate erred in law and in fact by disregarding the appellant's evidence and submissions.
7. The learned Magistrate erred in law in holding that the appellant allocation and subsequent registration of the land in her name was in unlawful, fraudulent. Irregular and unlawful ab initio.
8. The learned magistrate erred in law and in fact in failing to compel the 2nd respondent to participate fully during the trial.
9. The learned Magistrate failed to appreciate sufficiently or at all the relevant facts on record.

It Is Proposed to ask the Court for Orders: -

- a. That this appeal be allowed with costs.
- b. That the orders issued by the Hon. S. M. Mungai (Mr.) Chief Magistrate delivered on December 13, 2018 in CM ELC No. 7 of 2011 be set aside.
- c. That this honourable court be pleased to order a retrial involving all stakeholders in order to determine ownership of the suit premises.
- d. That this honourable court be pleased to make any other or further orders as may be deemed just and fair in the circumstances.

Dated at Nairobi this 17th Day of January, 2019

Hassan N Lakicha & Co Advocates for the Appellant

2. The appeal was canvassed through written submissions. On January 30, 2020, the court directed that written submission be filed within 60 days. As is normally the practice, the appellant files submissions first and then the respondent follows. On November 29, 2021, almost 2 years after the court's directions issued on January 30, 2020, the appellant had not filed submissions.
3. The 1st respondent asked the court to fix a date for Judgment although the appellant had not filed her submissions saying that it appeared that the appellant had lost interest in the case. Advocate Jarso, who held brief for the appellant's advocate asked the court to give the appellants advocate 14 days to file written submissions. In the greater interest of justice, the court gave the appellant's advocate 14 days to file written submissions. The court directed the parties to come back to court for further directions on February 7, 2022.
4. On February 7, 2022, the appellant had not filed submissions. The 1st respondent's advocate, once again requested the court to give a date for Judgment. Advocate Wanjohi, who held brief for the appellant's advocate asked the Court to give the appellant's advocate seven days to file submissions. He said that the appellant's advocate could not file submissions because a number of his staff members had been affected by the Covid 19 pandemic. Once again, even though the appellant had been given a last chance, on November 29, 2021, the court, in the greater interest of Justice, granted the appellant 7 days as requested by the advocate to file submissions. The parties were directed to come back to court for directions on May 23, 2022 when it was reported that the appellant had filed and served submissions.



5. As 2nd respondent had all along not filed its submissions, it was given a chance to file its submissions before 31st May. On May 31, 2022, the 2nd respondent had not filed submissions. This was about two and a half years after the parties had on January 30, 2020 been directed to file submissions. Considering that her appeal had been filed in July, 2019, and almost 3 years had elapsed since it was filed, the court found that there was merit to fix a date for judgment even though the 2nd respondent had not filed submissions.
6. Issues concerning this matter have been in the Judicial pipeline since the year 2007 when the appellant filed ELC No. 572 of 2007 which was dismissed for want of prosecution. In 2011, the appellant filed the suit which has spawned this appeal. This means that issues concerning this matter have been in court for 15 years. It is therefore necessary that this matter be handled expeditiously.
7. In her submissions, the appellant states that she was procedurally allocated her plot by the County Council of Isiolo, the predecessor to the 2nd respondent, the County Government of Isiolo vide a full council minute on October 13, 1998. She avers that she had paid land rent and rates from 1997 to 2003. It is argued that this was proof that she rightly owned the suit plot.
8. The appellant says that her exhibits and pleadings were not appreciated by the lower court including her reply to the amended defence and counter claim. The appellant says that her evidence concerning relevant correspondence and exhibits was not taken into account by the lower court.
9. The appellant says that her evidence concerning relevant correspondence and exhibits was not taken into account by the lower court. This to me, is the same point argued in paragraph 8 above when the appellant says that her exhibits and pleadings were not appreciated by the lower court.
10. The appellant asserts that failure by the court to compel the 2nd respondent to participate fully during the trial had an adverse effect to the suit generally. The appellant submits that failure to fully participate in the proceedings by the 2nd defendant was a miscarriage of Justice and argues that this is a good reason for the lower court's judgement to be set aside and for this appeal to be upheld. She argues that as the predecessor to the 2nd defendant was responsible for allocation of plots, its full participation in the proceedings was necessary.
11. The appellant refers to Meru CMCC No.572 of 2007 between the appellant, who was the plaintiff and the 1st respondent, who was the defendant, and says that a ruling on a preliminary objection (P.O) filed by the respondent was dismissed on January 24, 2012 and for this reason, the issue of res judicata could not be used as a reason to deny the appellant justice and asserts that she was rightfully before the lower court.
12. At the outset the 1st respondent submits that the appellant never filed a decree from the lower court or even demonstrated any attempt to obtain it to support her appeal as is required under order 42 rule 13 (4) (f) of the Civil Procedure Rules. The 1st respondent argues that, for this reason, this appeal is defective on account of failure to file a certified copy of the apposite decree. The 1st respondent says that when she filed her submissions, the appellant had not filed her submissions as she should have filed hers first and according to her this amounted to a deliberate attempt to delay the matter and steal a match against the 1st respondent. I do note that the appellant had ignored court orders to file submissions within stipulated times.
13. The 1st respondent says that during the proceedings in the lower court, the appellant relied on uncertified copies of documents in support of her claim and never proffered any original or certified documents. She points out that production of these copies was objected to. She submits that those documents had no probative value.



