



REPUBLIC OF KENYA



**Mukira v Mboca (Environment and Land Appeal E022 of 2022)
[2025] KEELC 4641 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E022 OF 2022**

CA OCHIENG, J

JUNE 23, 2025

BETWEEN

ROSE WANGARI MUKIRA APPELLANT

AND

MARY WANJIKU MBOCA RESPONDENT

(Being an Appeal of the judgment delivered on 30th April, 2020 by the Honourable E. K. Usui (CM) in Nairobi CMCC No. 242 of 2011: Mary Wanjiku Mboca v Rose Wangari Mukira)

JUDGMENT

1. Through a Memorandum of Appeal which was filed on 21st March, 2022, the Appellant appealed against the Judgement delivered by Hon. E. K. Usui. The genesis of this appeal is the Judgement in the Chief Magistrate's Court at Nairobi in CMCC No. 242 of 2011, by Hon. E. K. Usui (CM), delivered on 30th April, 2020 where the trial court entered judgment in favour of the Respondent (Plaintiff) and held that she was entitled to the parcel of land known as New Roysambu Housing Co. Ltd Plot No. 16D.
2. The Appellant being dissatisfied with the whole of the said Judgment filed her Memorandum of Appeal, which is premised on the following grounds:
 - a. The trial Magistrate erred in law and in fact in holding that the Respondent had proved her case on a balance of probabilities despite her failure to produce plausible evidence in support of her case.
 - b. The trial Magistrate erred in principle in taking the Respondent's (PW2) evidence as the gospel truth despite the said witness having been discredited and his evidence having been of no useful purpose to the case in the circumstances.



- c. The trial Magistrate exhibited lack of impartiality in her judgment by only considering one side of the case to the Appellant's prejudice which amounted to a travesty of justice.
- d. The trial Magistrate erred in law and fact in her evaluation, assessment and appreciation of the evidence tendered in court and thus arrived at the wrong decision thereby occasioning an injustice to the appellant.

The Appellant seeks orders:

- a. The appeal be allowed.
 - b. The Chief Magistrate Court's Judgment be set side and be substituted with an order dismissing the Plaintiff case.
 - c. The Plaintiff bears the costs of the suit and this appeal.
3. The appeal was canvassed by way of written submissions.

Submissions

4. The Appellant in her submissions, contended that she was allocated the New Roysambu Housing Co. Ltd Plot No. 16D, hereinafter referred to as the 'suit plot', on 24th March 1983 while the Respondent was allegedly allocated the same plot on 30th July 1983, four months later. Further, that she took possession and use in 1983 while the Respondent's suit was only filed before the lower court in the year 2021, thirty-eight (38) years after she had taken possession. She submitted that the suit in the lower court was barred by limitation of time as she had become the owner of the suit plot by operation of law and/or effluxion of time but admitted that out of oversight, the issue escaped her lawyers. She however submitted that limitation is a point of law that can be raised at any stage of proceedings and argued that the lower court ought to have taken judicial notice of the obvious delay and dismissed the suit as time-barred. It was her further submissions that the Plaintiff did not produce any plausible evidence to support her case and pointed out that while PW1 alleged to have bought the suit plot in 1982 for Ksh. 6,400/=, she could not produce the payment receipt thereof. Further, that she alleged to have been sent a letter in 1999 (sixteen (16) years after) informing her that her plot had been sold, while she was given a share certificate in 1989. She contended that the Share Certificate indicated that it was issued on 30th July 1983 but during cross-examination, she admitted that the Appellant's Share Certificate was issued earlier.
5. It was her further submissions that the learned Magistrate relied on the evidence of PW2 yet the same was discredited. She was pointed out that when PW2 attempted to produce a copy of an alleged Company Register, the defence counsel objected to its production insisting that he produces the original and despite the objection being upheld, PW2 never served the said Register upon the Defence Counsel. Further, that the trial magistrate went ahead to rely on an imagined Company Register and made a finding that the Respondent herein had proved her case on a balance of probabilities because her name was on the alleged Register. She insists that her name was also entered in the alleged Register.
6. She further submitted that the Respondent had referred to Criminal Case No. 1429 of 1999 in which accused persons who were charged with uttering false documents (Share Certificates) contrary to Section 357 (a) of the *Penal Code* were convicted but the said Share Certificates related to Share Certificates issued from November 1992 upto 1997, while her Share Certificate was issued in 1983 thus the judgment in the criminal case had nothing to do with the certificates in issue. To support her arguments, she relied on the following decisions: Eastern Produce (K) Ltd - Chemomi Tea Estate v Bonfas Shoya [2018] eKLR and Wainaina V Kiguru & Another [2024] KEELC 5865 (KLR).



7. On her part, the Respondent submitted that this court sitting as an appellate court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion, bearing in mind that it neither saw nor heard the witnesses as they testified, hence it must give an allowance for that. The Respondent reiterated that the issue of ownership of the disputed property was dealt with in the Criminal Case, Makadara Cr. Case 1425 of 1999 in which the court concluded that the Appellant had been defrauded by known people who were not authorized to sell plots on behalf of New Roysambu Housing Company Limited. Further, PW2 confirmed in that matter that the documents in custody of the Appellant were subjected to examination by a document examiner who concluded that the seal impression of the Appellant's Share Certificate and that of the Respondent were not tallying because the Share Certificate by the Appellant was not similar to that of the Respondent, which had been made by the Company.
8. She also contended that since PW2 denied knowing the Appellant and confirmed that the Share Certificate in her possession was not issued by the Company, it is immaterial, which Share Certificate was issued earlier than the other. Further, that the Appellant never proved in the lower court that she had become the owner of the suit plot by operation of the law and/or effluxion of time and in any case, the Appellant never opted to file a counterclaim.
9. To buttress her averments, she relied on the following decisions: *Abok Janes Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013] eKLR and *United India Insurance Co. Ltd -vs- East African Underwriters (Kenya) Ltd* (1985) EA 898.

