



REPUBLIC OF KENYA



**Mahethere v Kinuthia (Environment and Land Appeal 55 of 2020)  
[2022] KEELC 2733 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 55 OF 2020**

**JG KEMEI, J**

**JULY 21, 2022**

**BETWEEN**

**BENARD K MAHETHERE ..... APPELLANT**

**AND**

**HEZEKIAH K.KINUTHIA ..... RESPONDENT**

*(Being an appeal against the whole of the Judgment by the Hon R M L  
Wachira delivered on the 21/1/2006 in the Thika CMCC No 1179 of 1996)*

**JUDGMENT**

1. Aggrieved by the Judgment of the Hon Court the Appellant filed a Memorandum of Appeal on the March 16, 2006 raising the grounds that the Learned Hon Magistrate erred in law / fact in ;
  - a. Finding that the case before her had been proved to the requisite legal standards whereas stating in the same breath that she had no clear indication of the position on the ground;
  - b. Disregarding the evidence of DW2 who was the only witness knowledgeable on the position on the ground;
  - c. Delivering Judgment in a matter which was apparently not clear to her at all instead of resolving the vagueness of the evidence in favour of the Defendant who had no burden of proof;
  - d. In arriving at a decision which was not supported by the evidence tendered before the Court.
2. The Appellant's prayer is that the appeal be allowed with costs and the Judgment of the Court aforesaid be set aside, varied and or vacated.
3. The appeal is opposed. The appeal was heard by way of written submissions which I have read and considered.



4. The firm of Henia Anzala & Associates filed written submissions on behalf of the Appellant while that of the A W Kinuthia & Company Associates submitted on behalf of the Respondent.
5. The Appellant's submissions in support of the appeal dealt with the background of the case in the lower Court. The Appellant framed two questions for the Court to answer; whether the Respondent had proved his case on a balance of probabilities and secondly whether the Court considered all of the evidence on record.
6. On the 1<sup>st</sup> issue the Appellant submitted that Section 108 and 109 of the *Evidence Act* places an obligation upon a party that makes an allegation before the Court to prove it and that a party who does not discharge the burden cannot be deserving of the reliefs sought from the Court. It was submitted that the Respondent did not tender sufficient evidence to prove the allegation of trespass on plot 455 or that the Appellant was undertaking any construction thereon. In addition, that no evidence was adduced to demonstrate that the Appellant was in occupation of plot No 455. He relied on the decision of the Court in *Bernard Munyi Mugo vs Enid Igonji Mbogo* (2021) where the Court held as follows;
 

“In the instant case, there was no evidence which was tendered before the lower Court to prove the said fraud on the part of the Appellant's father. It is my considered view therefore that the trial Court erred in law and in fact by revoking the grant made to Obadia Muthee Njiru (the Appellant's father) on the basis of forgery of the signature on the consent to the grant being made to the Appellant's father. ... With all due respect to the Learned Magistrate, it is my considered view that the trial Court in holding as above proceeded to impute fraud from the facts of the case whereas the same was not proved.”
7. That as a result the Honourable Court erred in holding that the Appellant should give vacant possession of plot No 455 to the Respondent in the absence of any evidence in support of trespass.
8. With respect to the second issue, the Appellant submitted that the Court having established lack of clarity on the position of the suit property and inadequacies in the Respondents case ought to have dismissed the suit. In support of this proposition the Appellant cited the persuasive decision of the Court in *Titus Musya Musee vs Francis Ichamui M'mwenda* (2020) eKLR.
9. The Appellant faulted the Hon Court for failing to consider the evidence that was tendered by DW2 who stated that each person had his own plot, the Appellant on plot 454 and the Respondent on plot 455 respectively. In addition that the evidence tendered by the Witeithie Gwaka Investments Limited showed that the Appellant's land is plot 454 and therefore an eviction order becomes a real fallacy since he cannot be evicted from his own plot.
10. It was further submitted that the decision of the Hon Court was not supported by any evidence on record and the decision reached was baseless especially when the Court was not able to ascertain whether the property occupied by the Appellant belonged to the Respondent. That without cogent evidence the Court reached a wrong conclusion in fact and law.
11. The Respondent submitted that it is not in dispute that he is the owner in possession of plot No 455 and the actual nature and extent of his ownership is defined and delineated and surveyed as evidenced by the records held by Witeithie Gwaka Investment Limited, the plans and on the ground. That being the owner the Respondent is entitled to protection of the law from any form of trespass. That the unlawful entry by the Appellant upon the plot in possession of the Respondent without his consent and knowledge amounts to trespass which is actionable per se. The Respondent relied in the decision of the Court in *Nyangeri Obiye Thoma vs Yunuke Sakigwa Nyoiza* (ELC 277 of 2018).



