



REPUBLIC OF KENYA



**Mutkaa v Keitany (Environment and Land Appeal 6 of 2022)
[2023] KEELC 20697 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 6 OF 2022**

**L WAITHAKA, J
SEPTEMBER 18, 2023**

BETWEEN

THOMAS LIMO MUTKAA APPELLANT

AND

ALBINA KEITANY RESPONDENT

*(Being an Appeal from the Judgment of Hon. C. A. Kutwa SPM
Iten delivered on 2nd June, 2021 in CMCC number 6 of 2020)*

JUDGMENT

1. By a Complaint dated 21st February 2020, the plaintiff (now appellant) instituted a suit in the lower court to wit Iten CMC's Land Case No.6 of 2020 seeking judgment against the defendant (now respondent) for a permanent injunction to restrain the defendant from interfering with his proprietorship of the parcel of land known as Elgeyo/Marakwet/Kapterik/93 (the suit property); a declaration that he (the plaintiff) is entitled to exclusive and unimpeded right of possession and occupation of the suit property; a declaration that the defendant is a trespasser to the suit property; an order of vacant possession of the suit property; general damages for trespass; exemplary and/or punitive damages; costs of the suit and interest; any other or further relief that the court may deem appropriate.
2. The suit was premised on the ground that at all times material to the suit, the plaintiff was lawfully and rightfully in possession of the suit property; that sometime in 2019, the defendant without any legal right took possession of the suit property and constructed permanent houses therein thereby depriving him of use and enjoyment of the suit property and occasioning him loss and prejudice.
3. Lamenting that attempts to get the defendant to vacate the suit property were futile, the plaintiff urged the court to grant him the reliefs listed herein above.



4. The defendant filed a statement of Defence and Counterclaim inter alia denying the plaintiff's contention that he is the absolute owner of the suit property and that she is a trespasser in the suit property.
5. In the Counterclaim, the defendant pleaded that she is a bona fide purchaser of a portion of the suit property from Nathaniel Kibet Chepkener who had purchased it from the registered proprietor of the suit property one Catherine Jemutai Chemisto, (deceased).
6. Terming her possession of the portion of the suit property she occupies lawful, the defendant urged the court to dismiss the plaintiff's suit and to enter judgment in her favour as sought in the Counterclaim; recovery of 0.18ha of land to be excised from the suit property.
7. When the case came up for hearing, the plaintiff relied on his statement dated 21st February, 2020 after it was adopted as his evidence in chief. He also relied on the documents listed in his list of documents dated 21st February, 2020 after they were admitted in evidence as Pexbt 1 to 6. These are:- a copy of title deed issued on 1st August 2019; copy of official search dated 3rd February, 2020 (shows him and another, Julius Kibiengo Kiptanui as the proprietors of the suit property); the map sheet for the area and a copy of certificate of confirmation of grant issued on 20th July, 2019 in Eldoret High Court Succession Cause No.143 of 2009.
8. In cross examination, the plaintiff informed the court that he knows Catherine Chemisto; that she had been living in the land; that the agreement dated 20th February, 2001 is between Nathaniel and Catherine over the suit property; that there are people living in the suit property who he does not know; that the defendant's land is fenced and his father and Chemisto had no land dispute and he took over the land after his father passed on in 2003.
9. The defendant, who testified as D.W.1, relied on her statement dated 14th May, 2020 after it was adopted as her evidence in chief.
10. She informed the court that she bought the suit property from Nathaniel. She produced the sale agreement dated 20th February, 2001 as Dexbt 1; the sale agreement dated 7th June 1997, given to her by Nathaniel, as Dexbt 2; Nathaniel's ID Card as Dexbt 3; title deed in respect of the suit property as Dexbt 4. She also produced the map she bought from the lands office as Dexbt 5 and the apology letters written by the plaintiff to Nathaniel as Dexbt 6(a) and (b).
11. She informed the court that she entered the suit property in 2001; that she has developed it and that she did not see the plaintiff's father on the suit property.
12. In cross examination, she maintained that she bought the suit property from Nathaniel and that Nathaniel gave her the title deed.
13. DW2, Nathaniel Kibet Chepkener, relied on his statement recorded on 6th July, 2020 after it was adopted as his evidence in chief. He admitted that he gave the defendant the sale agreement produced as Dexbt 1(b). He bought the suit property from Catherine Chemisto. He also admitted that he gave the defendant (D.W.1) the documents she produced in evidence.
14. In cross examination, he stated that he has never been charged for fraud and maintained that he signed an agreement with Chemisto. The agreement between him and Catherine was done in 1996. They never went to the land control board. He leased the land to the defendant in 1998.
15. In re examination, he stated that the two title deeds issued in respect of the suit property are signed and have seals.



