



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kathuu v Mboroki (Environment and Land Appeal 089 of 2021)  
[2023] KEELC 18762 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 089 OF 2021**

**CK NZILI, J  
JULY 12, 2023**

**BETWEEN**

**HENRY KARERE KATHUU ..... APPELLANT**

**AND**

**STANLEY KIBORI MBOROKI ..... RESPONDENT**

*(Being an appeal from the Judgment in Githongo ELC 26 of  
2018 delivered by Principal Magistrate S. Ndegwa on 4.5.2020)*

**JUDGMENT**

1. The appellant, who was a defendant at the trial court, has appealed against the decision delivered on May 4, 2020 in favor of the respondent, who was the plaintiff, on the basis that the trial court erred in law and fact in:-
  - (i) Finding the case proved against him, yet he occupied the suit land.
  - (ii) For failing to consider his pleadings, submissions, case law and more particularly that fraud required a higher standard of proof.
  - (iii) For failing to find that the subject parcels of land were never interchanged at any stage as alleged.
  - (iv) Failing to consider that the registration of the parties in their respective parcels of land had given them an indefeasible title, which could only be canceled upon proof of fraud which was not the case.
  - (v) He failed to find that the demand notice for vacant possession meant he had been on the land for over 20 years, yet his evidence on user interruptions and occupation was on record.



2. As the first appeal, the court must re-evaluate, re-appraise and rehear the matter by way of the appeal record and come up with its independent findings on both facts and the law while at the same time giving allowance to the trial court, which had the opportunity to hear, assess and observe the witnesses firsthand. See *Peter v Sunday Post Ltd* (1958) EA 42A.
3. In the lower court, the respondent had sued the appellant as the 2<sup>nd</sup> defendant alongside M'Magiri M'Kaaria as the 1<sup>st</sup> defendant through a plaint dated September 16, 2014. He had complained that the appellant while subdividing his LR No Abothuguchi/Gaitu/356 into several portions, agreed to sell a piece to him measuring 0.81 ha, which the respondent took possession of and used for over 20 years marked as LR No Abothuguchi/Gaitu/1313.
4. The respondent had averred that on August 7, 2014, he received a letter from the appellant's lawyers requiring that he vacates the land, and upon making inquiries, he established that his land had been interchanged with L.R. No. Abothuguchi/Gaitu/1315, whose effect was to place the appellant in a different locality which was sloppy and rocky. He pleaded that the exercise was fraudulently done to get fertile or arable land, denying him ownership of prime land and failing to disclose the same until 20 years later. He prayed for an order that the land registrar rectifies the two parcels with the respondent taking LR No 1315 and the 2<sup>nd</sup> defendant taking LR No 1313 and an order or injunction restraining the defendants from interfering with his quiet possession and occupation of LR No Abothuguchi/Gaitu/1315. The plaint was supported by a case summary, list of issues dated October 2, 2015 and July 20, 2018, witnesses statements dated September 16, 2014, and a list of documents dated September 16, 2014. The appellant and the 1<sup>st</sup> defendant filed statements of defences December 5, 2014 and October 21, 2014 respectively. The 1<sup>st</sup> defendant denied the contents of the plaint. The appellant admitted that the respondent had bought LR No 1313 from the 1<sup>st</sup> defendant and took possession 20 years ago. He acknowledged that a demand letter was served upon the appellant after interfering with his land, which he had earlier bought from the 1<sup>st</sup> defendant, a neighbor and owner of parcels LR No's Abothuguchi/Gaitu/2528 & 2529. He averred that the appellant knew the status of LR No Abothuguchi/Gaitu/1315 before he purchased the same. The appellant denied the alleged fraud since the two parcels of land were distinct and separate and had been hived from the initial LR No Abothuguchi/Gaitu/356 before the respondent had bought LR No Abothuguchi/Gaitu/1313; hence the same could not be exchanged with LR No 1315.
5. The appellant further averred that no crime had been committed or reported against him and that the respondent was trying to pass out his land LR No 1313 as the 1<sup>st</sup> defendant's land parcel LR No 1315 and using the court to get that which does not belong to him. He denied that any cause of action had been disclosed against him. The defense was supported by a list of witness statements and documents dated October 24, 2021, a list of issues, and a case summary dated June 27, 2018. In reply to the defense dated January 5, 2015, the respondent joined matters raised with the plaint.
6. By a reply to the 2<sup>nd</sup> defendant's defense dated November 5, 2014, the respondent averred that he bought 2 acres of land from the 1<sup>st</sup> defendant over 20 years ago and acquired a title deed which land was fertile and arable, which the 2<sup>nd</sup> defendant allegedly interchanged with his LR No 1315, now reflected as sloppy and rocky, which he has been possessing. He averred further that the 2<sup>nd</sup> defendant was his neighbor who was well aware of these facts, and in all these years, he had never laid any claim to the land until he sent a demand letter to him.
7. At the trial, the respondent testified as PW 1 and adopted his witness statement dated September 19, 2018 as his evidence in chief. He said he bought the land in 1993, identified it and took possession. He produced a title deed, a demand letter dated August 7, 2014, a reply dated August 25, 2014, an area map, and official certificates of search for LR No. Abothuguchi/Gaitu/1313 and 1315 as PExh No's



