



**Kinyua v Kaesha & another (Environment and Land Appeal
E036 of 2022) [2024] KEELC 454 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E036 OF 2022
LC KOMINGOI, J
FEBRUARY 1, 2024**

BETWEEN

AGATHA WAMBETI KINYUA APPELLANT

AND

MARTIN KAMIA KAESHA 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

*(Being an Appeal from the judgement of the Hon. Kabuya I. M (P.M) in
Kajiado CMC ELC No. 14 of 2019 delivered at Kajiado on 15th July 2022)*

JUDGMENT

1. In the Judgement dated 15th July 2022 Hon. I.M. Kahuya (Principal Magistrate) held;

“In conclusion the plaintiff’s case fails thus the same is dismissed with costs. Subsequently prayers (ii) and (iii) of the 1st Defendants counter claim dated 11th October 2019 are allowed”.
2. Aggrieved by the said Judgement the Appellant filed a Memorandum of Appeal dated 10th August 2022. The Appeal seeks the setting aside of the judgement and that the Appellant’s prayers allowed on grounds that:
 1. The learned magistrate erred in law and in fact in finding that the Appellant did not prove that she has legal interest in Parcel of land known as plot No. 530/Business- Noonkopir T. Centre/New No. B7 contrary to the weight of evidence adduced in support.



2. The learned magistrate erred in law and in fact by failing to hold that the Appellant had an indefeasible title over plot No. 530/Business- Noonkopir T. Centre/New No. B7.
 3. The learned magistrate erred in law and in fact by allowing the counterclaim in the absence of any cogent evidence adduced by the 1st Respondent of the averment as regards to ownership of plot No. 530/Business- Noonkopir T. Centre/New No. B7.
 4. The learned magistrate erred in law and in fact in failing to find that the 2nd Respondent had not done any validation exercise to authenticate the ownership of the property in dispute.
 5. The learned magistrate erred in law and in fact by granting orders which were not sought in the counterclaim.
 6. The learned magistrate erred in law and in fact in dismissing the Appellant's case in toto.
 7. The learned magistrate erred in law and in fact in failing to consider the totality of the submissions filed on behalf of the Appellant.
 8. The learned magistrate erred in law by failing to exercise her discretion judiciously.
3. The Appeal was canvassed by way of written submissions.

The Appellant's submissions

4. Counsel for the Appellant submitted on the following issues as highlighted hereunder.
5. On whether the Appellant was the legal owner of Plot No. 530/Business- Noonkopir T. Centre/New No. B7, counsel submitted that it was evident and on record that the Appellant purchased the suit property from one Patrick Musembi in 2007 and the property transferred was to her in the same year. A search conducted in the year 2010 confirmed this position. Similarly, during the 2nd Respondent's cross examination they too confirmed that the documents in possession of the Appellant were legitimate and this evidence was not challenged. Counsel added that the 1st Respondent did not produce evidence to support his argument that he was the registered proprietor of the suit plot citing Section 24 of the [Land Registration Act](#) and the case of [Peter Wariire Kanyiri v Chriopus Washumbe & 2 others](#) [2022] eKLR. Counsel added that there was no evidence that the property 591 was registered to one David Ole Nkediye and the Letter of Allotment produced bore no legal consequence since a letter of allotment could not confer any transferrable rights to an allottee, citing the Supreme Court case of [Torino Enterprises Ltd v Attorney General](#) [2023] KESC 79 (KLR).
6. On whether the trial court erred in granting orders that were not sought in the counterclaim, counsel submitted that the counterclaim was fatally defective as it did not comply with Order 7 Rule 5 and Rule 8 of the [Civil Procedure Rules](#) as was held in [Bridge-Up Container Services Ltd v CFC Stanbic Bank Ltd](#) [2011] eKLR: "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... Therefore, the filing of a counterclaim without a verifying affidavit renders the defendant's counterclaim defective..."
7. He urged that, the Appeal be found to be merited and should be allowed with costs to the Appellant.



