



REPUBLIC OF KENYA



**Muthuru v Kithinji (Environment and Land Appeal E084 of 2021)
[2023] KEELC 15980 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E084 OF 2021**

CK YANO, J

MARCH 8, 2023

BETWEEN

DANIEL MUTHURU APPELLANT

AND

NICHOLAS KARANI KITHINJI RESPONDENT

*(An appeal from the judgment/decree of honourable S Ndegwa Principal Magistrate
(P M) delivered on September 14, 2020 in Githongo PMC ELC case no 51 of 2017)*

JUDGMENT

A. Introduction

1. The appellant herein Daniel Muthuri filed this appeal against the judgment of Hon S N Ndegwa delivered on September 14, 2020 and set out the following 5 grounds of appeal:
 - i. That the learned trial magistrate misdirected herself in failing to make a finding against the defendant.
 - ii. That the learned magistrate erred in fact and law by failing to consider the evidence tendered with regard to ownership of the suit land.
 - iii. That the learned magistrate misdirected herself in introducing extraneous issues and dwelling on probabilities instead of hard facts in the case and made a finding for the plaintiff
 - iv. That the Learned magistrate erred by failing to appreciate that the plaintiff had failed to prove his case on balance of probabilities
 - v. That the judgment was against the weight of the evidence.
2. The appellant prayed for the appeal to be allowed and the respondent be ordered to pay costs for this appeal.



B. Background of the appeal

3. Vide a plaint dated July 20, 2016 the respondent sought for a declaration that the respondent is the rightful owner of all that piece of land known as Abothuguchi/Kithirune/3255 measuring approximately 0.47 Ha and an order of permanent injunction restraining the appellant, his family members, agents, servants, employees, or anybody acting at his behest from interfering with the respondent's peaceful occupation, user and ownership of the land Ir Abothuguchi/Kithirune/3255 measuring approximately 0.47 Ha. Costs of the suit plus interest and any other relief that the honourable court may deem fit to grant.
4. The respondent averred that he is the sole registered proprietor of all that parcel of land known as Abothuguchi/Kithirune/3255 measuring approximately 0.47 Ha vide title deed issued on June 5, 2015. That between November 8, 2015 and March 20, 2016, the appellant trespassed on the respondent's suit land and upon reporting to Kariene police station, the appellant was arrested and charged with the offence of forceful detainer contrary to section 91 of the Penal Code vide Criminal case no 29 of 2016 and the offence of creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the [Penal Code](#) Vide Criminal case no 303 of 2016 at Githongo Law Court which cases were still pending before the court for determination at that time.
5. It was the respondents' case that he has all the necessary ownership documents and the appellant has nothing to prove that he is the owner of the said land and he was out to frustrate the respondent's peaceful occupation thereof.
6. The respondents stated that the said land parcel was sold to him by one Ikiara Karigi on March 23, 2015 and he acquired the ownership of the same legally and that the appellant had no claim whatsoever over the same.
7. The respondent further stated that the appellant once again on July 4, 2016 trespassed on the suit land and started threatening the respondent despite the pending criminal cases.
8. The respondent averred that in spite of repeated notices of intention to sue the appellant refused/neglected to cease from the aforesaid act of interferences rendering the suit necessary.
9. The appellant filed his defence dated June 11, 2018 and denied the respondent's claim.
10. At the hearing, the respondent produced the sale agreement, title deed in his name and the proceedings in Criminal cases no 29 of 2016, 791 of 2018 and 303 of 2015 in which the appellant was convicted of all the charges facing him.
11. The respondent called two witnesses, including the appellant's father Stephano Kiriga M'Ikiara who sold the land to the respondent. The appellant was the sole witness for the defence.
12. In the impugned judgment, the learned trial magistrate found in favour of the respondent and entered judgment as prayed in the plaint.
13. The appeal was canvassed by way of written submissions.

C. Appellant's submissions

14. The appellant filed his submissions dated December 13, 2022 after the timelines granted by the court, but nonetheless, I will consider it. The appellant submitted *inter alia*, that he was given the suit land by his father and has been in actual, peaceful occupation and use of it since 1984 and that he has extensively



developed the same. The appellant accused his father for fraudulently colluding with the respondent who he alleges has encroached and or trespassed on the land.

15. It is the appellant's submission that the respondent has no good title to the suit land and cited the provisions of section 26 (1) of the *Land Registration Act*. The appellant also cited section 119 of the *Land Act* and argued that the respondent did not undertake due diligence before purchasing the land. The appellant submitted that the respondent's title was acquired through misrepresentation and urged the court to find and make a declaration that the sub-division and subsequent transfer of the suit land to the respondent was unlawful, fraudulent, null and void, and for the title to be cancelled.
16. On costs, the appellant cited the provisions of section 27 of the *Civil Procedure Act* and relied on the case of *Party of Independent Candidate of Kenya & another Vs Mutula Kilonzo & 2 others* [2013] eKLR quoted in case of *Levben Products Vs Alexander Films (SA) PTY LTD* 1957 (4) SA 225 (SR) at 227.