14. The 1st respondent says that the Isiolo County Council's Minute dated October 13, 1998 did not disclose the plot number allegedly allocated to her. She also says that no original minutes were produced as part of the appellant's exhibits.
15. The 1st respondent submits that although during cross-examination the appellant claimed that she was aware of her adverse claim since 1997, she did not explain why she only filed Meru Civil Suit No. 527 of 2007 in 2007. She says that any interim orders granted in Meru Civil Suit No. 527 of 2007 had lapsed when the suit was dismissed for lack of prosecution and hence her continued occupation of the suit land could not be said to be supported by a court order.
16. The 1st respondent points out several contradictions in the appellant's evidence. For example, she says that the appellant's plot is no. 94 in Kiwanjani, Isiolo while her plot is plot NO. 557, Kiwanjani, Isiolo. Whereas the appellant relied on an uncertified Part Development Plan (PDP) No. ISL/177/99/66, the PDP was signed on March 19, 1999 well after the October 13, 1998 the date on which she claims the Isiolo County Council allocated the suit plot to her. The 1st respondent argues that the basis of the allocation and registration of the impugned plot was of fictitious and dubious origins.
17. The 1st respondent says that the PDP produced to buttress her claim was certified whereas that one produced by the appellant was uncertified and had a different signature from the certified one.
18. The 1st respondent says that in her testimony the appellant averred that she had not applied for the suit plot but had it allocated to herself by virtue of being a squatter. She says that the appellant could not explain how she was allocated the plot to the exclusion of the other squatters she allegedly lived with. The 1st respondent submits that there was no process for allocation revealed by the testimony of the appellant.
19. 1st respondent says that there is a contradiction when the appellant says that she has occupied the land since 1998 but proffered a rent receipt for 1997, one year before she claims she had occupied the suit land. The 1st respondent also pointed that in her amended plaint, the appellant states that she had been in exclusive possession of the suit plot since 1998 whereas in her testimony she claimed to have been a squatter from 1997. As per her amended plaint it would have been impossible for her to have paid rent in 1997 for an unregistered squatter land. And since she relies on a minute of Isiolo County Council of October, 1998, she could not have paid rent in 1997 for an unallocated land.
20. The 1st respondent in the submissions has narrated the process through which she was allocated her plot from application as per PDP Isiolo Township No. ISL/117/99/66 to its allocation to her.
21. The 1st respondent says that the appellant filed Meru CMCC No. 572 of 2007 and obtained interim orders which kept the 1st respondent away from the disputed plot. As the appellant failed to prosecute the case it was dismissed. She claims that to continue keeping her away from the suit land, the appellant filed Isiolo CMCC ELC Suit No. 7 of 2011.
22. The 1st respondent submits that she had proved through admissible documents that the suit land had been procedurally allocated to her even before the time the appellant claimed to have become a squatter on it and for the reason that she was the first allottee, any subsequent claim to the suit plot would be untenable.
23. The 1st respondent submits that she filed a counterclaim which was not controverted by the appellant and that in that counter claim she had pleaded fraud and particularized the following particulars: -

