



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

COUNTY COURT NAME: NAKURU ENVIRONMENT AND LAND

COURT

CASE NUMBER: ELCLA/E006/2025

SUSAN NGENDO MUGO VS PERIS WANYOIKE

JUDGMENT

Susan Ng'endo Mugo (hereinafter referred to as the appellant) has come to this court vide a memorandum of appeal lodged on 19th February 2025 against the decision of Hon Lina Akoth dated 23rd January 2025 in Nakuru CMELC No.E119 of 2024. The appellant prays that the judgment of the trial court dated 23rd January, 2025 and all consequential orders flowing therefrom be set aside and that this Honorable court be pleased to enter a judgment in favour of the Appellant as prayed in her Complaint dated 23rd May, 2024 and/ or as it deems fit and just. The costs of this appeal and of the trial court be awarded to the Appellant. The grounds of the appeal are that the learned trial magistrate erred in law and in fact in disregarding the Appellant's evidence adduced, the submissions filed and the authorities in support thereof hence arriving at an erroneous finding. According to the appellant, the learned trial magistrate erred in law and in fact in finding that the Plaintiff did not prove her case on a balance of probabilities against the Defendant notwithstanding that the said evidence was uncontroverted hence arriving at an erroneous determination. Moreover, that the learned trial magistrate erred in law and fact in finding that PW2 John Ndung'u did not testify despite the witness having testified on 23rd November, 2024 and the court's proceedings bespeaking as much.

Furthermore, that the learned trial magistrate erred in law and in fact in finding that the searches for L.R NO. Muguga/Kanyariri/3225 and L.R NO. M3226 did not bear the results thereof despite certificates of official search having been produced as P.EXB 14 and P.EXB 15 respectively and the court's proceedings bespeaking as much.

The learned trial court erred in law and in fact in finding that there was no proof of existence of the suit parcel of land, L.R NO. Dundori/Miroreni Block 1/ 43 despite a copy of the title deed thereof having been produced as PEXB 16 with leave of court and the court's proceedings bespeaking as much.



Lastly, that the learned trial magistrate erred in law and fact in dismissing the appellant's suit



allegedly for gaps in evidence notwithstanding that the alleged gaps were substantiated in oral and documentary evidence under the personal superintendence and supervision of the trial court. The trial Court considered extraneous issues that vitiated her good judgement thus arriving at an erroneous finding.

The appellant had approached the Chief Magistrate Court by way of plaint seeking a declaration that the Plaintiff is the rightful and/or lawful owner of the land parcel known as LR. Dundori/Miroreni Block 1/43 and that LR.Dundori/Miroreni Block1/43 registered in the name of the deceased Daniel Wanyoike Chege is held in trust in favour of Plaintiff.

Ultimately, an order of permanent injunction restricting the defendant by herself, agents, servants, employees and/or agents beneficiaries from entering, developing, charging, selling, leasing, litigating in a succession cause and/or in any other way from adversely dealing with all that parcel of land known as Miroreni Block 1/43 plus costs and interests of the suit.

The appellants case in the lower court was that she was the registered owner of L.R NO Muguga/Kanyeriri/3197 measuring 0.10Ha having acquired the same by way of transmission from her late father Daniel Wanyoike Njonjo. The respondent who is her daughter in law by virtue of marriage to his late son Daniel Wanyoike Chege was the registered owner of all that parcel of land known L.R No Dundori /Miroreni Block1/43 and a title deed was issued on 16th June 1989. According to the appellant pursuant to an oral agreement of 1995 made during the lifetime of her son, Daniel Wanyoike Chege and herself in the presence of John Ndungu, it was agreed that the appellant would excise a share equivalent to 50 x100 of LR NO Muguga/Kanyariri/3197 out of her entire share of 0.10 Ha to the deceased Daniel Wanyoike Chege in exchange for LR NO Dundori/Miroreni/ block 1/43. The status of exchange was informed by the market value of the respective parcels of land. The apppellant successfully sub-divided LR NO Muguga/Kanyariri/3197 into two portions LR NO Muguga/Kanyariri/3225 and 3226 vide a mutation form dated 9th September, 2017 and registered on 18th September 2017. Upon subdivision she transferred LR NO Muguga/Kanyariri/3226 to the defendant after the death of her son.

However, her son died before he could transfer LR Dundori/MiroreniBlock 1/43 to the appellant as agreed. The appellant's son had none the less handed over the title deed to the appellant and that the appellant had taken possession and developed a matrimonial home and a farm. She has interred the remains of her husband and son. According to the appellant, the land in Dundori was held in trust by her son in trust for the appellant. The respondent has disregarded the oral agreement and has attempted to evict the appellant. The respondent neither entered appearance nor filed defence. The appellant testified as PW1 and stated that she entered into an oral agreement with her son Daniel Wanyoike Chege (deceased) for exchange of a share equivalent to 50X100 ft of LR Muguge/Kanyari/3197 which she owned, with L.R No Dundori/Muoreni Block 1/43 which the latter owned. She went ahead to subdivid Muguga/Kanyariri/3117 vide a mutation form dated 9th September 2017 and created Muguga/Kanyariri/3225 and 3226 and transferred the latter to the respondent. Her son Daniel Wanyoike Chege died before he could successfully transfer Dundori

