



**Mwaura v Mukonza (Environment and Land Appeal E9 of 2020)  
[2023] KEELC 19944 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19944 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E9 OF 2020  
CA OCHIENG, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**JULIUS NJUGUNA MWAURA ..... APPELLANT**

**AND**

**JACKSON MUKONZA ..... RESPONDENT**

*(An appeal from the Judgment of the Honourable C. Ocharo Senior  
Principal Magistrate delivered in CMCC No. 802 of 2013, Julius  
Njuguna Mwaura Vs Jackson Mukonza on 9th October, 2020)*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the 9<sup>th</sup> November, 2020 which was amended on 30<sup>th</sup> September, 2022 and filed on 13<sup>th</sup> October, 2022 the Appellant appealed against the Judgement of the Senior Principal Magistrate Hon. C. Ocharo delivered on the 9<sup>th</sup> October, 2020 in Machakos CMCC No. 802 of 2013 between Julius Njuguna Mwaura v Jackson Mukonza. The genesis of this Appeal is the Judgement by Hon. C. Ocharo, Senior Principal Magistrate where she dismissed the Appellant's (Plaintiff's) suit.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 9<sup>th</sup> November, 2020 which was amended on 30<sup>th</sup> September, 2022 and filed on 13<sup>th</sup> October, 2022 that contains the following grounds:
  1. The Learned trial Senior Principal Magistrate erred in law and fact by failing to hold that the Appellant had not discharged his burden of proof which had been done through the Appellant's oral testimony, witnesses availed and documents produced.



2. The Learned Trial Senior Principal Magistrate erred both in Law and in fact by stating that the Appellant obtained his Title Deed through bear allegations of fraud.
3. The Learned Trial Senior Principal Magistrate erred in Law and in fact by challenging the rules and regulations that were followed by Katelembo Farming and Cooperation Society in order to process the Title Deeds to the members of the Society who included the Appellant.
4. The Learned Senior Principal Magistrate erred in Law and in fact by dealing with the service of the Demand Notice which the Respondent did not challenge as regards the service of the Demand Notice denying the Appellant pay costs when the claim of the Respondent was dismissed demonstrating bias.
5. The Learned Trial Senior Magistrate erred in Law and in fact by being biased against the Appellant.
6. The Learned Trial Principal Magistrate erred in Law by cancelling the Title Deed of the Appellant and giving no direction who was to be the owner of the suit premises after dismissing the Respondent's Counter-claim.
7. The Learned Trial Principal Magistrate erred in Law and in fact by awarding the Respondent costs who never wrote any Notices after the Respondent was served with the pleadings.
8. The Learned Trial Senior Principal Magistrate erred in Law and in fact by acting on behalf of the Estate of Mulwa Mweu who had no issue about Letters of Administration and the Respondent never acted for the said family or the Society.
9. The Learned Trial Principal Magistrate erred in Law and in fact by disregarding the procedure followed by the Society when it was allocating plots to members who included the Appellant.
10. The Learned Trial Principal Magistrate erred in Law and in fact by accepting the claim of the Respondent which ought to have been made by the mother-in-law of the Respondent.
11. The Learned Trial Senior Principal Magistrate erred in Law and in fact by cancelling the Title Deed of the Appellant which was being challenged by a 3<sup>rd</sup> Party and not the actual Claimant of the alleged interest.
12. The Learned Trial Senior Principal Magistrate decided the suit against the weight of the evidence.

Therefore the Appellant prays this Honourable Court to allow the Appeal with costs, enter judgement for the Appellant in terms of the prayers that were sought by the Appellant and maintain the dismissal of the Respondent's Defence and Counterclaim with costs to the Appellant.

