



**Jama v Mohamed & another (Civil Appeal E113 of 2022)
[2024] KECA 292 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 292 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E113 OF 2022
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
MARCH 8, 2024**

BETWEEN

SHUKRI ISMAIL JAMA APPELLANT

AND

ISILOLO COUNTY GOVERNMENT 1ST RESPONDENT

MARIAM MOHAMED 2ND RESPONDENT

*(Being an Appeal from the judgement and decree of the Environment and Land Court
at Isiolo (P.M. Njoroge, J.) dated 25th July, 2022 in ELCA Case No. 010 of 2021)*

JUDGMENT

1. By a plaint that was amended on 13th March 2015 filed before the Chief Magistrate’s Court at Isiolo, the plaintiff, Shukri Ismail Jama, hereafter referred to as the appellant, sued the respondents, Mariam Mohamed (1st respondent) and Isiolo County Government (2nd respondent) for orders, inter alia, as follows: -
 - a. A declaration that Plot No 94 Kiwanjani Estate, Isiolo Township, within Isiolo County belongs to the plaintiff;
 - b. A permanent injunction do issue restraining the defendant, its servants, agents and/or employees from interfering with the plaintiff’s possession of Plot No. 94 Kiwanjani Isiolo from evicting the plaintiff or in any other way interfering with the plaintiff’s quiet and peaceful possession occupation and possession within the suit property pending the hearing and determination of the suit.
2. The appellant’s case before the trial court was that she is the registered owner of Plot No. 94, Kiwanjani Estate, Isiolo Township (the suit property), which she said was allocated to her at an Isiolo County Council Full Meeting held on 13th October, 1998 as captured in Minute No. 131 of the Full Council



- Meeting minutes. She averred that after she was allocated the plot, she put up some semi-permanent houses and occupied them and she had been in occupation from 1998, and was still in occupation as at the time she filed the suit.
3. She stated that on or about 20th September, 2007 the 2nd respondent started writing her letters claiming that the suit property belonged to the 1st respondent. The first respondent is also said to have started depositing building materials on the suit property with the aim of developing the same, hence the claim and prayers in the plaint.
 4. The claim was resisted by the respondents. The respondents admitted sending letters to the appellant asking her to vacate the suit property. They nonetheless maintained that the 1st respondent's claim is in respect of Plot No. 557 Kiwanjani, Isiolo Township and not Plot No 94 as claimed by the appellant.
 5. The respondents also raised the defence of res judicata stating that the claim had been made in Meru CMCC No. 572 of 2001, which suit was dismissed with costs on 6th December, 2010. They urged for dismissal of the suit. The 1st respondent also filed a counter-claim in which she averred that it was the plaintiff who had trespassed onto her plot, being Plot No. 557 which the plaintiff was disguising as Plot No 94. She accused the appellant of obtaining registration of Plot No 557 (disguised as Plot No. 94) through fraud. She urged the court to allow the counter-claim and declare her the lawful owner of Plot No. 557 Kiwanjani, Isiolo Township, and an order evicting the appellant from the said plot.
 6. The appellant filed a defence to the counter-claim, denied the contents therein and reiterated that the appellant had no justiciable claim over the suit property and urged the court to dismiss the counter-claim.
 7. Before the hearing of the main suit, the court heard the preliminary objection raised by the 1st respondent to the effect that the claim was res judicata. The preliminary objection was heard, in limine, and dismissed, giving way to the hearing of the substantive suit. The matter proceeded by way of viva voce evidence and written submissions filed by counsel for the parties. After considering the evidence adduced before the court the learned magistrate entered judgment in favour of the 1st respondent and found the counter-claim proved. The appellant's claim was, therefore dismissed with costs.
 8. Aggrieved by the said judgment, the appellant moved to the Environment and Land Court (ELC) at Meru raising nine (9) grounds of appeal. The appellant sought from the ELC orders that the judgment of the Chief Magistrate delivered on 13th December, 2018 be set aside and that the court orders a retrial involving all stakeholders in order to determine ownership of the suit premises.
 9. The ELC (Njoroge, J.) reconsidered the evidence placed before the trial court, in line with the celebrated decision of the predecessor of this Court in *Selle and Another v Associated Motorboat Co. & Others* [1968] EA 123 which spelt out the duty of a first appellate court. See also [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) (2013) eKLR. The learned Judge also considered and analysed the nine grounds of appeal raised by the appellant and found the appeal devoid of merit and dismissed it with costs being awarded to the 1st respondent.
 10. The appellant is now before this Court on second appeal, raising fourteen (14) grounds of appeal. Although learned counsel for the appellant faults the learned Judge on both law and facts, we remind counsel that this being a second appeal, our jurisdiction is restricted to considering matters of law only and issues of facts are outside our remit. This being a second appeal we are alive to the duty of this Court which is to determine matters of law, and not to interfere with the findings of fact by the two courts below, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered. See [Stanley N. Muriithi & another v Bernard Munene Ithiga](#) [2016]eKLR and [Kenya Breweries Limited v Godfrey Odoyo](#) [2010]eKLR.