- 1-4 respectively. Even though he did not produce the sale agreement, PW 1 told the court that the two parcels of land, as per the map, were separate; the 1<sup>st</sup> defendant had altered the map to displace him. He did not produce any map showing the alleged alterations or amendments. PW 1 insisted that he bought and occupied where the land surveyor and the 1<sup>st</sup> defendant had shown him, now occupied by the appellant after the interim orders were vacated, yet he had lived on the land for 23 years. Gladys Kairigo Kobori and John Murithi Kiara testified as PW 2 and PW 3. PW 2 told the court that her husband, PW 1, had bought the land she had been cultivating. As a land surveyor, PW 3 told the court that he conducted a subdivision around 1991 over the 1<sup>st</sup> defendant's LR No 356 into nine portions, put the boundaries, and prepared a mutation form. He clarified that he was not present when the 1<sup>st</sup> defendant sold the land to the plaintiff. He confirmed that the two parcels of land were separate and distinct and that PW 1 was occupying someone's land from the ground since his land was parcel LR No 1313.
8. Cyprian Magiri, the 1<sup>st</sup> defendant, testified as DW1. He testified that he sold LR No 1313 and 1315 to the plaintiff and the 2<sup>nd</sup> defendant. As alleged, he denied visiting the land with the plaintiff and the land surveyor.
  9. Henry Kabere Kathuu, the appellant herein, testified as DW 2. He adopted his witness statement dated October 21, 2014 and produced a demand letter dated August 7, 2018, a copy of the green card for LR No 1315, official search for LR No's 2528 and 2529 and the area map as DExh No's 1-5 respectively. He testified that he bought his portion in August 2014 from the 1<sup>st</sup> defendant, who showed him the land though it was not vacant since the 1<sup>st</sup> defendant was cultivating it. He said that he never visited the land with a land surveyor. Further, he could not confirm what parcel of land the plaintiff, now respondent, was occupying. He clarified that the respondent owned LR No 1513, who had tilled his land for many years, neighboring his parcel number LR No 2528, which he had bought in 1994 alongside LR No 2529.
  10. The 1<sup>st</sup> defendant, who testified as DW 2, told the court that before buying LR No Abothuguchi/Gaitu/1315, the land was both vacant and barren. He said he conducted a search and established that it was owned by the 1<sup>st</sup> defendant, which he knew of its locality. The appellant testified that after he bought the land, the respondent allegedly entered the land, of which he wrote a demand letter and moved to court to eject him from his land. DW 2 told the court that having bought his land in 1994; the respondent knew where his land was located. With this evidence, the trial court, upon evaluating the evidence, found the respondent's claim merited, leading to this appeal.
  11. By submissions dated March 29, 2023, the appellant submitted that the respondent did not substantiate his claim based on fraud by tabling evidence that the mutation form for the original land LR No Abothuguchi/Gaitu/356 was altered after registration to show that LR No's 1313 and 1315 entries had been altered or interchanged. The appellant submitted that the respondent had authored his misfortunes for lack of due diligence. Reliance was placed on *Reuben Kirimi Mbeetu v Mark Mwirigi* Meru ELC No 116 of 2019.
  12. The court has carefully considered the appeal record, the grounds of appeal, and written submissions tendered by the parties. The issues for my determination are; if there is a proper record of appeal before the court and secondly, if the respondent had pleaded and proved his claim at the lower court to 'be entitled to the reliefs sought.
  13. The major complaint by the respondent at the lower court was that the 1<sup>st</sup> defendant in the process of subdividing LR No Abothuguchi/Gaitu/356 sold to him 0.81 ha of his land as LR No Abothuguchi/Gaitu/1313 was identified on the ground, took vacant possession, and after 20 years, on August 7, 2014, he was shocked to be told that the land belonged to the appellant and that he should relocate to another locality where his parcel number was situated.