The Appeal was canvassed by way of written submissions

## **Submissions**

### **Appellant's Submissions**

3. The Appellant contends that he discharged his burden of proof which is on a balance of probabilities as he produced his Title Deed as well as tendered oral evidence to that effect. He avers that he was a member of Katelembo Cooperative Society and the suit land belonged to the said Society. Further, that the Society had a duty to allocate its members and even buyers from the members, land. He argued that the Society had to determine who should own land and did letters to the Land Registrar to prepare



Title Deeds. He reiterated that he had proved he was the registered owner of the parcel of land known as Machakos Town Block 3/80 which he had bought from the original owner before it was surveyed. Further, that the Society vetted its records in the presence of the Appellant and Seller's relatives after which it issued a letter dated the 16<sup>th</sup> December, 2021. He further argued that the Respondent did not prove allegations of fraud against him. He insists that it was wrong for the trial Magistrate to challenge the Rules and Regulations of the Cooperative Society. He reiterates that the Court cancelled the Title Deed without any legal basis. He contends that there was no evidence to prove service of Notice upon him, hence the learned Magistrate erred to award costs to the Respondent for the Counterclaim. To support his arguments, he relied on Section 26(1) of the *Land Registration Act* as well as the following decisions: *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR and *Charles K. Kiarie v The Administrator of the Estate of John Mathare & Others* Nairobi Civil Application No. 12 of 2013.

### The Respondent's Submissions

4. The Respondent in his submissions contend that the Appellant did not have a good title since he failed to demonstrate how he acquired it. He insists that the Appellant proceeded to process the title without notice to him, so as to dangle it. He reiterates that the Court was right in cancelling the Appellant's title. He reaffirms that the trial Magistrate was wrong as she had jurisdiction to handle a claim on adverse possession. He further submits that costs is the discretion of the Court. To support his averments, he relied on the following decisions: *Munyu Maina v Hiran Gathiba Maina* (2013) eKLR; *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR; *Philip Kithaka v Mercy Karimi Nyaga* (2021) eKLR and *Joseph Kiprotich Bon v Tabutany Chepkoech Chirchir* (2021) eKLR.

### Analysis and Determination

5. Upon consideration of the Amended Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal and the rivalling submissions, the only issues for determination which I can decipher are:

Whether the Appellant acquired a proper title to the suit land.

Whether the Appellant proved his case on a balance of probability in the Lower Court.

Whether the Appeal is merited.

6. I wish to provide a brief background of this matter before I make a determination of the issues raised above. The Appellant herein filed a suit at the Machakos Chief Magistrates' Court being CMCC No. 802 of 2013 vide a Plaint dated the 6<sup>th</sup> July, 2013 where he sought the following orders against the Respondent:
  - a. An order by the Court to the Defendant to remove his structures and vacate from the Plaintiff's property.
  - b. An order of permanent injunction to be issued against the Defendant not to trespass or interfere in anyway with the Plaintiff's property.
  - c. General damages for loss of user of the parcel Machakos Town/ Block 3/80, trespass and unlawful disturbance and mesne profits.
  - d. Any other relief that this Court deems necessary to grant.
7. The Respondent filed a Defence including Counter-claim where he sought for the following Orders:
  - a. An order that the title for land Plot No. Machakos Town Block 3/80 which is registered in the Plaintiff's name and the land and its title transferred and registered under his name, and



alternatively the Defendant be declared the owner of Plot No. Machakos Town Block 3/80 by reason of adverse possession.

