



REPUBLIC OF KENYA



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**Mutisya v Gichuhi (Environment and Land Appeal 7 of 2021)  
[2022] KEELC 15272 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15272 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 7 OF 2021  
CA OCHIENG, J  
DECEMBER 6, 2022  
(FORMERLY MACHAKOS HCCA. NO. 140 OF 2012)**

**BETWEEN**

**JOSEPH MUNYAO MUTISYA ..... APPELLANT**

**AND**

**MARY MUTHONI GICHUHI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Kithimani Principal Magistrate's Court in Civil Case No. 318 of 2005 delivered on 16th August, 2012 by Hon. M.A.O. Opanga - (RM))*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the 31<sup>st</sup> August, 2012 the Appellant appealed against the Judgment of Hon. M.A.O. Opanga, Resident Magistrate made on the 16<sup>th</sup> day of August, 2012 in Kithimani PMCC. No. 318 of 2005 between Mary Muthoni Gichuhi -Versus - Joseph Munyao Mutisya. The genesis of this Appeal is the Judgment by Hon M.A.O Opanga, Resident Magistrate where she entered Judgment in favour of the Respondent.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 31<sup>st</sup> August, 2012 which contains the following grounds:
  1. The learned trial Magistrate erred in law and fact in not appreciating the fact that councils operate through Minutes and not allotments.
  2. The learned trial Magistrate erred in law and fact in admitting inadmissible evidence/ documents that were initially rejected by her predecessor.



3. The learned trial Magistrate erred in law and fact in not finding that there was no evidence for any extension of Plot No. 180 from 20 x 100ft to 52 x 100ft.
4. The learned trial Magistrate erred in law and fact in over relying entirely on letters dated 20<sup>th</sup> July, 2005 and 19<sup>th</sup> August, 1998 in arriving at her Judgment.
5. That the learned trial Magistrate erred in law and fact in not appreciating the existence of the Plaintiff's Plot No. 154 measuring 20 x 100 ft.
6. That the learned trial Magistrate erred in law and fact in entering Judgment as prayed in the Plaintiff.
7. That the learned trial Magistrate erred in law and fact in holding that the resolution of the councilors of 29<sup>th</sup> December, 1998 was not valid and councilors are not mandated to resolve plot disputes.
8. That the learned trial Magistrate erred in law and fact in holding that Matuu Town Council inherited plots from Masaku Town Council whereas plot belonged to individuals.

Reasons Wherefore the Appellant prays that:

- i. This Appeal be allowed.
  - ii. The Lower Court Judgment be set aside.
  - iii. Costs here and below be paid to the Appellant.
3. The Appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

4. The Appellant in his submissions contends that the trial court misdirected itself in arriving at its decision to uphold the Respondent's claim. Further, it failed to take into consideration matters which it should have taken into account and thus it arrived at a wrong decision. He insists that the Respondent did not have locus to institute her suit in the lower court, and yet the trial Magistrate disregarded this fact. He argues that the trial Magistrate proceeded to invalidate the minutes of the Council.
5. To buttress his averments, he relied on the following decisions:  
*Mbogo Vs Shah & Another* (1968) EA 93; *Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Another* (1982 – 1999) 1 KAR; *Morjaria & Abdalla* (1984) KLR 490 and *Troustik Union International & Another vs Jane Mbeyu & Another* Civil Appeal No. 145 of 1990.
6. The Respondent in her submissions argues that together with the Appellant, they each own commercial plots at Matuu market, having acquired the said plots by way of purchase from the Original County-Council. Further, that the said plots came to be administered by Matuu Town Council in the year 2000. She explains that she owned Plot No. 180 while the Appellant owned Plot No. 154. Further, both plots measure 100 feet in length but have a difference in width. She contends that at the commencement of the suit, both plots which they each have physically occupied since 1978, were vacant. She insists that in the Pleadings as well as during the hearing, the Appellant never raised the issue of her *locus standi* or legal capacity. Further, in the Memorandum of Appeal dated 31<sup>st</sup> August, 2012, there is no issue pleaded or the Respondent's evidence being contradicting as to the real size or measurements of the plots. She states that she led evidence in court as well as in her pleading clearly stating she is the wife of her late husband and produced Grant of Letter of Administration Intestate to that effect.



