



**Mberia v Manyara & another (Environment and Land Appeal  
E001 of 2022) [2023] KEELC 21266 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21266 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E001 OF 2022  
CK NZILI, J  
NOVEMBER 1, 2023**

**BETWEEN**

**JOSEPH BUNDI MBERIA ..... APPELLANT**

**AND**

**REBECCA KENDI MANYARA ..... 1<sup>ST</sup> RESPONDENT**

**SARAH KINYA NGITUYU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellant, who was the defendant at the lower court, has appealed to this court by a memorandum of appeal dated 3.1.2022 because the trial court:
  - i. Failed to consider his right of ownership of Plot No. A17 Kianjai market.
  - ii. Failed to consider the evidence he had tendered on ownership and the standard of proof.
  - iii. Failed to enter liability against the interested party who, despite service of summons, made no response and or appeared in court.
  - iv. Failed to consider the stay of execution of his judgment but instead issued eviction orders.
  - v. Considered irrelevant factors and ignored the status of Meru Petition No. 1 of 2020 Joseph Bundi vs the Country Government of Meru.
2. As a first appellate stage, this court is duty bound to re-hear, rehearse, and re-assess the lower court record and come up with independent findings on facts and law while giving credence to the trial court, which had the opportunity to see and hear the witnesses testify first hand. See *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123.



3. At the lower court, the respondents approached the court with a plaint dated 9.4.2021. They claimed to be bonafide owners of Plot No. 116 Kianjai market measuring 0.216 ha, acquired from the defunct County Council of Nyambene, whose successor was the interested party, the County Government of Meru.
4. It was averred that the appellant had unjustifiably or without the color of right trespassed into the suit land and caused them to suffer entrepreneurial despair in their downward spiral owing to the loss of user. The respondents had prayed for an order compelling the appellant to remove his semi-permanent structure unlawfully erected on the land, a permanent injunction restraining the appellant, his agents, servants, and employees from entering into and or in any way whatsoever interfering with their use, possession, utility, development, and enjoyment of the plot and mesne profits. The plaint was accompanied by a list of documents, witnesses' statements, issues, and a case summary dated 9.4.2021.
5. In his defense, the appellant denied all the contents of the plaint. He averred the existence of Petition No. 1 of 2020 between him and the interested party therein over the subject matter pending at the High Court Meru. The defense was accompanied by a witness statement and a list of documents dated 10.5.2021.
6. Through a notice of motion dated 10.5.2021, the appellant sought to stay the suit until the petition above could be heard and determined. It is not clear from the record if the application was prosecuted. The interested party entered an appearance by a memorandum of appearance dated 14.6.2021. The court has not, from the record, come across any defense filed by the appellant. By a reply to the defense dated 17.6.2021, the respondent reiterated the contents of the plaint and urged the court to strike out the defense.
7. Parties appeared before the court for a pre-trial conference on 10.8.2021 and confirmed the suit was ready for hearing on 21.9.2021. At the trial, the 1<sup>st</sup> respondent testified as PW 1 on her behalf and that of the 2<sup>nd</sup> respondent and adopted her witness statement dated 9.4.2021 as her evidence in chief. Her evidence was that she was a legal representative of the estate of Julius Ngituyu M'Muchiri according to letters of grant issued in High Court of Kenya Succession Case No. 369 of 2005. Her evidence was that her deceased father had been issued a provisional allotment letter for Plot No. 166 Kianjai market, by the defunct County Council of Nyambene. She told the court that the estate had duly paid rates and rents for the plot over the years, which the defendants illegally trespassed into the land and have remained there despite notices to vacate. The 1<sup>st</sup> respondent produced a copy of the certificate of confirmation of grant as P. Exh No. (1), provisional allotment letter as P. Exh No. (2), revenue receipts as P. Exh No. (3) and a demand letter as P. Exh No. (4). She urged the court to grant orders of eviction.
8. In cross-examination, PW 1 told the court that other than P. Exh No. (2), she had no other ownership documents, like the minutes for allocation from the interested party. Though not listed in P. Exh no. (1), she believed the plot belonged to her late father. She denied that the appellant had any ownership documents regarding the plot. Further, PW 1 confirmed that the defendant had won a case against the interested party thus land surveyors visited the land and established that the appellant was the one in occupation. PW 1 stated that she had been paying land rates, unlike the appellant, whose receipts for payment of business permits had no parcel number.
9. The appellant testified as DW 1. Even though the record indicates that the appellant adopted his witness statement, the court has not found any bearing his name. He nevertheless sought the petition and his witness statement be adopted as his testimony in chief. The appellant told the court that he did not know the respondents. He said that his father used to live on the land and was paying rates. The appellant denied receiving any notice to vacate the suit land from the respondents. In support of



