



**Ngerechi v Koech (Environment and Land Appeal 1 of 2019)
[2024] KEELC 5218 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 1 OF 2019
LA OMOLLO, J
JULY 11, 2024**

BETWEEN

MICAH K.A NGERECHI APPELLANT

AND

JOSEPH KOECH RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 22nd January, 2019 the Appellant appeals against the judgement of Hon. S.M Mokua Chief Magistrate delivered on 5th December, 2018 in Kericho CMCC No. 214 of 2015.

Factual Background.

2. The Appellant filed a Complaint dated 8th June, 2015, which complaint was subsequently amended on 19th February, 2018. In the complaint, the Appellant sought the following orders against the Respondent:
 - a. An eviction order and injunction pleaded above.
 - b. Damages for trespass.
 - c. Interest thereon.
 - d. Costs of the suit.
 - e. Any other or further relief.



3. The Respondent filed his Statement of Defence and Counterclaim on 18th May, 2018 wherein he denied the averments in the Amended Plaintiff and sought the following orders:

- a. An order that the Plaintiff (now Defendant) be compelled to transfer the parcel of LR No. Kericho/Silibwet/1281 to him (sic),

Or in the alternative

Failure to transfer the Executive Officer of the Honorable Court at Kericho do execute on behalf of the Plaintiff (now Defendant) all the necessary transfer documents.

- b. Costs of this suit.
- c. Any other or further relief this honorable court deems fit to grant.

4. The trial Magistrate in the judgement delivered on 5th December, 2018 found as follows;

“Based on the evidence and the provisions of the law, I find that the Plaintiff has failed to prove his claim; it is dismissed with costs to the Defendant. The Defendant has proved the counterclaim on a balance of probabilities. The prayers in the counterclaim are hereby allowed”

5. The Appellant being aggrieved by the said judgement approached this court by way of Appeal.

The Appeal.

6. The grounds of Appeal are as follows;

- a. That the Learned Trial Magistrate erred in law and in fact in holding that the transfer of the suit property to the Appellant by the Respondent's father was void yet no evidence was led to prove that fact.
- b. That the Learned Trial Magistrate erred in law in allowing the prayer for adverse possession by the Respondent yet the lower court does not have jurisdiction to grant that prayer.
- c. That the Learned Trial Magistrate erred in law in failing to find that the Respondent did not pray for cancellation of title to the suit property thus rendering the Respondent's claim incompetent and unenforceable.

7. The Appellant prays that the appeal be allowed, judgement set aside and the counterclaim remitted for hearing before another court of competent jurisdiction. He is also seeking to be awarded costs of the appeal.

8. On 6th February, 2023, the court directed that the appeal be disposed by way of written submissions.

9. The appeal was mentioned severally and on 15th May, 2024 it was finally reserved for judgement.

Issues for Determination.

10. The Respondent filed his submissions on 18th April, 2024. The Appellant did not file submissions.

11. The Respondent submits on each of the grounds of appeal and also submits on whether the appeal was filed within the prescribed period.



12. With regard to the first ground of appeal, the Respondent submits that the Appellant failed to prove how he obtained the title deed to land parcel No. Kericho/Silibwet/1281.
13. The Respondent also submits that the suit property is agricultural land and its dealings are therefore subject to the provisions of the [Land Control Act](#).
14. The Respondent relies on Section 6 (1) (c) of the [Land Control Act](#) and submits that the Appellant failed to produce any consent from the Land Control Board and any other relevant documents as evidence of transfer.
15. It is the Respondent's submissions that the Appellant's failure to produce the said documents informed the Learned Trial Magistrate's finding that the process of obtaining the title deed to the suit property was void. He urges the court to affirm the findings of the Learned Trial Magistrate.
16. With regard to the second ground of appeal, the Respondent submits that the Learned Trial Magistrate had the jurisdiction to hear and determine claims of adverse possession.
17. The Respondent relies on Section 7 of the Magistrate's Court Act, Section 26(4) of the [Environment and Land Court Act](#) and Article 169(2) of [the Constitution](#) of Kenya in support of his arguments.
18. In respect of the third ground of Appeal, the Respondent submits that since his claim in the counter claim was on adverse possession, he needed not to pray for cancellation of the Appellant's title.
19. The Respondent also submits that he proved his claim of adverse possession on a balance of probabilities and therefore the Learned Trial Magistrate did not err in granting the orders sought in the counterclaim.
20. On whether the appeal was filed within the prescribed period, the Respondent submits that the learned trial Magistrate delivered his judgment on 5th December, 2018 while the Appellant filed his Memorandum of Appeal on 23rd January, 2019.
21. The Respondent also submits that the Appeal was filed one month and twenty-three days after the Learned Trial Magistrate delivered the judgement which was outside the thirty-day period required by law.
22. The Respondent relies on Section 16A of the [Environment and Land Court Act](#) and submits that the Appellant did not seek leave of court to file the appeal out of time and the appeal should therefore be dismissed with costs.