- b. Costs of the suit and interest.
  - c. Any further relief as this Honourable Court may deem fit and just to grant.
8. The Appellant filed a Reply to Defence and Defence to Counter-claim denying the averments in the Counter-claim and insisting that the suit land belonged to him. Before I make a determination of this Appeal, I will proceed to analyze the evidence as presented in the lower court.
9. PW1 Joseph Mutisya Mongalika who was a Surveyor, confirmed the Appellant had documents for the suit land, however in cross-examination he admitted that the suit land No. 1870 had developments which belong to Mukonzi (Respondent) and it looked like an old home. He did not know when the Respondent put up the houses thereon. He thought Appellant was a member of Katelembo and they showed him his plot 'kwa mlima huko juu' but not Plot No. 1870. He further confirmed that there were problems with allocation at Katelembo and there was a taskforce investigating it. PW2 Nathan Ngili Mwangi who is a director at Katelembo Society said that the Respondent was not a member of the Society but was claiming the land through inheritance from one Karuli Kisio/Kiio who was their member. Further, as per their register, Plot No. 1870 belonged to Mulwa Mweu member No. 71 but is now in the name of Njuguna Mwaura. He confirmed that they certified that Plot No. 1870 belonged to Julius Njuguna Mwaura and did a letter dated the 10<sup>th</sup> July, 2018 to that effect. He further testified that the name of Jackson Mukonza was not in both registers but Karuli Kisio is member No. 2388 and she was awarded Plot No. 1874 which was sold to Phylis Mutua but registered as Peris Mutua. In cross examination he confirmed Mwaura bought Share No. 71 being Plot No. 1870 which shows Mulwa Mweu as member. Further, the Plaintiff's name is not captured in the register as he bought land but not a Share. He confirmed the dispute between the Plaintiff and Defendant arose in 2018 but did not know who was in occupation of the suit land. In re-examination he clarified that the Plaintiff is member No. 1934 and not 1935. PW3 Julius Njuguna Mwaura confirmed that the suit land belonged to him and he has a Title Deed to that effect. He explained that he bought the land from Mulwa who was member No. 71 and produced a Sale Agreement to that effect. He contended that he was member No. 1935 and produced a membership card. He explained that the Society gave him a letter dated the 10<sup>th</sup> July, 2018 to process his title. Further, that when he purchased the suit land, he could not locate it and engaged the Society's Surveyor in 2012 but the said Surveyor found someone developing the land. It was his testimony that they found a lady in the house who told them the plot belonged to her husband Jackson Mukonza who could not produce documents of ownership. He explained that the society told Mukonza his plot was No. 2330. In cross-examination he admitted that he did not have a Sale Agreement with Mulwa but the land was sold to him by his wife and son. He did not know when Mulwa Mweu died and Josiah never showed him any Letters of Administration in respect to his Estate. Further, Josiah's mother never signed the Sale Agreement and he could not recall when he paid the purchase price. He insisted that before he bought the suit land, the owner showed him the said land in 1988 but the next time he went to the disputed land, was in 2011. He further confirmed he found someone in possession of the suit land in 2012. He identified a permanent house he saw in 2012. He stated that it is the Defendant who is in possession of suit land but he has the title. He admitted that as per the register, his name is handwritten while the other names are typed and his identity card number is not indicated therein. He explained that he obtained his title on 16<sup>th</sup> December, 2012 but did not issue a notice to the Defendant to vacate the land. He admitted that he has a member card showing his plot is No. 524 and title No. 1168. Further, that he joined Katelembo Society when people had already been allocated their plots. He was not present when members balloted and Mulwa was given Plot No. 1870. He further confirmed that the Defendant was not present when the title deed was



issued to him and he only reported the Defendant to the Chief after he obtained the title. Further, he never reported the Defendant to the Police for trespass. PW4 Josiah Mulwa confirmed that Plot No. 1870 belonged to his late father but he sold it to the Appellant. Further, he did not procure Letters of Administration in respect to his father's Estate. He admitted that he is the one who balloted for the plot and not his father. From 1988 he could not state if the suit plot was developed or not. He admitted that there was misallocation and double allocation of land in Katelembo culminating in the setting up of a taskforce. DW1 Esther Kavole Kiio confirmed she was a member of Katelembo Society and produced a membership Card and Share Certificate to that effect. She testified that she gave her daughter Ndulu (*Defendant's wife*) the suit land which belonged to her. She further denied knowledge of the Appellant. She denied selling her land to Peris. Further, that she was summoned to the offices of Katelembo where she met Peris and Mwaura and they were all claiming her land. She contended that Mwaura ever notified her when he was processing the title to the land. Further, that Katelembo never determined the owner of the suit land. She reiterated that her daughter and son in law have a permanent home on the suit land.

