



Kainyu (Suing as the Legal Representative of the Estate of Stephen M’Imbui Garachi - Deceased) v Mathiu (Environment and Land Appeal 37 of 2020) [2023] KEELC 15979 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 37 OF 2020**

CK YANO, J

MARCH 8, 2023

BETWEEN

HELLEN KAINYU APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN
M’IMBUI GARACHI - DECEASED**

AND

LAWRENCE KIBERA MATHIU RESPONDENT

*(Being an appeal from the judgment and decree of Senior Resident Magistrate
Hon. L.N JUMA in Meru Case No. 7 of 2016 delivered on 23rd June 2020)*

JUDGMENT

Introduction

1. Stephen M’imbui Garachi (deceased) filed this appeal against the judgment and decree of the Senior Resident Magistrate (Hon LN Juma) SRM in Meru CMCC 7 of 2016 delivered on June 23, 2020 and set out the following 8 grounds of appeal.
 1. That the learned trial magistrate erred in Law and in fact in failing to appreciate the evidence of the appellant and his witnesses thus reaching to wrong decision and occasioning a miscarriage (sic) of justice.
 2. That the learned trial magistrate erred in law and fact failing to find that since the time of issuance of Balot number to the appellant he took occupation in 1991 of the suit land as shown to him by the Meru Surveyor according to the chronology of members and has been living there to date with his family and therefore the issue of occupation overrides other factors and



failure to take the same into account led to a wrong decision thus occasioning a miscarriage (sic) of justice.

3. That the learned trial magistrate erred in law and fact in failing to detect that there was an illegality that was cleverly done to displace the applicant's land to another site since there was no possibility of ballot Nos. 265 coming in between 881 and 1055.
 4. That the learned Trial Magistrate erred in law and fact in failing to consider that the respondent herein has land originally No 885 which was later on baptised as 1055 which borders the suit land and both the parcel occupied by the appellant and that occupied by the respondent were given other numbers purposely with intent to displace and defraud the applicant (sic) of his land so that the respondent could have two parcels at the same site which is a prime area.
 5. That the learned trial magistrate erred in law and in fact in failing to detect that there was blatant and illegal alteration of the maps, sketch and plan so as to displace the appellant.
 6. That the learned trial magistrate erred in law and in fact failing to find that the court was being asked to confirm an illegality which was committed by the applicant herein.
 7. That the learned trial magistrate erred in law and in fact in granting substantive injunctive orders whereby the threshold for granting such orders were never met by the respondent thus reaching to a wrong decision and a miscarriage (sic) of justice.
 8. That the learned trial magistrate erred in law and in fact in finding the applicant was a trespasser when he has since allotment of the land and issuance of ballot has been in occupation and utility of the same and in fact it was the respondent who was a trespasser and wants to displace and evict the appellant through the back door.
2. The appellant prayed that the decision of the lower court be set aside and the appellant be declared as the legal owner of the now P/No Nyayo Sirimon Scheme/265 which was originally No 884 where the appellant is in occupation and has developed and costs of the appeal.

Background Of The Appeal.

3. The gist of the case in a nutshell is that the respondent Lawrence Kirera Mathiu filed a suit vide a plaint dated May 13, 2014 against the appellant at the High Court. The matter was however transferred to the lower court for hearing and determination. In the plaint, the respondent sought for various orders.
4. The respondent averred that he was the current registered owner of land parcel Number 265 measuring approximately 1.4 acres at Sirimon Nyayo Settlement Scheme in Meru District having bought the same at Kshs 170,000/= and that he had extensively developed the same.
5. The respondent averred that on December 8, 2005 the appellant his agent/servants trespassed on said land parcel 265 at Sirimon Nyayo Settlement Scheme without the permission of the respondent and started constructing semi-permanent houses therein and also leasing to 3rd parties.
6. The respondent stated that as a result of the appellant's continued illegal occupation of the said land, he had suffered damage.
7. The respondent prayed for judgment against the appellant for-;
 - a. An order of declaration that land parcel 265 Sirimon Nyayo Settlement Scheme belongs to the appellant.



- b. An Order of injunction restraining the appellant, his servant, workmen and agent, from alienating or selling land parcel 265 Sirimon Nyayo settlement.
 - c. An order the appellant his servant/workmen and agent do vacate land parcel No 265 Sirimon Nyayo settlement.
 - d. Damages as a result of the appellant trespass.
 - e. Interest thereon and cost of the suit.
8. The appellant in his statement of defence dated June 5, 2014 denied the claim and put the respondent to strict proof. The appellant pleaded that he was the lawful proprietor of parcel No 884 measuring 1.4 acres in the same Settlement Scheme.
 9. After hearing evidence from both the appellant and the respondent, the subordinate court found that the respondent had proved his claim on a balance of probability and entered judgment for the respondent against the appellant as prayed in the plaint save for damages as prayed in prayer (d) which was not granted as the respondent failed to prove the same.
 10. The appellant was aggrieved by the said decision and filed the present appeal. The original appellant passed on and was substituted with his legal representative.
 11. The court, with the consent of the advocates for the parties, directed that the appeal be canvassed by way of written submissions but only the respondent filed his submissions dated 8th December, 2022. No submissions were filed by the appellant despite the fact that both parties were represented on 2September 9, 2022 when the directions were given by the court on the filing of submissions.

