



**Tabuya v Mwikabe (Environment and Land Appeal E002 of 2022)  
[2023] KEELC 19196 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19196 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

**MN KULLOW, J**

**JULY 3, 2023**

**BETWEEN**

**JOHN SAGONA TABUYA ..... APPELLANT**

**AND**

**MAROA MWIKABE ..... RESPONDENT**

**JUDGMENT**

1. This Appeal emanates from the Judgment and Decree of hon Mesa L. N delivered on 14<sup>th</sup> March, 2019 in Kehancha ELC Case no 17 of 2018, wherein the Plaintiff's claim was wholly allowed and the Defendant's Counter-claim was dismissed. The grounds in the Memorandum of Appeal dated 08.02.2022 are that: -
  - i. The Learned Trial Magistrate misdirected himself in failing to make a finding for the Plaintiff.
  - ii. The Learned Trial Magistrate erred in fact and law by failing to appreciate the evidence tendered with regard to fraudulent ownership of the parcel of land title number BUGUMBE/MABERA/1629 by the Plaintiff, the Appellant reside on the parcel to date.
  - iii. The Learned Magistrate misdirected himself by totally disregarding the evidence filed as Sale Agreement dated 5<sup>th</sup> August 1997 as proof that Appellant bought land from DW1 in the year 1997.
  - iv. The Learned Trial Magistrate erred by failing to appreciate that the Appellant had proved his case on a balance of probability which was uncontroverted by the Respondent.
  - v. The Learned Magistrate failed to consider the counter-claim as was filed by the Appellant.
2. Consequently, the Appellant sought the following orders:



- a. That all the subsequent orders in Kehancha ELC no 17 of 2018 be set aside and the matter be heard a fresh.
  - b. Costs of the Appeal.
3. A brief background to bring this appeal into perspective; *vide* a Complaint dated 25.05.2017 the Plaintiff/Respondent instituted a suit against the Defendant/Appellant; seeking an order of Eviction, general damages for trespass, any other relief the Honorable Court may deem fit and just to grant in the circumstances together with costs of the suit.
  4. It was the Plaintiff/Respondent's contention that he is sole proprietor of BUGUMBE/MABERA/1629 (hereinafter referred to as suit-land) measuring 0.70 ha. Sometime between the year 2015 and 2016; the Defendant/Appellant trespassed into the suit property and commenced construction of temporary structures thereon without his consent. That as a result of the said acts of trespass, the Respondent's right to own property was violated, he suffered mental anguish, considerable loss and damage.
  5. The Defendant/Appellant filed a Statement of Defence and Counter-claim dated 28.07.2017; wherein the Defendant/Appellant denied the allegations of proprietorship by the Respondent, trespass and the particulars therein pleaded by the Plaintiff. He maintained that he is the lawful occupier of the suit land and has been residing on the suit land pursuant to a sale agreement entered into in the year 1997.
  6. In his Counter-claim; it was the Appellant's claim that the Respondent fraudulently transferred the title of the suit land in his name in the year 2016. He outlined the particulars of such fraud and sought the court to issue orders in his favour by declaring him the true owner of the suit land, ordering cancellation of title of the Respondent and Costs to the suit.
  7. It was the testimony of DW1, Thomas Mwita, that the Respondent was his nephew and that he owned the suit land. He stated that he passed title by way of Sale to the Appellant in 1997. He averred that the registration number LR no BUGUMBE/MABERA/1629 was maliciously/fraudulently registered while he was away in Tanzania by the Respondent who wanted to occupy his land. He stated that he got property over the land under the laws of succession from estate of his late father.
  8. In the Reply to Defense and Defense to Counter-claim dated on 22.08.2017; the Respondent averred that the Appellant's contentions were frivolous, scandalous, misconceived and an abuse of Court process. He further denied any title claimed by the Appellant and maintained that such subsistence on the suit land since 1997 was otherwise Forcible Detainer which is a criminal offence. He dismissed the sale agreement relied on by the Appellant as being in contravention of the provisions of the [Land Registration Act](#) and the [Succession Act](#). The case was heard and determined in favor of the Respondent with costs hence the instant Appeal.
  9. The Appeal be canvassed by way of written submissions, from the court record only the Appellant filed submissions which I have read, and taken into consideration in arriving at my decision hereunder;

### **Appellant's Submissions**

10. I wish to digress and address the laxity on the part of the Appellant's counsel in following the directions issued by this Court. Advocates should act with due diligence and vigilance to their duties as officers of the court. This Court directed the Appellant to file his submissions within 2 days from 07.06.2023; yet in their self-conceived ideals, the Appellant's counsel filed their submissions on 27.06.2023, without leave and only 3 days to the date reserved for judgment, despite being fully aware of the strict timelines.