12. Further, that the evidence of DW2 fails to confirm the extent of the Appellants plot or whether the Appellant had encroached onto the Respondent's plot.
13. The main issue for determination is whether the appeal is meritorious and who meets the cost of the appeal.
14. Before I delve into the analysis it is apt to give the background of the case in the lower Court. In the year 2006 the Plaintiff/Respondent sued the Defendant /Appellant seeking orders that the Defendant do give vacant possession of plot No 455 or in the alternative be evicted and pay damages. The Plaintiff's case was that he was the registered owner of plot No 455 having acquired the same through sale from Mwangi Kambogo in 1980. That the plot was part of the larger land previously owned by Witeithie Gwaka Investment Limited. That upon purchase he was issued with share certificate No 1253 for plot No 455 on the October 12, 1994. He informed the Court that on the December 2, 1996 the Defendant entered his plot unlawfully without his knowledge and consent and started illegal construction on the ground.
15. The Plaintiff's claim was denied by the Defendant who insisted that indeed he was the owner of plot No 454 which is next to the Plaintiff's plot and measures 30 by 60 feet. That he is a member of the Investment Company vide share certificate No 3821 for plot No 454 dated the 14/3/1992.
16. At the hearing both parties led evidence which upon evaluation by the Hon Court the Court pronounced Judgment as follows;

“What clearly comes out is that this is a dispute about the position. The DW2 stated that each person has his own plot 455 for the Plaintiff and 454 for the Defendant.

From the record of the visit to the site by the Court it is not very clear what is what. Apart from what the parties stated in Court, I have no clear indication of the position on the ground. For DW2 a witness for the defense to say Defendant that the Defendant is in 454 and the Plaintiff has 455 seek to have the Defendant cast out of 455.

The Court has looked at the maps submitted by the Plaintiff in his evidence. The same are indicative. The proceedings before Asunah (RM) then also point to a blank. So on a balance of probabilities this is what I can say. That the Plaintiff property it emerges is No 455 and the Defendant is plot No 454

So then the Defendant should give vacant possession to the Plaintiff. In absence of what eviction order to issue.”

17. As this is a first appeal, it becomes my duty to analyze and re-assess the evidence on record and reach my conclusions in the matter. This was the holding in *Selle v Associated Motor Boat Co.* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High 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. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if



the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

This Court further stated in Jabane – v- Olenja [1986] KLR 664, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see also; Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services(1982-88) 1 KAR 870.”

18. Section 107 and 108 of the Evidence Act provide as follows:-

“107. Burden of proof;

“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 those facts.”

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.”

19. I have perused the record and the evidence of the parties and it is not in dispute that none of the parties submitted any titles for their plots. According to the letter by C R Gathogo , the District Surveyor Thika dated the August 21, 1997 addressed to the Resident Magistrate Thika, the two plots have not been surveyed neither were there records submitted to the Director of Survey. He opined that for his office to advise on the ownership of the plots all the necessary records ought to be registered and new numbers issued which would finally assist in procuring of the title certificates. He was of the view that given the situation he was unable to determine the dispute. The import of the letter is that the plots were not surveyed.
20. I have carefully considered the site visit report by the Court on the July 1, 2003 where the Respondent showed the Court his plot No 455 which measured 30 by 60 feet on the ground. He stated that the Defendant has built a stone structure on the front part. The Appellant on the other hand informed the Court at the locus quo that his plot was No. 454 and that plot 455 is the last one towards the road. That it measures 30 by 60 feet and he informed the Court that he would tender the maps during the hearing. The Chairman of the Investment Company explained to the Court that the plot No 455 is triangle in shape and it is more than 30 by 60 feet and that plot 454 is the disputed plot.
21. At the hearing the Plaintiff stated that he delivered stones at the corner shop plot in 1988 because he intended to commence constructions but because he fell ill leading to long hospitalization, he did not and in 1996 when he went to the ground he found the Defendant had constructed on the plot. He stated that his neighbor is the corner shop. He stated that different maps show the position of the plots differently. That the sale agreement did not indicate the size nor the extent of the plot on the ground. That he was shown the plot by a surveyor namely Mutua and the Chairman of the Investment Company namely Wanjaria. It was his evidence that the officials of the Investment Company manufactured 11 plots. He did not substantiate whether his plot was part of those manufactured.