/Miroreni Block 1/43 to the appellant as agreed. Nonetheless, during the lifetime of the said Daniel Wanyoike Chege he had however handed over the original title deed for L.R Dundori /Miroreni Block 1/43 to and permitted her to take physical possession and occupation thereof. Further and without prejudice to the foregoing paragraphs, upon assuming possession of L.R Dundori/Miroreni Block 43 she developed a matrimonial home therein where she resides to date, does farming and has even interred the remains of her husband, Samson Chege Mugo and her deceased son, Daniel Wanyoike Chege in line with Kikuyu customary law on burial of a spouse. She has subdivided the said land and apportioned to her other children who have developed their share with a semi-permanent houses and reside thereon. Although the parcel LR. Dundori/Miroreni Block 43 was registered in the name of the deceased, Daniel Wanyoike



Chege on account of the foregoing paragraphs, it was crystal clear



that he held the same in trust for the appellant.

Upon transfer of LR. No Muguga/ Kanyariri/ 3226 in favour of the respondent as a legal representative of her husband's estate, she sold and transferred the same to one Stephen Waihenya Kamau and a title deed was issued in his favour on 4th February, 2021.

On or about August 2023, the respondent herein without any color of right, resorted on harassing, intimidating and/or threatening to evict the appellant from land parcel LR. Dundori/ Miroreni Block1/ 43 with an intention of equally disposing it off thus depriving her of her peaceful and quiet possession and enjoyment of the land parcel. She attempted family resolution with the respondent seeing that she is my daughter in law, in vain. Thus, on 14th December 2023 she sought legal representation wherein a demand letter was done to the respondent which regrettably elicited no response.

PW2 stated that he knows the appellant as the owner of the land No. Dundori/Miroreni Block1/43. She has been living on the land and buried her husband and son on the land. Her other son Joseph Mugo lives on the land. He testified that the appellant and her son Daniel Wanyoike Chege exchanged land in an oral agreement between the two which he witnessed. The appellant gave a portion measuring 50X100 Ft of Muguga/Kanyariri/3197 in exchange for Dundori/Miroreni/1/43. However, Daniel Wanyoike Chege died before he could successfully transfer the land into the name of the appellant. The appellant subdivided Muguga/Kanyariri/3197 into two thus Muguga/Kanyariri/3225 and 3226 and transferred 3226 to the defendant who sold it to Stephen Waihenya Kamau. The respondent has been harassing the appellant with an intention to sell Dundori/Miroreni/Block/43.

The learned magistrate heard the plaintiff's case and dismissed the suit on grounds that the appellant did not prove her case on a balance of probability. According to the learned magistrate the oral agreement was before one John Ndungu who was not called to testify. The learned magistrate found it odd that the only party to the oral agreement was the appellant. The learned magistrate observed that it was necessary to call a witness to the said oral agreement. The learned magistrate further found that the original title handed over to the appellant was not produced. There was no certificate of official search produced. The appellant did not produce any evidence to show that the title property exists.

The learned magistrate observed that:-

" in view of the gaps in evidence by the plaintiff in this matter, the plaintiff has failed to prove that L.R No Dundori/Miroreni Block1/43 registered in the name of Daniel Wanyoike Chege was held in trust for the plaintiff and therefore she is not entitled to the reliefs sought."

The suit was dismissed.

Being a first appeal, this court relies on a number of principles as set out in *Selle and another V Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

"...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

Also, in the case of *Peter M. Kariuki V Attorney General* [2014] KECA 713 (KLR) the court held as follows:

"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence." I have re- analyzed the evidence on record and do find that the learned magistrate erred in finding that the appellant did not call Mr John Ndung'u when the record shows that he



was called and he



gave evidence which is on record. Moreover, the learned magistrate erred in fact in finding that there was no evidence that the parcel no Dundori/Miroreni/Block 1/43 existed when there was a title deed produced as an exhibit.

On whether the appellant proved his case on a balance of probability I do find that the appellant proved that Dundori/Miroreni/Block1/43 existed. I have perused the list of exhibits and do find that the appellant produced the title for Dundori/Miroreni/Block 1/43. That it was in the name of his deceased son. Though the appellant did not produce a certificate of official search, the title deed was sufficient.

I do not agree with the learned magistrate that the appellant did not prove her case on a balance of probabilities.

The appeal is allowed the judgment of the trial court dated 23rd January, 2025 and all consequential orders flowing therefrom be set aside and that this Honorable court enters a judgment in favor of the Appellant as prayed in her Plaint dated 23rd May, 2024. There are no order as to costs.

SIGNED BY/FOR:
HON. JUSTICE ANTONY O. OMBWAYO



THE JUDICIARY OF KENYA. NAKURU
ENVIRONMENT AND LAND COURT
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DATE: 2025-10-09 15:57:38