



Kitivi & another v Musyoki & another (Environment and Land Appeal E019 of 2021) [2024] KEELC 5269 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E019 OF 2021**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

MATHIAS KITIVI 1ST APPELLANT

JAMES KITIVI 2ND APPELLANT

AND

ONESMUS MUSYOKI 1ST RESPONDENT

JENIFFER K. MUSYOKI 2ND RESPONDENT

*(Being an appeal from the judgment delivered by Hon. A. G. Kibiru (CM)
on 9th June 2021 in ELC Case No. 44 of 2019 at Machakos Law Courts)*

JUDGMENT

Introduction

1. This is an appeal by Mathias Kitivi and James Kitivi against the judgment of Honourable A. G. Kibiru, Chief Magistrate, delivered on 9th June 2021 in Machakos CM ELC Case No. 44 of 2022. In the impugned judgment, the trial court allowed the plaintiffs' (the respondents herein) claim, thereby holding that the parcel of land known as Machakos Town Block 3/797 (suit property) belongs to the plaintiff; a permanent injunction to issue restraining the defendant (appellant herein) from interfering with the suit property and an order of demolition of the defendants' structure on the suit property.

Background

2. By a plaint dated 22nd May 2017, the plaintiffs sought against the defendants, the following prayers;
 - a. A declaration that the plaintiffs are the rightful registered owners of land Parcel No. Machakos Town Block 3/797 by virtue of 1st registration.



- b. An order of permanent injunction to restrain the defendants, their servants and/or agents from constructing, alienating and/or committing any acts of waste in Land Parcel No. Machakos Town Block 3/797.
 - c. An order of injunction to restrain the defendants, their servants and/or agents from burying the remains of the 1st defendant's wife in Land Parcel No. Machakos Town Block 3/797 until this case is heard and determined.
 - d. An order that the defendants do demolish and/or remove any illegal structures in Land Parcel No. Machakos Town Block 3/797 and in default the plaintiffs be at liberty to remove them at the defendants' expense.
 - e. Costs of the suit and interest.
 - f. Any other relief the court may deem fit and just.
3. The plaintiff averred that they are the registered owners of the suit property but that in 2015, the defendants who are squatters entered the suit property and began wasting the same by cutting down trees and putting up illegal structures. They stated that on 16th May 2017, the 1st defendant's wife died, whereof the latter planned to bring her on the suit property. That the plaintiffs' demand that the defendants desist from their actions were not heeded.
 4. The suit was opposed. The defendants filed a statement of defence dated 31st October 2017 wherein they denied the plaintiffs' case and averred that they had been in occupation of the suit property since 1989 on the basis that their mother Nzisa Kitivi was a co-owner of the suit property with one Kimuyu Mbondo. He sought for the dismissal of the plaintiffs' case.
 5. The matter was heard by way of viva voce evidence. The plaintiffs presented four witnesses while the defence presented one witness. The plaintiffs' testimony was that the plaintiffs purchased the suit property from their father in 2014. The plaintiffs' father Joseph Kimuyu Mbondo confirmed that the suit property was his before he transferred to the plaintiffs. He stated that the same had been in regard to a share he held at Katelembo, a land buying company. PW2 Nathan Ngwili Muange, a director of Katelembo testified in favour of the plaintiff and stated that the share held at Katelembo was not co-owned but solely owned by Joseph Kimuyu Mbondo.
 6. On their part, the defence witness was James Kitivi the 2nd defendant. He stated that his mother one Nzisa Kitivi, a sister of Joseph Kimuyu Mbondo, jointly owned the suit property with her brother Joseph Kimuyu Mbondo. That they had buried their kin on the suit property where they have lived since 1989. He stated that ownership dispute was presented before a taskforce and that the parties entered into an agreement. He however stated that he had no documents to confirm his allegation that his mother was a co allottee of the suit property by Katelembo. He also stated that the plot stated in the agreement between Joseph Mbondo and his mother related to Plot No. 2085 and that he had nothing to show that Plot Number 2085 was the same as parcel known as Machakos Town Block 1797.
 7. Upon consideration of the case, the trial court found contradiction in the defence case and stated that although the defendants submitted that they were entitled to the suit property on account of customary trust, the claim in their pleadings was based on co-ownership by virtue of Nzisa Kitivi being a co-allottee with Joseph Mbondo at Katelembo. The trial court further found that the plaintiffs had proved that they were registered proprietors and the defendant did not demonstrate that their registration was unlawful. Further, the trial court held that the defendants had failed to show that their mother co-owned the suit property with Joseph Mbondo. It was on that basis that the trial court allowed the plaintiffs' claim as prayed.



