



**Njuguna v Kiberu & 2 others (Environment and Land Appeal E003 of 2020)  
[2022] KEELC 15015 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15015 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E003 OF 2020  
BM EBOSO, J  
NOVEMBER 22, 2022**

**BETWEEN**

**JACINTA MICHENGI NJUGUNA ..... APPELLANT**

**AND**

**SAMUEL KIBERU ..... 1<sup>ST</sup> RESPONDENT**

**JOHN WABIRU KAIRU ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH MUGO WAINAINA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon. C. K Kisiangani (SRM) delivered at Ruiru Principal Magistrate Court on 22/12/2020 in Ruiru E & L Case No 104 OF 2019)*

**JUDGMENT**

**Background**

1. This appeal arose from the Judgment rendered on 22/12/2020 by Hon. CK Kisiangani in Ruiru SPMC E & L Case No 104 of 2019. The three respondents in this appeal were the plaintiffs in the trial court. The appellant was the defendant. The dispute revolved around the question of ownership of an unsurveyed and unregistered parcel of land designated as Plot No 2 [hereinafter referred to as “the suit property”]. The said plot was located in a subdivision scheme allegedly owned by M/s Wawage Investment Company. The parties’ respective pleadings and evidence did not disclose the survey and registration particulars of the land subject matter of the subdivision scheme. Before I delve into the issue that falls for determination in the appeal, I will briefly outline the background leading to the appeal.
2. Vide a plaint dated 15/8/2019, the respondents sued the appellant, claiming that the appellant’s children were laying claim to the suit property and were contending that the suit property belonged to the appellant. It was the respondents’ case that they purchased the suit property at Kshs 1,200,000 from



one Peter Gaitho Ngara and one Sarah Wanjiru Mwaura through a sale agreement dated 12/9/2017. They sought, among other reliefs: (i) a declaration that the suit property belonged to them; (ii) a permanent injunction against the appellant together with her agents and servants; and (iii) general damages.

3. The appellant filed a statement of defence dated 8/11/2019. Her case was that she acquired the suit property in 2001 through acquisition of shares in Wawage Investment Company. Through her children, she had been in possession of the suit property since 2001. There was no rival claim of ownership over the suit property until 2016 when strangers attempted to erect structures on the suit property. This prompted her to carry out a search at Wawage Investment Company. The search revealed that the suit property had been fraudulently and/or illegally assigned to the respondents in the internal records of the said company. She urged the trial court to dismiss the respondent's suit.
4. Upon conclusion of trial, the trial court rendered the impugned Judgment in which the learned magistrate identified the following as the two key issues that fell for determination in the suit: (i) Whether the respondents' ownership of the suit property was valid; and (ii) Whether the respondents were entitled to the prayers sought in the plaint.
5. The trial court made a finding that the respondents had proved ownership of the suit property and that they were entitled to a declaration to that effect and to a permanent injunctive order. She further found that the respondents had not led evidence to enable the court make an award them for general damages. She declined to award general damages. She awarded the respondents costs of the suit.

## Appeal

6. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds of appeal;
  1. That the Learned Magistrate erred in law and in fact in finding that the suit property being Plot 2 Ruiru Block No.126 comprised under Share Certificate No.258 belonged to the plaintiffs.
  2. That the Learned Magistrate erred in law and in fact in finding that the respondents were entitled to the relief of permanent injunction when the said respondents were actually not the owners of the suit property.
  3. That the Learned Magistrate erred in law and in fact in failing to identify the inconsistencies and fabrication of evidence produced by the respondents in prosecution of their case.
  4. That the Learned Magistrate erred in law and in fact in finding that the respondents had a superior right over the suit property as against the appellant yet the appellant had been in peaceful occupation of the suit property from the year 2001 to 2017 without any opposition from the respondents.
  5. That the Learned Magistrate erred in law and in fact in disregarding the appellant's long and uninterrupted occupation of the suit property as an equitable right worth protection by the law as opposed to the respondents' alleged rights allegedly acquired in the year 2017.
  6. That the Learned Magistrate erred in law and in fact in failing to question why the respondents and management of Wawage Investment Company, which was a land buying company and custodian of the suit property had never questioned the appellants occupation of the suit property for over 16 years if at all the appellant was not the owner of the suit property.
  7. That the Learned Magistrate erred in law and in fact in failing to determine that the appellant's long and uninterrupted occupation of the suit property was a clear indication that she was the



lawful owner of the suit property as opposed to the respondents' alleged right over the suit property.