his defense, he produced application number 4137 to Nyambene County Council, receipts number 404225, minutes extract dated 16.5.2005, a bundle of business licenses, minutes extract of a meeting held on 3.9.1992, and the original map for Kianjai market stall, all marked as D. Exh No's. 1-8, respectively.

10. In cross-examination, DW 1 told the court that Stall No. 116 had not been located on the ground, and the receipts he produced before the court concerned a shop he was operating. His evidence was that the initial allotment letter was for two years, which had since expired. Concerning land rates, DW 1 told the court he had not been paying for them since no demand for the land rates had been issued to him by the interested party. He clarified that he had sued the interested party in the petition before the High Court.
11. Daniel Limbere Lala testified as DW 2 and adopted his witness statement filed on 21.10.2021 as his evidence in chief. As a retired chief who served between 1978 and 2007, he told the court that the appellant was allocated the plot in 1991 and followed due process in acquiring the market stall as per the exhibits produced. In cross-examination, DW 2 clarified that he could not tell if the appellant possessed any ownership documents but was confident that he was shown the plot on the ground by both the then-area councilor and the county surveyor.
12. Francis Muchiri Ithangatha testified as DW 3 and adopted his witness statement filed on 10.5.2021 as his evidence in chief. As a former councilor of Kianjai ward between 1988 – 1993 and later on between 2002 – 2007, his evidence was that Kianjai Market had been planned by the defunct Meru County council Town Physical Planner, consisting of market stalls, barter market, and cattle shed area, veterinary area and plots as per a copy of the map produced. He told the court that one older man named Zakayo Mberia used to occupy the plot where he had erected a semi-permanent building. He said that through his son, the appellant, he bought forms and made an application to the defunct County Council of Nyambene, paving the way for authorization, permission, and licenses to develop and carry out business on the plot only for issues to arise after 2012, when some people came up with different plot numbers.
13. In cross-examination, DW 3 testified that the initial application was for market stalls, while others were for market plots. With this evidence, the trial court allowed the respondents' claim, which decision is now appealed to this court.
14. Following directions issued on 26.7.2023, parties agreed to canvass the appeal through written submissions. By written submissions dated 1.8.2023, the appellant stated that the respondents violated his rights over Plot No. A17 by unlawfully changing the map, issuing a notice of eviction, and giving out the plots to new occupants whose decisions had been made without fair hearing or compensation.
15. The appellant submitted that the exhibits produced showed that he was a bonafide owner of the plot, which exhibits were corroborated by the testimony of DW 2 and DW 3. Additionally, the appellant submitted that the respondents had not challenged his evidence. Therefore, relying on Article 40 of *the Constitution*, the appellant submitted that his appeal had merits since the respondents had no letters of a grant, no succession cause for the deceased estate had taken place, and the respondents owned no land in Kianjai market.
16. The appellant submitted that the respondents failed to produce any land documents for 1996 in terms of a Kenya gazette on the balloting, the fulfillment of the conditions, or the allotment letter as a sign that they had followed the correct procedure in acquiring the plot. Reliance was placed on *Mukundi Wairi vs Dorcas Wanjiku (2014) eKLR*.



