



REPUBLIC OF KENYA



Mutua & 4 others v Akiba Mashinani Trust (Environment and Land Appeal 14 of 2018) [2022] KEELC 12775 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 14 OF 2018
CA OCHIENG, J
SEPTEMBER 26, 2022**

BETWEEN

**PETER KYALO MUTUA 1ST APPELLANT
NZIOKI WILSON NDUTU 2ND APPELLANT
DANIEL MULANDI KIKUNZE 3RD APPELLANT
JULIUS KIOKO WAMBUA 4TH APPELLANT
ROSEMARY K MUTUNGA (SUING AS TRUSTEES FOR
THEMSELVES AND OTHER BENEFICIARIES OF ATHI RIVER SLUM
DWELLERS) 5TH APPELLANT**

AND

AKIBA MASHINANI TRUST RESPONDENT

(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Case No. 1151 of 2013 delivered on 17th April, 2018 by Hon. A.G. Kibiru -(CM))

JUDGMENT

Introduction

1. By a memorandum of appeal dated the May 15, 2018, the appellants appealed against the whole judgment delivered by Hon Kibiru (CM). The genesis of this appeal is the judgment of Hon Kibiru in Machakos CMC No 1151 of 2013 Peter Kyalo & others v Akiba Mashinani Trust delivered on April 17, 2018 where the trial court proceeded to dismiss the plaintiff's suit.
2. The appellants being dissatisfied with the whole of the said judgment filed a memorandum of appeal dated May 15, 2018 which contains the following grounds:-



1. The learned magistrate erred in law and in fact in failing to hold that the loan of 3 million advanced to the appellants by the respondent had been fully paid.
2. That the learned magistrate erred in law and in fact in failing to appreciate that a party is bound by its pleadings and the respondent did not plead by way of counter-claim any loan amount due to it and the same was never stated in the defence.
3. The learned magistrate erred in law and in fact in failing to appreciate that all defence witnesses who testified are disgruntled members of Athi River slum dwellers.
4. The learned magistrate erred in law and in fact in failing to appreciate that no witness from the respondent ever came to testify in court on any loan amount due.
5. The learned magistrate erred in law and in fact in holding that the issues raised in the suit were similar to those raised in Machakos HC ELC No 75 of 2013 when the court had *vide* its ruling dated February 18, 2015 held that the suits are very different and no appeal against the said ruling was preferred by the respondent.
6. The learned magistrate erred in law and in fact by failing to appreciate that the appellants in this case were seeking for release of the title deed for land parcel number Mavoko town Block 3/2347 by the respondent while the plaintiffs in Machakos High Court ELC No 75 of 2013 are seeking for injunctive orders.
7. The learned magistrate erred in law and in fact by failing to appreciate that the respondent herein is not a party in Machakos High Court ELC No 75 of 2013 hence the suit is not between the same parties litigating under the same title.
8. The learned magistrate erred in law and in fact by failing to appreciate the issue of genuine membership of the appellants has no connection whatsoever with claim for release of their title deed held by the respondent.
9. The learned magistrate erred in law and in fact by dismissing the appellants suit when the same has been proved on a balance of probabilities.
10. The learned magistrate erred in law and in fact by believing the evidence of the defendant's witnesses when they are not even employed by the respondent.
11. The learned magistrate erred in law and in fact by failing to appreciate that the loan of 3 million was advanced to the appellants as trustees for Athi River slum dwellers and not to individual members and same was fully repaid.
12. The learned magistrate erred in law and in fact by failing to determine whether the loan of 3 million has been fully repaid by the appellants but purported to determine by whom has the loan been paid when that was not an issue raised by the parties in their pleadings.
13. The learned magistrate erred in law and in fact by ordering the appellants to pursue their claim for release of the title before the ELC No 75 of 2013 when the same is untenable.
14. The learned magistrate erred in law and in fact by failing to determine conclusively the issues he framed as to whether the loan advanced of 3 million has been repaid to the respondent and if the respondent should release the title deed.

Reasons wherefore the appellants pray to this honourable court for the following orders:



- i. That the appeal be allowed and the judgment of the subordinate court dated April 17, 2018 be set aside.
 - ii. There be an order allowing the appellants suit in the lower court and directing the respondent to release the title deed for land parcel number Mavoko town block 3/2347 to the appellants.
 - iii. That the costs of the appeal and the suit in the subordinate court be awarded to the appeal.
3. The appeal was canvassed by way of written submissions.

