Chacha & another v Mahindi & 2 others (Environment and Land Appeal E025 of 2024) [2025] KEELC 7241 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7241 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E025 OF 2024

FO NYAGAKA, J

OCTOBER 23, 2025

BETWEEN

JAMES MUNIKO CHACHA ..... 1ST APPELLANT

MAPELA MAKAKA (SUING AS THE PERSONAL REPRESENTATIVES OF SABASTIAN MWITA MERIA) ..... 2ND APPELLANT

AND

TITUS MAHINDI ..... 1ST RESPONDENT

MWITA MARWA ..... 2ND RESPONDENT

ISAAC RIOBA ..... 3RD RESPONDENT

(Being an Appeal from the judgement and decree by Hon. M.O Obiero in Kehancha PMELC Case No. 31 of 2019 delivered on 9th March 2023)

JUDGMENT

1. By way of a Plaint dated 13th November 2025 the Plaintiff sought the following orders in the trial court;
    1. General damages
    2. A permanent injunction to issue restraining the Defendants jointly and severally from constructing, occupying and/or laying claim over Plot No. 76 Ntimaru Market and eviction to issue therefrom.
    3. Costs
    4. Interest on (a) and (c) at court rates.
    5. Any other relief.

2. The Plaintiffs pleaded that they were the owners and allottees of plot no 76 Ntimaru Market, Bwiregi Location. Further, that they were allotted the said Plot and a Plot Card issued on 1st August 1973 and have been in occupation of the suit property and carrying out business therein until August 2018 when the Defendants pulled down the structures thereon in readiness to rebuild. They particularized the trespass and urged that the claim be allowed.

3. The defendants filed a joint statement of defence dated 25th November 2019 where they denied all the contents of the plaint and urged the court to dismiss the suit. Then the matter proceeded for full hearing.

Hearing at the trial court

4. PW1 was Titus Marwa Mahindi who adopted his witness statement as evidence in chief. He urged that he was allocated the same by the then Town Council of South Nyanza. He stated that he had the minutes dated 8th - 23rd January, 1973 and that he was issued with the Plot Card. He produced the Plot Card as P. Exhibit 2. He urged that he was given the Plot in the year 1973 by the Town Council and he constructed a semi-permanent house on the land. He denied knowing that James had been paying rates for Plot No. 76B. He stated that he had been paying rates for plot number 76 as a whole.

5. DW1 was James Muniko Chacha, a Clerical Officer. He adopted his witness statement as evidence in chief. He stated that in the year 1993, he applied for a Plot. It was on 8th December 1993 and he was given a plot and lot card. That in the year 2017, the old cards were withdrawn on the 29th June 2017. He was issued with a new plot card and he produced a copy of the card as exhibit 1. He also produced receipts showing that he had been paying rent as exhibits 2a and b.

6. During cross examination, he stated that he had owned the Plot since the year 1993 but did not develop it immediately. He started developing it in the year 2021. He stated that he did not have a copy of the old Plot Card and had not produced any receipts for payments from the year 1993. He further testified that his plot card had the name of Chacha and that he was allocated the Plot in year 1993. He had not produced the Minutes. He stated that it is true that number 76 was given to the plaintiff before he was given the Plot number 76B. Additionally, That he had seen the photographs produced by Plaintiff urging that it was his building. He further stated that there was an order from Court that stopped the construction but he did not have the Approved Plan for his development.

7. Upon considering the testimonies, evidence and submissions, the trial magistrate entered judgment in favor of the plaintiffs on 9th march 2023.

8. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 14th October 2024 premised on the following grounds;

    1. The Learned Magistrate erred in fact and law by failing to appreciate the evidence tendered with regard to ownership of the Appellants' parcel of land.

    2. The learned magistrate erred in fact and law by failing to recognize the municipal/county rules applicable to issuance, transfer and allocation of plots.

    3. The learned Magistrate erred in law by failing to acknowledge the existence of two parcels of lands i.e. Plot No. 76 B and 76 Ntimaru Market on the ground which both occupants have been respective rents to the municipality.

4. The learned magistrate erred in law and fact by failing to exercise his judicial discretion and with bias concluded that Plot No. 76B Ntimaru Market exists only on paper without having an expert report to guide him and back up on his decision.

5. The learned magistrate erred in fact by failing to consider the evidence tendered by the Appellants and thereby disregarded the same without assigning any credible and or valid reasons whatsoever. Consequently, the decision of the trial magistrate has occasioned a miscarriage of justice.

6. The learned magistrate erred in law and fact believing the evidence of the Respondent without considering the evidence tendered by the Appellant.

7. The learned trial magistrate erred in law and fact by failing to properly or at all analyze, evaluate and consider the totality of evidence adduced by the Appellant. The trial magistrate arrived at a biased conclusion contrary to evidence on record.

8. The judgment by the learned magistrate is unbalanced, perfunctory and substantially at variance with the evidence rendered by the parties. Consequently, the judgment is fraught with errors of law and facts.

9. The appeal was argued through written submissions, and the parties filed them, giving their contents as below.

Appellants submissions

10. Learned counsel for the Appellant opened submissions by placing reliance on the decisions in Hebron Orucho Gisebe & 2 others v Joseph Ombura Gisebe & another (2022) eKLR and Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR in regards to the issue of the 2 plot cards issued by the South Nyanza County Council, predecessor of the County Government of Migori and the current County of Migori respectively as proof of ownership of the 2 distinct parcels of land.

