



REPUBLIC OF KENYA



KENYA LAW
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**Mururu v Lintari (Environment and Land Appeal E032 of 2021)
[2024] KEELC 3687 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E032 OF 2021**

CK YANO, J

FEBRUARY 22, 2024

BETWEEN

BEATRICE MWOMAITHA MURURU APPELLANT

AND

GEORGE LINTARI RESPONDENT

JUDGMENT

1. The appellant in this appeal moved the trial court in Tigania SPMC ELC Case No. 10 of 2018 vide a plaint dated 10th January, 2018 and filed on 23rd January, 2018 seeking orders of eviction against the respondent in respect of the suit plot No. 4A Miathene Market.
2. The appellant's case was that her father-in-law who was already deceased was the owner of the suit plot which he had given to the appellant's late husband's, Hezel Mururu Isaiah (also deceased). That the appellant's late husband took possession of the plot in his lifetime and built a temporary structure therein for use by the deceased and his family. That upon the demise of the appellant's husband in 2014, the respondent unlawfully and illegally encroached on the said plot and had completely refused to give vacant possession to the appellant and her family. The appellant averred that she had suffered loss for non-user of her late husband's property and accused the respondent of intermeddling with the property of the deceased. The appellant therefore wanted the respondent to vacate from the suit plot.
3. In his defence dated 30th January, 2018, the respondent denied the appellant's claim in toto and put the appellant to strict proof. He specifically denied that the appellant's late husband was given the plot by the deceased and further denied that the appellant have ever taken possession of the suit premises. On a without prejudice basis, the respondent contended that the appellant had no locus standi to file the suit as no letters of administration had been issued to her.
4. At the hearing, before the trial court, the appellant testified and called one witness Jackson Muriungi, the County Land Administration and Adjudication Officer, Meru County who testified as PW2.



5. The appellant adopted her statement filed on 23/1/18 as her evidence in chief. The appellant also produced as exhibits copies of Limited Grant of letters of administration ad litem, letter from the County Government of Meru, dated 7/12/2017 confirming that according to the register, the plot was in the name of Isaiah M'Twamwari and that rent and rate payment were up to date, bundle of receipts, demand notice and summons from the County Government of Meru dated 25/5/2017. According to the appellant, the suit plot had not been transferred from her deceased father-in-law to her late husband.
6. The appellant testified that the respondent was the one in actual occupation of the disputed plot having entered thereon on 3rd August 2017 after demolishing the appellant's house. The appellant stated that she was not aware whether her late husband had sold the plot to the respondent.
7. PW2 testified that according to their register the suit plot was registered under the name of M'Twamwari Isaiah and rates payment was up to date. That in the year 2017, there was a dispute over the property which was brought to his attention by the appellant who was claiming to be the wife of the late M'Twamwari. PW2 stated that he summoned the appellant and the respondent and asked for ownership documents. That the appellate showed him rates payment receipts and minutes for allocation, while the respondent showed him a Sale Agreement.
8. The respondent gave evidence that he purchased the suit property from Isaiah M'Twamwari, the father-in-law of the appellant on 15/7/1996. That the seller died before transfer was done. That he took possession and started utilizing the plot even during the lifetime of M'Twamwari. That after the deceased, the family of the deceased started bringing problems and the respondent filed HCC 133 of 2014(OS) which was still pending. Later on, the appellant filed suit, the subject of this appeal. He denied that Isaiah M'Twamwari (deceased) bequeathed the plot to the appellant's late husband. The respondent confirmed that he was the one in actual occupation of the plot, and that every time he went to pay rent, he was told that it was paid by Isaiah.
9. The respondent called one witness Julius Kaindio Mbirithi who testified that the respondent bought the suit plot from Isaiah M'Twamwari (deceased), and has been on the plot since 1996.
10. Upon considering the matter, the learned trial magistrate, Hon. G. Sogomo PM delivered a judgment on 21st January, 2021 in which he found that the appellant had not proved her case on a balance of probabilities and dismissed the suit with costs to the respondent.
11. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-
 1. That the Honourable Principal Magistrate erred in law and fact in reaching a conclusion that the appellant had not proved her case as required by Law.
 2. The Learned Principal Magistrate erred in law and fact in arriving at the conclusion that the respondent had produced an agreement to show that he had been in occupation for over 12 years when the said agreement was irrelevant.
 3. The Honourable Learned Magistrate arrived at a finding which was against the weight of the evidence given by the appellant.
 4. The learned Senior Principal Magistrate considered extraneous issues which were not before court.



