



**Malelu v Ndumi & another (Environment and Land Appeal 59 of 2019)
[2022] KEELC 4875 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 59 OF 2019
CA OCHIENG, J
SEPTEMBER 19, 2022**

BETWEEN

PAUL MALELU APPELLANT

AND

IRENE NDUMI 1ST RESPONDENT

JEFFERSON MUSYOKI PAUL 2ND RESPONDENT

(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Case No. 795 of 2013 delivered on 23rd October, 2019 by Hon. E.H. Keago -(SPM)

JUDGMENT

Introduction

1. By a memorandum of appeal dated the November 22, 2019, and amended on March 2, 2021 the Appellant appealed against the whole Judgment delivered by Hon E H Keago (SPM). The genesis of this Appeal is the Judgment of the Senior Principal Magistrate Hon E H Keago in Machakos CMELC No 795 of 2013 Irene Ndumi and Jefferson Musyoki Paul v Fr Paul Malelu, delivered on October 23, 2019, where the trial court proceeded to enter judgment in favour of the Plaintiffs as per the prayers sought in the Plaint.
2. The appellant being dissatisfied with the whole of the said judgment filed a memorandum of appeal dated November 22, 2019 which was subsequently amended on March 2, 2021.
3. The amended memorandum of appeal contains the following grounds:-
 1. The learned trial magistrate erred in law and fact by making a finding that the respondents are the owners of parcel of land Mavoko Town Block 3/3174 and that the appellant occupies the same without any right.



2. The learned trial magistrate erred in law and fact by failing to consider that the respondents herein acquired the title deed over parcel of land Mavoko Town Block 3/3174 fraudulently through non-disclosure of material facts and without following the due process/procedure envisaged in law since there was an appeal pending for hearing and determination being Minister Appeal No 339 of 1995.
3. The learned trial magistrate erred in law and fact by failing to consider that the respondents herein were not and had not been in occupation and/ or possession of the parcel of land Mavoko Town Block 3/3174 since the year 2008.
4. The learned magistrate erred in law and fact by failing to consider the evidence on record and documents adduced by the appellant as exhibits in support of their case during trial.
5. The learned magistrate erred in law and fact in by failing to consider the submissions by counsel for the appellant.
6. The learned magistrate erred in law and fact by failing to consider that the appellant herein is and has been in occupation and/ or possession of the parcel of land No Mavoko Town Block 3/3174 since the year 2008.
7. The learned magistrate erred in law and fact by making a finding that the respondents are the owners of parcel of land No Mavoko Town Block 3/3174 and that the respondents had made a *prima facie* case for grant of an order of permanent injunction.
8. The learned magistrate erred in law and fact by failing to consider that the parcel of land No Mavoko Town Block 3/3174 was excised from Plot No 294 within Lukenya Ranching & Farming Co-operative Society Ltd and was not part of Plot No 295 within the society.
9. The learned magistrate erred in law and fact by failing to consider the history of parcel of land No Mavoko Town Block 3/3174 before it's ownership by the appellant and the respondents.
10. The learned magistrate erred in law and fact by failing to consider that the appellant was an innocent purchaser for value without notice of their respective portions of land in parcel of land No Mavoko Town Block 3/3174.
11. The learned magistrate erred in law and fact in by failing to consider the statement of defence of the appellant.

Reasons wherefore the appellant prays that the appeal be allowed and the judgment of the lower court be set aside and the court do substitute the same with its own judgment.

4. The appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

5. The appellant in his submissions provided a history of land parcel No Mavoko Town Block 3/3174 (*hereinafter referred to as the 'suit land'*), which was the fulcrum of the dispute in Machakos CMELC No 795 of 2013 and is subject of this appeal. He explained that the suit land is a resultant sub-division of plot No 295 Lukenya Ranching and Farming Co-operative Society Ltd. Further, that the said Plot No 295 was subdivided into three (3) Portions which included Mavoko Town Block 4412, 4413 and 3174 respectively. He further submitted that plot No 295 was originally registered in the name of Mbula Koti (*deceased*) who was wife to John Koti Sanga (*deceased*). Further, that Plot No 294 Lukenya Ranching