Analysis and Determination.

23. In my view the issues that arise for determination are as follows;
 - a. Whether the appeal was filed out of time.
 - b. Whether the Learned Trial Magistrate erred in law and in fact in holding that the transfer of the suit property to the Appellant was void.
 - c. Whether the Learned Trial Magistrate had the jurisdiction to determine the issue of adverse possession.
 - d. Whether the Learned Trial Magistrate erred in not finding that the Respondent had not sought for cancellation of the Appellant's title thereby rendering his claim unenforceable.



- e. Who should bear costs of the appeal.

Whether the appeal was filed out of time.

24. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

25. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions

reached by the learned trial Judge are to stand or not and give reasons either way.”

26. The Respondent argues that the Learned Trial Magistrate delivered judgement on 5th December, 2018 while the Appellant filed the present appeal on 23rd January, 2019.

27. It is the Respondent’s argument that the said Memorandum of Appeal was filed one month and twenty-three days after judgement was delivered which was not within the required period of thirty days.

28. The Appellant did not file any submissions to the Appeal.

29. Section 79G of the *Civil Procedure Act* provides as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

30. All appeals from the subordinate Court to the High Court and Courts of equal status must be filed within thirty days from the date of the decree or order appealed against.

31. Order 50 Rule 4 of the *Civil Procedure Rules* provides as follows;

“

- “4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:



Provided that this rule shall not apply to any application in respect of a temporary injunction.”

32. It is important to note that the period between 21st December of any year to 13th January of the following year are omitted from any computation of time.

33. In *Francis Likhabila v Barclays Bank of Kenya* [2020] eKLR the Court held as follows;

“

“ 14. In view of the foregoing, I find that since the impugned order was made on 19th December 2019, the 30 day period prescribed under Section 79 G of the *Act* fell within the court’s Christmas Recess gazetted in the year 2019.

Consequently,
the days falling between 21st December 2019 and 13th January 2020 ought to be excluded when computing the time within which the appellant was required to file his appeal.

15. When I calculate 30 days from 19th December 2019 excluding the days between 21st December 2019 to 13th January 2020, I find that the 30 day period expired on or about 11th February 2020. The court record shows that the appellant filed his appeal on 22nd January 2020 which means that the appeal was filed well within the time stipulated by the law.”

34. In the present matter it is not disputed that the Learned Trial Magistrate delivered judgement on 5th December, 2018 and the Appellant filed his Memorandum of Appeal on 23rd January, 2019.

35. In calculating the thirty days from 5th December, 2018

excluding the days between 21st December, 2018 and 13th January, 2019, I find that the thirty-day period lapsed on 27th January, 2019. Since the Memorandum of Appeal was filed on 23rd January, 2019 the same was filed within the stipulated time in law.

B. Whether the Learned Trial Magistrate erred in law and in fact in holding that the transfer of the suit property to the Appellant was void.

36. The Appellant argues that the Learned Trial Magistrate erred in holding that the transfer of the suit property to his name by the Respondent’s father was void as no evidence was led to prove that fact.

37. In response, the Respondent submits that the Appellant did not adduce any evidence or produce any documents in support of the said transfer and therefore the Learned Trial Magistrate did not err in finding the transaction void.

38. In his judgement delivered on 5th December, 2018, the Learned Trial Magistrate held as follows;

“...The Plaintiff told the court that he purchased the land in issue from the father of the Defendant. He didn’t indicate on how he transacted with the Defendant’s father. It is also clear from the evidence that he has ever (sic) utilized the land in issue.

It is clear from the evidence that the Defendant is in occupation of the land with his family. One issue stand (sic) out, why did it take the Plaintiff too long to take possession if the purchase thereof followed the legal processes?



The defence raised issues regarding the consent that may have been issued by the Land Control Board. This is due to the fact that the land is subject to Sec. 6 of the [Land Control Board Act](#) Cap 302 Laws of Kenya. The said section provides...

As per the testimony of the Plaintiff, there is nothing demonstrating that the transaction of sale complied with the

requirement of 1(c) above. Therefore, due to lack of any evidence that the land control board gave its consent, the transaction between the Plaintiff and the Defendant's father is void for all purposes."

39. While giving evidence before the Learned Trial Magistrate, the Appellant produced a copy of his title deed for land parcel No. Kericho/Silibwet/1281. No other document was produced in support of his claim of ownership.