## Analysis and Determination

7. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination: Whether the Appellant encroached on the Respondent's plot. Whether the Appeal is merited.
8. Before I proceed to make a determination of this Appeal, I wish to provide a background of this matter. The Respondent claims her late husband Kinyanjui was allotted Plot No. 180 by the Masaku County Council. The Appellant claims to be the owner of Plot No. 154. The real issue in dispute was the width of the two plots. In the lower court the Respondent had sought for the following orders vide her Plaint dated the 5<sup>th</sup> October, 2005.
  1. The Defendant, by himself, his servants and or agents be restrained from encroaching or in any way encroaching Plot No. 180 Matuu Market.
  2. Costs of the suit be provided for.
9. The trial Magistrate after taking the evidence of the respective parties entered Judgment in favour of the Respondent on the 16<sup>th</sup> August, 2012 where she stated thus:
  - a. The Defendant by himself, his servant and or agents are hereby restrained from encroaching or in any way encroaching Plot No. 180 Matuu Market measuring 52 by 100 ft.
  - b. The Plaintiff shall also have the cost of this suit with interest a court rates.
10. The Appellant being aggrieved by the said Judgment, filed the Memorandum of Appeal containing various grounds. From the said grounds, the only issue I can decipher that is in dispute is the width of the two plots. In the evidence in the lower court, the Appellant did not produce any Letter of Allotment to his Plot No. 154. Further, from the minutes of the meeting of the Matuu Town Council conducted on 29<sup>th</sup> December, 1998, which he claims was held to determine the dispute as to the size of the plots, it is worth noting that in the said minutes, the Councilors proceeded to determine the size of the Respondent's plot and directed the Appellant to apply for the 20ft of the plot he had been allocated. This was a clear indicator that indeed the Appellant had not yet acquired the ownership of the whole plot 154 by the time the meeting was held to determine an alleged boundary dispute. I note from the various correspondence the Appellant produced especially letters dated the 18<sup>th</sup> June, 2004 and 21<sup>st</sup> September, 2010, it is clear the Matuu Town Council was yet to allocate him the whole alleged plot and even denied his representative a chance to pay fees in respect to Plot 154. From the evidence of the Respondent, she confirmed she was representing her deceased husband's estate that was owner of Plot 180 and produced a Certificate of Confirmation of Grant. Further, that the plot was 52ft by 100ft. I note the Appellant never raised the issue of locus in his Defence and evidence and I opine that he cannot raise it at this juncture. The Respondent contended that they had built on a portion of the suit plot and after her husband's demise, the Appellant commenced harassing her and blocked her from constructing on the remaining portion. DW2 who was a surveyor from the Matuu Town Council confirmed in his evidence that in their records there exists Plot No. 180 measuring 52ft by 100ft while plot 154 measures 20ft by 100ft. DW2 further testified that the deceased was given a letter of allotment in respect to Plot No. 180 in 1978 and all along Kinyanjui has been paying land rates for the 52ft x 100ft plot. The Respondent produced a copy of the Letter of Allotment and confirmed she had been paying land rates for the said plot. I note the Appellant even admitted that he had not developed his plot and that the Respondent had even submitted a building plan. Even though the Appellant blocked the Respondent from producing certain documents but from the few documents which were admitted in evidence as well as the testimony of PW1 and DW2, as an Appellate Court, I find that this indeed



corroborated that the Respondent's plot indeed measured 52ft by 100ft. It is trite that ownership of plots from local councils is proved by issuance of Letters of Allotment and not Council minutes as sought by the Appellant. Even though the Appellant has argued that the Respondent did not prove that she had been allowed to extend the width of her plot, however from the evidence of DW2 who was an employee of the Council, I find that it indeed confirms that the Respondent's plot measured 52ft by 100ft.

11. In the foregoing, I find that the trial Magistrate indeed took into account all evidence presented to arrive at her Judgment. I opine that the Appellant did not deny in the lower court that the initial suit plots were allocated by Masaku County Council which was succeeded by the Matuu Town Council.
12. To my mind, I find that since this was a suit seeking to restrain the Appellant from interfering with the suit plot, noting that the ownership of Plot No. 180 was proven to belong to the deceased, the trial Magistrate was actually right to enter Judgment in favour of the Respondent.
13. In the circumstances, I find the Appeal unmerited and will proceed to dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6<sup>TH</sup> DAY OF DECEMBER, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**

