



Presbeta Investment Limited v Kamau & another (Environment and Land Appeal E047 of 2022) [2024] KEELC 6766 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E047 OF 2022
MN GICHERU, J
OCTOBER 15, 2024**

BETWEEN

PRESBETA INVESTMENT LIMITED APPELLANT

AND

DUNCAN GITHU KAMAU 1ST RESPONDENT

LAND REGISTRAR, KAJIADO 2ND RESPONDENT

(Being an appeal against the entire judgment and decree of the Kajiado Chief Magistrates' Court in CM ELC E025 OF 2022 by Hon. Irene Marcia Kabuya (PM) issued/delivered on 28/9/2022) IN THE CHIEF MAGISTRATE'S COURT AT KAJIADO MC. NO E025 OF 2022)

JUDGMENT

1. This judgment is on the appeal by the appellant dated 18/10/2022 in which it seeks the following orders.
 - a. This appeal be allowed.
 - b. The judgment and decree of the Honourable Trial Court delivered and issued on 28/9/2022 be set aside and the same be substituted with a judgment in favour of the appellant in terms of the plaint dated 8/3/2022.
 - c. The costs of this appeal and costs of the Lower Court suit be awarded to the appellant.
 - d. Any other relief that this court may deem fit to grant.
2. In the judgment dated 28/9/2022 the learned trial Magistrate dismissed the appellant's suit with costs on the ground that its case was not proved to the required standard especially the particulars of fraud.



3. Dissatisfied with the decision of the learned trial Magistrate, the appellant, through counsel on record, filed a memorandum of appeal with twelve grounds of appeal as follows. The learned trial Magistrate erred in law and fact and or misdirected herself by,
- i. failing to find despite the evidence adduced that the appellant is the rightful and the owner of L.R. Kajiado/Lorngosua/6598, suit land, thus arriving at a wrong decision,
 - ii. by failing to find that the 1st respondent had a burden of explaining the root of his certificate of title, and which burden the 1st respondent failed to discharge on the required standard,
 - iii. by failing to find that the 1st respondent had no proprietary interest over the suit land for want of consideration,
 - iv. by failing to find that the 1st respondent had failed to demonstrate through evidence that this alleged acquisition of title in respect to the suit properties was legal, formal and free from any encumbrances,
 - v. by concluding that the appellant had not proved elements of fraud while selectively ignoring the appellant's documentary evidence tendered and the existence of other grounds of impeaching the 1st respondent's certificate of title,
 - vi. by failing to conclude that the 1st respondent's certificate of title to the suit land was impeachable on account of the same having been acquired illegally, unprocedurally and through a corrupt scheme,
 - vii. by rendering a decision that was not based on the evidence tendered by the appellant, the facts and any known legal principles,
 - viii. by failing to make a finding that the appellant's case and evidence was not controverted by the respondents,
 - ix. by failing to arrive at a conclusion that the appellant had discharged the burden of proof to the required standard of a balance of probabilities,
 - x. by rendering a decision in favour of the 1st respondent while ignoring the appellant's critical, reliable, cogent evidence and submissions,
 - xi. misdirected herself by considering extraneous matters and issues not pleaded by the parties thus rendering a contradictory, inconsistent, biased and unfair decision not supported by evidence or any known legal principles and judicial precedents,
 - xii. misdirected herself by failing to appreciate the totality of the evidence adduced by the appellant in support of its case and the applicable legal principles.
4. 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 –versus- Associated Motor Boat Company Limited* (1968) EA 123.

The appellant's case was that it owned L.R. No. Kajiado/Lorngosua/1836 measuring 125 acres which it wished to subdivide into 442 quarter acre plots. The 1st respondent together with the plaintiff's chairman and treasurer, at that time, created an additional seven plots out of L.R. No. 1836 without the



knowledge and authority of the appellant. It is the appellant's contention that the seven (7) additional plots created by the 1st respondent were obtained and registered unlawfully, irregularly, unprocedurally and through a corrupt scheme. The suit plot was one of the seven contentious parcels.

5. I have carefully considered the appeal in its entirety including the record, the prayers, the memorandum of appeal, the grounds therein and the submissions by learned counsel for the appellant. I will treat the twelve grounds as the issues. I make the following findings on the grounds.
6. On the first ground, I find that the evidence adduced by the appellant at the trial proved the appellant's case to the required standard of a margin of probabilities. The appellant proved that the suit parcel emanated from the original L.R. 1836. It also proved that it did not sell or transfer the suit parcel No. 6598, to the 1st respondent. Having proved ownership of the land, the burden shifted to the 1st respondent to explain how he acquired the suit land. He was also expected to prove that such acquisition was lawful. From the evidence on record, there was no proof by the 1st respondent. This is especially so because the 1st respondent did not even file a defence. Only the second defendant filed a defence denying liability as per page 11 of the judgment dated 28/9/2022. See the 7th and 8th line from the bottom. This finding covers the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth grounds.
7. On the 11th ground, the trial Magistrate did not consider any extraneous matters, at least none has been pointed out in the memorandum of appeal. The only fault on the part of the trial Magistrate was failure to find that the burden of proof shifted to the 1st respondent to explain how he acquired his title to the suit land and having failed to file a defence, the appellant's case had been proved to the required standard. One may also add that the defence by the second respondent should have been captured in the judgment. The second respondent should also have been served with a hearing notice. This may have happened but the record of appeal that is on record does not show this. Order 21 rule 4 of the Civil Procedure Rules provides as follows.

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such a decision”.

In this case the learned trial Magistrate failed to include the 2nd respondents defence in the judgment. Again, under Order 12 rule 2, a defendant who has entered appearance and filed a defence like the 2nd respondent in this case, is required to be served with a hearing notice. There is no explanation as to why this did not happen in this case. If it did, the record does not capture it. Whatever the defence by the second respondent may have been, the key player, the 1st respondent having failed to enter appearance and defend the suit, I see no other outcome of the litigation other than a finding in favour of the appellant.

8. For the above stated reasons, I find merit in the appellant's appeal and I allow it as follows.
 - a. The appellant's appeal is allowed.
 - b. The judgment and decree of the trial Court in Chief Magistrate Court at Kajiado MC ELC E025/2022 dated 28/9/2022 is hereby set aside and substituted with a judgment in terms of the plaint dated 8/3/2022.
 - c. The costs of this appeal and those of the Lower Court awarded to the appellant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 15TH DAY OF OCTOBER 2024.



M.N. GICHERU
JUDGE

