



**Jumbe v Rukwaro (Environment and Land Appeal E002 of 2020)
[2023] KEELC 18589 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E002 OF 2020**

JO OLOLA, J

JULY 6, 2023

BETWEEN

IJJILAL YUSUF JUMBE APPELLANT

AND

JOSEPH GITONGA RUKWARO RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of the honourable Wendy Kagendo, Chief Magistrate delivered on August 28, 2022 in Nyeri MCL & E Case No 62 of 2019.
2. By a plaint dated July 3, 2019, Joseph Gitonga Rukwaro (the respondent herein) had sought judgment against Ijjilal Yusuf Jumbe (the appellant) for an order of permanent injunction restraining the appellant from interfering with and or trespassing into or occupying the parcel of land known as LR No Aguthi/Gatitu/11. In addition, the respondent had sought mesne profits as well as orders of vacant possession requiring the appellant to remove the temporary structures said to have been erected on the suit property. In the alternative, the respondent urged the court to allow him to conduct the eviction through a licensed auctioneer.
3. It was the respondent's case that he was the absolute registered owner of the suit property and that the appellant had proceeded without his consent to erect temporary structures thereon which structures had hindered his enjoyment and use of the land.
4. In his statement of defence and counter-claim dated December 18, 2019, the appellant denied that the respondent was the absolute registered owner of the suit property. On the contrary, the appellant asserted that the respondent's title was questionable as it was illegally obtained during the pendency of two cases in court. The appellant further denied having trespassed onto the land asserting that he had lived on the land since his childhood.



5. By way of the counter-claim, the appellant sought for the following:
- (a) An order that the land registrar Nyeri be directed to cancel the registration of LR No Aguthi/Gatitu/11 in the name of Joseph Gitonga Rukwaro and subsequently alter the register to revert back to the name of Aisha Rajab Ramadhani (deceased);
 - (b) An order restraining the plaintiff from interfering with the peaceful occupation of the suit premises by the current occupants;
 - (c) That the plaintiff do bear the costs of the suit and of the counter-claim.
6. The dispute went for hearing before the Honourable Wendy Kagendo, Chief Magistrate. Upon hearing the parties and in a judgment rendered on August 28, 2020, the learned trial magistrate found and determined that the respondent had proved his case and was therefore entitled to the prayers sought in the plaint. The appellant's counter-claim was accordingly dismissed with an order that the appellant grants vacant possession of the suit premises within 60 days of the judgment.
7. Aggrieved by the said determination, the appellant lodged the memorandum of appeal herein dated September 2, 2020 urging this court to set aside and/or vary the said judgment on the grounds listed as follows:
1. That the learned trial magistrate failed to address her mind to the pleadings on record and evidence by the appellant particularly towards supporting the defence and counter-claim;
 2. That the learned trial magistrate erred in law and in fact by failing to consider and evaluate the entire evidence as well as supporting documents presented by the appellant, a miscarriage of justice was occasioned.
 3. That the learned trial magistrate erred in law and fact by failing to consider the related pending cases over the suit property hence rendering the said cases obsolete and or effectively redundant;
 4. That the learned trial magistrate failed to address her mind to the fact that the appellant and his family have been the owners and occupants of the suit property for over sixty (60) years and they cannot therefore be termed as trespassers. A miscarriage of justice was occasioned;
 5. That the learned trial magistrate failed to address her mind to the fact that the appellant and his family have been forcefully dispossessed of their property rendering them destitute and desolate. A miscarriage of justice was occasioned;
 6. That the learned trial magistrate erred in law and fact in dismissing the appellant's defence and counter-claim whereas the appellant had tendered sufficient evidence to warrant the orders sought.
8. The appeal was disposed of by way of written submissions. I have accordingly carefully perused and considered the record of appeal as well as the written submissions and authorities placed before the court by the learned advocates representing the parties herein. As was stated in *Selle & another v Associated Motor Boat Company Limited & others* (1968) EA 123, the duty of a first appellate court such as this one is to re-evaluate the evidence before the trial court as well as the judgment of that court and to arrive at its own independent judgment on whether or not to allow the appeal.



