

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCEPA NO. E003 OF 2024

MOHAMED ABEID MOHAMED
APPELLANT

VERSUS

ABDUL HAKIYA MOHAMED
DEFENDANT

(Being an Appeal from the Judgment of Hon. EK Usui, Chief Magistrate in Malindi SPMCC ELC E008 of 2021 delivered on 9th December, 2023)

JUDGMENT

The Memorandum of Appeal.

1. The Memorandum of Appeal dated **10/12/24** has the following grounds: namely, that the Learned Trial Magistrate erred in fact and in law by:
 - a. Failing to properly consider the uncontroverted evidence that the appellant was the legal owner of the land portion number 13306 Malindi, which he had possessed and occupied exclusively even prior to the subdivision of the parent parcel;*
 - b. By accepting the respondent's allegations of fraud without sufficient evidence contrary to the principle that fraud must be proved to a standard higher than the balance of probabilities;*
 - c. By failing to observe that the respondent's counterclaim was inconsistent and unsupported by credible evidence including the surveyor's testimony which confirmed discrepancies between the proposed subdivision plan and the deed plan but did not implicate the appellant in any fraud;*
 - d. By disregarding a critical maxim such as nemo dat quod non habet and equity aids the vigilant which applied to the appellant's rightful ownership;*
 - e. By failing to grant the injunctive orders sought by the appellant, despite clear evidence of trespass and interference by the respondent;*
 - f. By delivering the judgment against the weight of evidence, including testimonies of the appellant's witnesses which*

demonstrated the appellant's entitlement to the property and the respondent's unlawful actions;

- g.** *By overlooking the procedural lapses highlighted in the respondent's own evidence regarding the subdivision process which undermined the validity of his claims over the disputed portion of land.*

2. The appellant prays that:

- a.** *The appeal be allowed and the judgment of EK Usui dated the 19th December 2024 be set aside in its entirety;*
- b.** *This court grants the following orders:*
- i.** *A permanent injunction restraining the respondent his agents servants or any other party acting on his behalf from trespassing; constructing or interfering with the portion number 13306 Malindi.*
 - ii.** *Costs of this appeal and the proceedings in the lower court to be awarded to the appellant;*
- c.** *Any other orders that this court deems fit and just to grant.*

Background to the present appeal

Plaint.

3. The appellant filed **Malindi CMELC No E008 of 2020** against the respondent vide a plaint dated 21/9/2020. In that plaint he sought the following orders:
- a.** *An injunction restraining the defendant his servants, employees and/or agents or any other party from trespassing; constructing conveying and/or otherwise interfering with the rights and interests of the plaintiff in portion number 13306 (Original number 2012 /9) Malindi pending the hearing of this suit;*
 - b.** *An order of eviction be issued against the defendant;*
 - c.** *Costs of the suit be provided for.*
4. In the body of the plaint the appellant claimed he was the legal and beneficial owner of hereinafter also referred to as "*the suit land*"; that his father Mohamed Abeid Shausi was the previous owner of the same; the property is a subdivision of portion no 2012- Malindi. That original mutated into 8 subplots. One of the subplots, no 13302, is owned by the appellant's mother. On 2nd November 2018,

the appellant commissioned the district surveyor to prepare a surveyor's report to confirm the boundaries of the suit property; the appellant averred that the report confirmed that the area was duly and legally approved. In the year 2020 the respondent claimed the suit land and constructed a wall inside it and invited the appellant via a social media post, referring to the appellant therein as "*Aboud Rogoo*," to demolish it. The appellant reported to the police. The respondent thereafter reported that the appellant had maliciously damaged his perimeter wall. The appellant termed the actions of the respondent on the suit land as trespass hence the suit.

Defence And Counterclaim

Defence.

5. In his defence, the respondent denied the appellant's claim and pleaded that an acreage of 0.0330 ha in Deed Plan No 306454 for the suit property was obtained by fraud in the creation of the appellant's plot, hence resulting in portion no 13306 measuring 0.0330 while portion no 13302 was reduced to 0.042 ha.
6. The respondent averred that the appellant had joined him wrongly in the suit.

Counterclaim

7. In the counterclaim, the respondent joined Fatuma Omar Naji as his co-plaintiff and Abeid Mohamed Shaushi as the appellant's co-defendant and reiterated the matters in the plaint and claimed that the appellant was guilty of fraud and misrepresentation; that the appellant was not entitled to the portion since it had been hived off the respondent's portion created vide the subdivision scheme of **plot no 2012-Malindi**. He sought the cancellation of the Deed Plan No 306454 creating the appellant's portion and the deed plan for his plot, and their substitution with fresh deed plans that

reflected the measurements of the plots in the approved subdivision scheme for the **Plot No 2012** Malindi. He prayed for the following orders:

- a. An order for the rectification of deed plan no 306454 for land portion no 13306 and deed plan no 306455 for land portion no 13302 by ordering the cancellation of the said deed plan no 306454 and deed plan no 306455 and replace them with new deed plans for land portion no 13306 and land portion no 13302 that accord with the measurements in the approved subdivision scheme for land portion no 2012 Malindi;*
- b. Costs of the suit;*
- c. Any other relief that the court may deem just to grant.*

Reply to Defence.

