



Laon & 2 others v Kiono & 3 others (Environment and Land Appeal E034 of 2022) [2024] KEELC 911 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E034 OF 2022
LC KOMINGOI, J
FEBRUARY 22, 2024**

BETWEEN

**STEPHEN LAON 1ST APPELLANT
DANIEL KIMER OLE SANKALE (SUED IN HIS CAPACITY AS THE
ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE
LATE SANKALE OLE TAPASIAN) 2ND APPELLANT
TEPENI PAKUVYARE 3RD APPELLANT**

AND

**PAITA OLE KIONO 1ST RESPONDENT
MAKATAE KUYAN 2ND RESPONDENT
SAINIK PAITA 3RD RESPONDENT
PESIPESI TUMUTI 4TH RESPONDENT**

(Being an Appeal from the judgement and orders of the Hon. I. Kahuya in Kajiado CMCC No. 147 of 2012 delivered at Kajiado on 15th July 2022)

JUDGMENT

1. In her Judgement dated 15th July 2022 Hon. I. M Kahuya (Principal Magistrate stated);

“In conclusion, I find that the Plaintiffs have successfully discharged their burden of proof. The unfortunate part of their journey on the path to justice is that it took them 10 (ten) years to reach their destination; during which time some of the parties died on the way. Therefore, even as I grant judgement in their favors the same will only be applicable to the parties to whom the suit has not yet abated. As such I hereby order as follows;



- i. An order for permanent injunction do issue restraining the defendants/ occuppaants/intruders, their servants and assignees from committing or continuing to commit acts of trespass and or nuisancfe on the suit premises known as Plot No.334/Business – Konza T. Centre, Plot No. 315/Business-Konza T. Centre, Plot No. 333/Business – Konza T. Centre and Plot No. 260/ Business-Konza T. Centre and Plot No. 260/Business-Konza T. Centre.
 - ii. Cost of the suit to be by the Defendants.
 - iii. An order of eviction and or removal of the defendants’ structures from the Plaintiff’s plots within 60 days from the date of service of this order by the court bailiff.
 - iv. An order to OCS of the nearest police station to ensure smooth compliance of orders (3) above.
 - v. That all the above orders do not apply to the parties against whom the suit had already abated.”
2. Aggrieved by the said Judgement the Appellants filed a Memorandum of Appeal dated 4th August 2022. The Appeal seeks the setting aside of the judgement and that the Appellant’s prayers allowed on grounds that:
1. The learned trial magistrate erred in law and in fact by ignoring the private surveyor’s report dated 2/6/2015 which inter alia annexed a report by surveyors of the then County Government of Kajiado dated 12th November 2014 who in their findings had confirmed that the suit premises belonged to the Defendants/ Appellants herein.
 2. The learned trial magistrate erred in law and in fact by lending credence/weight and credibility to the surveyor’s report dated 23.5.2022 and yet the same could not stand in the presence of the unchallenged report of the then County Government of Kajiado surveyors report dated 12th November 2014.
 3. The learned trial magistrate erred in law and in fact by lending credence/weight and credibility to the surveyor’s report dated 23.5.2022 a very prejudicial document to the Defendants/ Appellants who were not granted an opportunity to cross examine the maker of the said document since it was introduced after close of the hearing of the case before the trial court.
 4. The learned trial magistrate erred in law and in fact by finding and holding that all the Plaintiffs’ / Respondents’ letters of allotment were issued earlier than those of the Appellants.
 5. The learned trial magistrate erred in law and in fact by finding, holding and ordering that a permanent injunction do issue restraining the Appellant/ Occupants their servants and assignees from committing or continuing to commit acts of trespass and/or nuisance on the suit premises, that is plot No. 334/Business- Konza T. Centre, plot No. 313/Business- Konza T, Centre, plot No. 333/Business- Konza T. centre and plot No. 260/Business- Konza T. Centre.
 6. The learned trial magistrate erred in law and in fact by finding, holding and ordering the eviction and/or removal of the Appellants’ structure from suit premises in the circumstances of the case before the trial court.



7. The learned trial magistrate erred in law and in fact by failing to consider evidence presented before court by the Appellants.
3. The Appeal was canvassed by way of written submissions.