22. PW2 the son of the vendor of the plot adduced evidence in support of the Plaintiff.
23. The Defendant stated that he bought his plot No 454 from Raphael Ngethe Kuria in 1992 and became a registered member of the Investment Company. That upon acquisition of the land he commenced construction in December 1996. That before commencing the construction, he requested the officials of the Investment Company to identify the plot for which they did.
24. DW2, the Chairman of the Investment Company stated that he and the officials of the Investment Company showed the Defendant his plot when he wanted to commence construction. That when the Plaintiff raised his complaint they perused the records and informed him that his plot was 455 but he insisted that his plot was 454. He informed the Court that according to their records both parties are properly on their respective plots.
25. I have perused the maps produced in evidence in the trial Court. I have difficulty in identifying the maps as per the exhibits for the reason that they are not marked. However I shall analyze the three maps produced in evidence as follows; the 1<sup>st</sup> map shows power supply lines to the Witeithie Scheme land generally. This was produced by the Plaintiff although nothing much turns on this one. The second is the proposed subdivision of the Witeithie Investment Company land (mother title) dated May 1975. This map shows plot 455 as the second last plot on the row. The last one is the corner shop which assumes a trapezium/triangular shape. During the site visit by the Court the Chairman of the Investment Company namely Mr Antony Hato informed the Court that plot No 455 was the corner plot which is triangular in shape. That evidence is at variance with the position of plot 455 in the proposed subdivision that was produced by the Plaintiff at the trial.
26. Plan No 3 is a copy of the unnamed map produced by the Defendant which shows plot No 455 as the last plot, the so called triangular plot and the second last plot is plot No 454. In this map plot No 454 is sitting on the previous position of plot No 455. In the second map the triangular plot is the last plot and is indicated as a corner plot. In this particular map plot No 455 is shown as the second last plot.
27. According to the evidence adduced at the hearing both parties claim that their plots are measuring 30 by 60 feet. Should that be correct then going by the evidence of Antony Hato, the Chairman of the Investment Company, plot No 455 cannot be sitting on the corner shop plot that is triangular and which in his evidence is bigger than 30 by 60 feet. The question that was before the Court was whether the Defendant had encroached on the Plaintiff's plot 455.
28. Having considered the evidence I find the following; the plots are not surveyed; there was no surveyor's report to guide the Court on whether or not there was any trespass on plot No 455 and if yes to what extent; the position of the two plots remains unclear in view of the proposed plans adduced by the parties; the surveyor expressed his frustration on the same point when asked by the Court to determine if there was any encroachment on plot No 455 and the extent; the officials of the Witeithie Investment Company Limited did not help the Court in determining the positioning of the two plots on the ground notwithstanding their evidence that the two contesting parties are in possession of their plots on the ground; the question of the situ of each plot is in doubt.
29. In the end I find that the Respondent did not discharge the burden of proof with respect to whether there was trespass by the Appellant on his plot. This was captured in all honesty by the Hon Magistrate in her Judgment. I find that the Hon Magistrate misdirected herself with regards to the evidence on record thus reaching the wrong conclusion.
30. The upshot is that the appeal has merit. The Judgment of the lower Court delivered on the February 21, 2006 be and is hereby set aside in its entirety. The Plaintiff's case is dismissed for want of proof.



31. The Appellant shall have the costs of the appeal as well as in the lower Court.

32. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 21<sup>ST</sup> DAY OF JULY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Anzala for the Appellant

Mrs. Kinuthia for the Respondent

Court Assistant – Phyllis Mwangi