16. D.W.3, Anthony Koech, relied on his statement dated 4th May, 2020 after it was admitted as his evidence in chief.
17. He informed the court that the suit property belongs to his late mother. It used to belong to his grandfather.
18. His mother sold a portion of it to Nathaniel. They neither did a search nor a transfer. They did not go to the Land Control Board.
19. His mother sold the land in 1996.
20. He confirmed the testimony of D.W.2 to the effect that the defendant used to cultivate the land.
21. He also informed the court that the plaintiff has land next to the defendant's land and that the defendant has fenced his land.
22. In re examination, he stated that he was present when his mother sold the land to Nathaniel. He witnessed the agreement.
23. His mother has a title to the suit property.
24. D.W.4, Wilson Kipkemoi, relied on his statement dated 27th August, 2020 after it was adopted as his evidence in chief. He witnessed the sale agreement dated 7th June, 1996.
25. He stated that Chemisto was buried on the upper part of the suit property.
26. D.W.5, Phillip Kibii Chebet, relied on his statement dated 17th August, 2020 after it was adopted as his evidence in chief.
27. He stated that the entire parcel of the land belonged to his brother, Kigen Changwony (deceased).
28. He confirmed the testimony of D.W.4 to the effect that Chemisto was buried on the upper side of the suit property.
29. He further informed the court that the defendant constructed on the suit property in 2001.
30. D.W.6, Ishmael Kandie Kite, relied on his statement dated 17th August 2020 after it was adopted as his evidence in chief.
31. He informed the court that the land belonged to his neighbour, Changwony Kigen and that part of it was sold to Nathaniel. The defendant bought the land from Nathaniel.
32. Upon considering the cases urged by the parties, the Learned Trial Magistrate inter alia stated/held:-

“I find that there could have been double registration of the suit property and the blame would therefore lay squarely on the land registrar.....from the plaintiff's annexures, it is evident that the root of title, especially how it was acquired by his late father cannot be traced. Further, no evidence was tendered by the plaintiff as to how the issuance of the 1st title to his father came to be. Secondly the suit property being an agricultural land governed by the provisions of the *Land Control Act*, there was no evidence that the plaintiff's late father appeared before the land control board for consent to transfer the same as required under Section 6 and 7 of the *Land Control Act*, Cap 302 Laws of Kenya. The evidence shows that at the time, the late Catherine Chemisto was still in possession of the original title. Needless to say that whereas the plaintiff's late father obtained his certificate of title on 28th October



1996, the late Catherine Chemisto was registered as proprietor of the suit property on 15th May 1996.

It is trite law that when there are two competing titles, the first in time will prevail....I find that the late Catherine Chemisto's title was the first in time and as equity teaches in its maxim; "when two equities are equal, the first in time prevails", then the late Catherine's title was first in time and should prevail there having been no evidence called by the plaintiff to challenge the same. No evidence was called to confirm how the plaintiff's late father's title deed came into being and whether the title deed held by the plaintiff as a result of succession proceedings was genuine or not....

Balancing the two competing titles, it is my view that the plaintiff does not hold good title to the suit property. The title of the plaintiff is in my view, and in the absence of evidence to rebut the same, could only have been obtained either by fraud or mistake of the land registry or both. ...

On 20th January 2021 the honourable court visited the locus in quo. On the ground the plaintiff was only interested in the portion belonging to the defendant. However, from the evidence on record and information gathered at the scene, the suit property is 0.60 ha and has been sold to the six 6 individuals. If indeed the defendant's portion measuring 0.18ha belongs to the plaintiff why get title for entire parcel measuring 0.6ha. This clearly shows that the plaintiff was out to grab the entire parcel from the innocent purchasers by conniving with the land registrar....

In the instant case, any cause of action as in the present case against the registered proprietor of Elgeyo/Marakwet/93 or any other property survived against her (deceased). The only person who can be sued or sue in respect of the said property is her legal representative.

The defendant herein is not the legal representative of the estate of the deceased....the plaintiff is seeking several declarations in respect of the suit property which is in the deceased name. The only person who can be sued for that purpose is the legal representative of the deceased. It does not help to merely say the defendant is sued in his individual capacity and that the suit is not against the estate of the deceased person. The fact remains that the bone of contention is the property which is registered in the deceased's name. That property can only be defended by a legal representative of the deceased. In this regard, I find that the defendant is not a legal representative of the late Catherine Chemisto and cannot therefore be sued.

That said and done, I hold that the plaintiff has not proved his case on a balance of probabilities and is not entitled to the prayers sought in the plaint. Consequently, I hereby dismiss the plaintiff's suit and allow the counter-claim in terms of paragraph 17 with costs.

I do issue an order directing the land registrar to rectify its register and to nullify the plaintiff's registration in respect of that entire parcel known as E/Marakwet/93."

33. Dissatisfied with the judgment of the Learned Trial Magistrate, the plaintiff appealed to this court on 15 grounds which can be reduced to one broad ground namely, the Learned Trial Magistrate erred by dismissing his case and allowing the defendant's counterclaim.
34. Pursuant to directions given on 21st May 2023, the appeal was disposed off by way of written submissions.