14. The respondent had averred that upon searching at the land registry, he established that his parcel number had been interchanged with parcel LR No 1315, whereby he was placed in a different locality whose topography was sloppy and rocky, unlike where he has been occupying, which was more arable and fertile. He blamed the appellant and the seller for fraud, withholding the information, allowing him to settle on the wrong parcel of land, colluding to deny him the land, interchanging the land without his consent, transferring and or taking a transfer LR No 1315 to complicate an earlier fraud, interfering with his occupation, threatening breach of peace, and or causing his loss and damage. He sought to rectify the land register so that LR No 1315 and be registered in the respondent's name and for LR No 1313 to belong to him with a prayer for a permanent injunction.
15. In trite law, parties are bound by their pleadings, and issues flow from the pleadings. In this appeal, the parties had isolated issues for the court's determination, the respondents dated October 2, 2015 & July 20, 2018 and the appellants dated June 27, 2018. The twin issues in the lower court suit were whether or not the respondent and his co-defendant had conspired to defraud the respondent by exchanging his land parcel with the appellant's LR No 1315 and whether the court could issue an order for rectification of two parcels of land at the land registry.
16. Order 42 Rule 13 (4) of the *Civil Procedure Rules* provides the documents which shall be included in the record of appeal, among them the memorandum of appeal pleadings, trial court's notes, all affidavits, maps, and documents put in evidence before the trial court, the judgment, order or decree appealed from and where appropriate, the order granting leave to appeal.
17. In the record of appeal filed before this court, the decree appealed against, and the order for leave to appeal was not included. Not all pleadings filed in the trial court have been included in the record. The documents produced and numbered as exhibits at the lower court are missing in the record of appeal as well. The judgment was delivered on May 4, 2020, while this appeal was filed on July 30, 2021.
18. Without the order for leave being attached to the appeal record, the court may not know before which court the leave was granted and under what terms. The court has also compared the lower court record with the record of appeal. Both appear materially different. It is not for the appellant to choose what to include and not to include in the record of appeal. That discretion lies with the appellate court upon a request by a party to omit or exclude any such document. The omission, therefore, renders this appeal defective.
19. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & others* [2014] eKLR, the court said that courts of law litigate on factual issues, look at facts, and will not engage in mitigating an apprehensive cause and or on speculation.
20. In this appeal, vital documents are missing, yet the appellant expects the court to rule on factual issues without the benefit of the exhibits and or pleadings that were before the trial court. The court must have a basis to do so. See *Safaricom Ltd v Jack K Khanjira & another* [2018] eKLR. In *Kenya Commercial Finance Co Ltd v Richard Akwesera Onditi* [2008] eKLR, the court struck out an appeal that lacked documentary exhibits produced before the trial court for being incurably defective and incompetent.
21. Regarding the submissions that there was no proof of fraud to the required standard, it is not in dispute that the respondent had pleaded fraud, collusion, illegality, and impropriety against the appellant in the manner that he had obtained his title deed for the land. He called PW 3, the land surveyor said to have been present during the transaction in 1994 and who had subdivided the nine portions of the subject land before the appellant came into the picture. He identified PExh Nos 3, 4 & 5. The appellant never challenged the said documents. Unfortunately, these are the exhibits the appellant has omitted



