



**Pertet v Wambua (Environment and Land Appeal E040 of 2022)
[2024] KEELC 5407 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E040 OF 2022
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

IBRAHIM WANGUNYU PERTET APPELLANT

AND

PIUS WAMBUA RESPONDENT

*(Being an Appeal against the Judgement of Hon. Judicaster Nthuku, in PM
ELC Case No. E001 of 2022 at Oloitoktok delivered on 23rd August 2022)*

JUDGMENT

1. In her Judgement dated 23rd August 2022, the Honourable Nthuku J.N. (P.M) observed;

“in the present case, the burden of proof lay on the shoulders of the Plaintiff because the defendant never filed any counter-claim and for the reasons stated in the above Judgement, I find that Plaintiff has failed to discharge that burden to the required standards. I hereby dismiss the Plaintiffs suit with costs to the Defendant.”
2. Aggrieved by the said Judgement, the Appellant has filed an appeal on the following grounds;
 1. The learned Magistrate erred in Fact and Law in disregarding, failing to consider and appreciate the ample and compelling documentary and witness evidence furnished by the Appellant in proof of the root to his title/unchallenged ownership of the subject property; A361 Isinet Trading Centre, formerly (R 125/Residential);
 2. The learned Magistrate erred in Fact and Law in failing to appreciate and give due weight to the fact that the Appellant’s claim to ownership of the subject property A361 Isinet Trading Centre, formerly (R 125/Residential) has been affirmed by both the allocating/allotting Authority with the Radical Title to the subject Property; that is the County Government



of Kajiado (formerly the County Council of Olkejuado as well as the Dispute Resolution Committee of the National Land Commission, County Government of Kajiado);

3. The learned Magistrate erred in fact and in law in failing to acknowledge the fact that the proceedings and determination of the Dispute Resolution Committee of the Land Commission, County Government of Kajiado, being a Quasi-Judicial Body, could only be challenged by way of judicial Review by the Respondent if he was aggrieved (which he failed to do) and therefore the learned Magistrate could not disregard and fail to pay heed to the said proceedings and determination so as to arrive at a decision in conflict with the same.
 4. The learned Magistrate erred in fact and in Law in disregarding and sidestepping glaring conflicts, inconsistencies, contradictions and conflicts in the documentary evidence and witness testimony of the Defendant and his Witnesses and more particularly and significantly ignored the unequivocal admission by the Respondent that he purports to have bought the subject property by written agreement on 7th October 2021 yet the Letter of Allotment purported to rely on is dated 14th October 2010 (evidently backdated, forged/falsified);
 5. The Learned Magistrate erred in fact and in law in ignoring, disregarding and failing to pay heed to the fact that the Defendant failed to formerly tender in evidence the Sale Agreement between himself and Mpete Kitesho vide which the Defendant purportedly purchased the subject Property and further failed to demonstrate that the said Mpete Kitesho was ever the Registered and/or- beneficial owner of the subject property capable of conferring and/or transferring his said interest to the Defendant.
 6. The learned Magistrate erred in Fact and in Law in relying upon the witness testimony of Timothy Kanka Saigilu and Daniel Kiberenge that not only conflicted with the Defendant's own evidence but also mainly comprised of hearsay evidence that was not backed by cogent documentary proof.
 7. The Learned Magistrate erred in fact and in Law in failing to consider and determine this matter on its own merits.
 8. The learned Magistrate further erred in arriving at a decision/ determination that was wholly against the weight of the evidence tendered herein.
3. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions.

4. Counsel submitted that the Appellant is the sole proprietor and registered owner of Plot Number A361 Isinet Trading Centre, previously known as R125/Residential, with clearly demarcated boundaries. Despite this, the Respondent allegedly trespassed onto the Appellant's property, constructed illegal structures and utilized the land without the Appellant's consent. Despite the Appellant demonstrating how he acquired title to the suit property and glaring evidence and inconsistencies in the Respondent's claim, the trial court disregarded this and dismissed the Appellant's suit.
5. Counsel further submitted that the Appellant provided comprehensive documentary evidence to support his claim. But the Respondent who claimed to have purchased the plot on 7th October 2011 from Mr. Mpete Kitesho failed to provide the sale agreement and/or evidence of payment. Furthermore, the Respondent's allotment letter was dated 14th October 2010, which is before the alleged purchase and signed by unknown person, hence raising suspicions of forgery. Lastly, witnesses for the Respondent provided contradictory and hearsay evidence.



6. The Appellant thus asked this court to uphold his title making reference to *Mary Wairimu Kimura v Ol Kejuado County Council & 2 others* [2020] eKLR.

The Respondent's Submissions.

7. At the time of writing this judgement, the Respondent had not filed his submissions.

Analysis and Determination

8. I have considered the grounds of appeal, the record of appeal, the written submissions, the authorities cited. The issues for determination are:

- i. Whether the Lower Court erred in its Judgement dated 23rd August 2022.
- ii. Whether the Appellant is entitled to the orders sought.
- iii. Who should bear costs of the appeal?