8. Aggrieved with the decision of the trial court, the appellants filed a Memorandum of Appeal dated 14th June 2021, citing the following grounds;
 - a. That the learned magistrate erred in law and fact by failing to consider the entirety of the appellants' evidence and submissions.
 - b. That the learned magistrate erred in law and in fact by failing to consider the appellants overriding interest over the respondent's title.
 - c. That the learned magistrate erred in law and in fact by holding that no customary trust existed in favour of the appellants.
9. Consequently, the appellants sought the following orders;
 - a. The judgment delivered on 9th June 2021 be set aside and quashed.
 - b. Costs of the appeal.
10. The court gave directions that the appeal be disposed by way of written submissions. On record are submissions filed by the respondent dated 20th July 2023. The appellants did not file their submissions.

Respondents' submissions

11. Counsel for the respondent submitted that the appeal was incompetent as the record of appeal lacked reply to defence, defence, plaint, pretrial questionnaire, statement of agreed issues and decree. Counsel relied on Order 42 Rule 13 (4) (f) to argue that the appeal was fatally defective and ought to be struck out.
12. Submitting in regard to ground 1 of the appeal, counsel argued that although the appellants alleged that the trial court failed to consider the entire evidence and submissions of the appellants, there is nothing to show such failure on the part of the trial court. Counsel submitted that the judgment shows that the trial court considered the appellants' evidence and submissions in their entirety and therefore that ground lacks merit.
13. Regarding grounds 2 and 3 of the appeal, counsel submitted that the issue of spousal rights over matrimonial property and trusts including customary trusts are overriding interests provided for in Section 28 of the [Land Registration Act](#); as exhibited at page 28 of the record. Counsel pointed out that on that issue, the trial court made a finding that the appellants failed to prove customary trust. Reliance was placed on the case of [Alex Kyalo Mutua v. Francis Makau Ngulasa ELC Appeal No. 14 of 2020](#), regarding the standard of proof in civil cases, being on a balance of probabilities. Further reliance was placed on the case of [Isaack Kinanga Kieba v. Isaaya Theuri Mlintari & Another \[2008\] eKLR](#) for the proposition that the appellants failed to prove that there existed customary trust.
14. It was further contended for the respondent that the question of overriding interests and customary trust was not raised in the defence and that the same cannot arise now.

Analysis and determination

15. The court has carefully considered the appeal, the evidence, the record and the respondents' submissions. The only issue that arise for determination is whether there is merit in the appeal. The issue of the incomplete record of appeal was addressed by court suo motto on 6th October 2022, when the court ordered the appellant to file supplementary record, which the appellant complied with. Therefore, the appeal's competency is not an issue.



16. The role of a first appellate court is to reassess, reanalyze and reconsider the evidence afresh and make its independent conclusions bearing in mind that it had no advantage of seeing or hearing the witnesses and therefore make due allowance for that (See *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR.)
17. The appellants complaints are that the trial court failed to consider their evidence and submissions in their entirety; that the trial court failed to consider the appellants' overriding interests over the respondents' title and that the trial court was wrong in holding that no customary trust existed in favour of the appellants.
18. It is clear that the respondents' claim against the appellants in the lower court was to restrain the appellants from interfering with the respondents' quiet enjoyment of the suit property on the strength and basis of the respondents' registration as absolute registered proprietors of the suit property. On the other hand, the appellants defence was that they had been on the suit property since 1980 on the strength and basis that their mother Nzisa Kitivi was a co-allottee of the suit property together with the respondents' father one Joseph Mbondo.
19. It is not in dispute that the respondents are the registered proprietors of the suit property, having been registered upon transfer of the same by their father Joseph Mbondo, who was the previous registered proprietor. Section 26 of the [Land Registration Act](#) provides for conclusiveness of a certificate of title as follows;
 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.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
20. Therefore, to defeat a title, a claimant must demonstrate that registration thereof was obtained by fraud, illegality, misrepresentation, without the proper procedure or by corrupt scheme.
21. Considering the defence and the defendants' evidence, the defence being that the appellants' mother was a co-allottee of the suit property jointly with the respondents' father, there was no question on the registration of the suit property as the appellants did not fault the registration thereof on grounds of fraud, illegality, want of procedure, misrepresentation or corruption of at all. They instead alleged that their mother co-owned that suit property which was allocated by Katelembo. A director from Katelembo testified in favour of the respondents and stated that the suit property was allocated only to Joseph Mbondo the respondents' father. No evidence was presented by the appellants to prove their allegations that the allotment by Katelembo was also in favour of their mother Nzisa Kitivi
22. It is therefore clear that apart from failing to plead or prove that the suit property was unlawfully registered in the respondents' names, the appellants failed to show ownership of the suit property or any lawful justification for them being on the suit property. In that regard therefore, the trial court was



right in arriving at the conclusion that the plaintiffs had proved their case while the defendants had failed to prove their allegations in the defence.

