

**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 13 OF 2022**

**PRISCILLA**

**MBUYA.....APPELLANT**

**-VERSUS-**

**EMILY WANJA MIGOGO..... 1<sup>ST</sup> RESPON  
DENT**

**RICHARD MWANJI NJUE..... 2<sup>ND</sup>  
RESPONDENT**

***(Being an Appeal against the Judgment of Hon. E.N Wasike, Principal Magistrate in Siakago CM ELC Case Number 68 of 2020 dated 6<sup>th</sup> October 2022)***

**JUDGMENT**

1. This appeal arose from the Judgment of Hon. E.N Wasike, Principal Magistrate at Siakago in Civil Suit CM ELC Number 68 of 2020. The judgement was delivered on 6<sup>th</sup> October 2022.
2. The Appellant filed a Memorandum of Appeal dated 18<sup>th</sup> October 2022 which sets forth the following grounds of appeal:
  - 1) *The learned Principal Magistrate erred in law and in fact in ordering the eviction and/or demolition of the illegally constructed structure in the suit property LR No.*

*Evurore/Evurore/2475 at the cost of the defendant contrary to the eviction process.*

- 2) The learned Principal Magistrate erred in law and in fact in not questioning how the said plaintiffs got the said land LR. No. Evurore/Evurore/2475.*
- 3) The learned Principal Magistrate erred in law and in fact in not considering how long the said plaintiffs have lived on the said land.*
- 4) The learned Principal Magistrate erred in law and in fact in not considering that the said defendant has extensively developed the said land LR. No. Evurore/Evurore/2475.*
- 5) The learned Principal Magistrate erred in law and in fact in not considering that the said land LR. No. Evurore/Evurore/2475 was illegally subdivided and illegally transferred to the plaintiffs without following the right procedure.*
- 6) The learned Principal Magistrate erred in law and in fact in not considering the defence by the defendant and the submissions thereon, which were detailed.*
- 7) The Learned Principal Magistrate erred in law and in fact in not considering that the defendant has no other place to go and (sic) his family.*
- 8) The Learned Principal Magistrate erred in law and in fact when he exhibited biasness against the appellant in his judgment.*

9) *THAT the Learned Principal Magistrate erred in law and in fact in failing to give the necessary weight to the appellant's evidence.*

10) *THAT the judgment was against the weight of the evidence adduced.*

3. The appellant prays for the following orders:

*i. The judgment of the trial court be set aside*

*ii. Revival of the suit before the trial court for purposes of re-examining some or all of the matters from the concluded trial.*

*iii. That the costs of the appeal be provided for.*

4. The suit in the lower court was filed vide Plaint dated 14<sup>th</sup> September 2020. The Plaintiffs, who are the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this appeal, claimed that they were the joint legal registered owners of land parcel, LR. No. Evurore/Evurore/2475 and that the appellant, who was the defendant, had unlawfully trespassed onto it and constructed structures on a part thereon. The appellant was accused of refusing to vacate from the suit land despite the respondent's demands.

5. The appellant on the other hand denied the allegations in the Plaint in her statement of defence and stated that the suit land was left for her and her children by her husband and her father.

### **Summary of evidence before the trial court.**

6. The hearing before the lower court commenced on 22<sup>nd</sup> July 2021. That is when PW 1, **Emily Wanja Migogo**, the 1<sup>st</sup> Respondent, gave her testimony. She stated that her co-respondent is her husband, with whom she shares joint ownership of the suit property. She said they bought the suit parcel from one Mbindu Gichindano, who is now deceased. She accused the appellant of trespassing on the suit land and refusing to vacate despite several requests.
7. On cross-examination, the 1<sup>st</sup> Respondent denied knowing how many wives the deceased seller of the land had and denied participating in the succession proceedings. She also confirmed that she and her husband had a valid title deed to the suit land.
8. **PW 2, Richard Mwaniki Njue** also gave his testimony. He reiterated what the 1<sup>st</sup> Respondent, his wife, told the Court. He added that upon the death of the deceased seller of the suit land the deceased's wife became the administrator, and after the succession proceedings, the land was transferred to them. However, the appellant set up illegal structures on the land.

9. On cross-examination, PW 2 denied taking advantage of the deceased. He said they bought the land from him as he was the legal owner. He also denied that the deceased died in their hands.

10. **PW 3 Jennifer Igoki**, stated that she knows the respondents, who bought the suit land from them. That the deceased seller was her husband. She added that she knows the appellant, who is her daughter-in-law. However, she stated that the suit land belongs to the respondents and that she would apportion the appellant her portion of land. That was the close of the respondent's case.

