



REPUBLIC OF KENYA



**Dzombo v Ngebe & 3 others (Appeal 3 of 2022)  
[2023] KEELC 16213 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16213 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
APPEAL 3 OF 2022  
EK MAKORI, J  
MARCH 7, 2023**

**BETWEEN**

**FREDRICK MWAGOSI GILBERT DZOMBO ..... APPELLANT**

**AND**

**LARRYSON CHIMAKO NGEBE ..... 1<sup>ST</sup> RESPONDENT**

**NGEBE KAZUNGU NGEBE ..... 2<sup>ND</sup> RESPONDENT**

**ALPHONCE MUDZOMBA KAZUNGU ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, KILIFI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and order of the Principal Magistrate's Court at Kaloleni, Hon. L.N Wasige delivered on 25th January 2022 in Kaloleni ELC No. E010 of 2021)*

**JUDGMENT**

1. On January 25, 2022, the learned magistrate entered judgment in favour of the Plaintiffs, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents herein, in the following terms:
  - a. A declaration that the Plaintiffs are lawful occupants of the suit land Title No Kilifi/Chilulu/318.
  - b. The 1<sup>st</sup> Plaintiff is entitled to bury his late wife Mercelina Mwaka on the suit land without any further hindrance by the 1<sup>st</sup> Defendant.
  - c. Each party shall bear its own costs.



2. Aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal dated January 25, 2022 and raised the following grounds of appeal: -
  1. The learned magistrate erred in law and in fact by finding that the Plaintiff's occupation of the Property Title Number Kilifi/Chilulu/318 ("the Suit Property") has been uninterrupted despite overwhelming evidence that the Plaintiffs' occupation has been interrupted as way back in 2008 and subsequent eviction;
  2. The learned magistrate erred in law and principle by granting prayers which were never pleaded nor sought by any party and in particular, the order that the Plaintiffs are entitled to inter the remains of the late Marcelina Mwaka on the suit property;
  3. The learned magistrate erred in law and principle by applying the law retrospectively and in particular, the provisions of section 30 (g) of the *Registered Land Act* (now repealed);
  4. In arriving at its decision, the learned magistrate took into account irrelevant factors and in particular, the concept of "overriding interests" which was never pleaded by any party.
  5. By holding that the suit property belongs to the late Gilbert Dzombo Tele yet directing that the Plaintiffs are lawful occupants thereof, judgment of the learned magistrate is self-contradictory and plainly wrong both in law and in principle.
  6. The learned trial magistrate erred in law by descending into arena of litigation, thereby exhibiting manifest bias as against the Appellant.
  7. The learned magistrate erred in fact and in law by failing to appreciate that the text and context of the Plaintiffs' pleadings was a claim for adverse possession brought as a normal suit.
  8. The learned magistrate erred in law by basing her findings and decisions on extraneous matters not pleaded by any party.
  9. The learned magistrate erred by failing to consider the evidence, submissions, and the authorities cited by the Appellant all of which were binding upon the court.
  10. The decision of the learned magistrate was plainly wrong in law and principle.
3. The Appellant prayed that his appeal be allowed; the judgment and decree of the trial court be set aside; and the Respondents' suit in the lower court be dismissed with costs to him.
4. The appeal was canvassed by way of written submissions. The Respondents did not file. On his part, counsel for the Appellant identified three issues for determination namely- whether the trial court correctly reached a finding that the Respondents' occupation of the suit property was lawful; if the Respondents' occupation is legal, what is the effect of this occupation as against sanctity of the Appellant's title; and whether the trial court correctly held that the Respondents were entitled to bury the remains of the late Marcelina Mwaka on the suit property without hindrance.



