



**M'Mwirabua v M'Etirikia (Environment and Land Appeal
E070 of 2022) [2024] KEELC 1830 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E070 OF 2022**

CK YANO, J

APRIL 4, 2024

BETWEEN

KOBIA M'MWIRABUA APPELLANT

AND

M'INYINGI M'ETIRIKIA RESPONDENT

*(An appeal from the judgment in CMC Maua ELC Case no.
82 of 2018 delivered on 31/10/2022 by Hon. C.K Obara SPM)*

JUDGMENT

Introduction

1. The respondent in this appeal moved the trial court vide a plaint dated 8th March 2018 and filed on 12th March 2019 seeking a declaration that he is the rightful owner of land parcel number Ithima/Antuambui/7736 and an order of eviction to issue against the appellant, a permanent order of injunction restraining the appellant by himself, family, agents, servant or any other person acting at his behest from entering, remaining, interfering or in any other manner dealing with the respondent's land parcel Number Ithima/Antuambui/7736, lost income from Miraa planted in the suit land and costs of damaged fence, any other or better relief and costs of the suit and interest.
2. The respondent pleaded that he is the registered, legal and rightful owner of suit land measuring approximately 0.15 ha or thereabout. That he acquired suit land from his father in law M'Mwirabua M'Ibere (deceased) in the year 2009 or thereabout.
3. The respondent averred that the previous owner M'Mwirabua M'Ibere had cases with the appellant before the land disputes Tribunal number 10 of 2005 whose judgment was subsequently adopted by court. That the same was also heard before the Provincial Land appeals Disputes Tribunal number 79 of 2005 and finally at Meru High court which were all determined in favour of the deceased previous owner.



4. The respondent averred that the appellant was subsequently evicted from the suit land by Japhet R. Nkonge Auctioneers in the year 2009 when the respondent was given the same though it had not yet been transferred to him.
5. The respondent further averred that after the eviction of the appellant, he settled in the same parcel and planted Miraa (Khat) plantations and seasonal food crops.
6. The respondent stated that after the demise of his father in law the appellant started disturbing him again on several occasions with a view of forcefully evicting him from the suit land and at one time he invaded the same and built temporary structures and uprooted the respondent's fence occasioning him numerous losses which matter together with other damages the respondent had been reporting to police at Laare Police station vide OBS 48/2/1/2015, 19/13/3/2013, 6/25/9/2017 among many more reports.
7. The respondent pleaded that after the demise of the deceased, the family filed a succession cause which was concluded and he was duly issued with a title deed in respect to the suit land. The respondent's claim was for an order of eviction and compensation for loss of user against the appellant.
8. The respondent averred that on the suit land stands Miraa (khat) plantation which he has been fetching Kshs. 30,000/=per month before he was forcefully evicted therefrom by the appellant and which the appellant has been plucking illegally since the year 2009 to date as well as cost of the fence which was Kshs. 50,000/=.
9. The appellant filed a defence dated 26th March 2018 where he denied the respondent's claim. The appellant pleaded that if the respondent acquired any land, the same was acquired fraudulently. The appellant admitted that he had cases with the previous owner but as a defence averred the same were not in favour of the respondent's father in law. The appellant averred that the respondent instituted several criminal cases which were all dismissed.
10. The appellant contended that there was a suit pending in High court being J.R No. 36 of 2009 which stopped the execution of the Tribunal's award.
11. Upon considering the matter, the trial court found that the respondent had proved his case on a balance of probabilities and entered judgment in favour of the respondent for a declaration that he was the rightful owner of the suit land, and order of eviction against the appellant, permanent injunction as well as costs and interest.
12. The appellant was aggrieved by that judgment and filed this appeal on the following grounds-;
 1. The learned magistrate erred in law and fact in failing to determine the issue of ownership before making an order for the eviction of the appellant from L.R No. Ithima/Antuambui/7736.
 2. The learned Magistrate erred in law and in fact in deciding the entire suit against the weight of evidence.
 3. The learned magistrate erred in law and fact in failing to find that the appellant had lived and developed L.R No. Ithima/Antuambui/7736 exclusively since time immemorial and thus award the said land to the appellant.
13. The appellant prays that the appeal be allowed with costs.



14. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 10th January, 2024 through the firm of L. Kimathi Kiara & Co Advocates while the respondent filed his dated 29th January, 2024 through the firm of M/S Mutembei & Kimathi Advocates.

Appellant's Submissions.

