

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ELCLA APPEAL NO. E015 OF 2023

DENNIS OKUMU OWANO.....
.....APPELLANT

VERSUS

NATHANIEL OYUGI JERA.....
RESPONDENT

JUDGMENT

(Being an appeal from the judgment of the Principal Magistrate Hon. Nicodemus N. Moseti (PM) delivered on the 21st June, 2023 in Mbita ELC No. E009 of 2021)

INTRODUCTION

1. As is clear from the heading of this decision, this is an appeal arising from the judgment of Honourable Nicodemus N. Moseti Principal Magistrate, delivered on 21st June, 2023 in Mbita ELC No. E009 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 18th October, 2023 appealing against the said ruling on the following grounds:

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1) THAT the learned trial magistrate erred in law and fact by making a finding that the Respondent herein proved his case against him to the required

standard yet he failed to produce in court documentary evidence to prove that he acquired the suit property through purchase.

2) THAT the learned trial magistrate erred in Law and fact by failing to observe that the Respondent herein is not a truthful and trustworthy witness to be relied upon given that in cross examination he stated that he was allocated 15 HA of land yet the final card indicated 12.5 HA, indicating that he currently held more than he claimed.

3) THAT the learned trial magistrate further failed to observe that failure by the Respondent herein to prove any damage or loss in the suit property clearly shows that he is a liar who cannot be relied upon.

4) THAT by holding that I failed to prove fraud done by the land's Registry by issuing the Respondent herein with the title deed of PNO. Lambwe west "B"/1323, the trial court failed to observe that I was not aware that PNO.1323 also emanated from plot

**NO. 56A Kamato Block registered in my name before
sub — division until I was accused in court.**

3. The Appellant seeks orders allowing the appeal and setting aside the trial magistrate's judgment dated 21st June, 2023. He prays that the court orders rectification of the register for land parcel No. Lambwe west "B"/1323 by deleting the Respondent's name.

BRIEF FACTS

- 4.** The Respondent had filed a plaint dated 6th April, 2021 seeking an order of permanent injunction to restrain the Appellant from trespassing onto land parcel Lambwe West/Labwe West "B"/1323 the suit property herein.
- 5.** The Appellant filed his Defence and Counter claim dated 5th May, 2021 where he denied the Respondent's claim. He sought for an order of cancellation of the title in the Respondent's name and that the same be registered in his name.
- 6.** The trial court heard the case and found that the Respondent had proved his case on a balance of probabilities and held that he was the rightful owner of the suit property. He also found that the Appellant had failed to prove fraud and dismissed his counter claim with costs.

7. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant filed his lengthy submissions dated 17th January, 2025 he submits that the trial magistrate misinterpreted and used the Plaintiff and Defendant interchangeably. He submits that the trial court believed that he had delivered justice upon the Defendant but ended up delivering the same to the Plaintiff.

9. He relied on the case of **Belinda Murai and Others V Amoi Maina (1978) KLR 2783** and the case of **Philip Chemwolo & Another V Augustine Kabende (1982-1988) KAR 103**.

10. It was counsel's submissions that the Respondent did not produce any evidence that confirmed that he purchased the suit parcel from the Appellant or any other party.

11. He further submits that the suit land was ancestral land with the Appellant in full occupation of the land since time immemorial. He argued that at no point had the Respondent

owned or taken possession of the suit land. He urged the court to allow the appeal as prayed.

12. Counsel for the Respondent on the other hand filed his submissions dated 29th October, 2024 where he identified two issues for determination. The first issue was whether the appeal should be allowed. He relied on **Section 24 (a), 25(1) and 26(1) of the Land Registration Act** and the case of **John Mbogua Getao V Simon Parkoyiet Mokare & 4 Others [2017] KECA 156 (KLR)**.

13. He submits that the Respondent was the undisputed registered owner of the suit property having acquired the same through purchase from the Appellant. He cited the Court of Appeal case in **Emfil Ltd v Registrar of Titles Mombasa & 2 Others [2014] eKLR** and submits that the Appellant despite having alleged fraud against the Respondent, he failed to prove the same so as to warrant cancellation of the Respondent's title. He urged the court to dismiss the appeal with costs.

Analysis and Determination

14. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

1. Whether the appeal is merited.

2. Who should bear the cost of the appeal.

15. Being a first appeal, the 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 ...”

16. Further, in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)** the court held that:

“This being a first appeal, this court’s mandate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect.”

17. I have keenly perused through the court record and I note that from the record of appeal, the index is shown to run from page 1 until page 11. However, a perusal of the physical file together with the CTS system, only contained the first page of the record with no annexures of the listed items in the index. Even when considering the other document dated 18/10/2023 also known Record of Appeal, which has 26 pages does not have the Plaint and Defence or pleadings generally.

18. In addition, the judgment and decree which Appellant seeks to appeal against are not contained in the record which

contravenes the provisions of **Order 42, Rule 2 of the Civil Procedure Rules** which provides that:

“where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section **79B** of the Act until such certified copy is filed.”

19. Order 42 Rule 13 (4) (a), (b) and (f) further provides that:

“Before allowing the appeal to go for hearing the judge shall be satisfied that inter alia, memorandum of appeal, pleadings and the judgment, decree or order appealed are on the court record, and that such of them as are not in the possession of either party have been served on that party.

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)”

20. This Court appreciates that the court record confirms that on 21st January, 2025, the court directed the Appellant to ensure that the record of appeal was proper. It is not in dispute that the Appellant had legal representation that ought to ensure that the same was rectified for purposes of determination of the appeal.

21. In the instant appeal the record of appeal is not complete to begin with since its only a one page.

22. The Supreme Court of Kenya in the case of **Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 Others [2015] eKLR** held as follows:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

23. This court has unfortunately been placed in a precarious position to determine the present appeal in the absence of a proper record of appeal. It is this court’s view that the heart of the determination on the merits of an Appeal solely lies a Record of Appeal as is with the Memorandum of Appeal. In its absence, the said Appeal is rendered not only incompetent but also

incomplete. This Court could have spared the Appeal herein by striking out only the incomplete record of appeal and leaving the memorandum of appeal intact as the civil procedure rules envisages. But the unfortunate complexity herein, as is borne from the court record and the CTS, is that the appellant filed the said Memorandum of Appeal with the purported record of appeal as one set of documents. The court cannot sever them and to breathe life to the instant appeal.

24. The upshot, this court finds that the instant appeal is incurably incompetent. The entire appeal is hereby struck out with costs to the Respondent.

25. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 20th day of January, 2026.

Hon. Dr. *iur* Nyagaka

Judge

In the presence of,

Ms. Odera Advocate for the Appellant

Ms. Madoro Advocate for the Appellant (Absent)