9. A first appellate court is thus empowered to subject the whole of the evidence adduced before the trial court to a fresh and exhaustive scrutiny and thereafter make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand
10. In his plaint dated July 3, 2019, the respondent had sought orders of a permanent injunction to restrain the appellant, his servants and/or agents from interfering with and/or trespassing upon the parcel of land known as Aguthi/Gatitu/11. He further sought orders of vacant possession requiring the appellant to remove illegal temporary structures said to have been erected on the suit property and for the Officer Commanding Station (OCS) Nyeri Central Police Station to enforce the same.
11. Those prayers were premised on the grounds that the respondent was the registered proprietor of the suit property and that the appellant had trespassed on the same without his consent and had proceeded to erect temporary structures thereon without the respondent's consent.
12. In his defence and counter-claim, the appellant questioned the circumstances under which the respondent came to be registered as the proprietor of the suit property and asserted that the registration was procured during the pendency of the two active cases involving the appellant and one Ratib Rajab Ramadhan from whom the respondent was said to have purchased the suit property.
13. In support of his case, the respondent told the court he had purchased the land at a consideration of Kshs 11,000,000/- and that the appellant had trespassed thereon and erected temporary structures therein without his consent. In further support of that position, he produced a sale agreement dated October 31, 2018 between himself and one Ratib Rajab Ramadhan. He also produced a title deed indicating the suit property was registered in his name on May 15, 2019.
14. On his part, the appellant accused the plaintiff of deliberately failing to disclose that there were subsisting suits at the Nyeri Law Courts relating to the suit property between his family and the family of Ratib Rajab Ramadhan who sold the land to the respondent. In support of that position, the appellant produced pleadings in relation to Nyeri Chief Magistrates Court case No MCL & E No 274 of 2018 between Rishad Rajab Ramadhan & 3 others v Ijilal Yusuf. The appellant further produced pleadings in Nyeri ELC Case No 289 of 2015 between Aisha Ramadhan & 3 others v Fatuma Ramadhan Muringwa.
15. Having considered the issues and the evidence, the learned trial magistrate found and determined as follows from page 3 of her judgment on the issue of ownership:

“ The plaintiff has annexed the copy of the title deed and certificate of official search to confirm that indeed he is the registered proprietor. He pointed out that there are no challenges as against his title deed that in any way reflected the exception of the invalidation (sic) as set out in the provisions of section 1 (a) and (b) of the *Land Registration Act*.

His advocate submitted that it is salient as appears in (the) sale agreement dated October 31, 2018 that the plaintiff purchased the land from the four joint owners in the name of Ratib Rajab Ramadhan, Rishad Rajab Ramadhan, Rabbeigh Ramadhan and Razak Rajab Ramadhan, the land having devolved to them as appears in the order issued *vide* Nyeri Kadhi Court succession cause No 17 of 2018 in their capacity as the actual beneficiaries and or legal heirs of Aisha Rajib Ramadhan (deceased) who was their mother in regard to LR No Aguthi/Gatitu/11 measuring approximately 0.44 Ha. The defendant is not a beneficiary to that effect and has not challenged in any manner the said order of the court.

From the foregoing, it is the plaintiff's submission that the subject property passed into his name through a valid legal process and the creation of the legal charge over the subject land



for (a) consideration of Kshs 6,424,800/-. The allegation by the defendant that the subject title deed was hurriedly registered cannot form the basis of impeaching the sanctity of the title deed and the suit land. Finally, there is no evidence that there was any caveat, caution, restriction and/or any prohibitory order made in favour of the defendant to protect any of the alleged interests in the land hence otherwise the purchaser was a bona fide purchaser for value.”

16. On the issue of the said pending litigation over the suit properties, the learned trial magistrate found and determined as follows:

“The main challenge to the plaintiff’s title and claim by the defendant appears to be the other suits which are said to be pending. The defendant also tried to resuscitate the issue of the trust. The court notes that the issue of ownership has to be considered alongside the issue of other suits. This court has had the chance to read the two rulings by my seniors on this issue of trust and the succession before the Kadhi’s Court and I find that the issues were settled five years ago. I cannot purport to re-open, or vary what the High Court settled. It was pointed out that the defendant has not bothered to appeal against any of those orders.

The defendant’s mother had raised the issue of the trust and that issue was settled in the High Court case No 18 of 2004. If the defendant was not satisfied, he ought to have moved to the Court of Appeal. It is noted that 5 years have since passed.

The court notes that the other case, sought to have the defendant’s late mother evicted from the land and so he cannot claim to have occupied the premises peacefully. Under the circumstances the court is satisfied that the plaintiff proved his case and is entitled to the prayers sought.”

17. From the material placed before me, it was apparent that the respondent’s registration as the proprietor of the suit property on May 15, 2019 stemmed from the sale agreement between himself and one Ratib Rajab Ramadhan dated October 31, 2018. A perusal of the said agreement as produced in evidence before the court reveals that the named vendor was selling the same on the authority of his siblings named therein as Rishad Rajab Ramadhan, Rabbeigh Rajab Ramadhan, Razak Rajab Ramadhan and Ratib Rajab Ramadhan.
18. It was also apparent from the material placed before the court that the said vendors of the suit property were cousins to the appellant all of them being the grandchildren of one Mariam Binti Makuti who was the original proprietor of the suit property.
19. From the pleadings exhibited before the trial court, it was evident that sometime in the year 2015, the vendors together with their mother - one Aisha Ramadhan had sued the appellant’s mother – Fatuma Ramadhan Muringwa in Nyeri ELC No 289 of 2015 accusing her of illegally occupying the suit property and just like in their matter herein seeking her eviction therefrom.
20. In her statement of defence dated and filed on February 18, 2018, the appellant’s mother denied the accusations and asserted that she has been in full and uninterrupted occupation of the subject parcel of land since the year 1962. That suit was later transferred to the Chief Magistrate’s Court as Nyeri MCL & E Case No 66 of 2018 where according to the appellant it remains pending for hearing and determination.
21. It was further evident that by yet another suit filed in the Chief Magistrates Court at Nyeri on December 7, 2018, the same vendors did sue the appellant herein accusing him of trespass onto the suit property and seeking to have him forcibly evicted therefrom in the event he does not yield vacant