40. Section 24 of the [Land Registration Act](#) provides as follows;

“

“24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights

and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

41. Section 26 of the [Land Registration Act](#) provides as follows;

“

“26. (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.”



42. The Court of Appeal in *Munyu Maina –v- Hiram Gathiba Maina* [2013] eKLR held as follows;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of the 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. It is our considered view that the

Respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

43. The Respondent in his Statement of Defence and Counterclaim challenged the Appellant’s ownership of the suit property. As was held in the above cited judicial authority, it was not sufficient for the Appellant to merely produce a title deed without any supporting documents to show how he acquired the suit property.

44. It is also not disputed that the suit property was agricultural land and it was therefore necessary to obtain the Land Control Board consent. Since there is no evidence that such a consent was obtained, it is my view that the Learned Trial Magistrate did not err in finding that the alleged transaction between the Appellant and the Respondent’s father to be void.

45. Therefore, this ground of appeal lacks merit.

C. Whether the Learned Trial Magistrate had the jurisdiction to determine the issue of adverse possession.

46. The Appellant argues that the Learned Trial Magistrate erred in allowing the prayer for adverse possession and yet he did not have the requisite jurisdiction to do so.

47. In response, the Respondent argues that specific Magistrates appointed to hear and determine land matters have jurisdiction to hear and determine claims of adverse possession.

48. As aforementioned, the Respondent raised the issue of adverse possession in his Statement of Defence and Counterclaim and the Learned Trial Magistrate addressed it in the judgement as follows;

“The Court looked at instances of adverse possession, particularly that whoever that claims adverse possession

has to demonstrate that his occupation

has been without interruption. The land in issue has to be registered in the name of the other party apart from the Applicant. I know that initially it was the high (sic) which was mandated to hear matters pertaining to adverse possession. However, with the amendment of the law, Magistrates are allowed to hear matters that fall under their pecuniary jurisdiction...The Defendant has proved the counterclaim on a balance of probabilities. The prayers in the counterclaim are hereby allowed.”

49. Section 9(a) of the *Magistrates’ Court Act* provides as follows;

“A Magistrate’s court shall—



- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- SUBPARA (ii)
compulsory acquisition of land;
- SUBPARA (iii)
land administration and management;
- SUBPARA (iv)
public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- SUBPARA (v)
environment and land generally;

50. In *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR the court held as follows;

“

“8. The alterations, adaptations, qualifications and exceptions referred to above must give Section 38 (1) of the *Limitation of Actions Act* conformity to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates’ Courts Act*, 2015 both of which were enacted to give effect Article 162(2) (b) and Article 169(1) (a) and (2) of *the Constitution*. So as attain that conformity, Section 38 (1) of the *Limitation of Actions Act* must be construed as not depriving Magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with Article 259 which enjoins the Court to interpret *the constitution* in a manner that promotes its purposes, values and principles...

23. In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4)

of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates’ Courts Act*, 2015, the principles of interpretation of *the constitution* as well as the principles of *the constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a Magistrate who is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, Magistrates’ Courts have jurisdiction and power to handle cases involving claims of adverse possession.” [Emphasis Mine]

51. As was held in the above cited judicial decision, Magistrates who are duly gazetted have the jurisdiction to hear and determine claims of adverse possession. This ground of appeal, therefore, lacks merit.



D. Whether the Learned Trial Magistrate erred in not

finding that the Respondent had not sought for cancellation of the Appellant's title thereby rendering his claim unenforceable.

52. The Appellant argues that the Learned Trial Magistrate erred in failing to find that the Respondent had not prayed for cancellation of his title and therefore the Respondent's claim was unenforceable.
53. The Respondent in response argues that he did not need to seek for cancellation of the Appellant's title, as his claim was on adverse possession which he had proved on a balance of probabilities and therefore the Learned Trial Magistrate made no mistake in granting the orders sought in the counterclaim.
54. A perusal of the pleadings and the evidence given during the trial before the Learned Trial Magistrate shows that the issue of whether or not the Respondent had sought for an order of cancellation of the Appellant's title and its effect thereof was not raised.
55. The Court of Appeal in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015* and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the Appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the Learned Judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his Memorandum of Appeal in this

Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the Appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate court would become a Trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).” [Emphasis mine]

56. My view is that this court cannot consider this ground of appeal as it was not raised before the trial Court.

Disposition

PARA 57.

In the result, I find that this Appeal has no merit and it is hereby dismissed with costs to the Respondent.

PARA 58.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF JULY, 2024.

L. A. OMOLLO

.....

JUDGE.



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

No appearance for the Appellant.

No appearance for the Respondent.

Court Assistant; Mr. Joseph Makori.