11. It is important for advocates to work with a sense of duty and motivation as to purpose for the interest of justice. How so will you cry foul in lack of representation for your client at trial yet on appeal you move with so sluggish and unbothered stance to help turn the wheels of justice. It is high time advocates learn that, for the interest and goals of justice to be achieved, both bench and bar must act in a simultaneous manner and step up when called upon. Be that as it may, I will proceed to consider the Appellant's submissions as filed hereunder;
12. Counsel submitted that Article 50 (1), (2) (h) had been violated. He argued that lack of legal representative made the Appellant's position weak and put the Respondent at a vantage position. It was also his submission that the Appellant had acquired prescriptive rights over the suit and relied on the provisions of Articles 40 (1),19, 20,21 ,22, 23, 24, 50 (1) and 159 (1) and (2) (a) – (e).
13. It was further his submission that the judgment was skewed; the Appellant having been an occupier pursuant to a Sale Agreement from the year 1997, he ought not to be found as a trespasser on the suit land. He urged the Court to set aside the judgment and allow for a proper trial to ensue.
14. At the time of writing this judgment, no written submissions had been filed by the Respondent despite being given sufficient opportunity to file the same.

### **Analysis and Determination**

15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat co* [1968] EA 123) the Court of Appeal held as follows: -

“...this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
16. I will now proceed to re-evaluate each of the party's claim from the trial court record, the evidence adduced and the trial court's findings in determining whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal dated 08.02.2022.
17. The dispute between the Appellant and the Respondent herein is primarily on the issue of trespass. It is the Respondent's contention that the Appellant trespassed onto his land parcel no 1629 and erected a house thereon. He maintained that he is the registered proprietor of the suit land and dismissed the Appellant's Counter-claim as being unfounded and challenged the alleged sale agreement of the year 1997.
18. The Appellant on the other hand maintained that he is the lawful occupier of suit parcel no 1629 pursuant to a sale from Thomas Mwita (DW1) and denied any claims of encroachment onto the suit land. By his Counter-claim, he contended that the Certificate of Title held by the Respondent was vitiated by fraud thus urged the court to set aside the decision of the trial court and order a retrial with costs.



19. In his Judgment, the trial Magistrate noted and I quote:

“the defendant did not tender any evidence to controvert the evidence adduced by the plaintiff herein, in so far as the defendant did not produce any documentary evidence to prove that the suit property belonged to the person who sold the same to him. Although the defendant did file a counter-claim the defendant did neither prosecute nor tender any evidence in support of the Counter-claim.” (emphasis mine)

20. By virtue of such dictum in his view and which I find to be correct, the trial magistrate could not then proceed to give judgment in favour of the Appellant on account of the Counter-claim. From the trial court record, it is clear that the Appellant did not adduce any evidence in support of his averments and claims. Section 107 – 109 of the *Evidence Act* is clear on this regard and provides that:

- (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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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.

21. From a perusal of the trial court record, it is instructive to note that the Appellant did not tender into evidence such sale agreement as alleged even though the same is included as part of his documents filed in court. Failure to produce the alleged sale agreement in evidence, this court has no choice but to disregard the same and its contents; the procedure and rules of evidence are clear in this regard.

22. However and without prejudice to the foregoing; the question that follows is whether the said sale agreement can be taken as the sole and conclusive evidence of proprietorship. As rightfully posed by the trial magistrate; from a cursory look at the said sale agreement, it cannot be ascertained that the subject land indeed belonged to the vendor therein, one Thomas Mwita, whether he had the requisite capacity to sell the same and consequently pass a good title. Thus, without further supporting documents produced as evidence, such as a copy of the title deed or a certificate of official search, this court is unable to find in favor of the Appellant with regards to the ownership claims.

23. I am therefore of the considered opinion that a sale of land agreement is not conclusive proof of ownership and the same cannot solely be relied on to challenge the title deed of the Respondent substantively. The purchaser of land ought to do more than simply stand on open field with a sale agreement as a basis for conferring proprietorship rights over a suit parcel.

24. The issue that remains for determination is whether the court should order for the retrial of the appellant as requested by appellant. The law as to when a retrial should be ordered has long been settled.



To this end, I am guided by the case of *Fatehali Manji v Republic* [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.” (See *Philip Kipngetich Terer v Republic* [2015] eKLR)

25. In view of the foregoing, I find that the learned trial magistrate exercised her discretion properly in allowing the Respondent’s claim and dismissing the Appellant’s Counter-claim. The analysis and subsequent decision was purely made upon examination of the facts of the case and the evidence adduced in court. I find no need to interfere with the said decision.

### **Conclusion**

26. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with no orders as to costs, each party to bear their costs of the Appeal. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 3<sup>RD</sup> DAY OF JULY, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

In presence of; -

No Appearance for the Appellant

No Appearance for the Respondent

Court Assistant – Tom Maurice/ Victor

Tom Maurice – Court Assistant