8. That the Learned Magistrate erred in law and in fact in failing to appreciate the defence, appellant's witnesses and submissions of the appellant on record.
  9. That the Learned Magistrate erred in law and in fact by misdirecting himself in the interpretation of the law and facts in the instant case and thus arrived at a wrong, erroneous and unjust conclusion.
  10. That the decision in its entirety is against the law and an irredeemable travesty of justice.
  11. That the entire decision is contrary to law and of the law.
7. The appellant prayed for an order setting aside the impugned Judgment and a finding to the effect that the appellant was the lawful owner of the suit property.

### **Submissions**

8. The appeal was canvassed through written submissions dated December 17, 2021, filed by M/s Musungu Pekke & Co Advocates. Counsel for the appellant identified the following as the three issues that fell for determination in the appeal: (i) Whether the respondents proved that they were the owners of the suit property; (ii) Whether the appellant had superior equitable rights to those of the respondent; and (iii) Who should bear costs of the appeal.
9. Counsel for the appellant submitted that the respondent did not prove their case to the required standards to justify the findings and orders which the trial court made. Counsel argued that the trial court was not told why all the individuals in the three groups of people whom the respondents claimed preceded them as owners of the suit property never took possession of the suit property between 1999 and 2017 and why none of them was called as a witness during trial. Counsel faulted the trial court for relying on the evidence of PW2 yet the said witness was unable to place before the trial court evidence relating to the legal status of Wawage Investment Company and his capacity in the said Organization. It was the submission of counsel for the appellant that no evidence was tendered to show that the said Organization was the original owner of the suit property. Counsel added that the internal register of the said Organization had not been produced for scrutiny. Counsel contended that the share certificate and the sale agreement produced by the respondent were not enough proof of ownership.
10. On whether the appellant had superior equitable rights to those of the respondents, counsel submitted that the appellant acquired the suit property in 2001 and had been in occupation since then. Counsel added that the appellant produced a share certificate showing that she acquired the suit property in 2001. Counsel argued that PW2 confirmed that, indeed, he issued a share certificate to the appellant in 2001. Counsel urged the court to disregard PW2's contention that the share certificate issued to the appellant in 2001 was merely for enabling the appellant to obtain a visa to travel to the USA, contending that the share certificate was evidence of acquisition of the suit property through purchase. Counsel urged the court to award the appellant costs of the appeal.
11. The respondent filed written submissions dated 24/1/2022 through M/s Wakio Mugo & Co Advocates. Counsel identified the following as the two issues that fell for determination in the appeal: (i) Who is the legal owner of the suit property; and (ii) Who should bear costs of this appeal.
12. On who is the legal owner of the suit property, counsel for the respondent submitted that, although the appellant and the respondent held parallel share certificates issued by M/s Wawage Investment Company, PW2, a director of the said company, testified that the share certificate issued to the appellant



in 2001 was merely intended to enable the appellant apply for a visa to travel abroad. Counsel added that the share certificate held by the respondents had been acknowledged by PW2 as the one conferring ownership rights over the suit property and that the respondent had demonstrated how they came to own the suit property. Counsel submitted that the appellant's contention that she had peaceful occupation of the suit property from 2001 to 2017 was not truthful because she had contradicted herself by stating that strangers erected structures on the suit property in 2016.

13. Counsel for the respondents submitted that the appellant had not demonstrated that she made any payment to M/s Wawage Investment Company or any other entity. Counsel added that at the time the share certificate held by the appellant was issued, the suit property did not belong to the Wawage Investment Company and therefore the company could not sell the land to the appellant. Counsel urged the court to consider the history relating to the parties' acquisition the suit property.
14. On costs, counsel urged the court to be guided by the general principle that costs follow the event.

### **Analysis and Determination**

15. I have read and considered the entire record of the trial court. I have also considered the record of appeal; the grounds of appeal; the parties' respective submissions; the relevant legal frameworks; and the relevant jurisprudence on the key question that falls for determination in this appeal. In her submissions, the appellant identified two substantive issues. The two issues focus on the question of ownership of the suit property. On their part, the respondents identified one substantive issue, which similarly focuses on the question of ownership of the suit property.
16. Based on the grounds that were advanced in the memorandum of appeal and the issues that were identified and submitted on by the parties, the key issue that falls for determination in this appeal is whether the trial court erred in its finding to the effect that the respondents had proved their case as against the appellant. Before I dispose the issue, I will outline the principle upon which this court exercises jurisdiction as a first appellate court.
17. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
18. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
19. I now turn to the key issue in this appeal which is the question as to whether the trial court erred in its finding to the effect that that the respondents had proved their case as against the appellant. The



reasoning which informed the trial court's finding is contained on pages 6 and 7 of the impugned Judgment and reads as follows:

“I have considered the documentary evidence produced by the plaintiffs and I find that they prove the ownership of this suit property since the year 1999 until the time that the plaintiffs got its possession. They have succeeded in showing that Nancy Mugure Njeru was the owner of plot 2 Ruiru East Block 126 as at 20/7/99. She then sold it to Peter Gaitho Ngara and Sarah Wanjiru Mwaura who were issued with its share certificate on 4/9/2012 then they sold to the plaintiff's herein on 12/9/2017. There is a clear chain of events as to the plaintiffs' claim herein and how they got to own this suit property. PW2 who is the director of the allocating company also confirmed the same and stated that he gave the defendant a share certificate for her visa application and that the plaintiff did not pay him any monies for the said plot. DW1 produced a share certificate for plot 2 Ruiru but does not state which block or another number in reference to the plot that was being allocated to her. She has only a share certificate which does not indicate where her alleged plot is located and no payment receipts of anything to prove that she paid for the alleged plot. In any case if she is claiming the same property as the plaintiff, her share certificate was issued when another person has already been allocated the suit plot and therefore she cannot claim it. All her witnesses were not present when the defendant entered the office of Wawage Investment Ltd on 11/5/01 to know exactly what happened for her to be issued with a share certificate. Nobody saw her paying money for it. The fact that the defendant and her family have been carrying on business at the suit property does not make them the owners of the same. The plaintiffs' share certificate is specific on the location of the plot while the defendant's is not. For these reasons, I find that the plaintiffs have made out their case on a balance of probability that are the rightful owners of the suit property.”

20. I have considered key aspects of the evidence that was before the trial court. PW2 who was called by the respondents testified that he was a director of Wawage Investments Company. He did not disclose whether Wawage Investment Company was a registered company. He similarly did not disclose the land registration details of the mother title of the subdivision scheme where the suit property is located. He conceded that in the year 2001, he issued to the appellant the share certificate which the appellant holds. The share certificate was issued on 11/5/2001 and reads as follows:

“This is to certify that Jacinta Michengi Njuguna Of P.o Box 718, Kiambu is the registered proprietor of Plot No 2 Ruiru One shares (sic) of Five Thousand each, fully paid numbered as in margin, in the above named company subject to the Regulations thereof.” [emphasis is mine]

21. Besides the above certificate which indicated that the appellant had been allocated Plot No 2, after she had fully paid for the plot, there was evidence that through her children, the appellant had been in possession of the suit property since 2001. Indeed, the respondents initiated proceedings against the appellant after the appellant's children resisted the respondents' attempt to seize the suit property from them.
22. Further, there was evidence that Wawage Investments company, through PW2, was behind issuance of the Certificate which the respondents were relying on to seize the suit property from the appellant. PW2 casually contended that the share certificate that Wawage Investment Company issued to the appellant did not confer upon her the rights of ownership of the suit property, contending that it was merely meant to assist the appellant acquire a visa to travel out of the Country. This contention cannot hold because there was evidence that upon M/s Wawage Investment Company issuing the share



certificate to the appellant, the appellant took possession of the land in 2001 and was in possession all through. If any other person had a claim of ownership over the plot, that person could have challenged the appellant's possession for the period of close to 16 years that the appellant enjoyed quiet possession of the plot.

23. It is clear from the evidence presented to the court that M/s Wawage Investment Company, through PW2, were the authors of the predicament in which the respondents found themselves. While aware that the appellant held a certificate duly issued by M/s Wawage Investment Company and had been in possession of the suit property from 2001, M/s Wawage Investment Company, through PW2 knowingly caused the respondent to part with the money on the basis of a duplicate share certificate which they purported to issue to them.
24. It is clear from the foregoing that M/s Wawage Investment Company, through PW2, were not honest in their dealings with the respondents. They knew that they had allocated the suit property to the appellant through issuance of a plot share certificate in 2001 but proceeded to issue another share to the respondent relating to the same plot. In my view, M/s Wawage Investment Company together with PW2 are the ones to answer for the money that the respondents parted with.
25. The result is that this appeal is allowed. The Judgment of the trial court is set aside and is substituted with an order dismissing the suit against the appellant.
26. Because the dispute giving rise to the suit in the trial court and to this appeal were authored by M/s Wawage Investments Company through Mr Francis Njeru Ngugi and both of them were not joined as parties to the dispute, there will be no order as to costs of the suit in the trial court and costs of this appeal. Those are the disposal orders of this court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF NOVEMBER 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Were for the Appellant

Ms Mugo for the Respondents

Court Assistant: Ms Osodo