8. The appellant filed this pleading on 28/10/2020 which reiterated all the matters in the plaint and denied the respondent's claims of fraud, and maintained that he had sued the right party who had entered his land and constructed a short wall thereon; that the respondent insulted the appellant on the social media and removed the chickens from the appellant's chicken house when served with process in this suit; that there has never been a boundary dispute between the two parties; that the property was subdivided long ago; that titles were issued after beacons were planted; that the appellant has been in peaceful possession of the suit land for more than a decade; that it was the respondent and not the respondent's mother who had interfered with the suit land claiming that the same belonged to his family; that the respondent renovated the appellant's chicken house and took it over and lodged a criminal case as the complainant against the appellant.

Defence to counterclaim

9. The appellant denied the matters raised in the counterclaim and stated that the plaintiffs in the counterclaim did not deserve the orders sought therein. The appellant averred that the respondent

and his co-plaintiff had failed to produce title to their portion of land; that it is the respondent's mother's plot that is larger than the dimensions it was assigned in the subdivision scheme but the appellant's plot is intact as per that scheme. It was prayed that the counterclaim be dismissed with costs.

The Judgment In The Subordinate Court.

10. The trial magistrate delivered a judgment dated 9/12/2024. It was her observation that the appellant had not established his claim on a balance of probabilities since according to her the survey was marred with irregularities; that there was no ground upon which to issue a permanent injunction as the sizes of the two parcels had been contested. She also found in favour of the respondent's counterclaim and gave the parties an opportunity to carry out a joint survey exercise as per the acreage agreed upon in the land sale agreement between the appellant's father and the respondent's mother. She then issued the following orders:

- a. A fresh subdivision exercise is carried out on the suit parcel Malindi 2012 in the presence of parties herein together with the Kilifi county land surveyor and in the presence of both counsels for the parties who shall also be at liberty to appoint their own surveyors;*
- b. An order of rectification of deed plan no 306454 for land portion no 13306 and deed plan no 306455 for land portion no 13302 by ordering the cancellation of the said deed plan no 306454 and deed plan no 306455 and replace them with new deed plans for land portion no 13306 and land portion no 13302 that accord with the measurements in the approved subdivision scheme for land portion no 2012 Malindi;*
- c. Costs of 1 and 2 above be borne by both the plaintiff and the defendant equally;*
- d. Pending the rectification of the deed plan the parties herein are bonded to keep the peace within their areas of occupation;*

- e. *The OCS Malindi Police Station shall provide security during the enforcement order 1 above on the ground;*
- f. *Costs are at the discretion of the court and to promote peaceful co-existence of the parties each party shall bear its own costs.*

Analysis and Determination.

11. The issues arising for determination in the present appeal are as follows:

- a. *Whether the learned trial magistrate erred in failing to consider that the appellant was the legal owner of the suit land and he had occupied the same even before the subdivision of the mother parcel;*
- b. *Whether the learned trial magistrate ruled in favour of the counterclaim without sufficient evidence;*
- c. *Whether the learned trial magistrate ignored crucial principles of equity in her decision;*
- d. *Whether the decision of the learned trial magistrate was against the weight of evidence adduced.*

12. Regarding the first issue, evidence showed the mother parcel belonged to the appellant's father who subdivided the same and sold a portion to the respondent's mother. The defence and counterclaim of the respondent was that the appellant's plot was carved out of the respondent's plot. The appellant's occupation of the suit land did not begin recently. Even DW2's evidence was that as at the time the appellant's father instructed him to conduct a survey on the mother parcel and subdivide it into **8** portions, the appellant was still present on the land and that he had some structures thereon. That was in the year 2008 according to DW2. I have no reason to doubt the veracity of the respondent's witness.

13. DW2's evidence was that Deed Plans issued on 5th March 2010. The complaint by the respondent arose in the year 2018.

14. The subdivision yielded the respondent's parallelogram-shaped plot *vide* Deed Plan No 306455. The appellant's plot was an irregularly shaped one *vide* Deed Plan No 306459. However, it is not the shape

that matters in this case now but the sizes of the two parcels and the date of the deed plans creating them.