Analysis and Determination

35. In exercise of the duty vested in this court as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123; *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
36. As pointed out herein above, the appellant's suit against the respondent was premised on the grounds that he was lawful and rightful owner of the suit property; that the respondent had without any legal right taken possession of the suit property and constructed permanent houses therein, thereby depriving him of use and enjoyment of the suit property and occasioning him loss and prejudice.
37. To prove his case, the appellant produced evidence showing that Julius Kibiengo Kiptanui and he are the registered proprietors of the suit property; that they got registered as proprietors of the suit property pursuant to succession proceedings of the estate of his father.
38. As pointed out herein above, the respondent had in her statement of Defence and Counterclaim, denied the appellant's contention that she is a trespasser in the suit property and pleaded that she is a bona fide purchaser of a portion of the suit property from Nathaniel Kibet Chepkener who had purchased it from the registered proprietor of the suit property one Catherine Jemutai Chemisto, deceased.
39. During hearing, the respondent produced evidence, oral and documentary, showing that her use and occupation of the suit property was pursuant to a sale agreement entered into between herself and Nathaniel Kibet Chepkener who had in turn bought a portion of the suit property from Catherine Jemutai Chemisto.
40. Contrary to the appellant case to the effect that the respondent trespassed into the suit property in 2019, the respondent produced evidence showing that she was in use and occupation of the suit property since 1998 and that she was not the only person who had bought portions of the suit property from Catherine Chemisto.
41. During hearing, it emerged that both Catherine Jemutai Chemisto and the appellant's father, had titles to the suit property. Catherine Chemisto's title was obtained on 15th May 1996, while that of the appellant's father was obtained on 28th October 1996.
42. The title issued to Catherine Chemisto in respect of the suit property was produced in evidence as Dexbt 4, while the one issued to Julius Kibiengo Kiptanui and the appellant, after succeeding the appellant's father was produced as Pexbt 1.
43. Clearly, the title issued to Catherine Chemisto was the first in time, having been issued before the one issued to the appellant's father.
44. As was rightly observed by the Learned Trial Magistrate, no explanation was offered by the appellant of the circumstances surrounding issuance of a second title deed to his father over the suit property.
45. Whilst in his submissions the appellant claims that the title produced in evidence by the respondent was fake, he never adduced any evidence capable of proving that the said title was fake. The mere fact that the land registrar had written a letter stating that the appellant and another were the registered



proprietors of the suit property or failure by the respondent to produce the green card in respect of the suit property does not make the title deed that was produced by the respondent in evidence fake.

46. In the circumstances of this case, where it was proved that the respondent was in use and occupation of the suit property way before the appellant's pleaded time of trespass into it and that there were other people in use and occupation of the suit property not with permission of the appellant, I am not persuaded that the appellant has made up a case for interference with the Learned Trial Magistrate's determination that the case presented before her was a case of double registration of land and that the title issued to Catherine Chemisto being the first in time prevails over the one issued to the appellant's father.
47. There being evidence that there are two title deeds issued in respect of the suit property, one to Catherine Chemisto and another to the appellant's father, the appellant having failed to join the Catherine Chemisto and/or the legal representative of her estate to defend the alleged/impleaded fraud or irregularity in registration of the title deed issued in her name, a question of law arises from the suit to wit whether the plaintiff can be allowed to impugn or challenge the title issued to Catherine Chemisto without her involvement or involvement of the legal representative of her estate. My view of that question is that he cannot. This is so because if the plaintiff is allowed to impugn or challenge that title without participation of the title holder and/or her legal representative that would amount to denying Catherine and/or her estate an opportunity to be heard on a matter that may lead to a decision adverse to her and/or her estate, something the law does not allow.
48. In view of the foregoing, I find and hold that the Learned Trial Magistrate did not err in determining that the suit property could only be defended by a legal representative of the deceased and not the defendant. The issue to be determined in the suit touched on rights tied to the suit property. Those issues included but were not limited to whether Catherine had good title to the suit property which she could pass to the defendant and/or the defendant's predecessor in entitlement to use and possession of the suit property.
49. There being evidence that the title held by Catherine and/or her estate was the first to be registered and the defendant having failed to sue Catherine and/or the legal representative of her estate comprized in the suit property, I do find that the decision of the Learned Trial Magistrate to the effect that the title of Catherine being the first to be issued, prevails over the one issued to the appellant since it was the first one to be issued to be the right position of law concerning the titles in question.
50. I think I have said enough to demonstrate that the appeal lacks merits and that its for dismissal. Consequently, I dismiss it with costs to the respondent.

RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 18TH DAY OF SEPTEMBER, 2023.

L. N. WAITHAKA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement read virtually in the presence of:-

Mr. Kipsamo for the appellant



Mr. Cheptarus for the respondent

Christine – Court Assistant

