



**Mwangi v Kyengo & another (Environment and Land Appeal
E001 of 2021) [2024] KEELC 6765 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E001 OF 2021
MN GICHERU, J
OCTOBER 14, 2024**

BETWEEN

NJOROGE MWANGI APPELLANT

AND

HILLARY NGONDI KYENGO 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

JUDGMENT

1. This judgment is on the appellant's appeal against the judgment of the learned Chief Magistrate in Kajiado CMCC 591 of 2015 which judgment is dated 30/4/2020. The appellant seeks the following orders.
 - a. This appeal be allowed as prayed.
 - b. The judgment in Kajiado CMCC 791 of 2015 in favour of the 1st respondent be set aside.
 - c. The appellant be awarded the costs of this appeal.
2. In the impugned judgment, the learned trial Magistrate found in favour of the 1st respondent and dismissed the appellant's suit which sought to restrain the respondents or anybody claiming through them from dealing with plot numbers 96A or 96B Residential Noonkopir T. Centre. Instead the trial Magistrate found as per the 1st respondent's counterclaim which sought two main prayers.
 - a. A declaration that the physical parcel of land between the parties was Plot No. 478 and 450 Business Noonkopir T. Centre (now C36 and C37) but not Plot No. 96A and 96B Residential Noonkopir T. Centre.



- b. An order of permanent injunction restraining the plaintiff whether by himself, his agents, servants or employees from selling, disposing, trespassing, interfering or in any way whatsoever dealing with Plot No. 478 and 480 (now C36 and C37).
3. The reasons for dismissing the appellant's suit and allowing the 1st respondents claim as per the judgment by the learned trial Magistrate are as follows. Firstly, there is no evidence that Plot Numbers 478 and 480 Business Noonkopir were numbered C36 and C37 after validation. Secondly, the County Surveyor in charge of the mapping of the various parcels found that it is Plot Numbers 478 and 480 that later became C36 and C36 on validation and not the appellant's parcels. Thirdly, the appellant did not produce any sale agreement between him and the alleged seller, Cate Nailontei. Neither did he call the seller as his witness. Fourthly, the appellant did not demonstrate where his claim for the current C36 and C37 (previously 478 and 480) is derived from. Finally, it was found that as per the surveyor's report, Plot Numbers 96A and 96B are distinct and a distance away from C36 and C37.
4. Dissatisfied with the judgment of the learned Trial Magistrate, the appellant filed a memorandum of appeal dated 26/11/2020 which contains twenty one (21) grounds of appeal as follows. The learned Chief Magistrate erred in law and/or in fact,
 - i. in failing to find and hold that the appellant had proved his claim on a balance of probabilities,
 - ii. in failing to frame, consider and determine all the issues before her,
 - iii. in pronouncing her judgment based on theories and hypothesis that the 1st respondent had demonstrated his ownership of Plot No. (C36 and C37) previously named 478 and 480 Business Noonkopir T. Centre alleged by the respondents to be one and the same Plot No. 96A and 96B,
 - iv. in failing to appreciate that the 1st respondent did not produce any documentary evidence to prove that plots number 478 and 480 renamed as No. C36 and C37 fall on 96A and 96B,
 - v. in failing to consider that as per the official map, there is a plot in between the 1st respondent's Plot No. 478 and C480 renamed as C36 and C37 and the appellant's Plot No. 96A and 96B,
 - vi. in failing to consider that the appellant's Plots No. 96A and 96B according to the County Surveyor are distinct and a distance away from the 1st respondent's Plots No. C36 and C37,
 - vii. in failing to consider that the plot in dispute could not be given a new number due to the dispute which was pending in court, yet she proceeded to hold that Plot No. 478 and 480 were renamed C36 and C37 and that it is owned by the 1st respondent,
 - viii. in failing to consider that the County Surveyor's report clearly indicated that no new numbers could be issued to the subject lands yet she proceeded to hold that the 1st respondent had proved ownership of Plot No. C36 and C37 previously known as 478 and 480 Business Noonkopir T. Centre,
 - ix. in failing to consider that the County Surveyor who testified on behalf of the 1st and 2nd respondents did not comply with the court order dated 28/9/2018 directing him to survey all the plots in question, an admission that he made during the hearing,
 - x. in failing to consider that the County Surveyor admitted in his evidence that he only visited one plot being No. 96A and 96B and did not visit Plot No. 478 and 480 hence he did not assist the court in distinguishing the 1st respondent's and the appellant's plots,



- xi. in failing to consider that the County Surveyor introduced new numbers in his survey report the same being C36 and C37 yet the court order was clear that he was to survey Plot No. 96A and 96B and Plot No. 478 and 480,
 - xii. in failing to peruse the appellant's report that clearly distinguished the 1st respondent's plot from that of the appellants.
 - xiii. in applying double standards in that she perused an earlier survey report that was never produced in court as evidence in favour of the 1st respondent but failed to peruse the appellant's private surveyor's report,
 - xiv. in failing to consider that the County Surveyor admitted in his evidence that he did not rely on any map when he was carrying out his survey hence his survey report was incomplete and inefficient,
 - xv. in failing to peruse the original official map relied upon by the appellant to prove that the 1st respondent's Plot No. 478 and 480 is distinct from the appellant's Plot No. 96A and 96B,
 - xvi. in failing to consider the appellant's evidence which stated that the appellant's Plot No. 96A and 96B alleged to have been subdivided to generate Plot No. B631 does not belong to the appellant as per search records,
 - xvii. in failing to consider that indeed the new members being C36 and C 37 belong to the appellant,
 - xviii. in adopting and relying on the County Surveyor's report which misled the court in reaching an erroneous decision,
 - xix. in pronouncing in his judgment that the appellant by himself, his servants and or agents are restrained from entering, interfering or in any way dealing with the 1st respondent's land being 478 and 480 renamed as No. c36 and C37 also said to be one and the same plot as 96A and 906B,
 - xx. in dismissing the appellant's suit in the circumstances as to amount to wrongful exercise of a discretion,
 - xxi. in that the findings are unsuitable in law on the basis of the evidence adduced in court by the appellant.
5. The appellant filed written submissions dated 11/4/2024 and identified only two issues for determination. The said issues are as follows.
- i. Whether the conduct of the site visit and the subsequent County Surveyor's report prejudiced the appellant's case.
 - ii. Whether all material facts were considered during the trial.
6. This being a first appeal, this court must do the following.
- i. Reconsider the evidence of the trial court, evaluate itself and draw its own conclusions,
 - ii. Bear in mind that it did not see or hear the witnesses in the Lower Court and make due allowance in this regard.