15. Regarding ground 1 of the appeal, it was submitted on behalf of the appellant that it was clear evidence that he and Muriungi M'Mucheke had bought the suit land from Richard Ibaba. That this was land parcel No. Ithima/Antuambui/4629 and that the respondent fraudulently caused subdivisions of the land resulting to L.R No. Ithima/Antuambui/7736. That this evidence was collaborated by the appellant's witnesses Murungi M'Mucheke and Geoffrey Ntongai. It was the appellant's submissions that the learned magistrate failed to determine ownership so as to determine that the appellant was the rightful owner of the suit land.
16. As regards grounds 2, the appellant submitted that he adduced evidence that he and one Muriungi M'Mucheke had bought the suit land from one Richard Ibaba and that that evidence was supported by the evidence of Murungi M'Mucheke and Geoffrey Ntongai. That the trial magistrate failed to consider the appellant's candid evidence and arrived at a wrong finding.
17. On ground 3 of the appeal, it was submitted on behalf of the appellant that after the appellant bought the suit land, he was put in possession and occupation of the same by the original owner and he started utilizing the same and was issued with a title and made various developments on the same. That the appellant's occupation was exclusive. The appellant submitted that it was a further error by the trial magistrate since the judgment was delivered even when there was a pending J.R No. 36 of 2009 in respect to the same parcel of land.
18. The appellant urged the court to find that the appeal is merited and set aside the judgment of the lower court and allow the same with costs.

Respondent's Submissions.

19. The respondent's counsel gave brief facts of the case and submitted that it is clear that the respondent herein is the legal and rightful owner of land parcel number Ithima/Antuambui/7736 measuring approximately 0.15 Ha which he came into possession and occupation of in the year 2009 following the eviction of the appellant from the suit land and having been given the same by his father in law during his lifetime to build on and develop for his family's use.
20. It was submitted on behalf of the respondent that the land has been the subject of constant disputes which were heard by the Land Dispute Tribunal vide case no. 10 of 2005 and the Provincial Land Appeals Dispute Tribunal No. 79 of 2005 which all determined the disputes in favour of the respondent's father in law as against the appellant herein.
21. It is the respondent's submission that following the determination in LDT No. 10 of 2005 which was upheld by the Provincial Land Appeals Dispute Tribunal, eviction order were issued and implemented against the appellant and subsequently the respondent herein took occupation of the vacated suit land in 2009 and began developing it extensively with miraa, seasonal food crops, a fence and trees of various species until the appellant illegally trespassed into the suit land and attempted to forcefully evict the respondent after the demise of his father in law and put up illegal structures after maliciously damaging the respondent's fence.



22. It is the respondent's case that upon successfully filing of a succession cause for his father in law's estate, he was duly issued with a valid title deed for the suit land in his name as the sole registered owner as evidenced by the search certificate adduced in the trial court.
23. The respondent pointed out that in the lower court, he produced exhibits which prove that he has a legitimate claim over the suit land and that he was in actual occupation and use of the land and has extensively developed the same with miraa, trees and various food crops.
24. The respondent further submitted that the appellant's allegations that he and one Muriungi M'Mucheke bought the suit land from Richard Ikiba and that the suit land parcel number Ithima/Antuambui/7736 is a subdivision of parcel number Ithima/Antuambui/4629 which was fraudulently subdivided are not backed by any documentary evidence. The respondent pointed out that the appellant never brought any formal fraud complaint to the Directorate of Criminal investigations to investigate the fraudulent allegation that he contends.
25. It is the respondent's submissions that having not adduced corroborating evidence to support ownership claims over the suit parcel, the appellant's appeal still holds no water as it is clear that he does not have any legal ownership rights over the suit land and ought to be evicted therefrom as he is in contempt of the court orders issued in the LDT case, and the lower court's judgement.
26. The respondent submitted that it is worth noting that the appellant herein never controverted the assertions and evidence that were adduced by the respondent in the lower court. That the appellant having been heard and his case closed without producing any evidence in the trial court, it is the respondent's submission that the appellant's appeal should fail and he be ordered to stop further infringement of the respondent's constitutionally enshrined proprietary rights.
27. The respondent's counsel pointed out that following a scene visit attended by the parties herein, the land registrar and the sub county surveyor on 10th February, 2022 accompanied by two police officers, a report was returned to court, duly signed by the sub county surveyor and land registrar which confirmed that the suit parcel herein resulted from the subdivision of land parcel number 4629 which created two new parcels, the suit land and parcel number 7737. That the said report further confirmed that the suit parcel measuring approximately 0.15 Ha was registered to the respondent and that parcel number 7737 measuring approximately 0.24 Ha was registered in the appellant's name. It was submitted on behalf of the respondent that that was enough corroborative proof that the respondent is the legal and rightful owner of the suit land and not the appellant as corroborated by the duly signed mutation forms dated 6th January, 2010 annexed in the surveyor's report. That the mutation forms are dated 2010, which is a while after the appellant was evicted from the land following the court decision in 2009.
28. The respondent cited section 26 of the [Land Registration Act](#) No. 3 of 2012 and submitted that the appellant did not present any evidence to challenge the legal ownership nor prove that the respondent's ownership documents were in any way fraudulently acquired. It is the respondent's submission that from all the evidence adduced, the respondent has good title although yet to be issued and collected which require and deserves protection in upholding their right to own property as enshrined in Article 40 of [the Constitution](#) of Kenya 2010.
29. The respondent also cited Section 24 of the [Land Registration Act](#) No. 3 of 2012 and relied on the case of *Kiplangat Shelisheli Mutarakwa Vs Joseph Rotich Kones* (2018) eKLR.



