

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC APPEAL NO. E009 OF 2024

MARTIN KIMWELI MULEI.....APPELLANT

-VERSUS-

JONATHAN WAMBUA MULI.....RESPONDENT
(Being an appeal from the judgment of Hon. M. N. Mutua Senior Resident Magistrate delivered on 21st June, 2024 in Makueni CMCC No. 55 of 2012)

JUDGMENT

Introduction

1. The Appellant filed this appeal to this court in which he raised the following grounds:

- 1) **That the learned magistrate erred in law and in fact in failing to take into consideration the Appellant's evidence and submissions placed before him.**
- 2) **That the learned magistrate erred in law and in fact in failing to appreciate the evidence placed before him and taking into account extraneous issues hence arriving at a decision that was erroneous and against the evidence placed before him.**
- 3) **That the learned magistrate erred in law and in fact in failing to appreciate the fact that the Appellant tendered evidence as to his acquisition of the suit property by tracing the root title and the subsequent transition of the property to himself.**
- 4) **That the learned magistrate erred in law and in fact in making a determination that the Respondent properly acquired the suit land from his father who allegedly bought the same vide a "gentleman's agreement" contrary to trite law on the disposition of interests in land which ought to be in writing.**
- 5) **That the learned magistrate erred in law and in fact in making a finding that the Respondent had proven his case on a balance of**

probabilities despite glaring inconsistencies in his evidence on record.

- 6) That the learned magistrate erred in fact by making a determination that the properties within Mwaani market are numerically following each other despite evidence to the contrary on record.
- 7) That the learned magistrate erred in law and in fact in failing to make a determination that owing to the possibility of double allocation of the suit land, and the Appellant having proven prior allotment, was entitled to the suit land de jure.
- 8) That the learned magistrate erred in law and in fact by delivering a judgment in which the analysis was not based on proper evaluation and consideration of the evidence on record, submissions and applicable laws, principles on the evidence on admission of evidence and the sacrosanct edicts on the burden of proof.

Background

2. The Appellant filed a suit against the Respondent Cleophas Muli Mbai on 24th May, 2012 vide plaint dated 22nd May, 2012 in which he sought the following reliefs:
 - a. **A permanent order of injunction to issue to restrain the Defendant, his servants and/or agents from trespassing upon plot No. 24 situate at Mwaani market in Makueni County and/or interfering with the Plaintiff's possession, use and/or works thereat.**
 - b. **Costs and interests at court rates.**
3. The Respondent filed a defence on 21st June, 2012 in which he denied the Applicant's claim. On 17th November, 2015, the Respondent filed an application dated 9th November, 2015 in which he sought to amend his

defence and raise a counterclaim. The record of proceedings does not show whether this application was ever allowed.

4. The Respondent passed away on 7th March, 2017. On 4th April, 2022 an application dated 2nd April, 2022 to substitute him was allowed on 31st May, 2022. The Respondent used the leave to substitute to further amend the draft which was annexed to the application dated 9th November, 2015. The further amended defence was filed on 21st June, 2022.
5. In the further amended defence dated 21st June, 2022, the substituted Respondent sought the following reliefs:
 - a. **A declaration that the late Cleophas Muli Mbai is the rightful owner of a plot No. 27 at Mwaani market.**
 - b. **An order of injunction restraining the Plaintiff, his servants, agents and/or anyone claiming under him from entering on to, cultivating, trespassing or interfering in any manner with the Defendant's plot No. 27 at Mwaani Market.**
 - c. **Costs of this suit.**
 - d. **Any further or other relief that the court may deem fit to grant.**
6. On 2nd October, 2023, the Appellant filed an application to amend the plaint but the application was dismissed in a ruling delivered on 14th November, 2023. On 10th January, 2024 the Appellant filed an application dated 9th January, 2024 in which he wanted the amended defence together with the further amended defence struck out as they were not properly filed leave to file the same having not been granted. This application was dismissed on 26th February, 2024.
7. The reason for dismissal of the Appellant's application is that the court had made a determination on 1st December, 2023 that all pleadings were properly on record. Of course this was an erroneous finding as the proceedings do not support any leave granted on 9th November, 2015 as the Respondent's counsel made the court to believe.