See Selle v Associated Motor Boat Company Limited 1968 EA 123.



7. I have carefully considered the record of appeal, the grounds in the memorandum of appeal, the written submissions by the appellant, learned counsel for the 1st respondent and the law cited in the written submissions. I find that the proper way to determine the appeal is by making a determination on each of the twenty one (21) grounds by the appellant. I make the following findings on the said grounds.
8. On the first, I find no error on the part of the trial Magistrate. The appellant did not prove his case on a balance of probabilities because he was not able to prove that he bought the plots that he claimed to have bought from Cate Nailontei. He had no letter of allotment. He had no sale agreement and he was not in occupation. The reports of the surveyors from the allocating authority concluded that the disputed ground belonged to the 1st respondent. With all this evidence against him, the plaintiff's case was not proved to the required standard.
9. On the second issue, I find no error on the part of the trial Magistrate. There was only one issue for determination in the suit. Simply put, who between the appellant and the 1st respondent owned the disputed ground? On 27/6/2019 when the appellant was under cross - examination by Mr. Mutavi, counsel for the 1st respondent he stated as follows.

“Yes, the dispute is who owns the physical ground as it is the same:.

That means that the only thing that the trial Magistrate had to decide was who owned the ground which was disputed? At page 5 of the judgment dated 30/4/2020, the Magistrate correctly identified the two issues for trial as follows.

- a. Whether the plaintiff or the defendant is the owner of the plots that are now C36 and C37 and therefore entitled to lock out the other party.
- c. Who bears the costs of this suit?

Clearly, the issue was brought out and a fair determination thereto given.

10. I find that the trial Magistrate did not base her judgment on theories and hypothesis but on concrete evidence. I therefore dismiss the third ground for reasons already given in determining the 1st ground.
11. I dismiss the fourth ground because I find documentary evidence was adduced by the County Surveyor to prove that it is the 1st respondent and not the appellant who owned the disputed land. Such documents include the official records of the allocating authority.
12. I find no merit in the fifth ground because the real issue in dispute was who owned the disputed ground. As to whether there was another plot between the plots owned by the parties in this case, I find that to be immaterial.
13. Contrary to the averment by the appellant in the sixth ground, the trial Magistrate found at page 6 of the judgment that Plot Numbers 96A and 96B were a distance away from C36 and 96B were a distance away from C36 and C37. She stated as follows.

“There is no evidence that the 1st defendant has trespassed onto Plots No. 96A and 96B which the plaintiff has produced documents to show that he purchased and which according to the surveyor is distinct and a distance away from C36 and C37”.

The contradiction in the sixth ground and the finding by learned Magistrate are obvious. The Magistrate found exactly what is she is accused of not finding.



14. The issue of the new numbers given to the plots during the pendency of the suit is not well brought out in the testimony of the County Surveyor. It has been raised in grounds 7 and 8 of the memorandum of appeal. The appellant's counsel should have raised it in cross – examining the witness who raised it. Since the dispute started at the offices of the second respondent, it was important to clarify at what time the plot in dispute could not be given a new number. Without that evidence, I find that the 7th and 8th grounds cannot hold.
15. The report by the County Surveyor shows that the appellant and his counsel were present when the site visit took place. It is even stated somewhere on record that the appellant's surveyor was present. The appellant did not make any application to call his surveyor. He should have called him as a witness to show the inadequacy of the report filed by County Surveyor. Failure to do so weakens ground 9 in the memorandum of appeal. There is no evidence that the survey exercise did not achieve the intended purpose of identifying which party was the rightful owner of the disputed physical ground. I find no merit in the ninth ground. This finding covers the 10th and 11th grounds.
16. As I have stated before while dealing with the sixth ground, the trial Magistrate found that the appellant's plots are separate from the 1st respondent's. Yet the twelve ground of appeal seems to me to state the exact opposite. I find no merit in that ground.
17. My findings on the 13th ground will be similar to that on the 9th, 10th, and 11th grounds. If the appellant wanted the evidence of his surveyor to be considered, he should have called him as a witness. There is nothing on record to show that he was precluded from doing so. The earlier survey exercise by the County Surveyor, one Risancho was ordered by the court. The trial Magistrate was bound to consider it and disregard one by a person not called as a witness. I find no merit in the 13th ground. This finding covers the 14th and 15th grounds because they relate to maps and the surveyor's report which the appellant failed to produce. It also covers the 18th ground.
18. I find that 16th, 17th, 19th, 20th and 21st grounds have already been determined in the finding made especially on the 1st issue as well as the other issues. I find no merit in any of them.
19. In conclusion, I find no merit in the entire appeal by the appellant and I dismiss it with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