17. The appellant submitted that the application for a stay of proceedings dated 14.12.2021 was never heard; the date was not communicated, and therefore, he had suffered over Kenya shillings One Million Five Hundred Fifty Thousand, out of the demolition undertaken while a hearing was stated for 28.12.2021. Lastly, the appellant submitted that he should have been given the 1<sup>st</sup> priority in the allocation, but no notice was given for any breach of the law.
18. The court has carefully reviewed the lower court record, the memorandum of appeal, the written submissions, and the law. The issues commending themselves for my determination are:
- i. If the appellant pleaded that he was the owner of Plot No. a17 Kianjai market.
  - ii. If the appellant pleaded and proved ownership of Plot No. 17 Kianjai market as distinct and separate from Plot No. 116 Kianjai market claimed by the respondents.
  - iii. If the appellant had pleaded and established liability against the interested party.
  - iv. If the appellant argued the application for stay of proceedings.
  - v. If the court failed to consider the status of Meru Petition No. 1 of 2020.
  - vi. If the respondent's claim had merit.
19. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from what parties have set out in those pleadings. In the suit, the respondents had claimed for Plot No. 116 Kianjai Market, measuring approximately 0.0216 ha, was allegedly illegally occupied by the appellant despite a notice to vacate and hand over vacant possession. Accompanying the plaint was a confirmed grant of letters of administration, a provisional letter of allotment dated 6.3.2012, rates payments receipts, and a demand letter dated 15.2.2021.
20. Through a statement of defense dated 10.5.2021, the appellant denied all the contents of the plaint by the respondents, save to add that there was a pending petition no. 1 of 2020 at Meru High Court between him and the interested party. There were no specific pleadings in the appellant's defense that he was the registered owner of market stall no. A17, based on minutes No. TP & M 16/15 A (a), 17 and Plot No. B 49 vide minutes number 20/92 (C), (B) 49, which was in the same position or locality as Plot No. 116, claimed by the respondents. Other than the witness statements by DW 2 & DW 3, who mentioned plot no. A17 nowhere did the appellant in his primary pleading allude to having lived, stayed, occupied, developed, and or owned Plot No. 116 allegedly, illegally or irregularly allocated to the respondents, instead of him by the interested party in the lower court suit.
21. By an application dated 10.5.2021, the appellant had sought to stay the proceedings of the lower court suit until the petition alluded to above was heard and determined. In the supporting affidavit sworn on 10.5.2021, the appellant had attached copies of the petition as annexure marked JBM 1. The petition did not mention Plot No. 116 Kianjai Market. The respondents were not parties to the petition. The appellant never took a date for the disposal of the said application. When the pre-trial directions and case conference were done, the appellant did not raise the question of a pending high court petition as a preliminary issue to be determined before the suit could commence hearing. Similarly, at the hearing of his defense, the appellant did not establish the relationship between the two suits and plots and perhaps give the judgment before the trial court to establish the nexus between the respondents' plot and plot No. A17. The parties and their advocates should assist the court in reaching a just and expeditious disposal of suits. It is not the court's work to conduct inquiries and determine issues not before it. The