8. The case before the lower court was fully heard and in a judgment delivered on 21st June, 2024 the Appellant's suit was dismissed and the Respondent's counterclaim was allowed.
9. The dispute before the trial court was in respect of one plot which was being claimed by both the Appellant and the Respondent. The Appellant was claiming the plot which he stated was plot 24 at Mwaani market. The Respondent was claiming the same plot under Plot No. 27.

Parties submissions

10. The court directed parties to file written submissions. The Appellant filed his submissions dated 9th September, 2025. The Respondent filed his submissions dated 2nd October, 2025.
11. Basically, the parties analyzed the evidence which was adduced by the witnesses. The Respondent appears to be under the impression that the Appellant's case started de novo. This is not the position as the trial magistrate had given the Appellant the liberty to decide whether the case was to start de novo or not. The Plaintiff was recalled just to clarify the proceedings and defend the counterclaim. He was then cross-examined. The Respondent cannot therefore submit that court should not consider the evidence prior to 27th March, 2024.
12. The duty of a first appellate court was stated in the case of **Selle & Another –vs- Associated Motor Boat Company Ltd & Others (1968) EA 123** as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect”.

Analysis and Determination

13. There is no contention that both the Appellant and the Respondent are claiming the same plot on the ground but based on different plot numbers. I have carefully evaluated the evidence which was adduced in the lower court. The only issue for determination in this appeal is as to who between the Appellant and the Respondent owns the plot.
14. The evidence which was adduced by the Appellant is that the disputed plot was allocated in his name but that the allocation was at the behest his father who met all the required payments. His parents are the ones who were utilizing the plot until 2007 when his father gave him the plot as a gift during his wedding.
15. The allocation was made on 19th August, 1973. Rent and conservancy fees of Kshs.60/= was paid on the same date of allocation. The Appellant also produced another receipt for Kshs.9,000/= which he paid to the County Council of Makueni on 10th April, 2012.
16. When a dispute arose between the Appellant and the Respondent, the court ordered the surveyor from Makueni County to go and compile a report on the status of plot 24 and 27 in the presence of the Appellant and the Respondent. The surveyor went to the ground on 18th April, 2014. A report dated 13th May, 2014 was filed in court.
17. According to the surveyor's report, Mwaani Market plots have not been planned. The plots were allocated to the beneficiaries who took possession pending planning of the market. The surveyor stated that when he went to the ground, both the Applicant and the Respondent pointed to the same plot. The surveyor confirmed that according to the records held by the County

government of Makueni, plot 24 is owned by the Appellant and plot 27 is owned by the Respondent's deceased father.

18. The surveyor in his report stated that when the plot was allocated in 1973, it had a structure which was on it. This structure was demolished and the plot was used as a shamba. The Appellant later started construction on the plot. The building had reached lintel stage when the construction was stopped after this case was filed.
19. There is the evidence of PW3 Kyungu Malandi Gitonye who owned a hotel on plot No. 31. He testified that he had known the Appellant since 1983. He used to buy cassava from the Appellant which cassava was planted on plot 24.
20. PW2 Lucas Kisuni Mang'oka testified that he was a revenue clerk at Makueni County Council. He was in charge of Mwaani Market. He used to collect revenue from the Appellant who owned plot No. 24.
21. The Appellant testified that plot 24 was in between plot 23 and plot 25 which were owned by Dr. Katisya.
22. The Respondent testified that plot No. 24 was sold to Dr. Katisya by the Appellant's father. He did not adduce any evidence to confirm the allegation. The Respondent's evidence is that his father purchased plot No. 27 from Zacharia Mwangela Ndunda in 1999. Makueni County Council then transferred plot No. 27 Makueni to his father on 9th November, 1999. The Respondent did not adduce any evidence of sale between his father and Zacharia Mwangela Ndunda.
23. The Respondent's evidence is that his father did not develop or do anything on the land. He was only paying rent and conservancy fee to the County Council of Makueni and lately to the County Government of Makueni.
24. Determining a dispute touching on an unregistered land might seem to be a difficult task as can be seen from the trial magistrate's judgment where he

stated that had either party called evidence from the Provincial Administration his task of determining ownership would have been lighter.

25. There are a number of decisions which have given guidelines on how to go about determining ownership of an unregistered land. In the case of **Caroline Awinja Ocheing & Another –vs- Jane Anne Mbithe Gitau & 2 others (2015) eKLR** Justice J. L. Onguto quoted with approval the decision of **Festo Ogeda Agutu –vs- Richard Odumbe & Another (2022) eKLR** where it was stated as follows:

“In determining the above issue it would be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. 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.....