The 1st Respondent's submissions

8. On whether the Appeal should be allowed, counsel submitted that one David Nkediye was allotted plot no. 591/ Residential Noonkopir Trading centre (now B7) in 1995 which he sold to the 1st Respondent in 2007. The 1st Respondent was consequently issued a letter of allotment. The Appellant did not produce evidence of how one Patrick Musembi or the unnamed Women Group in Kitengela were allotted the said plot citing *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR and *Mike Maina Kamau v Attorney General* [2017] eKLR. Counsel went on to submit that the suit property having been allotted to David Nkediye in 1995 was no longer available for allocation. He put forward the case of *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR noting that the National Land Commission in their letter dated 6th November 2018, stated that plot B7 belonged to the 1st Respondent.
9. On whether the trial court granted orders not sought in the counterclaim, Counsel submitted that this was false since the orders granted by the learned trial magistrate were the 1st Respondent's prayers ii and iii of his Defence dated 11th October 2019. He urged that, the appeal be dismissed with costs to the 1st Respondent.

Analysis and Determination

10. I have considered the Grounds of Appeal, the record of Appeal, the written submissions and the authorities cited. The issues for determination are;
 - i. Whether the learned trial magistrate erred in finding that the Appellant did not prove that she has legal interest in the parcel of land known as Plot. No. 530/Business-Noonkopir T.Centre/ New No. B.7.
 - ii. Whether the learned trial magistrate erred by allowing the Counter claim in the absence of any cogent adduced by the 1st Respondent.
 - iii. Whether this Appeal is merited.
 - iv. Who should bear costs of the Appeal?
11. This being a first Appeal, the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in *Peter Kamau Njau v Emmanuel Charo Tinga* (2016) eKLR where it was stated;

“Our duty in this Appeal being a first Appeal is to analyse a fresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion.
See *Selle v Associated Motor Boat Co.* (1968) EA 123.”
12. Similarly, the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR stated thus;

“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-analyze the evidence on record and then determine whether the conclusion is reached by the learned trial judge are to stand or not and give reasons either way.....”



13. In the Complaint dated 21st February 2019 in CMC Kajiado, ELC No. 14 of 2019 the Appellant case was that she purchased plot No. 530/Business- Noonkopir T. centre from one Patrick Mweu Musembi and the same was transferred to her on 16th April 2007. She paid Kshs. 3,000 as transfer fees and Kshs. 750 as rates clearance certificate fees and continued paying land rates. A search conducted on 11th May 2010 showed the Appellant was the owner of the plot. However on 7th September 2018, the 2nd Respondent arrived at a decision that the 1st Respondent was the rightful owner of the plot and gave it a new number B7. She thus sought to be declared the rightful owner and a permanent injunction to restrain the Respondents from any dealing with the plot.
14. The 1st respondent in his statement of defence at the lower court contested the allegation claiming that his plot was number 591/ Residential Noonkopir Trading Centre and not Plot No. 530/Business- Noonkopir T. centre as indicated by the Appellant. He stated that he purchased it in 2005 from one David Ole Nkediye and the same was transferred to him in 2007. He claimed that during a plot validation exercise conducted by the 2nd Respondent the plot was marked as disputed because the Appellant claimed to own it. The dispute was determined by the National Land Commission and in their letter dated 6th November 2018 they indicated that the plot belonged to him. In his counterclaim he sought a declaration that the suit property be found to belong to him. He also sought dismissal of the Appellant's suit with costs.
15. In the impugned judgement dated 15th July 2022 the learned trial magistrate held:

“What is clear is that neither the Plaintiff nor the 1st Defendant had letters of allotment in their names. According to the county land registrar, the present dispute was one based on double allotment of land. It is my view that the 1st Defendant had through the sequence of his documentation established his legal interest on the suit property right from the purported vendor to transfer of plot in his name and finally the confirmation from the National Land Commission that the lanes B7 belonged to him.

On her part the Plaintiff has failed to establish that the vendor Patrick Musembi was legally the owner of plot number 530 hence passed a good title to her. Her most relevant documents were the transfer of plot letter dated 16/4/2007 and search certificate dated 11/5/2010. However, that was as much as her ownership went, this being the records at the Land Registry but not on ground. The letter aspect would have been cleared had the parties especially the Plaintiff insisted on the County Surveyor visiting the suit property as previously consented before judgement was rendered.

