



REPUBLIC OF KENYA



KENYA LAW
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**Mbati v Ndombi & another (Environment and Land Appeal E004 of 2020)
[2022] KEELC 14777 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E004 OF 2020
DO OHUNGO, J
NOVEMBER 15, 2022**

BETWEEN

MARGARET BULIMO MBATI APPELLANT

AND

SUSAN NEKESA NDOMBI 1ST RESPONDENT

ISMAEL OBOTE NDOMBI 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Principal
Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal
Magistrate) delivered on 3rd February 2020 in Butali MCELC No. 3 of
2020 Margaret Bulimo Mbati v Susan Nekesa Ndombi & Ismael Obote Ndombi)*

JUDGMENT

1. The background of this appeal is that through plaint dated January 8, 2020, the appellant herein filed a suit in the subordinate court against the respondents. She averred that her husband (the late Kitts Mbati John Mukonyole) was the registered proprietor of the parcel of land known as S/ Kabras/Samitsi/99 measuring 2.4 hectares (the suit property). The appellant further averred that the respondents were planning to bury the body of the late Levi Ndombi Mukonyole on the suit property and that the appellant's efforts to stop them were futile. The appellant therefore prayed for an order of permanent injunction restraining the respondents from interring the body of the late Levi Ndombi Munyokole on the suit property.
2. The respondents filed their statement of defence and counter claim dated January 11, 2020 wherein they stated that the suit property is family land that originally belonged to the late Yohana Mukonyole who was the first respondent's late husband and the father to the appellant's late husband and that the appellant's husband "succeeded" the suit property and wrongfully obtained sole proprietorship without taking into account the share of the first respondent's husband and by extension the share



of the respondents' family. That the appellant's husband was holding the suit property in trust as family land. The respondents further averred that the appellant's husband instituted a case in the Land Disputes Tribunal in Malava in 1997 claiming exclusive possession of the suit property and the eviction of the respondents' family and that on October 11, 1997 the said tribunal passed a verdict giving the appellant's late husband 5 acres and the first respondent's late husband 1 acre respectively from the suit property.

3. The respondents further averred that the appellant's late husband appealed to the then Western Provincial Land Disputes Appeal Tribunal which overturned the decision of the Malava Land Disputes Tribunal on April 8, 1998, but the appeal tribunal's decision was quashed on January 24, 2005 and the Malava Land Disputes decision upheld through Kakamega High Court Civil Appeal No 31 of 1998. That the appellant's late husband's application to review the appeal was dismissed on May 18, 2006 and subsequently the appellant's late husband appealed against the decision to the Court of Appeal at Kisumu through Civil Appeal No 16 of 2007, which was again dismissed. That the appellant's late husband also filed Constitutional Petition No 33 of 2015 against the first respondent's late husband claiming among other things that he had been unconstitutionally deprived of the suit land but on July 25, 2018 the said petition was struck out with costs.
4. The respondents averred that they have a beneficial interest in 1 acre of the suit land which they have been using since 1970 and wherein they have established a homestead, where they reside and cultivate, where they buried their kith and kin without any objection from the appellant and where they intended to bury the remains of the late Levi Ndombi Mukonyole. They therefore prayed that the appellant's suit be dismissed, and that judgment be entered against the defendant for an order that the suit property be subdivided into 5 acres for the appellant's family and 1 acre for the respondents' family, for an order restraining the appellant, her agents and servants from interfering with the respondents' possession of the 1 acre and an order that the respondents be allowed to bury the late Levi Ndombi within the 1 acre. They also sought costs and interest.
5. Upon hearing the matter, the subordinate court (ZJ Nyakundi, Senior Principal Magistrate) delivered judgment on February 3, 2020. The court dismissed the appellant's case and ordered as follows:
 1. That the body of the deceased Levi Ndombi be and is hereby ordered to be buried on parcel No S/Kabras/Samitsi/99.
 2. That the said body of the deceased shall be buried on a portion of land measuring 1 acre of the said parcel No S/Kabras/Samitsi/99, within the same compound where the grave of his son Duncan is situate.
 3. That the plaintiff herein is advised to take out letters of administration and transfer a portion measuring 1 acres to the defendants in line with the High court decision in Civil Appeal No 31 of 1998.
 4. That the plaintiff to incur mortuary expenses in line with the consent dated January 15, 2020.
6. Aggrieved by the judgment, the appellant filed this appeal on February 3, 2020, the very date of delivery of the judgment, praying that the appeal be allowed with costs and that the judgment of the subordinate court be set aside. The following grounds of appeal are listed on the face of the memorandum of appeal:
 1. That the learned magistrate erred both in law and fact in holding that the appellant failed to proof (sic) her case on a balance of probability.