Procuring registration over suit property secretly and unjustly; depriving the 1st respondent of her property without her knowledge or consent; acquiring registration and occupation



of the suit property without formally applying for the same; acquiring registration and occupation of the suit property without paying for the same; dishonestly and unjustifiably taking undue advantage of the 1st respondent's semi-illiteracy; misrepresenting herself as a squatter in the suit land while it is ascertainable that she took possession of the land sometimes in 2007; hurriedly developing the property after she was asked by the 2nd respondent herein to vacate the same as it was owned by the 1st respondent; making income and profits from a property that was never allotted to her in the first place.

24. The 1st respondent submits that those particulars of fraud were never expressly denied or controverted and for that reason were upheld by the lower court.
25. The 1st respondent submits that she had filed a counter claim which sought the following orders:
 - a. A declaration that the 1st defendant is the sole and lawful owner of the Plot No.557.
Situating in Kiwanjani Estate (suit property) Isiolo Township.
 - b. A declaration that the alleged allocation and subsequent registration of the land in the name of the Plaintiff was unlawful, irregular and unlawful ab initio.
 - c. A declaration that the plaintiff unlawfully and illegally occupied and took possession of Plot 557 situate in Kiwanjani Estate (Suit Property) Isiolo Township and the same amounts to acts of trespass.
 - d. General damages and /or mesne profits on accounts of the acts of trespass be awarded.
 - e. An order directing the plaintiff to deliver vacant possession of Plot 557 situated in Kiwanjani Estate (Suit Property) Isiolo Township to the 1st respondent.
 - f. Costs of the suit and counterclaim.
26. The 1st respondent says that the counterclaim was upheld by the lower court after analysis of the apposite evidence.
27. The 1st respondent responded to all the 9 grounds of appeal.
28. The 1st respondent says that as regards ground 1 of the Memorandum of Appeal, the lower court appreciated the appellants exhibits and said that the appellant did not produce original exhibits and the copies she rendered were not certified. Regarding ground 2, the 1st respondent submitted that the lower court relied on the evidence rendered before it to find that the said plot belonged to the 1st defendant. Regarding ground No. 3 that the lower court erred in finding that the appellant's evidence was contradictory, the 1st respondent submitted that she had demonstrated a few instances of contradictory evidence at paragraph 14,16,17,20 and 21 of her written submissions. Regarding ground 4 that the lower court decided the case against the weight of evidence, the 1st respondent submitted that the appellant had given contradictory evidence and had not produced viable exhibits which could have controverted his testimony and pleadings.
29. Concerning ground No.5, the 1st respondent submitted that the ground of appeal was nebulous as it was not supported by evidence that the Lower Court had cherry picked issues to arrive at its determination. Regarding ground No.6, the 1st respondent submitted that the ground was not supported by any evidence that the Judgement rendered by the Lower Court was not informed by