- appellant should have pleaded all the facts and brought all material to the trial court to support his defense. There was nothing by way of pleadings before the trial court, and before this court, as a proof of the location of Plot No. A17 and Plot No. 116 Kianjai market, as overlapping each other.
22. Similarly, there is nothing by way of pleadings showing that what the High Court was determining in Petition 1 of 2020, was the same subject matter as the instant suit or appeal. Other than referring to Petition No. 1 of 2020, the appellant did not make a specific claim or seek relief against the County Government of Meru, a party in the lower court suit. Even at the defense hearing, the appellant did not make any specific allegations regarding the allocation, approval of development plans, and the licensing of his business over Plot No. 116 as if it was also Plot No. A17 by the interested party as a justification why he occupied the plot that the respondents alleged to be theirs. Additionally, the appellant had not pleaded that he was the first allottee in time.
  23. The appellant did not plead that the re-allocation of Plot No. 116 Kianjai market to the respondents was illegal, unprocedural, and or unlawful. The appellant failed to bring all these issues and tender evidence before the trial court. Consequently, I find grounds number 1, 2, 3, 5, and 8 of the memorandum of appeal dated 3.1.2022 lacking merits.
  24. On whether the respondents had proved their claim to the required standard, it is trite law that he who avers must prove through tangible evidence and to the required standard. Trespass upon private property is defined under Section 3 (1) (2) of the *Trespass Act* (Cap 294) as entering, remaining, erecting a structure, cultivating, tilling, grazing, or permitting livestock without reasonable excuse on private land without the consent of the occupier thereof.
  25. The respondents' claim was based on an alleged trespass by the appellant on plot 116 Kianjai Market. The respondents produced without objection, documentary proof of ownership from the allotting authority, the predecessors to the interested party, and acknowledgments of rates payments from the interested party. The appellant never contested the said exhibits as forgeries or illegally obtained or based on fraud, misrepresentation, or corruptly obtained as required under Sections 24, 25, 26, and 28 of the *Land Registration Act* as read together with Article 40 (6) of *the Constitution*.
  26. In *KPLC vs Eunice Ringera & 2 others* (Civil Appeal No. E247 & E248 of (2020) consolidated) (20220 KECA 104 (KLR) 4<sup>th</sup> February 2022 (Judgment), the court observed that loss of user, loss of opportunity to deal in and develop the suit land, and resultant denial and deprivation of usage of the suit land were some of the indicators to consider on awarding general damages for trespass. The court also said trespass could also be a continuing one from day to day.
  27. In this appeal, the appellant, as indicated above, failed to justify his alleged occupation of the suit land. The exhibits he used to support his defense were unrelated to the suit land. They lacked fundamental features such as the plot number. He had no allocation letter. He lacked evidence that he was a ratepayer for the suit land. The appellant failed to call officers from the allotting authority to establish that what he occupied on the ground was not what the respondents had demanded. DW 2 and DW 3 were not workers or officers from the allocating authority. D. Exh No's 1-8 were not certified, verified, or authenticated by the issuing authorities.
  28. In *Republic vs City Council of Nairobi & 3 others* (2014) eKLR, the court observed that once an allotment letter was issued and conditions set met, the land was no longer available for allotment unless the letter was challenged by the allotting authority or was acquired illegally, fraudulently or through misrepresentation. In *Benja Properties Ltd vs Syedna Mohamed Sahed and others* (2015) eKLR, the court held that once land becomes private property, it is no longer unalienated government land. In the appeal before the court, if there was double allocation, the onus was on the appellant to prove it through authentic documents and evidence from the County Government of Meru. In *Habiba*



Jattani Guyo vs Hassan Galgalo & another (2021) eKLR, this court cited with approval M’ikiara M’Rinkanya & another vs Gilbert Kabeere M’Mbijiwe (1988-1990) 1 KAR 196 that where there was double allocation, the first allotment prevails. The appellant failed to show any letter of allotment for the specific plot claimed by the respondents. It was not enough to waive the defense exhibits without clearly showing the root of the appellant’s title, if any. No specific pleading existed on the respondents’ double or illegal plot acquisition. The appellant also failed to call the county land surveyor or a physical planner to place his plot in the same locality as that claimed by the respondents. See David Were Wafula vs Titus Kapsigei (2019) eKLR and Ramadhan Mashua Mavumba vs George Kamau (2021) eKLR.

29. On ground number 6 of the memorandum of appeal, no appeal was filed against any post-judgment applications handled by the trial court before this court. The court finds no merits on this ground. Lastly, as to ground number 7, the lower court’s record shows that the trial court considered all relevant issues, including the pleaded facts, evidence, applicable law, and arrived at a correct decision. Consequently, I find no merits in this appeal. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

**In presence of**

C.A Kananu/Mukami

Appellant

Nyenyire for the appellant

Ngumato for Otineo C for the respondent

**HON. CK NZILI**

**ELC JUDGE**