11. The hearing of the Defence case in the lower court began on 31<sup>st</sup> March 2022. The appellant, DW 1, gave her evidence in chief. She stated that she has been on the suit land for over thirty (30) years and that her husband died and left her and her husband on the land. After the death of her husband, her father in law showed her where she would put up her house and she constructed it. She said she had done extensive developments on the land and also planted crops.

12. She further stated that her father in law, Mbindu Gichindano, died in the year 2013 and was the registered

owner of the suit land. That the respondents are the ones who took her father in law to hospital and when she went to check on him the following day she was told the respondents transferred him to a different location which she did not know. Further that she later heard that he died. Later on, the title deed of her father in law got lost and she made an announcement in the local vernacular radio station. The 2<sup>nd</sup> respondent threatened her with death should she make a further announcement. She was thereafter served with a demand notice and later with the pleadings for this suit.

13. On cross-examination, the appellant acknowledged that she saw the land agreement and heard the deceased's wife say that she was aware of the agreement. She stated that the 1<sup>st</sup> respondent prevented her from seeing her father-in-law in hospital and accused them of concealing the succession process from her.

14. The Defence sought to call for one more witness but was locked out as the witness statement was not filed in good time.

15. Judgment was delivered by the trial court on the 6<sup>th</sup> of October 2022. The trial Court found that the respondents exhibited three (3) valid agreements for sale and that they are the registered owners of the suit land. The court found that the appellant failed to controvert the respondent's title and discredit its validity. It allowed the respondents' suit and granted the prayers sought by them.

**The Appellants' submissions.**

16. Counsel for the Appellant, referring to the order that eviction be at appellant's own costs, submitted that the trial Court had found that there was no trespass and yet condemned her to cater for the costs of the eviction on land that she had lived on for many years.

17. Further, it was submitted that the Court turned a blind eye to the root of the title, by failing to consider the fact that the Appellant was not listed as a beneficiary to the Estate of Mbindu Gichindano, and was thus unlawfully disinherited.

18. Therefore, it was the Appellant's submission that the impugned judgment should be set aside as it occasioned miscarriage of justice.

19. Regarding their prayer for retrial, the Appellant submitted that the Learned Trial Magistrate erred in not allowing the

Appellant to call all the witnesses she intended to call to testify in the matter, thus occasioning miscarriage of justice. She sought for a chance to be allowed to ventilate the claim conclusively, stating that the Respondents will not be prejudiced in any way.

### **The Respondents' submissions**

20. Counsel for the Respondents submitted that the judgment issued by the lower court was sound, lawful and in line with the evidence and legal principles. Further that their joint registered title established ownership and that the Appellant trespassed on the land without authorization. He relied on the case of **Kenya Power and Lighting Company Limited v. Sheriff Molana Habib (2018) eKLR** and Section 26 of the Land Registration Act.

21. It was therefore their submission that the Appellant produced no credible evidence of fraud, misrepresentation or illegality to challenge their title, and that in the case of **Chemei Investments Limited -vs- The Attorney General & Others (2012) eKLR**, it was held that even if improvements are made on land, they do not grant ownership rights if done without legal authorization from the registered owner.

22. Counsel also relied on the following authorities:

**Esther Ndegi Njiru & anoter v. Leonard**

**Gatei(2014)eKLR**

**Samuel Kamau Macharia & another v. Kenya**

**Commercial Bank & 2 others (2012)eKLR,**

**James Ochieng Oduol & Company Advocates v.**

**Richard Kuloba(2008)eKLR,**

**Republic -vs- Attorney General & another ex-parte**

**Ongata Works Limited (2016) eKLR,** and

**Kenya Airports Authority -vs- Mitu-bell Welfare**

**Society & 2 others (2016)eKLR**

23.Counsel concluded that the Appellant failed to substantiate any of the grounds raised in the appeal and urged the court to dismiss it in its entirety.

### **ANALYSIS & DISPOSITION**

24. As the first appellate court, this court must approach the whole of the evidence on record from a fresh perspective and with an open mind. It has to evaluate and re-examine the evidence adduced in the trial court, taking into account the fact that it had no opportunity of hearing or seeing the parties as they testified. The role of an appellate court was stated in the case of **Gitobu Imanyara & 2 others v Attorney**

**General [2016] e KLR**, where the Court of Appeal stated thus;

***“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.”***

25. Having gone through and considered all the proceedings and pleadings filed in the trial court and the rival submissions in this appeal, I am of the view that the question that arises for determination can be condensed into whether the Trial Magistrate erred in law and in fact in his appreciation of evidence and whether he was right to decide in favour of the respondents.