and Farming Cooperative Society Ltd was registered in the name of John Koti Sanga (*deceased*) and a title deed to the said parcel was issued being Mavoko Town Block 3/3179. He states that there was a dispute in respect to Plot No 295 Lukenya Ranching and Farming Co-operative Society Ltd wherein John Koti Sanga was directed to split the said Plot No 295 belonging to his wife Mbula Koti (*deceased*) into two (2) equal parts. Further, he was to retain half the share and transfer the remaining half to Makau Mbili. He averred that John Koti Sanga and Lukenya Ranching and Farming Cooperative Society Ltd was dissatisfied with the said decision and lodged an appeal on October 31, 1995 with the Commissioner for Co-operatives Development being Appeal No 338 of 1995 *John Koti Sanga and Lukenya Ranching and Farming Cooperative Ltd v Makau Mbili*, which is yet to be determined but the respondents caused Plot No 295 to be subdivided, a register opened and Title No Mavoko Town Block 3/3174 processed. He stated that the appeal herein has merits and the court should allow the same and set aside the judgment of the lower court and substitute the same with its own judgment. He argued that the trial magistrate failed to critically analyze the issue whether the title deed for the suit land was as a result of subdivision of Plot No 295 or 294 Lukenya Ranching and Farming Cooperative Society Ltd. Further, that the trial magistrate failed to interrogate the issue of possession of Plot No 295 Lukenya Ranching & Farming Co-operative Society Ltd by the appellant, since the year 2008 as well as the possession by the family of Mbula Koti (*deceased*) since the year 1991. He insists that the trial magistrate should have directed a surveyor to visit plots 294 and 295 to determine location of the suit land. He claims the trial magistrate relied on hearsay evidence on the fact that a surveyor visited the land to establish the beacons. It was his contention that he produced the Letter of Allotment for Plot No 295 to prove ownership by Mbula Koti. He contends that the certificate of title for the suit land was obtained fraudulently and through corrupt means by the respondents as it was during the pendency of the appeal. Further, that the dispute ought to have been resolved first before the subdivision of the land. He reaffirmed that the respondents did not tender any evidence on how they proceeded to subdivide Plot 295 into three portions being Mavoko Block 3/ 3174 (suit land), 4412 and 4413 respectively. He further reiterated that the respondents failed to inform court of the pending appeal when they proceeded to process title for whole Plot No 295 and also filed NRB P& A No 3165 of 2003. He averred that the respondents tendered contradictory evidence on when they took the surveyor to subdivide Plot No 295 and obtained the new titles. Further, the learned trial magistrate erred in entering judgment in favour of the respondents as no judgment of the appeal nor arbitrator's award in Arbitration Case No 31 of 1995 was produced in court. In his further submissions, he reaffirmed that the Appeal was filed within time.

6. To support his arguments, they relied on very many decisions including: *Mayube v Nyamuro* (1983) KLR 403; *Nelson Omolo Achola V George Omondi Ajwala* (2020) eKLR; *Jason Masai v Masai Kipsamii* [1997] eKLR; *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR; *Benson Mogeni Arita (suing as the personal representative of Stephano Mogeni Arita - Deceased v Abel Karura Tineka & 7 others* [2017] eKLR; *Jennifer Kobilu Kandie Vs James Ondieki* (2019) eKLR; *M'bechi Nkandau & 19 Others Vs Attorney General & 3 Others* (2019) eKLR; *Raphael Kabindi Kawala Vs Mount Elgon Beach Properties Limited* (2018) eKLR; *Patience Abaid Tsuma Vs Asha Said Tuaha* (2022) eKLR; *Eye Company (K) Limited V Erastus Rotich t/a Vision Express* (2021) eKLR; *Jonathan Nzioka Mutiso Vs Nzuki Mwinzi & Another* (2020) eKLR and *June Christine Nyamoita Odhiambo V Jamii Bora Bank Ltd t/a Kingdom Bank Ltd & Another* (2021) eKLR.

Respondents' Submissions

7. The Respondents in their submissions contend that the suit land was legally transferred into their names and the learned trial Magistrate did not err when he entered Judgment in their favour. It is their submission that the Appellant did not testify during the hearing and neither did he plead fraud against them, hence the same was never proved. Further, that DW1 Charles Muema Koti testified that there



was indeed an arbitration award and that No 297 was to be subdivided into two equal shares between Makau Mbili's and John Koti Sanga's families respectively. Further, that the said decision was never overturned. They contend that the Appellant cannot claim a good title over the alleged purchase as the same stems from an illegal contract. They reiterate that the Appeal was filed out of time. To buttress their averments, they relied on the following decisions: *Mellen Mbera vs James Theuri Wambugu* (2020) eKLR; *Vijay Morjaria v Nansing Madhusingh Darbar & Others* (2000) eKLR; *Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & National Bank of Kenya Ltd*; *Nancy Kaboya Amadiva v Expert Credit Limited & Another* (2015) eKLR; *Abubaker Mohammed Al-Amin vs Firdaus Siwa Somo* (2018) eKLR and *Charles Karanja Kiiru vs Charles Githinji Muigwa* (2017) eKLR.