5. Regarding the first two issues, counsel submitted that having found that the Respondents failed to impeach the title in favour of one Gilbert Dzombo, deceased, on allegations of fraud, the trial magistrate in essence upheld the sanctity of the Appellant's title guaranteed under Section 24 and 25 of the Land Registration Act. To counsel, the learned magistrate then erred by finally declaring the Respondents herein the rightful occupants of the suit property, yet the claim was not that for adverse possession. Counsel relied on the cases of Peter Karong'a Kuria v Margaret Wairimu Kimani [2015] eKLR; and Dr. Joseph N.K Arap Ng'ok -v- Justice Moiwo Ole Keiwua and 4 others [1997] eKLR - Civil Application No NAI 60 of 1997.
6. Lastly, counsel submitted that in granting the Respondents orders to inter the late Mercelina in the circumstances was wrong and since the Respondent had not filed any application to bury the said Mercelina on the suit property, it meant that the trial magistrate issued orders that were never sought contrary to the law. Counsel relied on the case of Kenya Airports Authority v Mitu-Bell Welfare Society and 2 others [2016] eKLR.
7. Having considered the appeal, submissions and, authorities relied on, I find that the following issues arise for determination:
  1. Whether the learned trial magistrate granted orders that were not pleaded.
  2. Who is the rightful owner of the suit property?
  3. Costs
8. It is now settled that a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see the witnesses. See the Court of Appeal decision in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.
9. On the first issue, the law and the authorities support the position that parties are ordinarily bound by their pleadings. The Supreme Court of Kenya in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR held as follows with respect to the essence of pleadings: -
 

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive of the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
10. I have perused the amended plaint dated November 25, 2021, the substantial reliefs sought were framed as follows;-
  - a. A declaration that the Plaintiffs are lawful occupants of all that land on title number Kilifi/Chilulu/318 even before the issuance of the title to the 1<sup>st</sup> defendant's further irregularly and fraudulently and/or secretly as the same belongs to the plaintiffs.
  - b. That the 2<sup>nd</sup> defendant, the land registrar Kilifi land registry cancels the title deed issued in the name of Gilbert Dzombo Tele and corrects the register by



registering the plaintiffs Larry Ngebe Chimako, Ngebe Kaungu Ngebe and Alphonse Mudzomba Kazungu.

11. Looking at the aforementioned reliefs granted in the impugned judgment, it is evident that the trial magistrate granted orders that were not pleaded.
12. On the pleadings and evidence before the trial court, it is pertinent that I lay out the background leading to the suit therein. The 1<sup>st</sup> - 3<sup>rd</sup> Respondent herein sued the Appellant, as the legal representative of one Gilbert Dzombo Tele (deceased), at the subordinate court seeking the aforementioned reliefs. The gist of their case was that they occupied the land identified as Kilifi/Chilulu/318 (the suit property) registered in the name of the deceased, the Appellant's father, on 4<sup>th</sup> January 1978. According to the Respondents, the suit property was fraudulently registered in favour of the deceased who had been entrusted by the Respondents' parents to follow up on the title.
13. The Appellant on the other hand contested the claim, stating that the deceased enjoyed peaceful use and occupation of the suit property until sometimes in the year 2008 when the Respondents illegally gained entry. This prompted the deceased to successfully file suit against the Respondents and their families in Mombasa Civil Suit No 1190 of 2008. The Respondents filed an appeal which was dismissed but failed to vacate the suit property, forcing the deceased to file Mombasa CMCC No 2323 of 2011 which was not concluded prior to the demise of the deceased.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents testified as PW1 and PW2 respectively. PW1 testified that the Respondents together with their families and ancestors have always lived on the suit property and even buried some of their family members there. That the Appellant was their neighbour residing at an adjoining plot. He added that the government identified them as the owners of the suit property and produced a letter from the area Assistant Chief in that regard, as PEXH4. He also produced as PEXH 3 a copy of a decree in Misc. Application 670 of 2009.
15. On cross-examination, PW1 confirmed that they were evicted from the suit property following orders issued in CMCC No 2323 of 2011 but returned following the orders for stay. He added that the deceased was sent by his late father and uncle to process the title on their behalf. The witness however told the court that he did not have any evidence of corruption on the part of the deceased. When referred to PEXH 3, PW1 confirmed that the same did not state that the suit property belonged to him. Similarly, he confirmed that PEXH4 did not refer to the suit property.
16. On his part, PW2 testified that they learnt in the year 2008 when the deceased sued them that the suit property was in the deceased's name. He added on cross-examination that all the members of his clan lived on the suit property. That their late parents requested the deceased to assist them register the suit property but he did not have any evidence to that effect.
17. The Appellant and one Humphrey Chikande Katana testified as DW1 and DW2 respectively. DW1 adopted his written statement dated 3<sup>rd</sup> November 2021 as evidence in chief and produced documents contained in the list of documents evenly dated and a supplementary list of documents dated December 1, 2021. He testified that the suit property was part of a larger parcel of clan land and that it initially belonged to the deceased's grandfather. He told the court that sometime in 1972, adjudication was conducted on the area and the deceased was in occupation at the time. DW1 added that PW1 and PW2 entered the suit property in early 2008, referring to DEXH 5, the witness testified that the deceased at one point entered into an agreement with PW1 for payment of some coconut stolen by PW1 from the suit property. On cross-examination, DW1 confirmed that the Respondents had buried people on the suit land but he never attended any of the burials.