10. DW2 Peris Mwikali Mutua denied that DW1 sold her land and confirmed she met her for the first time at the Katelembo Society offices. She stated that it is Mwikali Sila who sold her land and not Kavuli Kiio (DW1). Further, that the Defendant is her neighbour, and has put up a house and is tilling the land. She explained that the Plaintiff had not built anywhere on the suit land but she knew his home which was at a different place. She further denied that her name is Phyllis Mutua. DW3 James Masai Kaswii confirmed the Plaintiff and Defendant's land were distinct and far apart. He denied that the Plaintiff was a member of Katelembo Society. He explained that he found the Defendant on the suit land in 1982 – 1983 and there was an iron sheet house including barbed wire fence thereon. DW4 confirmed he knew the Plaintiff since 1976. He contended that the Plaintiff had acquired his title by way of fraud. He explained that his mother-in-law (DW1) gave him the suit land in 1989 and he developed it. Further, that he learnt of the Plaintiff's allegations in 2012. He denied knowing Mutua Mwelu and insisted that he had no power to sell the suit land. He stated that he had cultivated the suit land, planted one hundred (100) eucalyptus trees and has a permanent house thereon. Further, that he has resided on the suit land for the past thirty one (31) years. In cross examination, he insisted that there were alterations in the Katelembo Society register.
11. From the analysis of the evidence I have highlighted above the main issue in contention is whether the Appellant acquired a proper title to the suit land. The Appellant claims he acquired a proper title to the suit land which fact is disputed by the Respondent who has been in occupation of the land for thirty one (31) years. The trial Magistrate after analyzing the evidence presented, proceeded to cancel the Appellant's title on the grounds that it was obtained fraudulently through misrepresentation and dismissed the suit with costs.
12. On validity of a title, Section 26(1) of the *Land Registration Act* stipulates thus:

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

  - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
13. In the case of *Munyu Maina v Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
14. See the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR.
15. In applying the legal provisions I have cited above as well as principles enunciated in the quoted cases to the circumstances at hand, I note the Appellant admitted that he proceeded to process the title to the suit land when the Respondent was in possession and even had permanent structures thereon as at 2012. Further, the Appellant despite having a Sale Agreement could not recall the amount of purchase price he paid. The Appellant’s witnesses admitted that there had been confusion in the Society records and it emerged in evidence that there were actually amendments to the Society’s land records which could not be explained. The Appellant even admitted that his name had been handwritten in the register while the others were typed. DW1 who gave the Respondent the suit land denied selling her land to DW2 and even produced documents to prove she owned the land that she had given to the Respondent and her daughter. DW2 denied purchasing the land from DW1 while DW3 admitted that the Appellant and Respondent’s land were distinct. It also emerged in evidence that the person who sold the land to the Appellant was not its owner but the real owner had died. Further, the said vendor proceeded to insert his photograph to documents yet he had not procured Letters of Administration Intestate in respect to his father’s Estate to enable him sell the suit land. The witnesses from the Katelembo Society did not provide proper explanation why they gave the Appellant a letter dated 10<sup>th</sup> July, 2018 to process title for the suit land which was already occupied by the Respondent. Further, they were aware Esther Kiio had denied selling land to Phyllis Mutua but they still proceeded to give the Appellant the said letter to process his title.
16. Based on the evidence before me, I find that the Appellant did not acquire a proper title to the suit land since the root of the said title was challenged. Further, he was aware there was an encumbrance thereon which was already an overriding interest on the land; he did not notify the occupant of the suit land but still proceeded to process the title. To my mind, there was indeed an element of fraud and misrepresentation when the Appellant was processing the land and this was subject to challenge. From the said evidence, I find that the trial Magistrate did not err in law and fact by holding that the Appellant had not discharged his burden of proof and actually obtained the title through fraud and misrepresentation. To my mind, I do not find that the trial Magistrate erred in challenging the rules and regulations that were followed by Katelembo Farming and Cooperative Society in order to process the Title Deeds, as she had to analyze the root of the title which was in dispute. I do not see any bias by the trial Magistrate on the award of costs to the Respondent as this was at her discretion. I however find that the trial Magistrate after dismissing the Appellant’s suit as well as failing to make a finding on the Counter-claim should have given direction on the ownership of the suit land.
17. In the circumstances, I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondent.
19. I will proceed to make a finding that the suit land indeed belongs to the Respondent.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19<sup>TH</sup> DAY OF  
SEPTEMBER, 2023

CHRISTINE OCHIENG

JUDGE