It is the delivery of deeds or documents which assist in providing not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any pervious owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen Headley (1991) Ch 425 at 437.*

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, plot cards, lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, *et al*”.

26. A good guide on how to go about determining ownership of unregistered land can be found in the case of **Simiyu –vs- Waswa (Environment and Land Appeal E021 of 2023 (2025) KEELC 3370 (KLR)** where it was stated as follows:

“In cases such as this one where the land is yet to be registered, proof of ownership must depend on other factors aside from title. In the case of Danson Kimani Gacina & Another vs Embakasi Ranching Company Ltd (2014) EKL, the court explained that: “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which leads to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property”.

27. The evidence adduced before the lower court clearly established the root of ownership of the Appellant as regards plot No. 24. The parents of the Appellant were using the plot up until the Appellant became a grown up. The father gave him the plot as a gift which he had already registered in his name. The names of the Appellant are in the records of the County Government of Makeni.

28. The County Surveyor confirmed that it is the Appellant who had been on the plot. The plots at Mwaani are occupied by the owners as the area has not been planned. The surveyor traced occupation of plot 24 from allocation up until 2009 when a structure which was on the land was demolished. The Respondent’s evidence is that plot 27 had no development on it and was not

being used in any way. The records of this plot are in the County Government of Makueni.

29. With all this evidence, the trial magistrate was plainly wrong in finding that the Appellant had failed to prove his case. On the contrary, it is the Respondent who did not prove his case. His claim to the position occupied by the Appellant was not supported by the survey report of 13th May, 2014. When the Respondent was asked whether he was aware of the survey report which had been filed in court, he claimed that he was not aware about it. This is despite the fact that he was present when the surveyor went to the ground.
30. The Respondent's lawyer is on record stating to court that she had seen the report by the surveyor. It is therefore clear that the trial magistrate found in favour of the Respondent when there was no evidence to support his position. The trial magistrate relied on evidence as to the sequence of plot numbers in the market when that could not help in determining the ownership dispute as the area had not been planned.
31. The Respondent had claimed that the Appellant's father had sold plot 24 to Dr. Katsiya. If this be the case, one then wonders on what basis he was again claiming plot 24 which according to the trial magistrate's finding followed a sequence from plot 20 to 28.
32. The Respondent's counterclaim was an afterthought. The Appellant filed a suit against the Respondent's father on 24th May, 2012. On 25th September, 2012, the Respondent filed an application for injunction seeking to stop the Appellant from constructing on plot 27. He obtained *ex parte* orders of injunction which he used to stop the Appellant from further construction. This is despite the fact that he had not filed any counterclaim.
33. On 16th December, 2014, the Appellant filed an application seeking to discharge the *ex parte* injunctive orders given on 25th September, 2012. This application was dismissed with costs to the Respondent on grounds that the

Appellant had not annexed a copy of the orders which he was seeking to set aside. The magistrate further observed that the application had been overtaken by events in that a ruling on the application dated 25th September, 2012 had been delivered on 13th February, 2013 but the contents of the ruling were not known as the crucial pages of that ruling had been plucked out. The trial magistrate gave unsolicited advice to the Respondent to file a counterclaim. This was in a ruling delivered on 24th June, 2015.

34. On 9th November, 2015 the Respondent filed an application seeking to amend his defence and file a counterclaim. He never pursued this application as the record shows that no such leave was granted. The Respondent's father passed away on 7th March, 2017. An application to substitute him was filed on 4th April, 2022. The Respondent used the leave to substitute to amend the draft amended defence which was annexed to the application dated 9th November, 2015 which was never allowed in the first place.

35. Despite the Appellant raising these anomalies, the irregular amendments were given a seal of approval on 26th February, 2024.

Disposition

36. From the above analysis, it is clear that the trial magistrate was wrong to dismiss the Appellant's suit and allowing a counterclaim that never was. I therefore allow the appeal, set aside the judgment of 21st June, 2024 and in place thereof make an order allowing the Appellant's suit before the lower court with costs. The Appellant shall also have the costs of this appeal.

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HON. E. O. OBAGA
JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF DECEMBER, 2025.

IN THE PRESENCE OF:

Ms. Nzau for Respondent.

Ms. Gichuki for Appellant.

Court assistant – Steve Musyoki

ORIGINAL