9. This being the first Appeal, this Court is tasked with the duty of reassessing the evidence at trial and make its own conclusions, taking into consideration that neither saw nor heard the witnesses as was held in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

10. Similarly in *South Nyanza Sugar Company Ltd v Leonard O. Arera* [2020] eKLR Mrima J observed thus;

“As the first appellate court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter, see the case of *Selle & Another v Associated Motor Boat Co. Ltd.*”

11. This dispute emanates from double allocation of plot A361 (formerly R125/ Residential) Isinet Trading centre.

12. At the lower court, the Appellant sought eviction of the Respondent, demolition of his structures and a permanent injunction restraining him from occupying plot No. A361 Isinet Trading centre. This was on grounds that he was the sole and registered owner of the said plot having been allotted the same as part of a staff benefit scheme of employees of the County Government of Kajiado. However, the Respondent had trespassed and erected illegal structures thereon and had refused to vacate.

13. His evidence was that the dispute arose when a validation exercise was conducted and both parties lay claim to the same plot. He stated that on 25th February 2021 he received summons through his mobile phone Short Message Service (SMS) asking him to attend a meeting to resolve the dispute. On 2nd December 2021 he was informed of the outcome of the meeting which found that the plot was his. To support his claim, he produced the following documents;

- i. Letter of Allotment for R125/Residential Isinet t. Centre 14th October 2010;
- ii. Dispute Resolution Committee letter dated 2nd November 2021 referenced Ibarhim Pertet vs Wambua Kathazui plot No. A361 Isinet which reads in part: The committee in making its determination, considered oral submissions from the client and their witnesses, through examination of plot ownership documents, verification of record from the County Land registry and report of the defunct County Land Management Board (CLMB) where applicable and above all considered each case on its won merit. ... the committee recommended that the said plot belongs to Ibarhim Pertet. By a copy of this letter, the Chief Officer lands is requested to ensure implementation of the decision with regards to official records.



- iii. Letter dated 21st December 2021 A361 Isinet Trading Centre formerly R125/Residential from County Department of lands, Physical Planning and Urban Development indicating that the land was allocated to the Appellant.
14. John Sumuni, confirmed the Appellant’s claim stating that he was also a staff member and was among the persons who were given the plots which were in a chronological order. His plot was A363 formerly R127.
15. The Respondent in his defence contested the allegation stating that he purchased the suit land from one Mpete Kitesho on 7th October 2010 and constructed a house where he resided on with his family until 2014 when the Appellant claimed being the owner of the plot. He stated that they were called for a meeting and he produced the sale agreement but was never summoned to attend the Dispute Resolution Committee hearings regarding the suit plot. He confirmed that the date of his allotment letter was before the sale agreement because the sale agreement was 7th October 2011 but the allotment letter was dated 14th October 2010. The Respondent produced as evidence a letter of allotment dated 14th October 2010 for R125/Residential Isinet trading centre; sale agreement between the Respondent and one Mpete Kitesho dated 7th October 2010.
16. The Appellants contention is that his letter of Allotment was signed by the then Clerk to the County Council of OlKejuado Fredrick O.Ndede. The same is signed on the 14th October 2010.
17. It is also his contention that the Respondent’s letter of Allotment was signed by Livingstone Melompuki whose position and designation was not known.

The Respondent in the lower court stated that he bought the plot from Mr. Mpete Kitesho. However the said Mr. Mpete was not called to testify to confirm that he had been allocated the said plot. Infact no letter of Allotment was produced to confirm that the said Mr. Mpete had been allocated any plot.

I find that the learned trial magistrate erred in finding that the Appellant had not proved that he had been allocated the said plot.

18. The Respondent also told the lower court that he bought the said plot on 7th October 2011. It is curious to note that the letter of Allotment in his name is dated 14th October 2010. The same as stated earlier is signed by unknown person. This only leads to the conclusion that the said letter of Allotment is a forgery. This could be the reason why the Respondent did not file a counter claim. The testimony of Timothy Kanka Saigilu, a former Councillor cannot be believed as he was not the allocating authority.
19. Having stated that the letter of Allocation to the Respondent was likely to be a forgery, the observations by the learned trial magistrate;

“that the makers of the Documents were never called and the records from the lands office were never availed to shed light on this matter as to which of the two allotment letters the court should upheld and why.”

In my view nothing prevented the court from having these officers summoned to shed light on who was allocated the plot. This ought to have been done in the interest of justice. The court had powers to ensure that it got to the bottom of the dispute.

20. I agree with the Appellant’s submissions that the learned trial failed to take into account the Dispute Resolution Committee findings. This was the Committee of the allocating authority and no reasons were given to doubt the authenticity of these proceedings.



21. I find that the Appellant and his witnesses were able to trace the root of his letter of Allocation while the Respondent could not.
22. In conclusion, I find that the learned trial magistrate erred in dismissing the Appellant's case.
23. I find the Appeal merited and the same is allowed.
24. Accordingly, the Judgement of the Honourable Judicaster Nthuku Principal Magistrate delivered in Loitoktok PM ELC Case No. E001 of 2022 at Loitoktok on 23rd August 2022 is hereby set aside in its entirety and substituted with a Judgement granting the prayers in the Appellants Amended Plaintiff.

The Appellant shall have costs of the suit in the lower court and in this Appeal.

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

L. KOMINGOI

JUDGE.

In the presence of:

Mr. E. Kamau for the Appellant.

N/A for the Respondent.

Court Assistant – Mutisya.