- the evidence and submissions proffered by the parties. Regarding ground No.7, the 1st respondent submitted that the finding that the appellants' registration of the Suit Plot was unlawful, fraudulent, irregular and unlawful ab initio, was a finding made by the court upon the evidence placed before it.
30. Regarding ground No.8 that the lower court had failed to compel the 2nd respondent to actively participate in the proceedings, the 1st respondent said that the 2nd defendant had filed a defence and had caused adjournment of the Suit on several occasions when it came up for hearing and specifically had sought time allocation but did not show up at the time evidence was taken. She said that considering the overriding objectives under section 1A and 1B of the *Civil Procedure Act*, it was necessary for the Lower court to obviate any further delay considering issues concerning this case had been in court from 2011, 7 years before Judgement was delivered.
 31. Regarding ground No.9 that the learned Magistrate failed to appreciate sufficiently or at all the relevant facts on record, the 1st respondent, submitted that this ground was nebulous and lacked necessary specificity. He submitted that this court when considering this appeal would have an opportunity to appreciate facts on record and to come to its own conclusion. The 1st respondent concluded by opining that the standard of proof in Civil Matters is on a balance of probabilities and that the Scale of Justice ought to tilt in favour of the 1st respondent in view of the weight and credibility of the evidence supplied.
 32. This court needs to determine if the Judgement delivered in CMELC No.7 of 2011 should be set aside and if a retrial should be ordered.
 33. The nine grounds of appeal all touch on the pleadings, Oral evidence and on the submissions filed by the parties in the lower court. For this court to arrive at a just determination of this Suit, I have carefully gone through the proceedings in the lower court. This being a first appeal, this court is entitled to consider and analyse the evidence proffered by the parties in the lower court and arrive at its own decision.
 34. The plaintiff's written submissions in the lower court are dated 30th day of November 2018. The 1st respondent's written submissions in the Lower Court are dated December 5, 2018. I have perused the submissions and juxtaposed them against the Judgement of the lower court delivered on December 13, 2018. I have also juxtaposed the submissions against the totality of the evidence rendered before the Lower Court. Having done that, I have arrived at my own decision.
 35. I find that the learned Magistrate in the Lower Court had properly considered the appellants exhibits. I, therefore, dismiss ground 1. I also dismiss ground 2 for the reason that the Lower Court after hearing and considering the available evidence, found that the Suit property belonged to the 1st respondent. I also find that the learned Magistrate rightly found that the appellants evidence was in many respects contradictory. Regarding ground 3, I do not agree, after a careful appraisal of the totality of the evidence tendered in the Lower Court, that the decision of the Lower Court was wholly against the weight of the available evidence. Regarding ground No.5 I do not agree that the learned Magistrate did not appreciate the Magnitude of the entire dispute and that he selectively only considered some of the issues. I also disagree with ground No.6 that the learned Magistrate disregarded the appellant's evidence and submissions. The Judgement of the Lower Court was veritably erudite in considering all available evidence and submissions
 36. I dismiss ground No.7 for the same reason that I dismiss ground No.2. The decision reached by the lower court regarding who was the lawful owner of the Suit plot was reached after the evidence that was availed to the court by the parties was considered.



37. Ground No.8 is that the trial Magistrate erred in the law and in fact in failing to compel the 2nd respondent to participate fully during the trial. I do not agree that the trial Magistrate had the duty of compelling a litigant to prosecute its/his/her case in a particular way. In all situations, it is the responsibility of the litigants to place all evidence before the court. Our Judicial system is unlike the Civil System which is practised in Continental Europe where a court of law can ferret out evidence not provided by the parties. If our courts did that, they would be accused of being biased. I dismiss this ground.
38. Ground No. 9 is rather omnibus in nature. It is also nebulous. It has not been shown how the learned Magistrate in the lower court failed to appreciate sufficiently or at all the relevant facts on record.
39. The conclusion is that all the nine grounds of appeal stand dismissed.
40. I do note that in her submissions, the 1st respondent submits that the appellant has never filed a decree in the matter in supports of her appeal and argues that this is a requirement Under order 42 rule 13 (4) (f). It is submitted that the appeal is defective for failure to file a Certified Copy of the decree. I opine that this issue is being raised too late at the tail end of the proceedings. It ought to have been raised at the commencement of the proceedings. I am not inclined to entertain this submission at this stage. Nevertheless, I find that the record of appeal filed by the appellant contained a copy of the apposite Judgement, and therefore the appeal satisfied the requirement of order 42 rule 13 (4) (f) of the Civil Procedure Rules. In any case, leave to appeal had already been granted by a Judge before commencement of the appeal's hearing.
41. I issue the following orders:
 - a. This appeal is dismissed.
 - b. Costs shall follow the event and are awarded to the 1st respondent against the appellant.

DELIVERED IN OPEN COURT AT ISIOLO THIS 25TH DAY OF JULY, 2022

in the presence of:

Court assistant: Balozi

Miss Mwiti h/b Ashava for the 1st Respondent.

Muthomi Njeru h/b Ndege for the Appellant.

HON. JUSTICE P M NJOROGE

JUDGE