- in his appeal record. PW3 identified the two parcels of land as separate and distinct. He indicated that he was the one who had prepared the mutation form and affected the boundaries using the original map. PW3 further confirmed that he shared the land between the respondent and the 1<sup>st</sup> defendant, who confirmed that the land belonged to the respondent.
22. The respondent, on his part, testified that he bought his land in 1993 after the subdivisions had been undertaken. PW 3 testified that he was called again in 1997 to put the boundaries and was told the land belonged to the respondent. He, therefore, corroborated the respondent's evidence. The appellant, in cross-examination, never showed the witnesses any rival mutation form or challenged the expert witness, PW3, who had prepared the mutation form.
  23. The law is that every paper trail towards acquisition comes into question when a title deed is under challenge as per Sections 24, 25, 26, 27, 28 & 80 of the Land Registration Act. See Dr Joseph Ngok v Justice Moijo Ole Keiwua & 4 others CA No Nai 60 of 1997. In this case, the respondent failed to bring forth any evidence that what he was sold and transferred on paper and on the ground by the 1<sup>st</sup> defendant was tallying. In his defense and testimony, the appellant told the court that he bought his land in August 2014, almost 20 years after the respondent had bought his land and took vacant possession. The appellant admitted that he never visited the land with a land surveyor to ascertain the parcel of land he was purchasing on the ground. It was not enough for him to allege and testify that what he was shown, bought, and transferred was LR No 1315. The exact locality of the land had to be established by qualified land officers or surveyors familiar with the registry index map. The appellant did not produce any sale agreement in the trial court or call an officer to produce an authentic registry index map. DExh No 2 shows that the appellant collected his title deed on August 5, 2014 after he became a registered owner on August 1, 2014.
  24. The 1<sup>st</sup> defendant told the court that he transferred LR No 1313 to the respondents in 1994, who also took vacant possession. Therefore, if the respondent was in occupation of the land from 1994 and the appellant bought his land in 2014 from the same seller as the 1<sup>st</sup> defendant, and since the appellant had brought other parcels of land in the locality from the 1<sup>st</sup> defendant, it means that he should have been the one to ascertain what he was buying was vacant or not. DW 1, in his evidence and witness statement, was emphatic that he put the respondent into possession earlier than the appellant.
  25. Equity follows the law; if two equities compete, the first in time prevails. The appellant sent the letter dated August 7, 2014 claiming that he had previously bought LR No 1315, allegedly occupied by the respondent. He did not produce any sale agreement before the trial court to show that what he purchased was LR No 1315 and not LR No 1313. He did not produce the transfer form and land control board consent or application forms. The appellant did not produce any land surveyor reports to show that he established the locality of the land he purchased.
  26. In the absence of that evidence to show that his title deed was legally and procedurally procured, my finding is that the respondent had tendered enough evidence to show an irregularity over the two parcels of land for the same to be rectified by the trial court under Section 80 of the Land Registration Act. The trial court's decision cannot be faulted.
  27. The upshot is that the appeal is both defective in law and lacks merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 12TH DAY OF JULY 2023**

**In presence of**

C.A John Paul



Appellant

Wamache for respondent

Kirigia Kithinji for appellant

Kimotho for appellant

**HON. CK NZILI**

**ELC JUDGE**