possession. In their plaint dated December 6, 2018, as filed in the said Nyeri Chief Magistrates Court being MCL &E No 274 of 2018, the vendors who claim to be the registered proprietors of the suit property do not state the date when the appellant illegally trespassed on the suit land.

22. Arising from the foregoing, it was again evident to me that as at the time the vendors executed the sale agreement with the respondent, on October 31, 2018 both the vendors and the respondent were aware of the fact that the appellant and other members of his family were in possession and occupation of the portions of the suit property of which the appellant is now accused of trespassing upon. That informs the failure by the respondent to point out in his pleadings and evidence exactly when the appellant trespassed upon the land.
23. In her witness statement dated November 30, 2015 as filed in the said Nyeri ELC 289 of 2015, the vendor's mother acknowledges the presence of the appellant's family on the land for many years and states as follows at paragraphs 2 and 3 thereof:

“That the land parcel LR No Aguthi/Gatitu/11 was solely my husband's land.

That the defendant (the appellant's mother) who was my husband's sister had only been given shelter by my husband but took advantage of the said shelter since we all live in Mombasa and wanted to take over our land.”
24. That being the case, I was unable to see how the respondent could succeed in a claim of trespass when he bought the property with full knowledge of the appellant's occupation thereof.
25. A perusal of the ruling of the Honourable Justice Serگون dated September 30, 2009 as delivered in Nyeri HCCC No 18 of 2004 indeed reveals that the parties herein have had a long standing dispute over the suit property for a long period of time. In the said case, the appellant's mother had sued the vendor's mother seeking a declaration that the vendor's mother held title for the suit property in trust for the appellant's mother who was entitled to a half a portion thereof.
26. In the ruling delivered on September 30, 2009 aforesaid, the learned judge did find that the appellant's mother had been on the land for long and that given the circumstances in which the title came to be registered in the name of the vendor's mother, a resulting trust should be presumed with the result that the appellant's mother was declared to be entitled to a half a share of the suit property.
27. Following an application by one of the vendors – Ratib Rajab Ramadhan, the ruling delivered by Hon Justice Serگون was set aside on February 4, 2015 by the Honourable Justice A. Ombwayo on account that the applicant was a necessary party to the initial suit and that he had been condemned unheard.
28. Contrary to what the learned trial magistrate states in her judgment, that setting aside cannot be in my view construed to mean that the question of trust was determined between the parties. It can only mean that the suit remains alive pending the hearing of all the parties on the issues that had been raised by the parties in their pleadings.
29. That being the case, one cannot but agree with the appellant that as at the time the suit property was purportedly sold to the respondent the same was the subject of a number of litigations before the courts. As it were, the law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. That injunction is granted under the doctrine of *lis pendens*.



30. Explaining the said doctrine in *Ruth Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, the Court of Appeal observed as follow:

“ *Black’s Law Dictionary* 9th Edition, defines lis pendens as the jurisdictional power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 of the *Indian Transfer of property Act* (now repealed). While addressing the purpose of the principle of lis pendens, Turner L. J. in *Bellamy v Sabine* [1857] 1 DC 5 566 held as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of *Mauji v US International University & another* [1976] KLR 185, Madan J. A stated thus:

“The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognised by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interest of public policy and good effective administration of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other ...”

In the same case it was observed inter alia that:

“Every man is presumed to be attentive to what passes on in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

31. Arising from the foregoing, it was self evident that the vendors had no authority to alienate the suit property in the manner they purported to have done. The purchase made of the property by the respondent *pendente lite* was void and no consequence.
32. It follows that I am persuaded that the learned trial magistrate made an error both in fact and in law in coming to the conclusion that the respondent had proved his case and was entitled to vacant possession of the land.
33. The result is that this appeal succeeds and the judgment dated and delivered on August 28, 2020 is hereby set aside with an order that the respondent/plaintiff’s suit is dismissed with costs to the appellant/defendant.
34. The costs of this appeal shall also be met by the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 6TH DAY OF JULY, 2023.

In the presence of:



Ms Wanjala for the Appellant

Mr. Wabandi Gacheru for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