26. The Respondents exhibited a copy of the title to the suit land. The title is in their joint names. They showed the agreements for the sale of the suit land, Evurore/Evurore/2475, dated 8/10/2012, 12/11/2012 and

17/5/2013, before the trial court. They also exhibited a Certificate for confirmation of grant dated 23<sup>rd</sup> July 2020 from the Principal Magistrate's Court at Siakago, where they were granted joint share of the suit land. I note that the seller Mbindu Gichindano (Deceased) died on 27<sup>th</sup> June 2013 and that he was the one who executed the said agreements. The wife of the seller also testified and said she was aware of the sale.

27. Section 26 of the Land Registration Act, provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship. The section is as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

**a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or  
b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”**

28. The Appellant on the other hand contends that she has lived on the suit land with her children and has no other home. According to her she is therefore rightfully entitled to the land as her inheritance. However, she did not prove that there was any fraud, misrepresentation, illegality in the acquisition of the land or that title was acquired unprocedurally or through a corrupt scheme. The seller had the right to sell his own land to whoever he wished and there is no evidence of an irregular transaction.

29. As to whether the Appellant is entitled to a share of the estate of the deceased, that is a matter that the trial Court was not clothed with the jurisdiction to handle as it was an Environment and Land Court at the time and was sitting as such. The Appellant had and still has the opportunity to contest the succession proceedings at the Siakago Court and to pray for the revocation of the confirmation of grant.

30. Section 47 of the Law of Succession Act CAP 160 provides that;

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”***

31. In this context, the trial court was not acting as a succession court but as Environment and Land Court, and it therefore could not make a determination on matters of devolvement of the estate of Mbindu Gichindano (Deceased).

32. Now that we have established that the Respondents are the registered owners of the title to the suit land, which has not been successfully challenged, it is imperative to establish whether the Appellant has trespassed onto the suit land. Section 3 (1) of the Trespass Act Cap 294 provides that:

***“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land***

***without the consent of the occupier thereof shall be guilty of an offence.”***

33. In **M’Mukanya v M’Mbijiwe (1984) KLR 761**, the Court held that:

***“the ingredients of the tort of trespass were revisited by this Court and restated as follows:***

***“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land (See Thomson v Ward, (1953) 2QB 153.”***

34. The respondents had proved in the lower court that they are the absolute proprietors of the suit land by virtue of purchase and subsequent issuance of title deed. They were therefore entitled to immediate and exclusive possession of the land, and the trial court therefore did not err in holding as such. It is therefore not right that the Trial Court stated that trespass did not literally occur, due to the fact that the Appellant may have lived on the land before the respondents became the registered owners. The Appellant had not yet acquired any land rights over the suit property and she therefore became a continuing trespasser on the

suit land from the time the respondents became the registered owners.

35. My opinion therefore is that the trial court did not err in finding in favour of the Respondents' case. On the matter of costs of eviction, Section 27 of the Civil Procedure Act CAP 21 of the Laws of Kenya provides as follows:

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

36. As evident above, the matter of costs is subject to the discretion of the Court. In the case of **Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 others (2013) eKLR** which cited with

approval the words of Murray C J in **Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227** , it was stated:

***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

37.As regards the retrial asked for, ordering a retrial of a civil matter in court is an unusual thing. It is only done in exceptional circumstances as the main business of the court is to bring finality to litigation. A re-trial would be ordered, for instance, where the original trial was so tainted by procedural wrongs or other malpractice so as to create the impression that fairness was comprised.

38.Some of the factors to consider include the interests of justice, discovery of new evidence or material relevant to the case, the prejudice that may be caused to the parties, any serious fraud or mistake surrounding the matter, or

whether there was obvious or glaring disregard of evidence.

None of this was demonstrated by the appellant.

39. Overall therefore, the merits of the appeal before court have not been demonstrated. The appeal is therefore dismissed.

40. I now come to the issue of costs. The law - See Section 27 of Civil Procedure Act (Cap 21) - is that costs follow the event. The appellants have won this appeal fair and square. There is no good reason for denying them costs. This court therefore upholds the lower court decision and also awards the respondents the costs of this appeal.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at Kitui this **28<sup>th</sup> day of April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

*Court Assistant - Musyoki*

Appellant - absent

Respondent - absent

**A. KANIARU**

**JUDGE- ENVIRONMENT & LAND COURT, KITUI**