11. Counsel urged that the Appellant and Respondents have their respective plot cards and have been paying their respective land rents on the properties to the County Government of Migori and all parties produced receipts to prove the payments. Further, that the Respondents annexed a letter in form of a "search document" from the In charge Lands and Housing Kuria East showing the records at the lands registry as at 8/11/2019. The annexed document confirmed the existence of Plot No.76 created vide minute No. 38/73 of 8th, 9th and 23/1/1973. This document also reveals a 2nd entry minute No. 27th ,28th/2/1973. The same document revealed the existence of Plot No. 76B created vide minute 33/93 of 8th, 9th/12/1993 and indicates a 2nd entry of minute WTP & M/MIN/12/2010. He maintained that this document 'collaborates' both evidences of the Appellants and Respondents as to the existence of the plots and the position held by the trial court that Plot No. 76B indeed exists on paper.

12. Counsel submitted that despite the trial court pronouncing itself of the existence of Plot No. 76B on the land records, the court proceeded to contradict itself by challenging its creation. The trial court erroneously held that the Appellant did not produce documents for its creation and based on that, the learned magistrate made a determination that the Appellant is not the owner and or registered proprietor of the plot which the Respondent claim to be theirs, Plot No.76. Counsel submitted that the Appellants and Respondents produced original plot cards in their respective names and this is the conclusive evidence as to ownership of the 2 plots. Further. Plot No. 76 and 76B Ntimaru Market are 2 separate and distinct properties with different ownership.

13. Counsel submitted that as per the Appellant's plot card for Plot No. 76 B Ntimaru Market, the actual size is indicated as 25ft by 100ft. The Respondents plot card does not indicate the actual acreage to be occupied and the Respondents only testified in the trial court that their Plot No.76 was measuring 50 ft by 100 ft without any proof of the same. He cited the case of Jeremiah Gakuru Ng'ang'a v Brown Inziani Shagwira & another [2022] eKLR in support of this submission and stated that the trial magistrate arrived at an erroneous conclusion that Plot No. 76B does not exist on the ground only on comparison and contrasting documents by the Respondents and Appellants alongside the evidences of the parties without having an expert opinion on the existence of the two parcels on the ground.

14. Counsel submitted that the Respondents never sought for any prayers/declaration on the sub-division and or transfer of Plot Number Ntimaru 76. Further, that the learned magistrate erred to hold that Plot No. 76 and 76B Ntimaru Market comprises of one single property disregarding ownership and actual occupation of the Appellant on plot 76B as allocated and registered despite holding that the same was in existence. He urged the court to allow the application as prayed.

Respondents' Submissions

15. Counsel urged that the appellant testified and admitted that despite allegedly owning Plot No. 76B of 1993, he never had evidence that he had been paying rent. He admitted that he did not have the minutes allocating him the plot or an approved plan for the construction that would have illustrated the location of his plot. He confirmed that the photos of the structures were photos of his structures.

16. Counsel urged that it was incumbent on the appellant to prove that Plot No. 76B exists and where it was located. He cited section 109 of the *Evidence act* and the case of Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another (2005) 1EA 334.

17. Counsel urged that trespass is defined in the Black's Law Dictionary 11th Edition as the wrongful entry into another's real property. The respondent having pleaded trespass, he was obligated to prove that the appellants unlawfully entered his land. He produced Minutes by the Local Authority awarding him the said plot, a plot card and receipts of payment of land rates. The Respondent also produced pictures of a structure being put up on his land to which the Appellant did accept in cross examination that the pictures show the structure he was building. The Respondent therefore discharged the requisite proof that indeed the Appellant was unlawfully building on the Respondent's land. Counsel urged that the trial court rightfully held that the onus of the proof was on the appellant to prove the existence of Plot No. 76B.

Analysis and Determination

18. The duty of an appellate court was set out in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR where the Court held as follows;

> " This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. The role of the Appellate Court was Additionally stated by the Court of Appeal in the judicial decision of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR. It was held as follows;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect."

20. Upon considering the record of appeal, pleadings and submissions, the following issue arises for determination; Whether the trial court erred in allowing the respondents' claim.

21. From the evidence that was tendered in the trial court and I note that during cross examination, the Appellant admitted that he could not produce the minutes for allocation of Plot No. 76B and he could not produce any receipts for payments from the year 1993. On the contrary, the 1st respondent was able to produce the minutes for allocation of the plot in 1973 and the plot card. The appellant was unable to demonstrate how his plot card came into being and further, how it related to the already existing plot number that was issued to the respondent in 1993.

22. Sections 107 and 108 of the *Evidence Act* provide as follows:

107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. In Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14 state :-

" The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence."

24. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

" As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party

the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

25. Having considered the evidence, it is clear that the appellant failed to satisfy the burden of proof as to the claim of ownership of the suit land. From his evidence, the plaintiff stated that he was allocated the suit land by the then Town Council of South Nyanza. He was issued with the Plot Card which he produced as P. Exhibit 2. He urged that he constructed a semi-permanent house on the land. He denied knowledge that James had been paying rates for Plot No. 76B. Was the plot card evidence of ownership, without more? I think not.

26. The above position shows that the Plaintiff had never obtained the certificate of lease or title to the land, even assuming that there was a proper allocation. The appellant ought to have moved deeper than producing that document only to show that he owned a title: at the very least that he complied with all the conditions of allotment of the plot.

27. The position regarding allotments which as at the time of an issue or dispute arising are not perfected and remain mere allotments is aptly captured in the holding of the decision by the Supreme Court of Kenya in Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment). The said Court held;

> " 60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In Peter Wariire Kanyiri v Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:
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> > [15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].
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> 61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed."

28. I find no reason to interfere with the judgement of the trial court as the trial court carefully and properly analyzed the evidence and arrived at the right decision.

29. In the premises, the appeal is dismissed in its entirety with costs to the Respondents.

30. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 23RD DAY OF OCTOBER 2025.

HON. DR *IUR* FRED NYAGAKA

JUDGE

In the presence of,

Bochaberi for the Appellants

Abisai for the Respondent