Analysis and Determination

8. Upon consideration of the Amended Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal and the rivalling submissions, the following are the key issues for determination: Whether the Respondents acquired title to land parcel number Mavoko Town Block 3/3174 fraudulently. Whether the Appellant is a bona fide purchaser for value without notice of two (2) acres portion of land from Mavoko Town Block 3/3174 and is in possession thereof. Whether the Appeal is merited.
9. I will deal with these issues jointly but before I proceed to do so, I wish to provide a background on this matter. The Respondents (Plaintiffs) filed a suit against the Appellant (Defendant) being CMELC No 795 of 2013 *Irene Ndumi & Jefferson Musyoki Paul vs FR Paul Malelu* seeking the following orders:
 - a) That the Defendant, his agents and servants be restrained and/or stopped from trespassing and entering into the Plaintiffs land and further be evicted and give vacant possession to the Plaintiffs land known as Mavoko Town Block 3/3174.
 - b) That costs of this suit and any order this court deems fit to grant.
10. The Appellant (Defendant) filed his Defence dated the September 11, 2013 which was amended on September 25, 2013 where he denied the various averments in the Complaint and insisted that title to the suit land was acquired by fraud and avers that the court did not have jurisdiction to handle the matter. He contended that Plot No 294 did not form part of Mavoko Town Block 3/3174. He pleaded that title to Mavoko Town Block 3/3174 which is part of Plot No 295 was procured by fraud, material non-disclosure and in blatant disregard to the law as there was a pending Appeal being Minister's Appeal No 338 of 1995 between *John Koti & Another vs Makau Mbili*.
11. After the testimonies of the two witnesses by the Plaintiffs and one of the Defendant's, the learned trial Magistrate entered Judgment in favour of the Plaintiffs (Respondents), which is the subject of this Appeal. I have perused the many grounds of Appeal and find that there are only two key issues which are whether the Respondents legally acquired their title to the suit land and if the Defendant is a bona fide purchaser for value without notice and is in possession thereof.
12. As to whether the Respondents legally acquired their title to the suit land, I note the Respondents are administrators to the estate of the late Makau Mbili Kyai as evident in the Certificate of Confirmation of Grant dated the March 19, 2007. It emerged in the pleadings and evidence that Makau Mbili was involved in a dispute with John Koti and Lukenya Ranching Cooperative Society *vide* Arbitration Proceedings in respect to share No 297 which was in the name of Mbula Koti, the wife of John Koti Sanga.



13. The said John Koti and Lukenya Ranching and Farming Cooperative Society Limited being aggrieved by this decision, filed an Appeal being Minister's Appeal No 338 of 1995 *John Koti & Another vs Makau Mbili vide* a Memorandum of Appeal dated the October 31, 1995 which was produced by DW1 Charles Mwema Koti as an exhibit. During the hearing in the lower court, the Appellant never adduced any evidence but DW1 Charles Mwema Koti stated that the aforementioned Appeal was still pending but failed to provide its current position nor indicate whether there had been a stay granted pending the said Appeal. The Appellant in his Defence confirms he is the owner of two acres of land comprising of Plot. 295 within Lukenya Ranching having bought it from the family of John Koti, the beneficial and or legal owner under Mbula Koti (deceased) who had been allocated Plot No 297 within the said Ranching Company. DW1 Charles Mwema Koti confirmed in the lower court that Plot No 295 belonged to his mother Mbula Koti (deceased). Further, that he is an administrator of her estate. He testified that he was not aware if the case no. 338 of 1995 was resolved but stated that he sold two acres of land to the Appellant and showed him Plot No 294 (3179). He stated that it was the surveyor from Lukenya Farm who showed them beacons for plots No 295 and 294 respectively. He produced a Letter of Allotment for member No 298 for plot 294 and Sale Agreement in Kikamba dated March 27, 2008. However in cross examination, he confirmed as follows:

I have seen documents produced in court and refer to Plot No 295. Land No 3174 emanated from Plot No 295. I have seen documents to that effect, but I have not produced such documents because I have letter of allotment. We are challenging that Title Deed No 3174. It is the case with my advocate. I have not filed a case anywhere.”

