



**Ntotoi & another v Lenguro (Environment and Land Appeal
009 of 2021) [2023] KEELC 18677 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 009 OF 2021**

PM NJOROGE, J

JULY 10, 2023

BETWEEN

RAFFAELLA ADIYAKHISO NTOTOI 1ST APPELLANT

ANDREW HARULE BULYAAR 2ND APPELLANT

AND

ROBERT ABRIAN LENGURO RESPONDENT

*(Being an Appeal from the Judgement of Hon. T.M Wafula Senior
Resident Magistrate delivered at Marsabit Law Courts on 24/6/2020)*

JUDGMENT

1. This appeal is spawned by a Judgement delivered by Hon T M Wafula, SRM, at Marsabit on June 24, 2020. In his plaint dated July 4, 2011, the appellant sought Judgement against the defendant (now the respondent) for:
 - a An order of Eviction from Plot No 53B Loiyangalani, Marsabit County Council.
 - b An order of permanent injunction restraining the Defendant, by himself, his agents or anybody through him from entering or in any other way whatsoever interfering with Plot No. 53B at Loiyangalani, Marsabit County Council.
 - c General damages for trespass.
 - d Costs of this suit.
 - e Interest on C and D above.
2. The Appellant's suit was dismissed by Hon T M Wafula, SRM, on June 24, 2020. Hence this Appeal.
3. The Memorandum of Appeal in this suit takes the following format:



Memorandum of Appeal

1. That the Learned Magistrate erred in Law and fact in dismissing the appellants' suit.
2. That the Learned Magistrate erred in Law and fact in failing to properly analyse, consider and apply the appellants evidence on record before arriving at his decision.
3. That the Learned Magistrate erred in Law and fact in relying on extraneous matters in arriving at his findings.
4. That the Learned Magistrate erred in Law and fact in failing to find that the Respondent's Defence was frivolous and a mere denial.
5. That the Judgement of the Learned Magistrate was against the weight of the evidence before him.
4. The parties canvassed the appeal by way of written submissions.
5. The five grounds raised in the Memorandum of Appeal largely touch on the proceedings in the lower court. To fully interrogate those grounds, I have carefully gone through the pleadings and the proceedings in the lower court. This being a first appeal, I am required to consider the totality of the evidence adduced in the lower court and to make my own decision based on the evidence tendered in the lower court.
6. In his submissions, the appellants advocate collapsed the issues for determination into 2 main ones as follows;
SUBPARA 1.
Whether the Learned Magistrate erred in his findings that the appellants have not proved their suit on a balance of probabilities.
SUBPARA 2.
Whether the Learned Magistrate erred by failing to find that the Respondent had no tenable defence against the appellants suit.
7. The appellant's advocate submits that the extract of Council Minute No 6/92 (C) was cogent proof that the disputed land belonged to the appellant. He also says that though the Learned SRM visited the scene he failed to record the proceedings thereon. He also says that the appellant produced receipts for payment of rates to Marsabit County Council. He concludes that the Learned Senior Resident Magistrate was wrong in holding that the appellants had not proved ownership and existence of Plot No 53B at Loiyangalani.
8. Regarding issue No 2, the appellant's advocate says that the respondent did not produce any documents to prove that his claimed Plot No. 85 was allocated to him by Marsabit County Council.
9. The respondent's rejoinder to the appellant's submissions is that the extract of Minute 5/92 (C) of Marsabit County Council, reliance upon which the appellants lay claim to ownership of the suit property was subject to "Meeting other Planning Principles" The Advocate says that if at all the 1st Appellant's deceased husband was allocated land, it was not surveyed, planned and parameters and/or beacons identified and that no letter of allotment was issued to the alleged allottee. In support of this assertion, the respondent proffered the case of *Lucy Nchebeere Versus Rose Ndululu Musee* {2015}



eKLR which quoted the court of Appeal case of Joseph Arap Ng'oki Versus Justice Moiwo Ole Keiwa (Nairobi Civil Application No.60 of 1997 where it was opined as follows;

“It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter pursuant to the provisions of the Act under which the property is held”

10. The respondent submits that he produced receipts for payment of land rates which confirmed that he indeed owned his Plot No 85. He was categorical that the size of his plot was 50 by 100 feet and not 100 by 100 feet as claimed by the appellants. He seeks to demonstrate contradictions evinced by the evidence proffered by the appellants. He concludes that the appellants failed to discharge the burden of proof in the lower court and asks the court to dismiss the appeal and to uphold the Judgement of the Hon SRM in the lower court.
11. This being a first appeal I am required as was decided by the court of Appeal in the case of *Okemo v Republic* [1972] EA 32 to make my own findings and draw my own conclusions in this matter.
12. I do find that the appellant's evidence is riddled with inconsistencies. For example, Minute 5/92 (C) does not specify that it was Plot No. 53B which had been allocated to Samuel Ntotoi Bulyaa (deceased). It is also claimed that the respondent had curved a plot the size of 100 ft by 100 ft whereas the respondent is unequivocal that his plot No.85 is only 50ft by 100ft in size. The respondent's assertion in this respect was not, in any way, controverted.
13. One of the primary documents relied by the plaintiffs in the lower court was document No 3 in the list of documents dated July 4, 2011. It is referred to as “A copy of Application for registration of the plot.” At Section C regarding “verification by Council Officials” there is no verification whatsoever. Also, in Section D, no decision by the clerk to Council is indicated. In a nutshell, this document is veritably inchoate. These few examples of inconsistencies will suffice.
14. Having carefully gone through the proceedings in the lower court and having also considered the judgement delivered by the Hon SRM in the lower court, I have come to the conclusion that the Hon. SRM's Judgement delivered on June 24, 2020 is congruent in all respects with the pleadings and evidence proffered in the lowered court. I do find that the Hon. SRM properly analyzed the evidence placed before him and properly arrived at his decision. I do not find any evidence that he placed reliance on extraneous matters when he arrived at his decision contained in the impugned judgement. I, unreservedly dismiss grounds 1,2,3,4 and 5 in the Memorandum of Appeal.
15. Consequently, I issue the following orders;
 - a. This appeal is dismissed.
 - b. Costs shall follow the event and are awarded to the respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 10TH DAY OF JULY, 2023 IN THE PRESENCE OF:

Court Assistant; Balozi

Caleb Mwititi holding brief for Mose Mose for the Respondents.

Harun Gitonga absent for the Appellant.

HON JUSTICE P.M NJOROGE

JUDGE