Analysis and Determination

10. I have considered the Memorandum of Appeal, Record of Appeal including rivalling submissions and the following issues are for determination: Who is the owner of New Roysambu Housing Co. Ltd Plot No. 16D. Whether the Appeal is merited.
11. This being a first appeal, the Appellate Court is expected to evaluate the evidence presented in the trial court, without having seen the witnesses testify and arrive at its own conclusion. See the case of *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 and *Peter M. Kariuki v Attorney General* [2014] eKLR.
12. In this instance, both the Appellant and Respondent claim ownership of the suit plot. Further, both the Appellant and Respondent produced their respective Share Certificates to confirm ownership. Both the Appellant and Respondent called witnesses who testified and produced documents to prove ownership of the suit plot, after which the Trial Magistrate entered Judgment in favour of the Respondent.
13. At this juncture, I will to analyze the evidence as presented in the lower court. As per the proceedings, the Respondent as PW1 confirmed that she purchased the suit plot for Kshs. 6,400/= in 1982 from the New Roysambu Housing Company and was issued with a Share Certificate. She testified that she was unable to develop the suit plot and in 1999 she learnt that the said land had been sold. Further, that the person fenced it and built an iron sheet house therein. She stated that there had been a criminal case in respect to the suit plot. During cross examination she stated that her Share Certificate was issued on 30th July, 1983. Further, in re examination she clarified that she went for balloting in 1983.
14. PW2 Joseph Mwangi Mawaonga stated that he is a Director of Roysambu Housing Company. He confirmed that Plot 16D was registered in the name of Mary Wanjiku Mboca, who is the Respondent herein, and confirmed she was one of their members. He explained that he participated in proceedings involving the Appellant, being Makadara Criminal Case No. 1425 of 1999 where the Court found the



- Certificates and Signature forged, and persons convicted. He stated that the company never received monies paid by the defendant. During cross examination he was categorical that the Defendant's (Appellant's) Certificate did not belong to the Company and that the signature also did not belong to them. Further, that the Judgment and document examiner's report indicated it is a forgery.
15. DW1 Grace Ndotum Kangera who was the Appellant's only witness testified that they bought land in Roysambu together with the Appellant and Appellant later went abroad. She confirmed having a Power of Attorney over the matter. During cross examination, she claimed to have bought her land in 1994 but did not know when the Appellant bought hers. It was her testimony that in 1999, the Appellant put up semi permanent structures on the suit plot. She was not aware of the criminal case and did not know the Plaintiff (Respondent).
 16. From the above analysis, the question we need to decipher is whether the learned Magistrate erred in finding that it is the Respondent who owned the suit land. At this juncture, I note PW2 who was the key witness from the New Roysambu Housing Company that sold the suit plot, denied knowledge of the Appellant, and confirmed that the Appellant's documents did not emanate from their Company. Further, he disputed the signature on the said documents. He further confirmed that the Respondent was their member and owned the suit plot. The Appellant has argued that since her Counsel objected to the production of the aforementioned Company Register, then PW2's evidence is immaterial, however, I beg to disagree. Further, she has insisted in her submissions that the Respondent's case is statute barred but I note she never raised this in her pleadings in the lower court nor in the Memorandum of Appeal. It is trite that parties are bound by their pleadings and cannot raise new issues in submissions and I will hence disregard this allegation.
 17. On proof of ownership of unregistered land, the Court in *Caroline Awinja Ochieng & Another v Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR, held that:

“Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.”
 18. While in *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] KEELC 1092 (KLR), it was stated that:

“31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain..”
 19. Based on the facts as presented while relying on my analysis and documents produced, while associating myself with the decisions quoted, I opine that the Respondent demonstrated the root of her title including proprietary interest over the suit plot while the Appellant failed to do so. Even from the evidence of PW2 alone, it emerged that the Respondent was a member of the Company while her Share Certificate emanated therefrom, while there was even a criminal case in respect to the suit plot. I note even the Appellant's witness during cross examination could not confirm when she purchased the suit plot.
 20. From the foregoing, I hence find that the trial Magistrate did not err in law and in fact in holding that the Respondent had proved her case on a balance of probabilities. I find that Appellant indeed



produced plausible evidence in support of her case and the trial Magistrate did not err in principle in taking the (PW2) evidence. I opine that PW2 who was from the Company where the suit plot emanated from, was the key witness to prove who owned the suit plot between the Appellant and Respondent. I do not find that the trial Magistrate exhibited lack of impartiality in her judgment as she considered the evidence of ownership of the suit plot as presented by both parties and there is no travesty of justice as claimed. In my view the trial Magistrate was proper in her evaluation, assessment and appreciation of the evidence tendered in court and thus arrived at the correct decision and has not occasioned an injustice to the Appellant. I hence find that the Respondent is the owner of Plot 16 D Roysambu Housing Company.

21. In the circumstances, I find this Appeal unmerited and will proceed to dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Nduati for Appellant

Court Assistant: Joan