15. According to the proposed subdivision scheme plot no 13302 was to measure 0.036 ha while plot no 13306 was to measure 0.030 ha.
16. The final acreage reflected on the deed plan for plot number 13302 at the top left-hand corner of the Deed Plan No 306455 is 0.0380 ha. which exceeds that in the subdivision scheme but which is the correct acreage stated in the indenture dated 5/8/2010 executed between the respondent's mother and the appellant's father.
17. The final acreage reflected on the Deed Plan No 306459 for portion number 13306 is 0.0330 ha. Both deed plans were created on the same day. The boundaries have remained the same on the map since then.
18. Considering that the deed plans were created in the year 2010 and that it is not controverted that the appellant has been utilizing the suit property since then, the trial magistrate erred in not considering that fact as persuasive in her judgment.
19. As to whether the learned trial magistrate ruled in favour of the counterclaim without sufficient evidence, it is the case that the legal burden of proving the counterclaim lay with the respondent.
20. Section 107 of the Evidence Act provides as follows:

"107. Burden of proof.
(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."
21. 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.

22. The respondent was to establish the following according to the pleading in his counterclaim:

- a. The appellant hived off of a portion of the respondent's portion no 13302;*
- b. That hiving off occurred after the creation of parcel no 13302;*
- c. The hiving off of a portion of the parcel no 13302 was fraudulent and by use of misrepresentation on the appellant's part;*
- d. That the appellant was not entitled to the portion; since it had been hived illegally hived off portion no 13302;*
- e. That consequently there was need for rectification of deed plan no 306454 for land portion no 13306 and deed plan no 306455 for land portion no 13302.*

23. The only evidence towards proof of the counterclaimant's case emanated from DW2 which did not come close to stating that the appellant hived off of a portion of the respondent's Portion No 13302. DW2 was the Surveyor employed to do the subdivision; it was not the appellant who had been hired to conduct the survey work; the respondent never established that the appellant had any survey credentials to be able to conduct the survey. DW2 stated as follows in examination-in-chief:

"Owner of the plot gave me instructions."

24. When cross-examined by Ms. Mwangi he stated as follows:

"The son of the owner of the plot was present when I picked a plot."

25. In his written statement which he adopted he stated as follows:

*"After placing the beacons one Mohamed the son of the owner of the plot requested me to move the beacon from the original proposed boundary between **D** and **E** because it had some cages*

which might have been keeping chicken which made proposed plot E to be smaller than plot D.”

26. Assuming that by plot E he meant the respondent's plot, he did not explain why the final measurements appearing on the deed plans produced on the same date for the two plots reflect that plot no E is larger than plot D to date.
27. DW2's evidence thus contains inconsistencies, first: *is it the owner who gave him instructions or the owner's son? And perchance the son gave him instructions, in his professional standing was not he to verify the same with the owner prior to lodging the proposed subdivision plan? Secondly: despite his evidence that the appellant's plot ended up being larger than the respondent's, why do the final measurements appearing on the deed plans produced on the same date for the two plots reflect that plot no E is larger than plot D to date?* I find that in the light of these inconsistencies, the magistrate erred in allowing the counterclaim.
28. Regarding whether the learned trial magistrate ignored 2 crucial principles of equity in her decision I have not seen any submissions of the appellant's counsel in regard but I also do not find any application of the *nemo dat quod non habet* rule in this case. However, in respect of the maxim of equity "*Equity aids the vigilant*", it is the case that both the deed plans creating the plots having been prepared in the year 2010, and the parties having been in possession of their respective plots since then, it is too late in the day for the respondent to raise his claim.
29. Further, I also find that the respondent raised that claim with the wrong party since the respondent never joined in his counterclaim the surveyor who prepared the plan and lodged it with the Director of Surveys, and who ought to be questioned as to why there arose any discrepancy (which discrepancy in this court's view is purely

imaginary). Instead, he called the same surveyor as a witness where for some incomprehensible reason, he made very self-incriminating statements in evidence. It is even strange that he was not arrested and charged with any wrongdoing instead of, or jointly with, the appellant, if the appellant had to be arrested and arraigned in court at all. It is also strange that it was the appellant who was arrested and arraigned in court with malicious damage whereas the respondent's wall intruded on his property.

30. On the last issue, this court finds that the above discourse answers that question as to whether the decision of the learned trial magistrate was against the weight of evidence adduced in the positive.
31. Accordingly, this appeal has merit. I allow the appeal and hereby issue the following final orders:

- 1. The appeal herein is allowed;**
- 2. The judgment of Hon EK Usui, CM dated the 19th December 2024 is hereby set aside in its entirety and is substituted with the following orders:**
 - a. The plaintiff's claim in the main suit in MALINDI CM ELC NO E008 OF 2020 has merit and is hereby allowed in the following terms:**
 - i. A permanent injunction is hereby issued restraining the respondent his agents servants or any other party acting on his behalf from trespassing; constructing or interfering with the portion number 13306 Malindi;**
 - ii. The defendant's counterclaim in MALINDI CM ELC NO E008 OF 2020 lacks merit and is hereby dismissed with costs to the plaintiff in the main suit in that case;**
 - iii. The costs of the suit in MALINDI CM ELC NO E008 OF 2020 are awarded to the plaintiff in the main suit in that case;**
- 3. The costs of this appeal shall be borne by the respondent.**

**Dated, signed and delivered at Malindi on this 25th February
2026.**

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**