



REPUBLIC OF KENYA



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**Nyateko v Okech (Environment and Land Appeal E036 of 2022)
[2023] KEELC 21392 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E036 OF 2022
AY KOROSS, J
NOVEMBER 9, 2023**

BETWEEN

JUMA NYATEKO APPELLANT

AND

FREDRICK OMONDI OKECH RESPONDENT

*(Being an Appeal from the judgement of PM Hon. J Ong'ondo
delivered on 25/04/2019 in Siaya ELC Case Number 142 of 2018)*

JUDGMENT

Background

1. In the trial court, the appellant was the plaintiff and the respondent the defendant. This appeal impugns the appreciation of facts, evidence and law by the trial court in a dispute on land parcel no. East Alego/Nyajuok/2634 (suit property).
2. In a plaint dated 23/04/2018, the appellant sued the respondent for trespass and claimed he was the bona fide registered proprietor of the suit property. He alleged in 2018, the respondent illegally encroached on the suit property, put up dwellings and started living on the suit property.
3. He prayed for the court to compel the respondent to remove all structures he had erected on the suit property and for him to vacate the suit property. He also sought orders for permanent injunction, general damages, costs and interests.
4. On 29/05/2018, the firm of Ko'winoh & Company Advocates entered appearance for the respondent but did not file any defence. A request for judgment against the respondent for failure to file a defence was filed on 25/05/2018, entry of judgment dated 11/06/2018 was issued and the suit thereafter proceeded for formal proof.



5. The appellant testified alone. After the suit had been reserved for judgment, the trial court on 28/08/2019 ordered the appellant and Ko'winoh & Company Advocates to furnish it with certain documents. It appears two additional documents were remitted to court by the appellant; an agreement for sale and greencard.
6. Upon considering the agreement for sale, the trial court was of the view it was suspect and found the appellant had not proved he purchased the suit property or that its consideration had been fully settled. It found the appellant had not proved his case and dismissed it with costs.
7. Aggrieved by the decision of the trial court, the appellant through Messrs. Wakla & Company Advocates came to this court by way of appeal. His counsel abandoned some of the grounds and condensed others into one:-
 - a. The learned trial magistrate erred in finding that there was a discrepancy between the sizing of the purchased portion and that of the registered portion and finding the appellant did not prove payment of the balance of purchase price.
8. The appellant prayed for the impugned judgment and subsequent orders to be set aside and be substituted with judgment in his favour as sought in the plaint. He sought for costs of the trial court suit and of the appeal. In opposition, the respondent filed a replying affidavit he deposed on 17/01/2023.
9. The appeal was disposed of by written submissions. The appellant's counsel, Mr. Otieno filed his written submissions dated 16/03/2023 while the respondent, who was acting in person, filed his dated 18/05/2023.

Appellant's submissions

10. On the consolidated ground, counsel submitted the trial court misdirected itself in finding the non-payment of the balance of the purchase price was proof the appellant did not prove his case. Counsel submitted this finding ran afoul with Section 27 (2) of the [Land Registration Act](#) which provided as follows: -

“When registered, such a transfer has the same effect as a transfer for valuable consideration.”
11. Counsel submitted the protection of the appellant's title document which was produced before the trial court was provided for by Section 24 (a) of the same Act which vested the appellant with all rights, privileges and appurtenants thereto.
12. On the finding of discrepancy of sizes, counsel submitted by the provision of Section 26 of the [Land Registration Act](#), the appellant's title documents could only be challenged if it had been acquired by means of fraud, misrepresentation, illegality, unprocedurally or through a corrupt scheme. Further, the title deed and greencard which were produced before the trial court, were prima facie prove the appellant owned the suit property. To buttress his arguments on Sections 24, 25 and 26 of the [Land Registration Act](#), counsel cited several cases including Ahmed Ibrahim Suleiman & another vs. Noor Khamisi Surur [2013] eKLR.
13. Counsel submitted that considering the applicable law and bearing in mind the appellant's evidence was uncontroverted, the trial court did not address the claim of trespass but digressed into questioning the validity of the agreement for sale. Counsel relied on Kipchirchir Kitur vs. David Kimut & another [2006] eKLR where the court held that a registered owner's land could not be interfered with by unlawful occupation.



14. Regarding damages, counsel submitted that the trial court failed to consider the appellant's claim for damages and in relying on *Lamet Leiyagu vs. Attorney General* [2018] eKLR, urged this court to find the appellant had suffered loss and damages and an assessment of Ksh. 1,000,000/- should suffice.

Respondent's submissions

15. He identified 6 issues that arose from the appeal. On the 1st issue of the trial court's findings on the payment of the balance of the purchase price and size variation, the respondent concurred with the trial court's findings and submitted the appellant did not follow due legal process towards acquisition of the suit property.
16. On the 2nd issue of whether the court had power to relook at the respondent's defence and evidence. It was the respondent's submission that under Section 78 (1) and (2) of the *Civil Procedure Act*, an appellate court had the power to frame issues, refer them for trial, take additional evidence, require the evidence to be taken or order a retrial. The respondent relied on the Court of Appeal decision of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR.
17. On the 3rd issue of whether the trial court had failed to consider his defence, the respondent submitted that the trial court was obligated by law to consider his defence; which it had failed to do.
18. On the 4th and 5th issues of whether the appellant purchased the suit property for value and obtained good title and whether probate proceedings were ever conducted, the appellant submitted probate proceedings were not conducted on the suit property hence its acquisition by the appellant was unprocedural and the suit property was non-existent. On the last issue, he prayed for costs.

