**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC APPEAL NO. E008 OF 2024**

**JAMES MUNGAI KAMAU……APPELLANT**

**VERSUS**

**KENYA FOREST SERVICES……RESPONDENT**

***(Being an appeal from the judgement of Hon S. MOGUTE (S.P.M) delivered in Nyahururu CMELC No. 6 of 2021 on 16.4.2024)***

# JUDGMENT

**1.** The appellant herein instituted proceedings in the trial court vide a plaint dated 25.1.2021 contending that he was at all material times the registered owner of land parcels L.R NOS. LAIKIPIA /NYAHURURU/6785 and 6784, and was the beneficial owner of parcels L.R NOS LAIKIPIA/ NYAHURURU/6693, 6699, 6710 and 6786 (the suit parcels).That the respondent leased out or granted licences to persons who trespassed on the suit parcels.

**2.** The appellant sought judgment against the respondent in the following terms;

**“a) A permanent injunction do issue restraining the defendant by itself, its servants, agents, tenants, lessees, licensees and/or any person entering, remaining, ploughing on, fencing, constructing and/or in any other way interfering with L.R No. LAIKIPIA/NYAHURURU/6784, 6785, 6693, 6699, 6710 and 6786 in perpetual**

**b) Costs of the suit plus interest at court rates.**

**c) Any other or further reliefs that this honourable court may deem just and fit to grant”**

**3.** The respondent opposed the suit through a statement of defence dated 6.12.2022 denying the claim of the appellant. It argued that the suit parcels fall within Marmanet forest, thus no authority had powers to allocate any portion of the land before de-gazettement of

the forest land. The respondent therefore prayed for the cancellation of the titles of the suit parcels.

**4.** At the trial, the appellant testified as PW1. He adopted his witness statement dated 20.1.2021 as his evidence. He produced the 6 title deeds for the 6 suits parcels as his exhibits 1 a)-f, while he marked the 2 sale agreements as MF1 2 a) & b). In his recorded witness statement, Pw1 reiterated that he owned the suit parcels which had been trespassed upon by about 20 squatters in January 2021 under the authority of the respondent.

**5.** On cross examination, Pw1 stated that he had not availed the consent from the land control board and the transfer, that the said documents were at the lands office. He averred that he bought the suit parcels from the sellers.

**6.** Pw2 was one JOHN WATAKI KAMAU who adopted his witness statement dated 20.1.2021 as his evidence. He averred that on 15.7.2011 and 20.7.2011, he sold parcels 6693, 6699 and 6710 to the appellant at the sum

of Ksh.9 million. To this end, Pw2 produced the sale agreement as P-Exhibit 2 a.

**7.** On cross examination, Pw2 stated that he was given the land by the government where he paid fees to the tuner of Ksh. 3, 750 in the year 2003.

**8.** The defence case was advanced by EVANS KEGODE (DW1), the head of survey of the respondent He adopted his witness statement dated 23.10.2023 as his evidence. He produced the following documents in support of the respondents' case;

i) Copy of the Kenya Proclamation No. 44 of 1932,

ii) Copy of the Legal Notice No. 174 of 1964,

iii) Legal Notice No. 84 of 1998

iv) Legal Notice No. 52 of 1999

v) Copy of map extract of Marmanet forest showing illegally created parcels.

**9.** The evidence of Dw1 was that the proclamation no. 44 of 1932 proclaimed Marmanet forest as a forest reserve, while the legal notice no.174 of 20.5.1964 declared Marmanet forest reserve as a central forest, adding that

the suit parcels are within Marmanet forest as seen from the map extract.

**10.** In the judgment delivered on 16.4. 2-2024, the trial court decreed that the appellant had failed to prove his case on a balance of probabilities and proceeded to dismiss his claim. The court also found that the titles to the suit properties were procured illegally and ordered for the rectification of the register to cure the illegality so as to return the land to the respondent.

**11.** Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal on 30.4.2024 raising seven (7) grounds of appeal summarised as follows; That the learned magistrate erred in law and fact in finding that the suit parcels were part of Marmanet forest, that the appellant did not tender evidence of how he acquired the said parcels and in finding that the titles to the suit properties ought to be cancelled.