5. That the judgment arrived at by the Senior Principal Magistrate went against the evidence and the pleadings which was before court.
12. The appellant prays that the Judgment delivered on 21st January, 2021 in the lower court be set aside and be substituted by a Judgment allowing the Appellant's case together with costs of the lower court and the appeal.
13. The appeal was canvassed by way of written submissions. The appellant filed her submission on 27th November, 2023 through the firm of J. O. Ondieki & Co. Advocates while the respondent filed his dated 9th January, 2024 through the firm of Hillary Sandi & Co. Advocates.

Appellant's Submissions

14. The appellant compressed grounds 3, 4 and 5 of the appeal as one. The appellant's counsel summarized the case before the trial court and submitted that there was no agreement to show that the respondent purchased Plot No. 4A. Learned counsel submitted that the main issue was whether there existed a valid contract of sale and cited Section 3(3) of the Law of Contract Act. It was submitted that the agreement that was produced was in relation to Plot No. 4B Miathene Market and not Plot 4A which is in dispute. Learned counsel for the appellant relied on the case of *Nelson Kivuvan Versus Yuda Komora & Another* Nairobi HCC. NO. 956 of 1991 and urged the court to find that there was no proof of purchase of plot No. 4A Miathene Market. That the respondents invaded Plot 4A in the year 2014 upon the demise of the appellant's deceased husband and that the suit was filed within time.
15. It is also the appellant's submission that the learned trial magistrate considered extraneous issues in arriving at his judgment which was against the weight of the evidence and pleadings before him. That the learned magistrate relied heavily on the findings of *Njuri Ncheke* proceedings which were produced by the respondent as exhibits. The appellant's counsel pointed out that the said proceedings were carried out after the demise of both Isaiah M'Twamwari and Hezel Mururu and submitted that this shows that the respondent wanted to use the *Njuri Ncheke* as rubber stamp to grab the plot since he had no written agreement from the seller. The court was urged to find that the decision of the subordinate court was wrong, set aside the judgment of the trial court and substitute the same with a judgment allowing the appellant's case with costs of the lower court and of this appeal.

Respondent's Submissions

16. The respondent's counsel also gave a brief summary of the case before the lower court and submitted that the trial court took issue with the character of the appellant where her sworn evidence in court highly contradicted her pleadings. That in her testimony in the lower court, the appellant averred that the respondent got into possession of the suit land on 3rd August, 2017 while in her sworn affidavit she claimed the respondent invaded the suit property in the year 2014. That the glaring disparity are yet to be addressed by the appellant and remain contradicting.
17. The respondent's counsel supported the trial courts finding that the appellant had not proved her case as required by law. That whereas the appellant in her submissions targets the respondent's agreement, she herself had no document to prove her claim on the land. That the appellant had no marriage certificate had not filed a Succession Cause and was not in possession of the suit land. The respondent's counsel submitted that the respondent had been in occupation of the of the land for over 27 years and there was no basis of denying him the land and giving it to the appellant. It was the respondent's submission that there was a valid agreement, noting that there was only a clerical error occasioned by the advocate who drafted it and indicated that the land was Plot 4B instead of 4A. That the issue was explained at the trial court that the suit land was joint at the time of purchase and that the clerical error



ought not be visited upon the respondent. That the validity of the agreement was not challenged by M'Twamwari when he was alive or anyone else who appended his signature on the agreement. The respondent argued that the late M'Twamwari had other beneficiaries and wondered why it was only the appellant who was not even a beneficiary was carrying a claim over the suit land. That even then, the appellant's claim which was filed after 27 years which was in excess of 12 years since the respondent took possession could not succeed since the appellant was guilty of laches. The respondent's counsel relied on the case of *James Maina Kinya Versus Gerald Kwendaka* [2018]eKLR.

18. On the appellants attack on the trial court for relying on proceedings and findings by *Njuri Ncheke*, the respondent's counsel submitted that the *Constitution* under Article 159(2) (c) recognizes and appreciates alternative dispute resolution mechanisms. That *Njuri Ncheke* is a well-known council of elders and held in the highest regards by the Meru Community. The respondent's counsel relied on the case of *Lubuaru M'Manyara Versus Daniel Murungi* [2013]eKLR. The respondent urged the court to dismiss the appeal with costs.

