



**Bororo v Mokamba (Environment and Land Appeal 005 of 2021)  
[2022] KEELC 14601 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14601 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 005 OF 2021  
JM ONYANGO, J  
NOVEMBER 3, 2022**

**BETWEEN**

**DAVID BORORO ..... APPELLANT**

**AND**

**LENNOX GEORGE MOKAMBA ..... RESPONDENT**

*(Being an Appeal from the judgment Hon. P. K. MUTAI (SRM)  
delivered on 12th April, 2021 in KISII CM ELC Case No. 131 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment of Hon. P. K. Mutai (SRM) delivered on 21<sup>st</sup> April, 2021 in Kisii CM ELC CASE No. 131 of 2019 (hereinafter referred to as ‘the Appeal’).
2. As per memorandum of Appeal dated December 6, 2021 the appeal is premised on the following grounds:
  - a. The learned trial magistrate erred in law and fact by finding for the Respondent without considering the weight of evidence on record.
  - b. The learned trial magistrate erred in law and fact by not appreciating the fact that the Appellant had bought part of the suit land as was shown by the agreement.
  - c. The learned trial magistrate erred in law and fact in not considering the fact that the Appellant had a claim in respect of the suit property as a purchaser for value and that the Respondent/administrator was duty bound to transfer the sold portion to the Appellant.



- d. That the learned trial Magistrate erred in law and in fact by not appreciating the fact that the Respondent having obtained certificate of confirmation of grant to the estate of his father had a duty to transfer the portion to the Appellant.
  - e. The learned trial magistrate erred in law and in fact by not setting out concisely the facts of the case and reasons for finding in favor of the Respondents.
3. Premised on the above grounds the Appellant prayed that the court sets aside the judgment of the learned trial Magistrate.

### **Brief Background of the Case**

4. The Respondent filed suit against the Appellant *vide* a plaint dated May 24, 2018 seeking a declaration that he is the registered owner of land parcel No. Nyaribari Chache/BB/Boburia /12151 (hereinafter referred to as the suit property). He further sought a permanent injunction against the Appellant as well as an eviction order evicting the Appellant from the suit property.
5. In support of his case the Respondent alleged that he was one of the registered owners of the suit property. He alleged that his late father, one George Haron had leased to the Appellant a piece of the suit property measuring 25ft by 80ft which lease period expired but the Appellant had failed, refused or neglected to yield up the suit property forcing him to file the suit against the Appellant.
6. The Appellant filed a statement Defence denying the Appellant's claim. He denied ever entering into any lease agreement with the Respondent's late father. He averred that his late brother one, Evans Nyakeirura purchased a portion of the suit property from one Richard Makori who had purchased the same from the Respondent's father.
7. The appellant further stated that after purchasing the suit property his late brother, Evans Nyakeirura constructed a permanent structure thereon. He alleged that he was the one who cleared the balance of the purchase price that had been pending between the defendant's late father and Richard Makori on behalf of his late brother.
8. It was his further contention that while holding the suit property in trust for his brother's family he had leased the permanent structure to one Shem T. Machoka who was paying rent to him. He lamented that the Respondent had maliciously started claiming the suit so as to acquire it illegally from the Appellant while relying on irrelevant documents.
9. After hearing both parties and their witnesses, the trial Magistrate delivered his judgement on April 21, 2021 in which he held that:

“Land cannot be sold by word of mouth. It must be reduced into writing. The fact is that the Defendant has constructed on the suit land. The photograph produced by the Defendant is no prima facie evidence to establish ownership. The defendant admitted that he was using the suit land for the benefit of Evans Moku's Children. The Defendant is therefore a stranger occupying the suit land illegally.

The plaintiff produced title deed and official search. It shows that he was registered owner together Lucia George. This is prima facie evidence.

From the forgoing, the Plaintiff claim was proved on the balance of probabilities and I direct as follows;

- i. The Plaintiff is the registered and/or the lawful owner of LR No. Nyaribari Chache/BB/boburia /12151



- ii. Permanent injunction restraining is hereby issued restraining the Defendant either by himself, agents, servants and/or anyone claiming under the Defendant from entering upon, reentering, trespassing onto or interfering with and in any manner dealing with the suit property that is
  - iii. The defendant is ordered to move out of the plaintiff's property within the next 60 days in default eviction order to issue.
  - iv. Cost of the suit.”
10. It is against the said judgment that the Appellant has lodged the Appeal herein based on the grounds highlighted above.
11. The Court directed that the Appeal be disposed of by way of written submissions and both parties have since complied with the courts directions.

### Issues for Determination

12. Having considered the background of this case, the, the testimonies of the witnesses, the documentary evidence produced before the lower court, the submissions of the parties in the lower court, the judgment of the trial Court, the grounds outlined in the Memorandum of Appeal and the submissions of the parties with respect to this Appeal, the sole issue for determination is whether the appeal should be allowed.

### Analysis and Determination

13. This being a first appeal, it is the duty of this court as a first appellate court to reconsider the evidence adduced in the lower court, evaluate it and draw its own conclusions though always bearing in mind that it has neither seen nor heard the witnesses testify and it should make due allowance in that respect.
14. The standard of proof in civil cases is on a balance of probabilities. It is therefore the duty of the plaintiff in a civil case to prove his case against the defendant on a balance of probabilities. This is illustrated in the case of *Philip Mulupi Chiteshi – Vs- Timothy Lucheli Mukhoiya* (2016) eKLR where C. Kariuki J. held that: -

“The issue arising is that whether the plaintiff proved his case on balance of probabilities? It is cardinal principle of law of evidence that he who avers must prove. See provisions of sections 107,108 and 109 of the Cap 80.EA.