30. The respondent submitted that having proved his ownership claims over the suit parcel, he prays that the court prevents further infringement of the respondent's proprietary rights by the appellant and dismiss the appeal herein and uphold the lower court's judgment.

Analysis And Determination

31. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat Co. Ltd* (1968) EA 123.

32. There are only two issues I find for determination-; Whether the learned magistrate failed to determine the issue of ownership before making an order for eviction of the appellant form LR. No. Ithima/Antuambui/7736 and whether the learned trial magistrate decided the entire suit against the weight of evidence.

Whether the learned magistrate failed to determine the issue of ownership before making an order for eviction of the appellant from L.R No. Ithima/Antuambui/7736.

33. I am of the view that the trial magistrate addressed the issue of ownership wherein she held-;

“The search certificates dated 7/9/2022 attached to the surveyor's report indicates that M'Inyingi M'Etirikia was registered as the proprietor of parcel number Ithima/Antuambui/7736 on 22/8/2016 and was issued with a title deed on 19/9/2017. Kobia M'Mwirabua was registered as the proprietor of parcel number Ithima/Antuambui/7737 on 1/6/2010. He is yet to be issued with a title. According to the land records, the mutation was registered on 6/1/2010 meaning that parcel number Ithima/Antuambui/4629 is no longer in existence. The defendant never availed any evidence to show how parcel number 4629 was fraudulently subdivided.

34. The above passage clearly indicates that the trial court addressed itself on the issue of ownership before making orders of eviction. The trial court proceeded and relied in the case of *John Sebastian & Another Versus Samuel Ciskei Too* (2018) eKLR and further stated that the surveyor's report was not contested and therefore the respondent had proved his case on a balance of probabilities.

35. I opine that the trial court addressed the issue of ownership substantively and correctly.

Whether the learned trial magistrate decided the entire suit against the weight of evidence.

36. The respondent pleaded that he is the registered, legal and rightful owner of land parcel number Ithima/Antuambui/7736 measuring approximately 0.15 ha. or thereabout, herein referred to as the suit land. That he acquired the suit land from his father in law M'Mwirabua M'Ibere (deceased) in the year 2009 or thereabouts. The respondent further pleaded that the previous owner (M'mwirabua M'Ibere) had cases with the appellant before the Land Disputes Tribunal Number 10 of 2005 whose judgment was subsequently adopted by court. That the same was also heard before the Provincial Land Appeals Disputes Tribunal number 79 of 2005 and finally at Meru High Court which were all determined in favour of the deceased previous owner. The respondent testified that the appellant was evicted from the land by Japheth Nkonge Auctioneers pursuant to those cases.

37. The respondent stated that after the demise of his father in law, the appellant started disturbing him, invaded the land and finally forcefully evicted him from the suit land and put up temporary structures



- and uprooted the respondent's fence occasioning him loss and damage. The respondent testified that he made reports to police at Laare Police station vide OBS 48/2/1/2015, 19/13/3/2013, 5/25/9/2017 among many more reports. That they filed succession cause in respect of his father in law's estate and after it was concluded, he was issued with a title deed. The respondent produced various documents, including proceedings in the tribunal case which was adopted in the magistrate's court. The tribunal ordered the appellant to vacate from the suit land. There was no evidence to show that that decision was set aside or reviewed.
38. In this case it is also evident from the record that a surveyor visited the suit parcel of land in the presence of the parties. The surveyor's report confirmed inter alia, that parcel No. 4629 was subdivided into parcel No. 7736 (the suit land) and No. 7737. Parcel No. 7736 is registered in the name of the respondent while parcel No. 7737 is registered in the name of the appellant. The search certificates on record confirm that position.
39. Section 26 of the *land Registration Act* 2012 provides-;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-
- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
40. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land. That can only be challenged on grounds stipulated as above. In the present case the title produced by the respondent shows that the suit land is registered in his name. That position was not challenged by the appellant. Though he alleged fraud the same was not proved.
41. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns. In other words, the rightful owner of the land has a right to possession, occupation and use of the suit land. The respondent produced evidence that shows that the appellant has illegally taken possession of the suit land and is utilizing it for his own benefit. The actions by the appellant amount to violation of the respondent's right as guaranteed in Article 40 of *the Constitution* and must be stopped as rightly done by the trial court.
42. From the evidence and material on record, I do find that the respondent had proved his claim on a balance of probabilities and established that the appellant had no legal right to remain on the suit land. Based on the evidence placed before the trial court, the respondent's claim had to succeed.
43. It is therefore my finding that in this case, the learned trial magistrate rightly reached the conclusion that the respondent proved his case on a balance of probabilities. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the learned trial magistrate were well founded and I find no basis to interfere with it.
44. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent.



DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF APRIL 2024

In The Presence Of

Court assistant – Tuppet

Ms Mugo holding brief for Kimathi Kiara for appellant

Ms Asuma holding brief for Mutembei for respondent

C.K YANO

JUDGE