**12.** The appeal was heard by way of written submissions. The submissions of the appellant are dated 8.9.2025 where it was argued that no evidence was adduced to

prove that the titles in question were obtained through fraud, illegally or through procedural lapses in terms of the provisions of Section 26 of the Land Registration Act, and that there was no counterclaim by the respondent calling the appellant to adduce evidence in rebuttal. It was argued that the appellant was not accorded an opportunity to defend himself on allegations of fraud which were introduced in the body of the judgment. Finally, it was argued that the respondent did not avail any green cards to prove that it ever owned the suit parcels, adding that the respondent had not even applied for the suit parcels to revert back to it.

**13.** In support of his case, the appellant proffered the following authorities; **Vijay Moriaria v Nansingh Madhising Darbar & Another (200) KECA 223 (KLR), Samuel Murimi Karanja & 2 Others v Republic Nairobi High Court Crimina App. No. 412 of 2003, Orieny & another v National Bank of Kenya (Civil Appeal E016 of 2023) (2024) KEHC 6002 (KLR), Sawe & Another v Kenei & Another**

**(Environment & Land Appeal E030 of 2022 (2024), Malawi in Malawi Railways Ltd v Nyasulu (1998) MWSC 3, Gandy v Caspair Air Charters Limited (1956) 23 EACA 139 as quoted in the case of Oudia V. Okelo & 2 Others and Aga Wanjiru Mwaniki v Jane Wanjiru Mwaniki Civil Appeal 176 of 1995.**

**14.** The submissions of the respondent are dated 29.9.2025 where it is submitted that the trial magistrates finding that the suit parcels fall within Marmanet forest was judiciously arrived at guided by facts and evidence, adding that the appellant failed to demonstrate the legality of the titles. In particular, it was argued that on acquisition of the titles, the appellant had only availed the sale agreements.

**15.** In support of its arguments, the respondent proffered the following authorities; **Munyua Maina v Hiram Gathiha Maina (2013) Eklr** and **John Kamau Gachina v Safia Salim Karama (2021) eklr.**

## DETERMINATION

**16.** As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. **(See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123).** This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).**

**17.** I have carefully considered the pleadings, the evidence, the submissions as well as the judgment of the trial court. Similarly, I have duly considered the grounds of the appeal as well as the submissions proffered before this court. It is noted that the titles availed by the appellant related to 6 parcels of land. The titles to

parcels 6784 and 6785 were registered in the appellants name on 27.4.2011, title for parcel 6786 was in the name of George Onyango issued on 3.1.2003, while titles no's 6693, 6699 and 6710 are in the names of Pw2, John Wataki Kamau issued on 3.1.2003. The crux of the dispute is whether the said titles are within Marmanet forest.

**18.** All the above titles were challenged by the respondent at paragraph 8 and 9 of the statement of its defence where it is stated that the suit parcels fell within Marmanet forest. However, it is trite law that what is pleaded has to be supported in evidence. See **Daniel Otieno Migare v South Nyanza Sugar Co. Ltd (2018) eKLR.**

**19.** The defendant availed historical evidence to support its pleading dating as far back as year 1932 when proclamation no 44 under the forest ordinance was made, followed by the declaration of Marmanet as a central forest vide the legal notice no.174 of 20.5.1964.

**20.** The appellant did not proffer any iota of evidence on how he acquired the suit parcels including the two titles in his name. He had no consent, no transfer, no evidence of payments for the land and no stamp duty. Further, there is no evidence to indicate how the persons who apparently sold the other 4 parcels, that is George Onyango and John Wataki Kamau to the appellant acquired the suit parcels. To this end, I find that the trial court rightly found that a certificate of title is an end process. For indeed merely because a person is entered in the register as proprietor does not offer that person protection if the root of the title is tainted with illegalities and irregularities, See **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** .

**21.** That notwithstanding, the question for determination is whether the 6 titles fall within the Marmanet forest land. Put it differently, was the challenge posed by the respondent sufficient to impeach the aforementioned titles?

**22.** The import of the proclamation no 44 of 1932 and the legal notice no 174 of 1964 were substantially discussed by the Supreme Court of Kenya in the case of **Pati Limited v Funzi Island Development Limited & 4 others [2021] eKLR,** where the court stated that;

> **"Besides, the Forest Act No. 7 of 2005 at Section 65 and the Forest Conservation and Management Act No. 34 of 2016 at Section 77, provide (d) that, notwithstanding the repeal of the preceding Act, 'any land which, immediately before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act.' Section 77 of the Forest Conservation and Management Act specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any**

**other relevant law shall be deemed to be a public forest under the Act" Emphasize added.**

**23.** The Marmanet forest is still listed in the Third Schedule of the Forest Conservation and Management Act Cap. 385 laws of Kenya at no.7.

