



**Mwinyifaki v Munyika (Environment and Land Appeal
16 of 2015) [2023] KEELC 17323 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 16 OF 2015**

NA MATHEKA, J

MAY 9, 2023

BETWEEN

FATUMA MWINYIFAKI APPELLANT

AND

HUSSEIN MUNYIKA RESPONDENT

JUDGMENT

1. The Appellant herein, appeals to this court from the Judgment of the Honourable Resident Magistrate Kitagwa in CMCC No 1256 of 2007 Mombasa dated October 23, 2015 and sets forth the following grounds of objection to the Judgement appealed against namely;
 1. The learned Resident Magistrate erred in law and fact when she completely ignored the glaring evidence before her that concerned trespass by Respondent on the Plaintiff's Plot No 1749/8.
 2. The learned Magistrate erred wholly in disregarding the Appellant's Counsel's Submissions and the authorities submitted and proceeded to rely on her own views not backed by law.
 3. The learned Magistrate erred in failing to analyse and synthesis the evidence before her and arrived at a completely erroneous finding.
 4. The learned Magistrate paused an issue that she completely failed to resolve.
 5. The learned Magistrate failed to apply the known principle in civil litigation that proof required is on a balance of probability and not beyond reasonable doubt.
2. The Appellant prays that this appeal be allowed with costs and the judgment of the Magistrate dated October 23, 2015 be set aside.
3. The Appellant submitted that during cross-examination of the Respondent, (see pages 156-157 of the Appellant's Record of Appeal) the Respondent admitted that the suit property belonged to the



Appellant. It is their submissions that on this admission alone, the issue of ownership had been proved and by extension the need to protect Appellant's right to own property as guaranteed by Article 40 of the Constitution of Kenya 2010 with relation to the suit property was established. That once the Appellant was registered as the proprietor of the suit property Plot No. 1749/8/ Mikindani she acquired an indefeasible title to the suit property and as such, her right to own the same ought to be protected by this Honourable Court. That the land registration adopted by the County Government of Mombasa, just like in the entire Republic of Kenya, is the Torrens system whereby an indefeasible title is obtained upon registration. This system is the backbone of the sanctity of title doctrine/principle. Once a proprietor is registered as the owner of any given parcel of land under the Torrens system, he/she acquires an indefeasible title to the property. In making the above submissions on the indefeasibility of the Appellant's title they were guided by the case of *Gibbs v Messer* [1891] AC. That the trial court erred in law and fact by ignoring the overwhelming evidence on record as to ownership of the suit property and the Respondent's trespass thereon and thereby arrived at a wrong decision which ultimately led to dismissal of the Appellant's suit.

4. The Respondents submitted that the Allotment Letter held by the Appellant was not sufficient to establish the allegations of trespass made against the Respondent. The Appellant must prove that the Respondent has illegally and unjustifiably entered into the suit property. They submit that it was not enough for the Appellant to wave her Allotment Letter as proof of trespass, the Appellant's case would only have succeeded if she had established that the parcel of land which the Respondent is occupying or has constructed the two houses is part and parcel of the suit land (Plot No 1749/8). That the Appellant failed to discharge this onus of proof placed on her and hence the trial court could not disturb the Respondent's long held possession and occupation on the basis of the inadequate evidence which the Appellant relied on.
5. This court has considered the Appeal and the submissions therein. At the hearing of the Appeal, parties opted to canvass it by way of written submissions. In *Okulu Gondi v South Nyanza Sugar Co Ltd* [2018] eKLR, the Court held that;

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the lower court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd v Brown* [1970] E.A.L.R.”

6. PW1 the Plaintiff testified that on or about April 30, 2007 the Defendant trespassed onto her property Plot No 1749/8/Mikindani and commenced construction work without her consent. PW2 from the Department of Housing of the County Government of Mombasa the Assistant Director of Survey testified that the Plaintiff/Appellant owns Plot No. 1749/8/Mikindani and the Defendant/Respondent owns Plot No 1749/6/Mikindani. That the two are distinct plots and are adjacent to each other. She did not produce any documentary evidence. Section 3 (1) of the Trespass Act, Cap 294 provides that;

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows;



Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

7. Should the trespass be proved the Halsbury’s Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass;
- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss
 - b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss
 - c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use
 - d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded
 - e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased”

7. In the instant case PW2 from the Department of Housing of the County Government of Mombasa the Assistant Director of Survey testified that the Plaintiff/Appellant owns Plot No. 1749/8/Mikindani and the Defendant/Respondent owns Plot No. 1749/6/Mikindani. She stated that Plot No. 1749/6/Mikindani has one house and Plot No. 1749/8/Mikindani had a house and a shade. No evidence was adduced of the said trespass. Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides that;

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence as stated in *Isca Adhiambo Okayo v Kenya Women’s Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016] eKLR*. That is captured in Sections 109 and 112 of the Act as follows;

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

8. In the case of *Jennifer Nyambura Kamau v Humphrey Mbaka* Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR the court held as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature



on these forms belong to the Respondent. Section 107 of the [Evidence Act](#) provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the [Evidence Act](#) provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

9. I find that the Appellant failed to prove her case on a balance of probabilities and especially the surveyor PW2 who did not produce any report to establish the same. I find that the learned Magistrate did not fail to apply the known principle in civil litigation that proof required is on a balance of probability and not beyond reasonable doubt. I find this Appeal is unmerited and I dismiss it with costs.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