Submissions

Appellants' Submissions

4. The appellants submitted that the suit land was purchased at Kshs 4 million. The group raised Kshs 1 million while the respondent advanced them a loan of Kshs 3 million. Further, as a security for the loan, the respondent retained the title deed for the suit land and the agreement was that the said title deed was to be released upon full repayment of the loan. They contended that the letter dated September 15, 2006 which was produced as exhibit 4 confirmed that the respondent received the title deed. They argued that no charge was registered by the respondent over the title deed but the same was casually retained by mutual consent. They insisted that the issue of genuine membership was not pleaded in the plaint including defence and was not an issue for determination. Further, that the issue for genuine membership has no connection with the appellants' claim against the respondent for release of the title deed since the loan of Kenya shillings 3 million has been fully repaid.
5. The respondent in its submissions insists there is no dispute that the appellants were advanced a loan of Kshs 3 million by the respondent, however it is a disputed fact that they have fully repaid the said loan. It argued that the evidential burden of proof squarely rests with the appellants to prove that the loan was repaid and how it was paid. It contended that the appellants failed to prove this fact hence the learned magistrate did not err to find that there is no proof, that the loan had fully been repaid. Further, that the testimony by PW1 when cross-examined, was to the effect that individual members were repaying the loan by depositing their money to a bank account. The lingering question is why would members repay the loan advanced to the trustees. This question was not resolved by the appellants by way of calling evidence. It insisted that the evidence of DW2, DW3 and DW4 was probative since they are members of the appellants' group. Further, that the trial court cannot be faulted for relying on this evidence on record since the appellants had an opportunity to challenge the evidence during cross-examination which they never did. It reiterated that the trial court came to the right conclusion that the appellants suit was not well founded since the same was instituted during the pendency of Machakos ELC No 75 of 2013 where interim orders had been granted to subsist until the disposal of the main suit. To buttress its averments, it relied on the following decisions: *Jacinta Wanjiku Kamau v Isaac Kamau Mungai & Another* (2006) eKLR and *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR.

Analysis And Determination

6. Upon consideration of the memorandum of appeal, record of appeal as well as rivaling submissions, the following are the issues for determination: Whether the appellants fully repaid the loan owed to the respondent. Whether the respondent should be compelled to release the title deed for Mavoko town block 3/2347 to the appellants. Whether the appeal is merited.



7. I will deal with these issues jointly.
8. The background of the dispute herein revolves around a loan of Kshs 3 million that had been advanced to the trustees of the appellants on behalf of its members and how the title deed to land parcel No Mavoko town block 3/2347 was retained as security. In the plaint, the plaintiffs (appellants) sought for the following orders:
 - a. An order directing the defendant to return the original title deed for land parcel number Mavoko town block 3/2347 to the plaintiffs.
 - b. An order directing the defendant to release to the plaintiffs a bank statement of the defendant loan account number 0xxxxxxx Co-operative Bank Athi River Branch and refund of any amount which has been overpaid beyond the loan amount of Kenya shillings 3 million and interest.
 - c. Costs of this suit and interest.
9. The loan was supposed to be repaid by members of the appellants. The appellants claim the loan was fully repaid which fact is disputed by the respondent. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decisions of the trial magistrate. See the case of *Selle v Associated Motor Boat Co* [1986] EA 123.
10. From the evidence tendered in the lower court, it emerged that the appellants who are trustees took a loan on behalf of their members but each member was expected to repay Kshs 11,333.00. PW1 during cross-examination admitted that individual members were repaying the loan by depositing their monies to a bank account. The appellants insist the loan has fully been repaid and referred to certain documents which had been produced as exhibits. From the evidence of DW2, DW3 and DW4, who were members of the appellants, they confirmed in the lower court that they had not fully repaid their respective loans. DW1 who was an official of the respondent insisted that the loan advanced to the appellants was yet to be repaid. Section 107 of the *Evidence Act* places the burden of proof upon the appellants to prove that the loan had fully been repaid by the members of the appellants which to my mind they seem to have shifted to the respondent when they sought for bank statements from its account No 0xxxxxxx0 Co-operative Bank Athi River Branch. However, based on the proceedings in the lower court, I find that the appellants failed to discharge the burden of proof placed upon them to prove the loan had been fully repaid, since they failed to furnish court with all documents from their respective members who were repaying the said loan.
11. It further emerged in evidence that there was a related suit being Machakos ELC 75 of 2013 wherein some of the appellants' members sued the appellants herein and the fulcrum of the dispute related to issue of determination of genuine members. The learned magistrate in his judgement proceeded to hold as follows:

I have seen pleadings in Machakos ELC No 75 of 2013 where the issue of genuine membership has been raised. The loan hereof and the land parcel number Mavoko town block 3/2347 are issues before that court. Consequently, I find the suit before me raises issues that are germane in the Environment and Land Court. The issue before the Environment and Land Court will determine with finality the genuine members of the plaintiffs group and also determine the issue of land parcel number aforementioned. The court will therefore be over reaching itself if it delves on issues before the Environment and Land Court. The evidence of DW2, DW3 and DW4 clearly indicates that there is more to this matter than mere repayment of the loan. Consequently, I find the plaintiffs case not



well founded and order that the plaintiff should pursue all issues before the Environment and Land Court which is a higher court. They cannot separate some issues to be determined by this court and others by the ELC. The upshot of the foregoing is that the plaintiff suit fails and is hereby dismissed with costs to the defendants.”

12. As a court i take judicial notice of the fact that ELC No 75 of 2013 is actually related to the instant suit as it touches on the issues of genuine membership of the appellants which is yet to be resolved. To my mind, i find the appellants who were simply trustees of Athi River slum dwellers were not being candid as they seek the release of the title deed in respect to the suit land, knowing fully well that there are parties to a pending dispute in respect to the genuine members of the said group, which fact they cannot escape. In the foregoing, i find that the learned magistrate did not err when he declined to make an order for release of the title deed and finding that the loan had not been repaid.
13. In the circumstances, i find the appeal unmerited and will dismiss it.
- 143 Costs awarded to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