14. PW1 Jefferson Musyoka Paul who was the 1st Plaintiff and is the 1st Respondent herein stated during cross examination that they acquired the suit land as a result of the tribunal judicial process where there was a Judgment. He confirmed that the land initially belonged to Mbula Koti. Further, that after title was issued, they took the surveyor to indicate beacons as well as boundaries. He denied selling the land to the Appellant. PW2 Irene Ngumi (the 2nd Respondent) confirmed that the Appellant had entered the suit land and constructed thereon. In cross examination she explained that it is the Society that gave them the suit land. Further, that the land was allocated to their late father. She did not know how Lukenya Society worked out the acreage of the land to allocate them but she confirmed they got 32½ acres. She further explained that the suit land was surveyed twice. The Appellant insists the title was obtained fraudulently as the root of title is challenged since the Respondents failed to explain how they acquired it. However, from perusal of the Pleadings and evidence tendered in the lower court, I find that both parties admit there were proceedings in the Tribunal wherein Makau Mbili was awarded land. Further, the Respondents undertook succession proceedings in respect to Makau Mbili's estate after which they obtain title to the suit land. Section 107 of the *Evidence Act* provides that:

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.”

15. However, in relying on the legal provision I have cited, at this juncture I find that the Appellant never tendered any evidence to confirm the suit land was acquired fraudulently. Further, it is trite that parties are bound by their pleadings and cannot introduce fresh issues in submissions as the Appellant sought to do. From the evidence in the lower court including the documents produced, it is my finding that the Respondents did not acquire the Certificate of title fraudulently as claimed as this was as a result of the impugned judgment from the Arbitrator dated September 15, 1995 which is yet to be set aside. As



relates to the Certificate of Title produced by the Respondents, Section 26(1) of the [Land Registration Act](#) provides that:

The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

16. In the case of [Willy Kipsongok Morogo v Albert K. Morogo](#) (2017) eKLR the Court held as follows:

The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).”

17. In associating myself with this decision as well as the analysis above, I find that since the Respondents were the registered proprietor of the suit land and had a title to that effect, they are indeed entitled to protection of the law as well as orders of injunction to restrain the Appellant from interfering with it.

18. The Appellant in his Defence pleaded that the Respondents acquired the suit land fraudulently during the pendency of the said Appeal but I note DW1 also confirmed that he sold a portion of the suit land to the Appellant and did not know the outcome of the Appeal. DW1 further never produced any title he had obtained prior to selling the suit land to the Appellant.

19. It is against the foregoing that I find that the Learned Trial Magistrate did not err in Law and Fact by making a finding that the Respondents are the owners of the suit land and that the Appellant occupies the same without any right. I further find that the Learned Trial Magistrate did not err in Law and Fact as he held that the Respondents used the documents held by Lukenya Ranching Scheme as well as the decision of the Arbitration Award which is yet to be over turned to obtain their title. Based on my analysis above, I further find that the Appellant never proved that the Respondents acquired title to the suit land fraudulently or through non-disclosure of material facts and without following the due process/procedure envisaged in law since there was an Appeal pending for hearing and determination. I hold that since the issue of whether the Respondents were in occupation of the suit land was not in dispute, the Learned Trial Magistrate did not err in Law and Fact by failing to consider this point. To my mind, I find that since the Appellant failed to tender any evidence but raised many issues in submissions, the Learned Magistrate did not err in Law and Fact as he considered the Defence, evidence on record, and documents produced by the parties before he made his decision that the Respondents are the owners of the suit land and hence had made a *prima facie* case to warrant the granting of an Order of Permanent Injunction. Further, I find that the Learned Magistrate did not err in Law and Fact as there was no evidence tendered to prove that the suit land was excised from Plot No 294 within Lukenya Ranching & Farming Co-operative Society Ltd and was not part of Plot No 295 within the said Society. I also find that the Learned Magistrate in his judgement indeed considered the history of the suit land and that the Appellant is not an innocent Purchaser for value without notice of his respective portion of land in LR No Mavoko Town Block 3/3174 since the buyer who is DW1 did not have a title to pass to him as established in the principle set out in the Uganda Court of Appeal case



of *Katende V Haridar & Company Limited [2008] 2 EA 173* where the Court of Appeal in Uganda held that:

For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

20. In the circumstance, I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

