



Nyaga (the Administrator of John N.M Nyaga) v Njagi & another (Environment and Land Appeal 31 of 2019) [2023] KEELC 19329 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEELC 19329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 31 OF 2019**

A KANIARU, J

MAY 9, 2023

BETWEEN

**DOROTHY WAKAGIO NYAGA THE ADMINISTRATOR OF JOHN N.M
NYAGA APPELLANT**

AND

PETER NJIRU NJAGI 1ST RESPONDENT

ELIUD WAWERU JUSTUS KAUGI 2ND RESPONDENT

JUDGMENT

1. This is an appeal that arose from the judgement of the lower court (Hon. M.N. Gicheru, Chief Magistrate – as he then was) in CMCC No. 24 of 2013. The judgment was delivered on 1/2/2019. From the records, it is apparent that the suit was originally filed in the High court as HCC No. 146 of 2007 but an order made by that court on 28/1/2013 transferred the matter to the lower court where it became CMCC No. 24 of 2013. The appellant – John N. M. Nyagah – was the plaintiff while the respondents – Peter Njiru Njagi and Eliud Waweru Justus Kaugi (who clarified that his proper name is Eliud Ileri Kiragu) – were the defendants.
2. In the suit, the appellant pleaded that he was the registered owner of Land parcel No. Embu/ Municipality/1260 and that the respondents had trespassed into it and threatened to put up structures. He wanted the respondents restrained from doing that. He also asked for costs of the suit, interests and/or any other relief the court may deem fit.
3. The respondents filed separate defences, with 1st respondent denying the appellants alleged ownership of Plot No. 1260 and stating that he himself owned Plot No. T. 60. The 2nd respondent equally denied the appellant’s ownership of Plot No. 1260 and asserted that he himself owned Plot No. T 90. Both respondents averred that they occupied and possessed the plots they alleged to own. Both asked the court to dismiss the appellants case with costs.



4. The matter in the lower court was canvassed through written submissions and in the ensuing judgement, the court found for the respondents. That is what provoked this appeal, which is premised on five (5) grounds as follows:
 1. The learned magistrate erred in fact and in law in holding that there was no proof that Plot No. Embu/Municipality/1260 is the same ground that the same defendants claimed to be Plots No. T61 and T90.
 2. The learned magistrate erred in fact and in law in holding that the maps produced by the parties were not clear on the relationship between the plots in dispute whereas the map produced by the appellant was a registry index map from the Land's office and approved by the Directorate of the Survey of Kenya.
 3. The learned magistrate erred in law and in fact in holding that the respondents owned the plot since the County government had not revoked ownership and he hereby failed to appreciate that the appellant as the registered owner is the legal owner of the property and that a first registered owners title can not be defeated unless there is proof that it was procured through fraud which was not alleged and the learned magistrate erred in failing to appreciate that upon the registration of the lease, other allocations became overtaken by events.
 4. The learned magistrate erred in holding that the respondents ought not to be evicted and wrongly applied Section 25 of the [Land Registration Act](#).
 5. The learned magistrate erred in dismissing the plaintiff's suit.
5. This appeal was canvassed by way of written submissions. The appellant's submissions were filed on 22/11/2022. Addressing the first ground of appeal, the appellant submitted, inter alia, that the respondents had only been given temporary rights of occupation of the plots they are calling their own. The trial magistrate was faulted for failing to properly appreciate the competing interests of the parties and in particular failing to appreciate that the appellant's right of ownership were superior as they were permanent while those of the respondents were temporary. The cases of [Gitwany Investment Limited v Tajmal Limited & 3 others](#): HCC No. 1114 of 2002, Nairobi, [Lilian Waitthera Gachuhi v David Shikuku Mzee](#) [2005] eKLR, [Njuwangu Holdings Ltd v Langata Kda Nairobi & 5 others](#): ELC No. 139 of 2013, [Satya Investments Ltd v J.k. Mbugua](#) [2016] eKLR (Civil Appeal No. 164 of 2004) and [Wreck Motor Enterprises v Commissioner Of Lands](#) Civil Appeal No. 71 of 1997 (unreported) were all cited and extensively quoted to drive the point home.
6. From all these decided cases it is made clear that the title of a registered owner is always superior to other documents of ownership – such as allotment letter or a share certificate issued by an organization – and it can not be defeated unless it is shown well that it was fraudulently, illegally, or corruptly obtained.
7. The lower court was also faulted for not appreciating that the respondents alleged entitlement to the plots allotted to them was on the basis of a license. Being so, the license could be revoked as they were never meant to be permanent. A licence only confers limited rights and it always terminates at some point in time. Besides, the respondents were not the original allottees. They got the plots from the original allottees. According to the appellants, such original allottees had no rights in law to transfer the plots. The cases of [Kamau v Kamau](#) [1984] KLR Edd and [Gabriel Amok & others v Mombasa Water Supply & Sanitation Co. Ltd](#) [2015] eKLR, were cited to support this position.
8. The lower court was also further faulted for holding that there was no proof that Plot No. Embu Municipality/1260 is on the same ground as Plot Nos T61 and T90. The respondents were said to have failed to show any survey documents to show that their plots existed on the ground. The appellant



