



REPUBLIC OF KENYA



**Tadi v Boru (Environment and Land Appeal 008 of 2021)
[2022] KEELC 14953 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 008 OF 2021
PM NJOROGE, J
NOVEMBER 21, 2022**

BETWEEN

WAKO GALGALO TADI APPELLANT

AND

HASSAN BORU RESPONDENT

*(Being an Appeal arising from the Judgement of HON. E. NGIGI,
PM dated 22nd of December 2020 at Isiolo Civil Case No. 26 of 2017)*

JUDGMENT

1. The memorandum of Appeal in this appeal states as follows;
 1. The learned trial magistrate erred in law in not considering the relevant factors in a suit for injunction as pleaded, thus coming to a wrong conclusion.
 2. The learned trial magistrate erred in law and facts in considering extraneous matters that were not relevant to the matters at hand, thus coming to a wrong conclusion.
 3. The learned trial magistrates erred in law and facts by basing the judgement on matters that were neither pleaded nor proved in sustaining the counterclaim.
 4. The learned trial magistrate erred in law and facts in sustaining a counterclaim that was devoid of other necessary parties contrary to the law.
 5. The learned trial magistrate erred in law and facts in sustaining a counterclaim that was incompetent and an abuse of court process.
 6. The learned trial magistrate erred in law in abdicating on the role of the court to adjudicate on the matters at hand and proceeding to deliver a judgement that is per incurium.

DATED AT NYERI THIS 15TH DAY OF JANUARY ,2021



C.M. KINGORI

ADVOCATE FOR THE APPELLANT

2. The appeal was canvassed by way of written submissions.
3. The appellant submitted on his 6 grounds as shown here below.
4. Ground number 1 is that;

The learned Magistrate erred in law in not considering the relevant factors in a suit for injunction as pleaded, thus coming to wrong conclusion.

The upshot of the appellants submissions is that he was the legitimate owner of Plot No R -29 K/ Asharaf for which an allotment letter had been issued by the Isiolo County Council. The respondent claimed ownership of Plot No. E Chechelesi/283 and 284. He submits that these are different entities. He also says that there has been no satisfactory explanation how Plot No. KAMBI SHARAF 87 which the respondent claims to have bought from one Abdi Sharrif Idris mutated to Plot Numbers Chechelesi/283 and 284. He submits that there was never any proof of the respondent's ownership of Plot Nos 283 and 284 whereas he had an allotment letter for Plot No. R-29K/SHARRIF.

5. Grounds Number 2 is that;

The learned trial Magistrate erred in law and facts in considering extraneous matters that were not relevant to the matters at hand, thus coming to a wrong conclusion.

The appellant submits that the trial court erroneously treated the case as one of double allocation and concluded that the respondent's allocation was first in time in history. He says that no minutes of the alleged allocation to the respondent by the County Council were placed before the court as an exhibit and therefore there was no proof of the allocation to the respondent on 24th October, which according to the court preceded the date of allocation to him which was 24th November, 2010.

The appellant claims that the trial magistrate went on a frolic of his own when he considered the issue of there being a Somali Community around the suit land.

He also says the council meeting held on 24th October, 2010, was non-existent as this date fell on a Sunday when public institutions do not work.

6. Ground No. 3 is that;

The learned trial magistrate erred in law and facts by basing the Judgement on matters that were neither pleaded nor provided in sustaining the counterclaim.

The appellant submits that parties are bound by their pleadings and that courts should make determinations based on the available pleadings. He submits that a counterclaim is a case in its own right, completely different from the plaintiffs' case and will fall or succeed on its own merit as was found in the case of *Kibona Versus Transcan Timber Co. Ltd, Mbeya* HCC No. 8 of 1999 [1995 -1998] IEA121.

He submits that the respondent did not particularize the facts upon which the respondent's case is premised and the facts upon which the appellants documents were being impugned.

The appellant adds that the respondent never counterclaimed for any parcel of land and also never particularized any claim of illegality or fraud on the part of the appellant to warrant the invalidation of the appellants' documents



7. Ground number 4 is that;

The learned trial magistrate erred in law and facts in sustaining a counterclaim that was devoid of other necessary parties contrary to the law.