2. That the learned magistrate erred both in fact and law in holding that the respondents had proved their counter -claim on a balance of probability.
 3. That the learned magistrate erred both in fact and law in analyzing the evidence tendered by the appellant and hence arriving at a wrong decision.
 4. That the learned magistrate erred both in fact and law by considering irrelevant documents tendered by the respondents in arriving at his decision.
 5. That the learned magistrate erred both in fact and law by failing to consider the submissions of counsel for the appellant in arriving at his decision.
7. The appeal was canvassed through written submissions. The appellant filed his submissions on April 26, 2022. She argued that the suit property is registered in the name of the late Kitts Mbatu John Mukonyole in respect of whose estate she holds a limited grant ad litem and that the respondents never proved their claim in the suit property since they never adduced any documents to prove that the late Levi Ndombi Munyokole was the owner of any portion of the suit property. That the decisions that the respondents referred to were not relevant to the proceedings since they related to disputes between the late Kitts Mbatu John Mukonyole and the late Levi Ndombi Munyokole. She further submitted that the Subordinate Court awarded the respondents an acre of the suit property, yet the respondents never raised the claim in their pleadings at all. The appellant therefore urged that the appeal to be allowed.
 8. The respondents filed their submissions on April 4, 2022 and argued that this appeal is incompetent for being filed out of time since it was filed on January 10, 2022, yet the impugned judgement was delivered on February 3, 2020. That the appellant failed to prove her case in the subordinate court and that the trial magistrate correctly considered the previous decisions of the High Court, the Court of Appeal and the Environment and Land Court. That the trial magistrate correctly held that he was bound by the said decisions and that the decisions show that the deceased was entitled to one acre of the suit property. The respondents therefore urged the court to uphold the judgment of the subordinate court.
 9. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR.*
 10. I have considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the appeal was filed within time and whether the decision of the subordinate court should stand.
 11. The respondents have contended that this appeal was filed on January 10, 2022, yet the impugned judgement was delivered on February 3, 2020 and that the appeal is consequently incompetent for being filed out of time since it. Pursuant to section 16A (1) of the *Environment and Land Court Act, 2011*, an appeal from the subordinate court to this court is to be filed within 30 days of delivery of the judgment or ruling. A perusal of the record herein shows that the memorandum of appeal in respect of this appeal was filed on February 3, 2020, the very date of delivery of the judgment. What the appellant filed on January 10, 2022 was the record of appeal. I am satisfied that this appeal was filed within time.
 12. The appellant's case before the subordinate court was that that her late husband Kitts Mbatu John Mukonyole was the registered proprietor of the suit property and that the respondents should not



therefore bury the body of the late Levi Ndombi Mukonyole on the suit property. The respondents' case, on the other hand was that late Levi Ndombi Mukonyole was entitled to 1 acre of the suit property and that he should be buried on that portion.

13. There is no dispute that Kitts Mbatu John Mukonyole filed Malava Land Disputes Tribunal Claim No 95 of 1997 seeking the eviction of Levi Ndombi Mukonyole from the suit property. The tribunal heard the dispute and found that Levi Ndombi Mukonyole was entitled to 1 acre of the suit property while Kitts Mbatu John Mukonyole was to retain 5 acres. Although Kitts Mbatu John Mukonyole appealed to the Provincial Land Disputes Appeals Tribunal and the Appeals Tribunal ordered Levi Ndombi Mukonyole to vacate the disputed property, Levi Ndombi Mukonyole appealed to the High Court which quashed the decision of the Appeals Tribunal thereby reinstating the decision of the Malava Land Disputes Tribunal. Thus, as of the date of the judgment of the subordinate court, the position remained that the estate of the late Levi Ndombi Mukonyole was entitled to 1 acre of the suit property. The respondents wanted to bury his remains on the 1 acre which he was entitled to and which they were occupying.
14. In view of the foregoing, the appellant cannot simply wave the title deed in respect of the suit property and purport to assert full proprietorship rights over the suit property. She must recognize the rights of the estate of the late Levi Ndombi Mukonyole and by extension, the respondents.
15. I am satisfied that the conclusions reached by the learned trial magistrate are valid and should therefore stand. I find no merit in this appeal and I therefore dismiss it. Considering the close family relationship between the parties, I make no order as to costs of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER 2022.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant

Ms Muthami for the respondents

Court Assistant: E Juma