was said to have shown a Registry Index Map from the land office and approved by the Directorate of survey of Kenya. The appellant was also said to have shown well the position of his plot on the ground. The appellant submitted that the area had been reserved and the ground of T61 and T90 became Plot No. 1260. The exercise was conducted by the county government and the appellant submitted that it would be wrong to assume that Plot Nos T61 and T90 continued to exist after the survey was done.

9. The respondent's submissions were filed on 9/11/2022. They submitted that the two plots – T61 and T 90 – belong to them, having acquired them from the original allottees who had gotten the plots from Embu Municipal Council. They are plots that they have continuously occupied and have been duly paying the necessary rates and rents to Embu Municipal Council. The respondents late husband, who was the original plaintiff, was said to have been aware of this state of affairs as he was a senior officer and/or employee of the Municipal Council.
10. Plots Nos T.61 and T. 90 were said to have no nexus with Plot No. Embu/Municipality/1260 and the respondent was said to have failed to demonstrate any nexus or relationship.
11. It was further submitted that there was a time when the area in which the plots are situated caught fire and various properties were burnt. Embu Municipal Council, of which the respondents' late husband was a senior employee, came to the aid of those affected including the respondents. It was said that the municipal council recognized at the time that those affected and aided were the owners and occupiers of the plots in the area.
12. The findings of the trial magistrate were said to be correct since it had not been shown that Plot No. T. 61 and T 90 are on the same ground as Plot No. Embu Municipality/1260. The court was therefore urged to dismiss the appeal with costs.
13. I have considered the appeal as filed, the lower record, and the rival submissions. This is a first appeal and my duty as the first appellate court were well captured by the court in the case of *Selle v Associated Motor Boat Company* [1968] EA 123. In that case the court expressed itself as follows:

“An appeal to this court from a trial by the high court is by way of a 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 bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
14. One would find the above position expressly in generally similar terms in the cases of *Mbogo & Another v Shab* [1968] EA 93 and *Otieno Ragot & Company Advocates v Kenya Airports Authority*: CA No 34 of 2012, Kisumu (as consolidated with CA No. 36 of 2012, Kisumu.)
15. It is clear to me that the lower court judgment was premised on two issues viz:
 - i. Whether plots Nos T61 and T90 are the same as Plot No. Embu/Municipality/1260
 - ii. Whether the respondents have lawful claims to the plots that they occupy.
16. On the first issue, the court held that the evidence made available had not resolved the issue as the “maps produced by the parties are not clear on the relationship between the plot(s) in dispute”. On



the second issue, the court expressed itself as follows: “What is not in dispute is that the defendants are in occupation of the plots allocated to them lawfully and whose allocation has not been revoked.”