**24.** It follows that any titles falling within Marmanet forest are illegal.

**25.** In the above cited case of **Pati Limited v Funzi Island Development Limited & 4 others (Supra)** the court stated that;

> **"The Forest Act Cap 385 was enacted in 1942 and revised last in 2012. It was an Act of Parliament to provide for the establishment, control and regularization of central forests, forests and forest areas in the Nairobi area and on unalienated Government land. Section 4 of the Act provided that" "The Minister may from time to time, by notice in the gazette declare any**

**unalienated Government land to be a forest area; declare the boundaries of a forest and from time to time alter those boundaries and declare that the boundaries shall cease to be a forest area……"**

**26.** Both document no. 3 and 4 of the respondent are legal notices no's 84 of 1998 (issued on 29.5.1998) and 52 of 1999 (issued on 12.5.1999) in which the minister pursuant to the provisions of the Forest Act Cap 385 **"declared that the boundaries of Marmanet forest shall be altered so as to exclude the area described in the schedule hereto".**

**27.** The import of the above notices is that the boundaries of Marmanet forest were altered. To what extent? Dw1 who described himself as a surveyor did not tender any tangible evidence on the extent of the excision of the forest in question.

**28.** At paragraph 6 and 7 of the statement of defence, the respondent had stated that in 1964 Marmanet and Nyahururu settlement schemes were created, of which

Nyahururu settlement scheme was excised and degazetted leaving out Marmanet settlement scheme which was not degazetted from Marmanet forest and still forms part of the public forest land. There is eerie silence regarding this information when it came to the evidence. In his witness statement, Dw1 talked of the 1932 proclamation as well as the legal notice of 1964, then he jumped strait to the issue that the spatial spread of the suit parcels falls within Marmanet forest. He omitted to give evidence relating to the land which was hived off the Marmanet forest vide the 1998 and 1999 notices.

**29.** The inconsistency of respondent's evidence doesn't stop there. Even though the respondent pleaded that Marmanet settlement scheme was not degazetted, it did not demonstrate the nexus of the suit parcel with the alleged Marmanet settlement scheme. Although the extract of the Marmanet map availed in the record of appeal is not legible, the court was able to peruse the original record and found the map majorly coloured in

green. It has no mention of Marmanet settlement scheme.

**30.** What more, the map has the yellow markings of LAIKIPIA- NYAHURURU SETTLEMENT SCHEME, of which the alleged illegal titles falls within that area. The Marmanet forest is shaded in green of which the alleged suit parcels do not fall within that area. Nyahururu settlement scheme is the one which the respondent pleaded that it was excised and degazetted (though there is no evidence to that effect).

**31.** Another notable point from the map extract is that although the 6 suit parcels fall within the area enclosed in yellow, the respondent did not indicate the registration status of the entire land enclosed in yellow. For instance, are there other titles issued within the yellow enclosed area known as Laikipia Nyahururu settlement scheme? In other words, if indeed the titles in question are illegal, it would mean that the entire area enclosed in yellow falls within Marmanet forest. Why then would it be called Nyahururu settlement scheme,

the scheme which respondent recognizes as having been hived off from the forest?

**32.** This far, it is apparent that no tangible evidence was adduced to indicate that the 6 suit parcels fall within the Marmanet Forest land. Thus, despite the fact that the acquisition of those titles is unknown, there was still no sufficient evidence to warrant the impeachment of the 6 titles.

**33.** I find that the trial Magistrate misapprehended the facts as presented thereby arriving at a wrong finding. The appellant had merely sought an order of permanent injunction while the respondent had proffered a defence that the suit parcels were within Marmanet Forest. Thus, the issue of the validity of the titles was not the primary subject of contest. It is only when a proper claim challenging the legality of the aforementioned titles is filed can the court delve into the legality of the same in terms of the provisions of Article 50 (1) of the Constitution on what amounts to a fair trial.

**34.** In the end, I find that this appeal is merited. Thus, the appeal is allowed. The judgment delivered on the 16/4/2024 in Nyahururu C.M ELC No. 6 of 2021 is set aside in its entirety and the appellant's suit filed in Nyahururu CM ELC No. 6 of 2021 is allowed. Each party is to bear their own costs of the suit at appeal and before the trial court.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 1ST DAY OF DECEMBER 2025 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:**

Court Assistant – Vanessa

Chepkurui for Respondent

Gakenia Gacheru holding brief for Waichungo Martin for Appellant