



**Mutai & another v Lelei (Environment and Land Appeal E004 of 2021)
[2024] KEELC 555 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E004 OF 2021
MN MWANYALE, J
FEBRUARY 12, 2024**

BETWEEN

JOEL MUTAI 1ST APPELLANT

ESTHER MUTAI 2ND APPELLANT

AND

JOSEPH KIPKETER LELEI RESPONDENT

JUDGMENT

1. *Vide* their Memorandum of Appeal dated 28th October, 2021 the Appellants Joel Mutai and Esther Mutai, being dissatisfied with the Findings, Decision and Judgment of Hon. Jacinta A. Orwa, Senior Principal Magistrate in Kapsabet Magistrates Court Environment and Land Court Case No. 104 of 2018, delivered on the 4th day of October, 2021, raised the following Grounds of Appeal:
 - i. That, the learned Trial Magistrate erred in law and in fact in dismissing the Appellants case after failing to evaluate the entire evidence on record and the exhibits and make a finding that the Appellants had an arguable case, a prima facie case against the Respondent and had proved their case on a balance of probabilities.
 - ii. That the learned Trial Magistrate erred in law and in fact in failing to establish that the Plaintiff/ Respondent had not proved his Case on balance of probability when no evidence was led on how the said Respondent became the Proprietor of the Suit Land Songhor/cheptonon Block6 (Komolet)/147 thereby arriving on a wrong finding and decision against the weight of evidence before her.
 - iii. That the learned trial Magistrate erred in law and in fact in disregarding and ignoring the evidence and Submissions of the Defendants and the Law touching Titles and in particular, she failed to ensure the Principles on a Tittle Deed to which the person is proved to be a party



to fraud; or where it is procured illegally, un procedurally, or through a corrupt scheme is liable to be impeached.

- iv. That the Learned trial Magistrate erred in law and in fact in disregarding the evidence and Submissions of the Appellants, that the Respondent was not the absolute proprietor of the Suit Land. "The suit land is and has been at all material times registered under the Registered Land Act, Cap 300 laws of Kenya providing under Section 30(f), rights in the process of being acquired under the Limitation of Actions Act, are in the nature of Overriding Interests and go with the land and not the registered proprietor; that change of ownership does not affect those rights as they attach to the land and in the circumstances as the Defendants/Appellants occupation started long before the Respondent Plaintiff became the registered owner, their rights were in the nature of an overriding interest over the land and could be enforced....."
 - v. That Learned Magistrate erred in law and fact in failing to take into consideration the Appellants Submissions as she deliberately failed to render herself on the same yet the Appellants had filed and served their written submissions and the Exhibits.
 - vi. That the Magistrate erred in law and in fact by failing to consider the Appellants' case especially their written Submissions and proceeded to issue the eviction Orders that were not prayer by the Respondent. The learned Magistrate therefore did not determine the matter before her on merits.
 - vii. That the Trial Court arrived at wrong findings on issues before Court and in particular when she affirmed the Decision of the Land Disputes Tribunal which, however preciously certain and technically correct was a nullity and not only voidable, was void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which it was rendered but be declared void by every court in which it was presented. It was a nullity amounted to nothingness
 - viii. That the Judgment of the learned trial Magistrate is contrary to the evidence on Record and consequently manifestly unsafe and unjust and deserves being vacated in its entirety through failure to interrogate the Pleadings and evidence by Parties and Witnesses.
2. On the strength on the above cited Grounds, The Appellants pray for orders that: -
- a. That the Judgment of the Lower Court be set aside in its entirety and the Appeal be allowed.
 - b. That the Hon. Court be pleased to assess, re-evaluate the Appellants Case on evidence on Record and arrive on its own independent conclusion and enter Judgment against the Respondent as prayed for.
 - c. That in the alternative, and strictly without prejudice to the above prayer the Decision of the Land Disputes Tribunal which, however preciously certain and technically correct was a nullity and not only voidable, was void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which it was rendered but be declared void by every court in which it was presented. It was a nullity amounted to nothingness. The Suit Land in the Land Dispute Tribunal was not in existence then.
 - d. That the Hon Court be pleased to Award Costs of this Appeal and in the Lower Court to the Appellants.
3. Upon admission of the Appeal on 8.11.2023 the court directed the appeal to be heard by way oral submissions which was initially slated for 5.12.2023 but was later adjourned to 13.12.2023 and Judgment reserved for 29.01.2024



4. On the appointed date 5.12.2023 Mr. Choge Learned Counsel for the Appellant did present his submissions and Mr. Tallam partly responded as it become apparent to the Court in the course of the submissions by the learned counsels that additional evidence in the form of the copy of the Register / Green Card of Songhor/ Cheptonon/397 which was not adduced in evidence before the Trial Court was necessary so as to determine this matter.
5. Pursuant to the provisions of Section 78(i)(d) of the *Civil Procedure Act* the Court directed the filing of the register/green card of Songhor/cheptonon /397 and granted Mr. Tallam an opportunity to file the same alongside written submissions and Mr. Choge was granted leave to file supplementary submissions in respect of the copy of Register /Green card of Songhor/cheptonon /397.
6. The said copy of the register/ green card was not available at the registry as the parcel had not been registered yet but a copy of the area adjudication list was filed in its place on 23.01.2024 and it was not possible to deliver the judgment on 29.01.2024 as earlier reserved hence the judgment date was deferred to 12.02.2024.
7. From the submissions by the parties, they agree that in essence there was an exchange of the suit properties between the Appellant's father and the Respondent, to wit, Songhor /cheptonon/397 belonging to the Appellant's father and Songhor Cheptonon/147 belonging to the Respondents so that the respective parties would move to the exchanged parcel after the titling process.
8. It is the Appellants position and submission that even after the exchange none of them moved from their original parcels of land but that during titling of the area the Respondent was illegally registered as proprietor for both parcels to wit Songhor /cheptonon147 and Songhor /cheptonon/397 and that he sued in respect of Songhor /cheptonon/397 and was by a decision of the Land Dispute Tribunal awarded same hence their decision to move to the exchanged property Songhor /cheptonon /147 thus provoking the suit for vacant position before the trial Court and now subject of this appeal.
9. It is the Respondent's position and submission that the Appellant's had no right to occupy the other exchanged parcel Songhor/cheptanon/147 and the Court was right to order for delivery of vacant possession.
10. A copy of the Green card and/or copy of the register for Songhor /cheptonon /397 was not adduced in evidence before the trial court and certainly this crucial piece of evidence was not considered.
11. The parties have now filed the area adjudication list in lieu of the green card / copy of the register. It is the courts view that the said additional evidence must first be considered by the trial Court and accordingly the suit is remitted to the trial court under section 78(1)e) of the *civil procedure Act* for a new trial and the Adjudication list to be produced and considered by the trial court.
12. As the suit property is situated in Songhor area now under the jurisdiction of Tinderet Magistrate's Court, the file is accordingly transferred for hearing and determination before Tinderet Law Courts.
13. Costs of the appeal shall abide by the outcome of the new trial.
14. Judgment accordingly.

DATED AND DELIVERED AT KAPSABET THIS 12TH DAY OF FEBRUARY 2024.

HON. M. N. MWANYALE

JUDGE

In the presence of;



1. Mr. Kiprono holding brief for Mr. Choge for the Appellant.
2. Mr. Tallam for the Respondent