The appellant has reproduced Order 7 Rule 8 of the [Civil Procedure Rules](#) which states as follows:

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross- action, would be defendants to such cross-action, and shall deliver to the court his defence, for service on the plaintiff within the period within which he is required to file his defence”.

The appellant submits that the respondent, in contravention of the applicable rule did not provide for the names of the persons against whom he was counterclaiming. This, according to him, rendered the purported counterclaim null and void ab initio.

8. Ground number 5 is that;

The learned trial magistrate erred in law and facts in sustaining a counterclaim that was incompetent and an abuse of court process.

The appellant submits that Order 7 Rule 5 of the Civil Procedure Rules requires that a counterclaim must be accompanied by a verifying affidavit. It is submitted that where the counterclaim is not accompanied by a verifying affidavit, it is misconceived and bad in law and should be struck out with costs. The appellant has supported this assertion by proffering the case of; In [Bridge -Up Container Services Ltd Versus C.F.C Stan Bank Ltd](#) [2011] eKLR where it was held that:

“A counterclaim being the document initiating the counter suit against the plaintiff must of necessity be accompanied by the verifying affidavit, verifying the correctness of the averments contained in the counterclaim. Order 7 Rule 5(a) of the Civil Procedure Rules 2010 has only reinforced this position by specifically providing for a verifying affidavit. Therefore, the filing of the counterclaim without a verifying affidavit renders the defendant’s counter-claim defective”.

The appellant opines that the trial court entertained the defective counter-claim in utter disregard to the rules of procedure and substance. He urges the court to dismiss the counter-claim on this ground alone.

9. Ground number 6 is that;

The learned trial magistrate erred in law in abdicating on the rule of the court to adjudicate on the matters at hand and proceeding to deliver a judgement per incurium.

The appellant submits that all relevant facts were ignored even where the evidence was incontrovertible including non-production of proof of how the respondent acquired plot Nos. Chechelesi 283 and 284. He asserted that the lands in dispute are in different locations; Chechelezi and Kambi Asharaf.

10. The appellant prays that the appellant’s claims in the lower court be upheld and that the respondent’s defence and counterclaim be dismissed with costs to this appeal and in the lower court.

11. The respondent’s submissions are undated but were filed on 20th June, 2022.



12. In the submissions, the respondent gave a background of the case. He then gave a narration of the respondent's evidence given in the lower court by him (DW1) and his witnesses DW2 and DW3. He then narrated the evidence of the appellants witnesses PW1, PW2 and PW3. Having done that, he merely asked the court to dismiss the appellant's appeal in its entirety with costs to the respondent.
13. I do note that the respondent had the benefit of having been served with the appellant's submissions. I am surprised that he never addressed any of the 6 grounds filed by the appellant in support of his appeal.
14. What can I say? A court of law does not take sides. It cannot go behind the pleadings to ferret out unpleaded and unfiled issues. A court cannot aid an indolent litigant.
15. While finding the grounds postulated by the appellant as having not been controverted in any way by the respondent, I do particularly find that the counter-claim in the lower court was incurably defective for not being accompanied by a verifying affidavit and for having not particularized the claims and facts upon which the respondent's case in the lower court was premised.
16. There is one veritably intriguing fact. The respondent claims that the County Council of Isiolo allocated the disputed land to him on 24th October, 2010. The minutes of that meeting were not produced as an exhibit. The said allocation is highly suspicious because 24th October, 2010 fell on a Sunday. Public institutions do not conduct business on Sundays.
17. I have considered the parties pleadings in the lower court, the attendant proceedings and the Judgement delivered in the lower court. I do note that the Judgement delivered by the lower court upheld a defective counter-claim. Hence that Judgement is hereby declared void ab initio.
18. In the circumstances, I issue the following orders;
 - a. This appeal is allowed.
 - b. The appellants claim in the subordinate court is allowed and the respondent's defence and counter-claim in the subordinate court are dismissed.
 - c. Costs for this appeal and in the subordinate court shall follow the event and are awarded to the appellant.

DELIVERED IN OPEN COURT AT ISIOLO THIS 21ST DAY OF NOVEMBER, 2022, IN THE PRESENT OF;

Court assistant: Balazi

Miss Nyasani holding brief for Jarson for the Appellant.

Kithinji holding brief for Mokuia for the Respondent.

HON. JUSTICE P.M NJOROGE

JUDGE