18. Similarly, DW2 adopted his written statement dated 1<sup>st</sup> December 2021 as evidence in chief. On cross-examination, DW2 stated that he was the Assistant Chief and that he retired in 2019.
19. A Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – on the grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Section 24(a) of the [Land Registration Act](#), 2012 provides thus:

“Subject to this Act, 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.”

Section 26 (1) of the [Land Registration Act](#) further states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

20. The 1<sup>st</sup> -3<sup>rd</sup> Respondents’ claim against the Appellant’s father’s title was on grounds of fraud. It was incumbent therefore that the Respondents strictly proved those allegations. The Court of Appeal in the case of [Arthi Highway Developers Ltd -v- West End Butchery Ltd & Others](#) [2015] eKLR, cited the following passage from [Bullen & Leake & Jacobs, Precedent of Pleadings](#) 13<sup>th</sup> Edition at page 427:

“The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

21. As regards the burden and standard of proof, the court in the case of [Kinyanjui Kamau -v- George Kamau](#) [2015] eKLR expressed itself as follows: -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo -vs- Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as



in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

22. In this case, I find no evidence adduced to support the Respondents’ allegations of fraud on the part of the Appellant, the deceased, or the 4<sup>th</sup> Respondent herein. Indeed, PW1 and PW2, confirmed that they did not have any evidence to prove that the deceased caused the suit property to be registered in his name fraudulently. The trial court was of a similar opinion. This is evidenced on page 8 of the impugned judgment. What I find unsettling however is that the learned magistrate despite arriving at that conclusion, proceeded to find that the Respondents were lawful occupants. The finding by the trial court on this point was incongruent with both the pleadings and evidence on record.
23. As already stated, to impeach a title, one has to prove that the title was obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme, both of which were not proven in the instant case. The deceased’s title, therefore, remains unchallenged and is vested with absolute ownership together with all rights and privileges thereto to the exclusion of the 1<sup>st</sup>- 3<sup>rd</sup> Respondents or any other person.
24. In any case, there was enough evidence to show that the deceased had been involved in a never-ending legal battle with the Respondents and their predecessors over the suit property. Furthermore, and in my view, it is contradictory to hold that the deceased’s title is indefeasible while at the same time finding the Respondents to be lawful occupants. This amounts to approbating and reprobating at the same time leading to a scenario – as we have here - establishing two parallel ownership rights over the same property, which is a recipe for chaos.
25. In view of the foregoing, I find that the learned magistrate erred in law and in principle in awarding the reliefs as she did. The upshot is that the appeal is merited and succeeds with costs here and in the Lower Court to the Appellant.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 7<sup>TH</sup> DAY OF MARCH 2023.**

**E. K. MAKORI**

**Judge**

**In the Presence of: -**

**Mr. Odunga for the Appellant**

**In the Absence of**

**M/s Ronald Kai for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents &**

**A-G for the 4<sup>th</sup> Respondents**