Analysis and determination

19. As the first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witness, hearing him and observing his demeanour and giving allowance for that. See *Selle vs. Associated Motor Boat Company Ltd*, [1968] EA 123.
20. I have carefully perused the record including the lower court pleadings and impugned judgment. I have also carefully considered the grounds of appeal and parties' respective rival submissions and considered applicable provisions of law, case law and common law principles as enunciated by courts.
21. In my considered view, the primordial issue for determination is whether there was a mistrial, however, before I address this issue, I will also address the secondary issue of whether the respondent introduced new evidence on appeal without seeking leave.

I. Whether the respondent introduced new evidence on appeal without seeking leave

22. Ordinary in practice, superior courts hear appeals by written submissions. High courts and courts of equal status derive such power from the provisions of Order 42 Rule 16 of the Civil Procedure Rules. Although odd in the manner in which the respondent opposed the appeal by filing a replying affidavit, this Order 42 is silent in the manner in which a respondent can respond to a memorandum of appeal. therefore, I do not consider the replying affidavit improperly on record.
23. The respondent's affidavit and submissions introduced a salvo of new evidence that were not the subject for determination or raised by the appellant in his grounds of appeal. The issue of his then counsel's conduct, cancellation of title documents including that of the suit property, probate proceedings, impropriety, illegality and existence of a filed defence among others were never subjected to determination by the trial court.



24. These issues were never pleaded, canvassed, raised or succinctly made an issue before the trial to enable it exercise its mind upon them and leave to introduce new evidence was not sought and allowed in accordance with the provisions of Section 78 (1) (d) of the Civil Procedure Act and Order 42 Rules 27 of the Civil Procedure Rules. This new evidence shall be disregarded.

25. In *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd* (Formerly known as *The Delphis Bank Limited*) [2019] eKLR, the Court of Appeal stated: -

“...save in exceptional cases, restricts the appellate court to consider only those issues that were canvassed before (and perhaps determined) by the trial court.”

26. I adopt the position in this decision and find the appellant introduced new evidence on appeal without seeking leave. This new evidence will not be considered.

II. Whether there was a mistrial

27. The proceedings before the trial court had several mishaps. It is paramount for this court to highlight some of the key procedural errors that the trial court made.

27. When a party files a suit, his documents are by the provisions of Order 3 Rule 2 of the Civil Procedure Rules accompanied by a verifying affidavit, list of witnesses, written statements and documents he intends to rely upon. In the circumstances of this case, the appellant adhered to this provision of law except that in his witness statement, he merely stated he reiterated the averments made in the plaint. His list of documents contained the title document to the suit property, demand letter and photographs.

27. Under the auspices of Order 11, the next step was for the suit to be subjected to a pretrial conference. Within Order 11 Rule 3 (5), the trial court was to issue directions which ordinarily includes trial time, admission of statements, receiving of exhibits and referring a matter to alternative justice mechanisms. In the circumstances of this case, this was never conducted.

27. Thereafter, the matter was to be set down for hearing and in this case Order 18 of the Civil Procedure Rules came into play. During hearing of the suit, the appellant, was by the provisions of Order 18 Rule 2 (1) called upon to produce his evidence which included documentary evidence. From the record, apart from his oral evidence and witness statement which was bereft of facts, the appellant merely prayed for an adoption of his documentary evidence as exhibits and not their production and, the trial court granted this prayer.

27. This adoption of documentary evidence is strange in law. The terms “adopt” and “produce” are two distinct terms which cannot be used interchangeably. In *Concise Oxford English Dictionary*, 12th Edn, “adopt” has several definitions including: -

“formally approve or accept”

27. *Black’s Law Dictionary*, 11th Edn, has several definitions for the term “produce” and in the context of evidence, it has been defined as:-

“To provide (a document, witness, etc.) in response to subpoena or discovery request.”

27. Ordinarily, in practice, the court usually adopts witness statements as evidence in chief and witnesses proceed to produce evidence. Once this evidence is produced, the last step is admission of evidence. See Order 14 particularly Rule 3 (1).



27. In the circumstances of this case, the appellant did not produce any document and from the record, the documents which were filed together with plaint were never admitted. The steps for production and admission of documents were laid down in the Court of Appeal decision of *Kenneth Nyaga Mwingi vs Austin Kiguta and 2 others* [2015] eKLR as follows: -

“Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.”

35. The last step before the trial court retired to write judgment, was closure of parties’ respective cases. Put in another way, to end or conclude the case. In the circumstances of this case, the appellant’s case was and has never been closed. Instead of the trial court recalling the appellant to be examined within Order 18 Rule 10, the trial court purportedly in exercise of its inherent power under Section 3A, ordered the appellant to remit to it an agreement for sale.

35. Accordingly, this document was unprocedurally remitted to court. It contravened rules of procedure and denied the appellant a right to fair hearing as stipulated in Article 50 of *the Constitution* of Kenya. It was entirely on the basis of this agreement that the trial court made its findings. It totally ignored the appellant’s pleadings and oral testimony. There is a disparity between the appellant’s pleadings, oral testimony with respect, findings of the trial court.

35. Utmost, notwithstanding the appellant did not formally produce any documents as exhibits, his evidence was never closed and the document the trial court relied upon in arriving at its findings and ultimate decision was never procedurally produced. The appellant was never accorded a fair hearing on it and salient issues were left undecided. It is unfortunate that I find the judgment of the trial court unsatisfactory and amounts to a complete mistrial.

35. The upshot is that, I find the appeal successful. I allow this appeal, set aside the entire judgment and decree appealed from, and order that the suit be remitted to the trial court for retrial. Each party shall bear their respective costs of this appeal and the costs of the unsuccessful original trial shall be at the discretion of the trial court which shall eventually retry the suit.

35. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF NOVEMBER 2023.

HON. A. Y. KOROSS

JUDGE

9/11/2023

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Respondent present

N/A for appellant

Court assistant: Ishmael Orwa