Respondent's Submissions

12. In his submissions, the respondent pointed out that the appellant's claim was that he was the lawful owner of L.R No 884 Nyayo Settlement Scheme and that they were neighbours with the respondent. The respondent submitted that the trial court correctly found that indeed the appellant was the owner of L.R No 884 while the respondent's suit land was LR. No 265 Nyayo Settlement scheme. That the parties by consent and pursuant to the Honourable court's order, the County Surveyor Meru visited the two parcels of land and made a report on the correct position of each of the two parcels of land, and that the surveyor's results and findings formed the basis of the trial court's decision.
13. The respondent submitted that the trial court appreciated the evidence of the appellant and his witness, but that the evidence was not enough as found by the County Surveyor in his report that the appellant's land was No 884 measuring 0.86 Ha, that the respondent's land was No 265 measuring 0.63 Ha, that the two parcels of land were 1.5 kms apart, that the appellants land was triangular in shape while that of the respondent is rectangular, the map position of the two parcels, the evidence of the appellant that he was in land parcel No 265, and the appellant's evidence of his usage of parcel No 884 which was fenced and cows tethered therein.
14. The respondent pointed out that the area chief gave evidence confirming that the appellant had leased his parcel No 884 to a third party and had even buried his father on the land, adding that the appellant had encroached into the respondent's land.
15. The respondent further submitted that he tendered evidence to show that all parcels of land were not following each other arithmetically and that the appellant was in occupation of the two parcels. That the appellant was even charged in criminal case No 40. of 2006 at the Nanyuki Law court.



16. The respondent submitted that the appellant never proved that the respondent had power to alter or change the contents of the map, size of land or its position.
17. The respondent pointed out that in ground 4 of the appeal, the appellant has raised new issues that were never raised at the trial court nor are the orders sought before this court. It is the respondent's submissions that the appeal is not merited and prayed for it to be dismissed with costs.

Analysis And Determination

18. I have perused and considered the record of appeal, the grounds of appeal and the submissions filed. This being a first appeal, I am conscious of the courts duty and obligation to evaluate, re-asses and re-analyse the evidence on record to determine whether the conclusion reached by the learned magistrate were on the basis of the evidence presented and the law. The court finds that the issues that call for determination are-;
 - i. Whether the learned trial magistrate failed to consider the evidence tendered by the appellant and his witnesses, thus reaching at wrong decision and occasioning miscarriage of justice.
 - ii. Whether the decision of the learned magistrate was against the weight of the evidence and the law.

Whether the learned trial magistrate failed to consider and appreciate the evidence tendered by the appellant and his witnesses, thus reaching at a wrong decision and occasioning miscarriage of justice

19. I have carefully perused the record. From the proceedings, it is clear that the appellant testified and called three witnesses. In his evidence, the appellant is recorded to have testified that some time back, they were moved from Kiricha and taken to Nyayo Settlement Scheme where they were allocated plots through balloting, and that he picked and was allocated plot No 884. He produced documents showing ownerships of plot No 884 and denied trespassing on parcel No 265. The appellant also admitted that he had leased his plot No 884 to a third party and even buried his deceased father therein.
20. Nathan Karata (D.w 2), Kenneth Gikunda (D.w 3) and Rael Nkirote (D.w 4) all testified that the appellant was allocated plot No 884. It is clear therefore that in the judgment, the learned trial magistrate outlined the evidence of the appellant and his witnesses. Consequently, I am satisfied that the trial court considered all the evidence on record, including that of the appellant and his witnesses and there was no miscarriage of justice that was occasioned to any of the parties as alleged.

Whether the decision of the learned magistrate was against the weight of the evidence and the law.

21. The issue that was before the trial court was whether plot No 265 Sirimon Nyayo Settlement Scheme belonged to the respondent herein and whether the appellant had trespassed on the said plot. Having perused the evidence adduced by the parties and their witnesses, I note that there was no dispute in their evidence that respondent was the owner of plot No 265 while the appellant was the owner of Plot No 884. However, it appears that the issue in contention was the physical location of plot No 265.
22. From the record, and as correctly captured by the learned trial magistrate, Peter Kimani, the County Surveyor Meru, who testified as P.w 2 visited the suit plots pursuant to a court order. In his report which was produced as an exhibit, P.W 2 was categorical that the two plots were distinct. He confirmed that plot No 265 belonged to the respondent while plot No 884 belonged to the appellant. He further confirmed that on the ground, the two plots were 1.5 kms apart. P.w. 2 also testified that the appellant had moved from his land and settled on the respondent's plot No 265.



23. The deceased appellant in his evidence confirmed that he was allocated plot No 884 and he produced documents showing ownership. As already stated above, the witnesses called by the appellant also supported this position. Besides, the evidence of P.w 2 (Peter Kimani) confirmed that it was the appellant who had trespassed on the respondent's plot No 884. The trial magistrate also correctly noted that the expert opinion of P.w 2 was not controverted and as such was conclusive proof that the appellant was a trespasser on the respondent's plot No 265. I am therefore inclined to find that the appellant had trespassed on the respondent's plot No 884 and the trial court reached the correct decision.
24. From the pleadings and the evidence on record, it is my considered view that the learned magistrate was justified in arriving at the decision he made. The findings and holdings by the learned magistrate were well founded and I find no basis to interfere with the same.
25. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondent.
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF MARCH, 2023.

In Presence Of:

C.A Kibagendi

Appellant Present In Person

Mutungu For Respondent

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C.K YANO

JUDGE