D. Respondent's submissions

17. In his submissions dated November 16, 2022, the respondent summarized the evidence that was tendered by the parties before the trial magistrate and submitted that the trial court's finding that the suit land belonged to the respondent was based on the solid evidence adduced in court. The respondent denied that the trial court did not consider any extraneous issues.
18. The respondent further submitted that he successfully discharged his burden of proof as to the ownership of the suit land by producing both the sale agreement and certificate of title of the land and argued that the appellant's assertion to the contrary is unfounded and without merit. It is the respondent's submissions that the appeal as framed lacks any merit and is just one of the appellant's delay gimmicks to actuate his intention of delaying the matter. The respondent urged the court to dismiss the appeal with costs to him.

E. Analysis and determination

19. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are;
 - I. Whether the respondent had proved his case against the appellant on a balance of probabilities.
 - II. Whether the learned magistrate considered extraneous issues.
 - III. Whether the judgment was against the weight of the evidence.
 - IV. Whether the appeal is merited or not.
 - V. Who bears the costs of this appeal.

Whether the respondent had proved his case against the appellant on a balance of probabilities

20. The respondent's case was that on March 23, 2015, he entered into a sale agreement for sale of the suit land LR Abothuguchi/Kithirune/3255 with one Ikiara Karigi who is the appellant's father. The respondent testified that he paid the entire purchase price and the land was transferred to him. The respondent produced the sale agreement and a copy of the title deed in his name. The respondent also produced proceedings in criminal cases nos 29 of 2016, 791 of 2018 and 303 of 2016 in which the



appellant was charged and convicted of various offences including forceful detainer of the suit land and creating disturbance. The respondent was the complainant in those cases.

21. Stefano Kirigi M'Ikiara who is the appellant's father, testified as P w 2 and confirmed that he sold and transferred the land to the respondent, thus corroborating the evidence of the respondent. Even pastor Joshua Mwenda (P w 3) who is the appellant's brother testified that indeed the suit land was sold to the respondent by their father Stefano Kirigi M'Ikiara (P w 2).
22. All the said evidence that was considered by the trial court confirmed that the respondent was indeed the rightful owner of the suit land. The law is clear on ownership and the place of a title deed which is a *prima facie* evidence of ownership of land.
23. Section 26 of the [Land Registration Act](#) is categorical that a certificate of title is *prima facie* evidence that the person named therein is the proprietor of the land, but the same can be challenged where the certificate of land has been acquired fraudulently, unprocedurally or through a corrupt scheme. In this case, in my view, there was no evidence tendered by the appellant challenging the respondent's title in any of the stated grounds. This therefore means that the respondent had demonstrated that he was the rightful owner of the suit land, and as the lawful owner, he was entitled to the orders sought in the plaint since he had proved his case on a balance of probabilities. In my view, the trial magistrate arrived at a right decision in entering judgment for the respondent against the appellant as prayed in the plaint.

Whether the learned trial magistrate considered extraneous issues

24. I have perused the pleadings and the proceedings in the record of appeal. It is clear to this court that the trial court addressed its mind to the issue whether the respondent was the rightful owner of the suit land. The findings of the trial court was based on the pleadings filed and the evidence adduced at the trial. I have not seen any extraneous issue that was addressed by the trial court. Indeed, the appellant has not pointed out any of the alleged extraneous issues. The submission that the court dwelt on extraneous issues is, in my view, without basis.

Whether the judgment was against the weight of the evidence

25. In this case, the respondent produced a title deed which is a *prima facie* proof that he is the registered owner of the suit land. He also produced a sale agreement. Stefano Ikiara Karigi, the person who sold the respondent the land testified and confirmed that indeed he sold and transferred the land to the respondent. From the evidence adduced it was clear that the respondent acquired the ownership of the suit land legally and procedurally and the appellant had no justification to remain in possession of the land. Moreover, there was evidence that the appellant had been charged before court with various criminal cases and was convicted. To that end, the appellant remained a trespasser on the respondent's land.

Whether the appeal is merited or not

26. Having looked at the material in this case and the evidence that was adduced before the trial court, I find that the learned trial magistrate was justified in arriving at the decision she made. The findings and holding by the learned magistrate were well founded and I find no basis to interfere with the same.
27. On costs, ordinarily costs normally follow the event. Section 27 of the [Civil Procedure Act](#) provides that costs are awarded at the discretion of the court. In this case, since the respondent is the successful party, I see no reason why he should not be awarded the costs of this appeal.
28. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondent.



29. It is so ordered.

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

In the presence of

Ms mukaburu for respondent

No appearance for Otieno C for appellant

C a Kibagendi

C K YANO

JUDGE