The Appellants' Submissions

4. The Appellants' issues for determination were summarised as: Whether the trial court erred in by ignoring the surveyor's report dated 2nd June 2015 and adopted the surveyor's report dated 23rd May 2022 which was produced after parties having closed their cases. Counsel submitted that the Appellants produced a survey report dated 12th November 2015 which confirmed that the parcels belonged to the Appellants. The report was signed by Wesley S. Risancho and Charles Angira (then County Surveyor Olekajuado). This report was never impeached by the Respondents. However, after close of their cases, the Respondents produced a report dated 23rd May 2022 signed by one Wesley S. Risancho who had earlier signed off the previous report. The Appellants appealed against use of this report which the trial court relied on in its determination because: it was neither produced for inspection by court nor the Appellants given a chance to cross examine the Respondents or the maker of the said report. The Defendants' had also opposed its production for coming after close of evidence. As such, it went against Section 65(1) of the *Evidence Act*. Counsel also submitted that save for the survey report, the Respondents did not produce any documentation as evidence of their ownership of the suit properties citing Section 116 of the *Evidence Act* and *Benja Properties Limited vs Seydna Mohammed Burbanuddin Sabed & 4 others* [2015] eKLR. And that the Respondents had not shown any fraud against the Appellants in the acquisition of the suit properties as was held in *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [200] eKLR.
5. As such, the trial court's judgement and orders should be set aside and Appeal allowed.

The Respondents' Submissions

6. Counsel submitted that the suit properties were allocated to the Respondents between the years 200 and 2003 and were no longer available for allocation as was held in *Benja Properties Limited vs Seydna Mohammed Burbanuddin Sabed & 4 others* [2015] eKLR. Therefore, the claim that they belonged to the Appellants was invalid and the Appeal should be dismissed.

Analysis and Determination

7. I have considered the grounds of Appeal, the Record of Appeal, the rival submissions and the authorities cited. The issues for determination are;
 - i. Whether the learned trial magistrate erred in law and in fact by lending credence/weight and credibility to the surveyors Report dated 23rd May 2022 and yet the same could not stand in the presence of the unchallenged report by the county Government of Kajiado Surveyor's Report dated 12th November 2014.
 - ii. Whether the Appeal is merited and the orders sought should be granted.
 - iii. Who should bear costs of this Appeal?



8. This being a first Appeal, the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in [Peter Kamau Njau vs. Emmanuel Charo Tinga](#) (2016) eKLR where it was stated;

“Our duty in this Appeal being a first Appeal is to analyse a fresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion see *Selle vs. Associated Motor Boat Co.* (1968) EA 123”

9. Similarly, the court of Appeal in [Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates](#) (2013) eKLR stated thus;

“This being a first appeal, we are reminded of our co primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.....”

10. In the Complaint dated 4th July 2012 and Amended on 24th October 2012 the plaintiffs (the Respondents herein) claimed that they were the registered owners of properties Plot No. 334/Business- Konza T. Centre (1st Respondent), 315/Business- Konza T. Centre (2nd Respondent), 333/Business- Konza T. Centre (3rd Respondent) and 260/Business- Konza T. Centre (4th Respondent) from sometime in 2002 until on or about 11th October 2011 when the Defendants (herein Appellants) unlawfully gained entrance and began construction. They thus sought an order of permanent injunction against the Defendants from trespassing on the suit properties and costs of the suit.

11. The Defendants in their further amended statement of defence dated 17th June 2020 averred that the 1st Defendant (herein 1st Appellant) was the lawful owner of plot No. 1//Business- Konza T. Centre which was transferred to him by his father in 2011 and that plot had been allotted to his father in 1972; the 2nd Defendant's (herein 2nd Appellant) father was the owner of Plot No. 2/Business- Konza T. Centre having acquired it from his father who was allotted the same on 23rd November 1972 and the 3rd Appellant was the owner of Plot No. 464/Business- Konza T. Centre from 1st August 2011.

12. I will start by dealing with the issue of whether the trial court erred in making a determination using the surveyor's report dated 23rd May 2022.

13. As per the proceedings in the Record of Appeal, on 15th September 2021 the court ordered the County Surveyor to visit the land for a present report on the situation thereon. The Defendants opposed this directive. However, the court in its ruling dated 17th November 2021 held:

“... To begin with, it wasn't in dispute that this suit was filed in 2012; this being 9 years ago hence the circumstances on the ground had greatly evolved. It is on this basis that the court having being guided by the provisions of Section 1A, 1B, 3 and 3A of the [Civil procedure Act](#) deemed it fit to have the County surveyor move to the ground and file the correct status report about the suit land so that the court is well versed with the issues at hand before rendering the final decision. I do not see any prejudice likely to be suffered by either parties since the County surveyor is acting as a court witness making independent findings that is subject to cross examination by either witness. Similarly, the Defendants right to still compare the previous report of 12/11/2014 and expected current surveyors report while posing questions to the expert witness is in my view firmly protected...”