Analysis and determination

19. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. In *Gitobu Imanyara & 2 Others Versus Attorney General* [2016]eKLR, the Court of Appeal stated that:-

“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”

20. In *Peters versus Sunday Post Ltd* [1958]RA 424, the court held that; “ Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
 21. Similarly, in *Abok James Odera t/a A. J Odera & Associates Versus John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR, the same was stated with regard to the duty of the first appellate court; “ This being the first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
22. Although the appellant has raised 5 grounds of appeal in her Memorandum of Appeal dated 9th February, 2021, this court is of the opinion that the appeal may be conclusively determined on the issue whether the findings of the trial court was against the weight of evidence presented and the law.
23. From the pleadings, it is clear that the appellant's claim against the respondent was seeking for eviction orders against the respondent.



24. The Appellant led evidence to the effect that the respondent was the one in actual occupation of the disputed plot and that he entered the plot on 3rd August, 2017 after demolishing the appellant's house and constructing his house therein.
25. The Appellant further testified that she was not aware whether the land had been sold to the respondent. That she was not aware of any agreement for sale of the land between her late husband and the respondent and further pleaded that if there was such an agreement, she would have been a co-signatory in the transaction.
26. On his part, the respondent led evidence to show that he purchased Plot No.4B Miathene Market. He pointed out that the error of the plot reading No.4B instead of 4A was amended by Isaiah M'Twamwari at a consideration of Ksh. 37,000, although the agreement shows 22,000/=. The respondent relied on the evidence of the sale agreement marked "DEX1" and the proceedings of the *Njuri Ncheke* "DEX2".
27. It is clear from the record that in the plaint dated 10th January, 2018, the Appellant pleaded that her father-in-law who was then deceased was the registered owner of plot NO. 4A Miathene Market. That he had given the plot to the Appellant's husband one Hezel Mururu Isaiah who is also deceased. The Appellant pleaded that her husband took possession of the said Plot NO. 4A in his lifetime and had built temporary structures for his own use and for the family. That upon the demise of the appellants husband in the year 2014, the respondent unlawfully and illegally started encroaching on the said plot and completely refused to give vacant possession to the appellant and or her family therefore necessitating the suit in order to evict the respondent.
28. I have noted that whereas the appellant pleaded that the respondent entered the plot in 2014 the appellant suddenly changed the date of entry while testifying to 3rd August 2017. This was a clear contradiction on the part of the appellant. As rightly observed by the Learned Magistrate, the stark inconsistency pollutes the entire corpus of the evidence proffered by appellant, and the inference made by court being that she was not a credible witness.
29. It is also trite law that a party should not be permitted to go beyond his pleadings. Parties are bound by their pleadings. By departing from the pleadings, the appellant no doubt raised questions about the credibility of her evidence. And as rightly submitted by the respondent, the onus was upon the Appellant to prove her case. With the glaring contradiction in both the appellant's pleadings and her testimony in court, the appellant could not be found to have proved her case.
30. In this case, the respondent had produced evidence in the form of an Agreement to support his claim that he bought the plot. That to me also explains the respondent's possession and occupation of the suit premises for a number of years. Furthermore, the trial court was within its right to consider the proceedings of the *Njuri Ncheke* since the same was part of the evidence adduced at the trial. Whereas the appellant pleaded that the respondent invaded the suit premises and demolished the structures which were thereon and began constructing his own, there was no sufficient explanation given by the appellant why such alleged invasion and damage to property which bordered on criminal acts were not acted upon immediately. For example, there was no evidence to show that a report was made to the police or any other agency to take action against the respondent who allegedly committed what can be treated as Criminal offence.
31. The principle in law is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side (see Section 107 and 109 of the *Evidence Act*). In this case, the Appellant failed to adduce sufficient evidence to support her case as clearly pleaded in the plaint. Instead, the appellant's evidence



was contradictory. On the contrary the respondent was able to demonstrate through an agreement for Sale that he purchased the suit property and took possession and occupation.

32. In totality, my evaluation of the evidence and the applicable law to the facts of this case shows that the learned trial magistrate arrived at the right decision. I find no reason to upset the findings of the trial court.
33. In the result, I find that the appellant's appeal has no merit and I dismiss it with costs to the respondent.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF FEBRUARY, 2024

HON. C. YANO

ELC – JUDGE

In the Presence of:-

Court Assistant: Tupet & Bernice

No appearance for Ondieki for Appellant, but the Appellant is present in person

No appearance for Sandi the respondent