7. It is incumbent upon the appellant to prove that he owned S/Kabras/Bushu/2720 that he cultivated and natured sugar cane crop therein and that defendant unlawfully and without his permission or consent harvested cane therein and delivered to the Western Kenya Sugar Co. Ltd.”
15. The Respondent approached the court with a claim that the Appellant had trespassed into a portion of the suit property which was registered in his name and that of his sister one Lucia George. In his testimony before the trial court he testified that he inherited the suit property from his late grandmother through transmission. He testified further that after carrying out the succession process he discovered that the Defendant had constructed a structure on the suit property claiming that he had bought a section of the suit property from his late father though he did not present any sale agreement to that effect. It is after the said realization that he filed this suit.



16. In his defence the Appellant denied being a trespasser on the suit property. He claimed that he was occupying the suit property as a caretaker of business premises that had been constructed by his late brother one Evans Makori who had bought a portion measuring 25 feet by 80 feet from one Robert Makori. Evans had in turn bought the same from the Defendant 's late father.
17. In support of his case, the Appellant called two witnesses being Robert Makori, the person whom the Appellant alleged to have been the one who sold a portion of the suit property to his late brother. Mr. Richard Makori testified that he bought a portion of the suit property from the Respondent's late father. He produced a sale agreement dated February 22, 2004 to support his testimony. He however admitted that the Appellant's late father did not transfer the said portion to him.
18. In his analysis of the above facts, the trial Magistrate observed as follows;

I have considered the evidence tendered by the by both parties and the submissions filed. The dispute is over ownership of LR Nyaribari Chache/BB/Boburia 12151. In support of his claim, the plaitniff produced a copy of the title deed, official search, and letters of administration and death certificate. The land is currently registered in the name of Lennox George Mokamba, the plaintiff herein and one Lucia George Mokamba indicated as minor. It is the position of the Plaintiff that the Defendant has encroached on his land.

According to the Defendant the suit property was bought by his brother Evans Mokuia now deceased and he is just a caretaker. That his brother bought the land from Richard Makori and was using it for the benefit of deceased children. It is noted that Richard Makori is not a party to these proceedings. There is no document to show that indeed the late Evans Mokuia bought the land from Richard Makori.

Land cannot be sold by word of mouth. It must be reduced into writings. The fact is that the Defendant has constructed on the suit land. The photographs produced by the Defendant is no prima facie evidence to establish ownership. The defendant admitted that he was using the suit land for the benefit of Evans Mokuia's Children. The Defendant is therefore a stranger occupying the suit land illegally.

The plaintiff produced title deed and official search. It shows that he was registered owner together Lucia George. This is *prima facie* evidence.

19. It is clear that during the hearing the Appellant admitted that he was but a caretaker of the suit property. He did not produce any Grant of Letters of Administration to show that indeed he was claiming or acting on behalf of his late brother. It is surprising that in his grounds of Appeal he blames the trial court for not recognizing him as a purchaser for value of the suit property. As correctly held by the trial magistrate, he remains a stranger in so far as the interest in the suit property is concerned. He is not clothed with the locus standi to claim any interest in the suit property either on his own or as a legal representative of his late brother.
20. The trial magistrate has also been blamed for not considering the Appellant's documents especially the land sale agreements. This is equally not a legitimate criticism. From the summary of his judgement which I have reproduced earlier in this judgment, the trial magistrate clearly observed that the Appellant did produce the sale agreement between his late brother and Robert Makori which he mentioned in his statement of Defence as well as in his witness statement. How would the trial magistrate have implied that he was legally occupying the suit property on the basis of photographs of a building allegedly constructed on the suit property by his late brother without any legal backing of such occupation?
21. Furthermore, from the Record of Appeal, the only agreement submitted was one entered between Robert Mokuia and the Respondent's late father on February 22, 2004. As correctly observed by the



trial magistrate, Robert Mokuwa was not a party to this suit and therefore an agreement between him and the Respondent's late father would not have been essential in determining the interests between the Appellant and the Respondent.

22. Even if the learned trial magistrate would have reviewed the said agreement as between the Respondent's late father and Robert Mokuwa, it is clear that the said same would not have influenced his final decision. This is because the said agreement does not identify the registration number of the property that was being sold to Robert Mokuwa by the Respondent's late father. It only refers to "a plot along Kisii-Kilgoris highway Measuring 250 by 100". Thus, it would have been an exercise in futility. There is no way he would have drawn a relationship between the parcel of land described on the face of the said agreement and the suit property as described by the Respondent in his plaint.
23. During the trial it was equally proved that the suit property was previously registered in the name of Kengenda Aroni (Deceased). The Respondent proved without any contradiction that he had carried out a succession process and caused the suit property to be registered in his name and that of his sister Lucia George. The Appellant and the family of his late brother, Evans Makori did not challenge this process. It is also evident that the Respondent established that the property was not part of the estate of his late father from whom the Appellant alleged to have purchased the same. This is because from the registration documents relating to the suit property as produced by the Respondent, the same was not registered in his name. Therefore, it would have been erroneous for the trial court to allow the Appellant to acquire an interest in the estate of Kengenda Aroni (Deceased) which the Respondent had concluded administering without any challenge from the Appellants.
24. From the foregoing therefore, I find that the trial court magistrate correctly held that the Respondent had proved his case against the Appellant on a balance of probabilities. I find no tangible reasons to reverse or vary his judgment. The same is therefore upheld and the Appeal is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022.**

.....

**J.M ONYANGO**

**JUDGE**