14. On 26th June 2022 the matter came up for mention to confirm filing of surveyor's report and a judgement date was issued. It is not clear when the surveyor's report dated 23rd May 2022 was filed in court since the copy on record does not have a receipt stamp date. But it is on record that the report was neither produced as evidence nor was the maker cross examined by the parties.
15. The report reads: The disputed sites do exist on the ground and were earlier identified to the Plaintiffs as evidence by the signature of the then surveyor, on their letter of allotments on 9/12/2003. That the defendants' plots were later shown to them irrespective of the earlier allocation hence the dispute. An exercise was carried out in 2010. That the defendants' plots were being allocated the site during the exercise of validation. That the County Council had been trying to arbitrate on the dispute but could not exhaustively conclude. Both the Plaintiffs and Defendants are legal plot owners in the town and have been paying county rates...
16. It is not in contention that the survey report dated 23rd May 2022 was only filed but not produced as evidence. However the learned trial magistrate went ahead and referred to it in her judgement dated 15th July 2022. The impugned judgement reads in part:

“It must be observed that the County Surveyor reports dated 18/02/2014 and 23/05/2022 respectively have the same findings in terms of the Plaintiffs having been shown the subject parcel of land in 1998 which was earlier in time that the Defendants' who are currently in possession”.
17. The Court of Appeal in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR elaborated as follows on the issue of production of evidence:
 - “18. ... How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.
 20. ... A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account....



23. ... We are persuaded by the dicta in the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.”
18. Guided by the foregoing Court of Appeal’s decision, I find that the report was not formally produced as evidence in court, should not be part of the court record and is consequently expunged from record.
19. I now move on to determine whether the trial court erred in finding that the suit properties belonged to the Plaintiffs/Respondents herein.
20. It is not in contention that the dispute is on double allocation of the suit properties. When an issue of double allocation arises, the first in time should prevail as was held by the Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR:
“ ... Double allocation arises when there are two or more otherwise valid certificates of title issued erroneously and in good faith by the lands office...”
21. The trial court held:
“It was noted that both contents in the surveyor’s report dated 2/6/2015 and 23/5/2022 acknowledge the fact that the present dispute was a result of double allocation of land primarily due to improper record keeping at the County Government Land Registry... The official record at the Land’s office in relation to the suit properties shows that the Plaintiffs were the first allottees. No evidence has been furnished to prove that the subject letter of allotment were forged/ fraudulently obtained.
In conclusion, I find that the Plaintiffs have successfully discharged their burden of proof...”
22. I have reviewed the evidence on record and I will first by making observation on the private surveyors’ report dated 2nd June 2015 referred to by the lower court. The findings in the Surveyor’s report dated 2nd June 2015 are:
“ ... The reports by the County Surveyor (Appendix 2) and the County Secretary (Appendix 3) confirm that the four plots in dispute belong to the Defendants. The source of dispute appears to be multiple allotments of plots in Konza Trading Centre by the Kajiado County which should be sorted out...”
23. It is therefore inaccurate that the private surveyor’s report indicated that the suit properties belonged to the Plaintiffs/ Respondents as held by the Learned Trial Magistrate.
24. The County Surveyor’s Report dated 12/11/2014 is signed by Charles Angira; County Surveyor and Risancho Wesley; Assistant County Surveyor. In the report dated 23rd May 2022 the said Wesley Risancho, County Surveyor now states that the plots in dispute belong to the Respondent’s herein which contradicts the earlier report dated 12th November 2014.
25. The 2nd respondent (Makatae Kuyan) produced a letter of Allotment dated 15th May 2002 for Plot No. 315/Business- Konza T; 3rd Respondent’s (Sainik Paita) letter of allotment for plot No. 333 is dated 16th July 2002; the 4th Respondent’s (Pesipesi Tumuti) letter of allotment for plot 260 is dated 6th January 1999. All these documents were accompanied with payment of rent/rates on diverse dates between March 2010 and July 2011. The court did not see record for the 1st Respondent who was claiming plot No. 334.