17. Although much has been said about ownership of the disputed plots, it needs to be appreciated that the suit filed by the appellant in the lower court did not raise ownership as an issue. The appellant merely wanted the respondents restrained from erecting buildings on Plot No. Embu/Municipality/1260. He seemed to have proceeded on the basis that the physical location of the plot and his ownership of the same were obvious and/or incontestable. But the respondents filed their defences which cast doubts as to the legality of that ownership and denied the existence of the plot. It appears clear that the response by the respondent is what brought the issue of ownership to the fore.
18. I think I need to say something about the issue before delving into the issues handled by the lower court. The two respondents aver that they own Plots T.61 and T.90. The kind of ownership they have is derived from the country government by-Laws and/or regulations. They are in the nature of a license. They are normally temporary or transitory in nature. When such rights are considered vis-à-vis the rights derived from *Land Registration Act* or even the now repealed *Registered Land Act* (Cap.300), they are usually inferior. They lack the privileged attributes or permanent character of the rights derived from the land statutes. When the two are in conflict, the rights derived from the land statutes prevail unless it is shown that such rights originated from legally flawed, fraudulent, or corrupt transactions.
19. The law regarding rights derived from the applicable land statutes is as stated by the appellant in the various decided authorities cited and quoted in her submissions in this appeal. It is a serious misapprehension of the law to submit, as the respondent did in the lower court, that the rights they have “are superior vis-à-vis the whole world and that they are entitled to exercise all the rights of registered proprietors which rights obviously include to have exclusive possession and occupation of the properties in dispute.” An assertion like that can only hold true regarding rights derived from the *Land registration Act* or the now repealed Registered Land Act. Alternatively, it can hold true in a locality or area where rights under these land statutes have not yet started to apply.
20. I need now to turn to the issue of the physical location or ground position of the two plots claimed by the respondents and the one said to be owned by the appellant. The lower court was of the view that these plots may not be in the same place. More specifically, the lower court found that the plots were not shown to be in the same place.
21. I hold a contrary view. And here is why: When the lower court suit was filed, it came with an application for interlocutory injunction that was filed contemporaneously with it. In the 1st respondents response to that application, he is shown deposing in his replying affidavit that plots in the locality where his is situated were re-named and given different numbers illegally with a view to dispossessing the original owners. Infact, he stated expressly (paragraph 9 of his replying affidavit) that his plot T.61 “was renamed and allocated the reference No. Embu/Municipality/1260.”
22. Further, the respondent’s submissions in the lower court seemed to suggest that the plots could be in the same place. This is shown by the fact that the submissions talk of a possible “double allotment: and fraudulent dealing by the late husband of the appellant to cause that kind of allotment.” The same submissions also alleged that the appellants late husband “in his capacity as the town clerk between the years 1982 and 1989 fraudulently re-named and caused to re-issue different reference numbers and titles to all and/or most of the plots in Shauri Yako Estate where the defendant properties are located” To me, this is an obvious reference to the fact that the respondents plots had been changed in a new ownership arrangement which they view as fraudulent. It is an arrangement allegedly initiated or instigated by the appellants late husband.



23. All the above is a pointer to the fact that the plots said to be owned by the respondents and the one owned by the appellant are in the same place and the respondents are actually aware of this.
24. The lower court seemed to think that the maps made available by both sides should be clear as to the location of the plots. With respect, the maps, alone and without more, can not be a conclusive indicator of the position of the plots. They are documents that originated from different offices and were clearly about different ownership arrangements. Conclusive proof of where the plots are located needed the viva voce evidence of the experts who made the maps. Such evidence would speak to the court as to the actual ground position of the plots.
25. But lack of such evidence does not leave the court bereft of the knowledge as to the location of the plots. The respondents themselves talked of possible overlap in their location. One would also question why the appellant needed to restrain the respondents from interfering with plot 1260 if the actual plots said to be owned by the respondents are far from that plot. The more likely scenario is that there is an overlap and both sides are claiming the same place with each claiming to have superior rights.
26. In light of this therefore, my finding is that the plots are actually or substantially in the same place. The only difference is to be found in the documents describing the official identity of the plots.
27. The issue before me now is to determine which rights the court should recognize at this stage. The appellant has a lease issued under the now repealed *Registered Land Act*, (Cap 300). The respondents on the other hand have documents that can only be treated as letters of allotment from Embu Municipal Council. As pointed out earlier, rights enjoyed under the Land statute are superior. The court can only consider the respondents position favourably if they successfully challenge those rights. They did not counter-claim in order to dislodge the appellants title. They alleged fraud but did not even give particulars of the alleged fraud and did not even prosecute their case on the basis of fraud. As things stand now, the appellants rights remain superior to theirs. It is even possible that those rights may have extinguished their rights.
28. The lower court seemed to be of the view that Section 25 of the *Land Registration Act*, which spells out the rights of a proprietor does not apply. My considered view is that section applies unless and until the lease held by the appellant is successfully dislodged through a legitimate process. I am generally in agreement with the appellant regarding the grounds of appeal raised. The appellant's rights are superior and well protected by the applicable land law regime.
29. I consider that what I have said so far is enough to dispose of this appeal. My finding is that the appeal herein has merits. I hereby allow it and grant prayer (a) as asked for in the lower court plaint. On costs, however, my considered view is that each side should bear its own costs. I appreciate that ordinarily, costs should follow the event but in my view, the appellant, as plaintiff in the lower court, should have joined the Municipal Council of Embu as a party. If this had been done it would have been easier to order that party to pay costs. I say this because that party seems to have played a role in bringing or causing the confusion that arose between the parties on the issue of ownership. In my considered view, when the appellant became a permanent owner, the respondents temporary rights of occupation should have been revoked in order that the appellant can have proper enjoyment of his right as a permanent owner.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF MAY, 2023.

In the presence of

Court Assistant: Leadys



A.K. KANIARU

JUDGE

9/5/2023