23. Although the appellants in the appeal raised the issue of overriding interest, that complaint did not particularize which specific overriding interest they were referring to, as they have raised the issue of overriding interest as separate ground of appeal from the issue of customary trust. The vagueness arises because Section 28 of the [Land Registration Act](#) provides specific overriding interests in the following words;

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

- a. Deleted by Act No. 28 of 2016 S.II(a);
 - b. Trusts including customary trusts;
 - c. Rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - d. Natural rights of light, air, water, and support;
 - e. Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - f. Deleted by Act No. 28 of 2016 S.II(b);
 - g. Charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - h. Rights acquired by virtue of any written law relating to the limitation of actions or by prescription.
 - i. Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law, and
 - j. Any other rights provided under any written law.
24. Therefore, the appellants contention that the trial court failed to consider their overriding interests on the suit property without mentioning the specific overriding interest or demonstrating such interest in their pleadings and evidence, demonstrates that they had no overriding interest on the suit property. Considering the defence, it is clear that no overriding interest is pleaded and therefore the trial court could not decide on a matter that is not raised in the pleadings.
25. Parties are bound by their pleadings. In the Nigerian case of *Adetoun Oladeji (NIG) Ltd v. Nigeria Breweries PLC SC 91/2002*, cited with approval in the case of *Philmark Systems Co. Ltd v. Andermore Enterprises [2018] eKLR*, it was held as follows;

It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.



26. In view of the above, the second ground of appeal fails on the basis that the appellants did not plead any overriding interest and have not specified the overriding interest that the trial court failed to consider.
27. On the issue of customary trust; having considered the defence filed by the appellants, my observation is that apart from denying the respondents' claim, the only averment they made regarding the suit property was that their late mother Nzisa Kitivi co-owned the suit property with Joseph Kimuyu Mbondo. Therefore, customary trust was not pleaded anywhere in the defence, hence the same did not form part of the issues to be determined by the trial court. The appellants raised the issue of customary trust in their submissions before the trial court and that court rightly pointed out that the dispute was on co-ownership and that customary trust was not pleaded and that therefore, the pleadings and submissions were at variance. It is my view that submissions do not amount to pleadings or evidence and a party who introduces an issue or evidence in submissions, which does not arise from the pleadings is merely raising irrelevancies. It is trite that pleadings guide the evidence and submissions are merely persuading arguments meant to convince the court to agree with the parties' position and have no evidentiary weight.
28. In the case of *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another* [2014] eKLR, the Court of Appeal held as follows;
- Submissions cannot take the place of evidenceSubmissions are generally parties 'marketing language, each side endeavoring to convince the court that its case is the better one.
29. Therefore, having considered the pleadings and noting that the defence only stated that the appellants' mother and the respondents' father were co-allottees of the suit property from Katelembo, the question raised in the defence was only on whether the suit property was jointly allocated to Joseph Mbondo and Nzisa Kitivi by Katelembo and not whether a customarily trust existed in favour of the appellants and on that basis, the third ground of appeal fails for lack of merit.
30. On the first ground of appeal, the appellants contended that the trial magistrate failed to consider the appellants' evidence and submissions in their entirety. The appellants have not pointed out which part of their evidence or submissions were not considered by the trial court. I have considered the judgment of the trial court and it is clear that apart from giving a summary of the evidence of each witness and the parties pleadings and submissions, the trial court interrogated the evidence of each party and made findings on the issue of ownership that arose, and stated clearly that the plaintiffs demonstrated ownership while the defendants failed to demonstrate co-ownership as alleged. On that basis and for lack of specificity and justification, the first ground of appeal fails.
31. The upshot is that there is no merit in the appeal before me, and the same is hereby dismissed with costs to the respondents.
32. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

A. K. Mutua for respondents



Mr. Mburu holding brief for Kamande for appellants

Court assistant – Josephine