26. The 1st Appellant produced a letter of transfer of Plot No. 1/Business- Konza T. Centre dated 10th February 2011 from Stephen Laon to Jonah Saitabau Laon and rates clearance certificate dated 3rd March 2011. A plot dispute resolution letter dated 18th November 2013 addressed to: Tepeni Parkuyiare Plot No. 464, Pesipesi Tumuti Plot No. 260; Kukei Ole Asaape plot No. 259, Paita Kiono Plot no. 334; Stephen Laon plot No. 1, Makatae Kuyan plot No.315; Sankale Ole Tapasian plot no. 2, Sainik Paita plot no. 333. It reads:

Refer to a Dispute Resolution Meeting held on 15th November 2013 at the office of the CEC in charge of Lands where all parties were present... It was further found out that plots No. 464 Bus, 259 Bus, 1 Bus and 2 bus existed on the Council map and duly validated by the County Surveyor. This proves beyond reasonable doubt that the sites in dispute belong to: Tepeni Parkuyiare- plot No. 464 Bus, Kukei Ole Asaape plot No. 259 Bus, Stephen Laon plot No. 1 Bus, Sankale Ole Tapasian plot No. 2 Bus.

Another letter dated 12th July 2011 disputed plot 1 Business vs 315 Business signed by the County Land Surveyor reads: ...

The council hereby confirmed the disputed site belongs to Mr. Stephen Laon and not Mr. Makatae Kuyan as plot No. 1 Business and not plot No. 315/Business...

27. The 2nd Appellant produced a transfer letter dated 11th July 2011 from one Tapasian to Sankale Tapasian Olodala, rates clearance certificate, and letter of allotment dated 23rd November 1972 to Tapasian issuing him plot No.2 Business at Konza and the dispute resolution letter dated 18th November 2013. From this chronology, the first allotment belonged to Tapasian in 1972 which was later transferred it to his son Sankale Tapasian (now deceased). It therefore devolves in his Estate.
28. 3rd Appellant produced a letter of allotment dated 24th May 2001 in the name David Kukei Asaape and allotment letter dated 13th July 2010 in the name Jemimah Tepeni Parkuyiare. To begin with, I find that the 3rd Defendant (herein the 3rd Respondent) Tepeni Pakuvyare did not discharge his burden to show that plot belonged to him. The 4th Respondent (Pesipesi Tumuti) produced a letter of allotment dated 6th January 1999 for plot No. 260. I thus find that his allotment is first in time and declare that the plot belongs to him.
29. The following reports were also produced: Surveyors reports dated 2nd June 2015 (excerpt summarised above) and 12th November 2014 which found: ...

The former County Council was initially allocating plots without planning and surveying the trading centre. When the planning and surveying was carried out for Konza trading Centre, it was only accommodated 240 plots against over 800 letters of allotment for the town. According to the county survey map/plan (hereby attached) the sites being disputed are plots No. 464/Bus, 259/Bus, 1/bus and 2/Bus. And plots No. 315/Bus, 333/Bus, 334/Bus and 260/Bus have not been shown yet at Konza Trading Centre of Olkejuado...

30. The 1st respondent was in contention of the suit property with Kukei Ole Asaape who is not a party to the suit. Therefore, in line with fair administrative action and right to be heard as per Article 47 and 50 of the Constitution no orders shall be issued against Kukei Ole Asaape who was not party to the suit.
31. The 1st Appellant, Stephen Laon and the 2nd Respondent Makatae Kuyan claim the same property. The 2nd Respondent claims that she was allotted plot 315 on 15th May 2002 as per the letter of allotment. During the testimony she indicated that her name was Nairei Ole Kuyan but the rate receipts were in the name Gladys Kuyan. Apparently, this was also her name. The 1st Appellant (Stephen Laon



now deceased) claimed that the plot was allotted to his father in 1972 as plot No. 1 who transferred it to him and he subsequently transferred it to his son (Jonah Saitabau Laon) in 2011 as shown by the transfer letter. Save for the dispute resolution and survey letters' findings that the suit property belonged to Stephen Laon there was no evidence of how Stephen acquired it. That notwithstanding, Stephen passed away in 2016 and from record there are no letters of administration against his Estate. The suit against him, as rightly held by the trial court, thus abated.

32. The Appeal therefore succeeds in part as follows:

- i. That Pesipesi Tumuti (the 4th Respondent) is hereby declared the legal and lawful owner of plot No. 260/Business- Konza T. Centre.
- ii. Daniel Kimer Ole Sankale (the 2nd Appellant) as the Administrator of the Estate of the late Sankale Ole Tapasian is hereby declared the lawful owner of plot No.2/Business- Konza T. Centre.
- iii. That Paita Ole Kiono (the 1st Respondent's) claim is dismissed with no orders to costs.
- iv. That No orders are issued for Stephen Laon's (deceased) which suit abated.
- v. Each party to bear their own costs of the Appeal and the suit in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22ND DAY OF FEBRUARY, 2024.

L. KOMINGOI

JUDGE

In the presence of:

Ms. Kathike for the Appellants.

N/A for the Respondents.

Court Assistant – Mutisya.