Lastly, there was in record a valid decision by a constitutional body this being the National Land Commission which the Plaintiff having been aggrieved would either have appealed against it at the Commission level or directly at the Environment and Land Court. This would have saved the resources used in filing the present suit. In conclusion the Plaintiff's case fails thus the same is dismissed with costs. Subsequently, prayer (ii) and (iii) of the 1st Defendant's counterclaim dated 11/10/2019 are allowed.”
16. I have perused the record of appeal including evidence adduced at the lower court and note that the Appellant produced the following documents to support her claim: An application for transfer of the suit property dated 13th April 2007 from one Patrick Musembi to herself and a confirmation letter of the transfer dated 16th April 2007. Both letters bear the letter head of Olkejuado County Council signed by the Clerk to Council; rates clearance receipts for various years; letter dated 10th September 2007 from the clerk to Council asking the Administrative Assistant to visit plot No. 530 to identify the trespasser and stop any activities; search certificate dated 11th May 2010 and a letter from the National



- Land Commission dated 6th November 2018 addressed to the 1st Respondent indicating that following the dispute between the Appellant and the 1st Respondent for Plot New No. B7 Noonkopir, the 1st Respondent retains the plot as the owner.
17. The 1st Respondent produced: A letter of allotment dated 1995 to one David Ole Nkediye for plot 591/Residential Noonkopir T. Centre; transfer to the 1st Respondent dated 23rd August 2007; rates clearance certificate; rates payment receipts and the National Land Commission letter dated 6th November 2018.
 18. DW2 Jonathan Oseur, the County Land Registrar stated;

“.....Plot No. 530 belongs to the Plaintiff while 591 belongs to the 1st Defendant. The dispute between them was registered in our office on 27th November 2018. Thereafter both parties were called to the National Land Commission and the land committee. Our surveyor equally visited the site and our investigations led to the conclusion that the property which is only one belongs to the 1st Defendant. As such there are no 2 plots on the ground. It was only an issue of double allocation caused by the defunct local authority. Presently the plot is referred to B-7 which both parties are claiming....”
 19. The courts have over time held that when an issue of double allocation arises, the first in time should prevail. The Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR held: “... Double allocation arises when there are two or more otherwise valid certificates of title issued erroneously and in good faith by the lands office...”
 20. In this case, it is on record that the first allotment was the one in favour of David Ole Nkediye in 1995. Thereafter it was transferred to the 1st Respondent. Therefore, the learned rial magistrate did not err in arriving at the decision which was also the decision arrived at the by the National Land Commission.
 21. It is important to consider the history of ownership to ascertain which party had the better title. This was the holding of the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR where it was stated “...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”
 22. The Appellant produced a transfer from one Patrick Musembi who allegedly purchased it from a women’s group in Kitengela but there was no evidence to prove this assertion. No letter of allotment was produced. The 1st Respondent produced a letter of allotment issued to David Nkediye in 1995 who he claimed to be his relative and that he was the only owner of the suit plot until when he transferred it to him. On this ground, I find that the 1st Respondent established the root of his title.
 23. One of the grounds is that the learned trial magistrate erred by allowing a defective counterclaim and granting orders not sought in the said counterclaim. Order 7 Rule 5 of the *Civil Procedure Rules* provides that;
 - “ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
 - (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;”



24. From the record of appeal I note that there is no verifying affidavit accompanying the counterclaim. While this might render it defective, it is not fatal or an incurable error that cannot be corrected. Article 159(2)(d) of the Constitution behoves courts to administer justice without undue regard to procedural technicalities. Moreover, the trial court heard and determined the suit to finality without this issue being raised and there is no evidence of any prejudice occasioned against the Appellant by lack of the verifying affidavit. I associate myself with Ringera J's pronouncement in Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR where he stated;

“... Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged...”

25. I therefore find that the counterclaim was neither fatally defective nor prejudicial to the Appellant.

26. The Appellant also claimed that the learned trial magistrate issued orders that were not sought in the counterclaim. The 1st Respondent's prayers were:

- i. Dismissal of the Plaintiff's suit with costs
- ii. A declaration that plot number 591/Residential Noonkopir Trading Centre now B7 belongs to the 1st Defendant.
- iii. An order directing the Plaintiff to pay costs of this suit.
- iv. Any other order that the court may deem fit to grant.”

27. The orders in the impugned judgement read: Subsequently, prayer (ii) and (iii) of the 1st Defendant's counterclaim dated 11/10/2019 are allowed.” I do not see how the orders granted were contrary to what the 1st Respondent sought.

28. The upshot of the matter is that I find no reason to interfere with the judgment of the lower court dated 15th July 2022 and the same is upheld.

29. I find no merit in the appeal and the same is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF FEBRUARY 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Njagi for the Appellant.



Ms. Wanjiku for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant – Mutisya.