11. Some of the grounds are repetitive and we will side step them. In summary, the appellant faults the learned Judge for failing to appreciate the evidence adduced by the appellant; disregarding evidence on record in regard to Plot No. 94 Kiwanjani, Isiolo; failing to find that fraud and or misrepresentation had not been proved; failing to re-evaluate and re-analyse the evidence on record in favour of the appellant; and dismissing the appellant's appeal contrary to the evidence on record.
12. In his submissions, learned counsel for the appellant, Mr. Lakicha summarized the issues for determination as:-
 - a. whether the appellant is the bona fide owner of the suit property;
 - b. whether the 1st respondent has proved the issues of fraud and irregularities to the required standards as against the appellant; and
 - c. whether the Environment Court disregarded the documentary evidence produced by the appellant to prove ownership and possession.

We may, however, at this point state that possession is a question of fact and not law and we will not, therefore, make any findings in that regard.

13. In his submissions, Mr. Lakicha reiterated that the main issue in the suit was that of double allocation. That is to say that there was only one plot which was, nonetheless, given two different numbers, and there were two different letters of allotment to the parties.
14. Parties produced their documents in support of that claim, and it was for the court to look at the documents and see which claim was valid. According to Mr. Lakicha, the first person to pay all the requisite fees and obtain quiet possession is the rightful owner of the property. The appellant was allocated the plot in 1998 vide some council minutes and she commenced payment of the requisite fees and she took quiet possession. For these reasons the courts below should have declared her the bona fide owner of the plot, submitted counsel. He placed reliance on this Court's decision in *Asbmi Investment Ltd v Riakiria Limited and Another* (Civil Appeal No. 384 of 2019) KELA 184 (KLR).
15. On his part, Mr. Mwiti, learned counsel for the 1st respondent did not file written submissions as he was served with the appellant's submissions four days to the hearing. We indulged him and allowed him to proceed by way of oral submissions. In his oral submissions, he urged that most of the issues raised by the appellant were issues of fact and this Court lacked the requisite jurisdiction to entertain the same. We agree with learned counsel on that point. We will therefore sift and separate the issues of law and matters of fact and deal with the same as appropriate in accordance with our mandate on second appeal.
16. On the claim that the learned Judge failed to consider the appellant's exhibits, counsel referred us to the ELC judgment and pointed out that the learned Judge had considered the said documents but found them to be uncertified photocopies, which were in the circumstances of no evidential value; and that the court had found that the signatures on the said document did not match with those in the respondent's documents, which were duly certified. Counsel urged that those are factual issues which we cannot interfere with.
17. We have considered the record before us, the grounds of appeal and the rival submissions by both counsel. We appreciate that the appellant has compacted the issues for our determination into three and we shall deal with them shortly. Before we do so however, it is apposite to point out that the contested allocation and ownership of the suit plot has nothing to do with the *Land Act* 2012 as the Statute was enacted long after the plot had been allocated to the parties.



18. The gravamen of this entire suit and the appeal is simply “who is the rightful owner of the suit plot?” From the evidence, there is no doubt that plot No. 94 and Plot No. 557 are one and the same plot on the ground. According to the appellant, she was a squatter on the land and the same was allocated to her vide the council minutes which she produced as exhibit before the trial court. She also produced several receipts in support of her claim.
19. However, as found by the learned trial magistrate and the learned Judge on first appeal, these documents were not certified as required of public documents. In our view, if it was not possible for the appellant to procure certified documents, they should have served a notice to produce the originals on the 2nd respondent, but that was not done. Those documents, were therefore, properly rejected by the two courts below.
20. The issues on the inconsistencies in the receipts produced by the appellant, and the questions as to how one could have paid for the plot before it had been allocated to her, as demonstrated in one of the receipts are issues of fact which we cannot delve into. It suffices to say that the documents produced by the appellant in support of the claim did not meet the evidential threshold to support her claim. It was unfortunate that the 2nd respondent did not testify, but as correctly stated by the learned Judge, the court cannot force a witness to testify for a party in a civil matter. As we have gratuitously pointed out, the appellant should have served the 2nd respondent with a notice to produce the original documents, failing which the court would have made the necessary inferences and findings. We say no more on that issue. Our findings have addressed issues No. (i) and (iii) as framed by the appellant’s counsel and answered them in the negative.
21. As to whether the counterclaim was proved, we are satisfied from the evidence placed before the trial court that the counterclaim was proved and that the 1st respondent proved to the required standard that she was the lawful owner of plot No. 577 Kiwanjani, Isiolo Town, which was the same plot as Plot No. 94 Kiwanjani, Isiolo.
22. On whether the 1st respondent proved fraud against the appellant, we hold the view that that was neither here nor there because the appellant’s claim was dismissed, not on account of fraud, but for the other reasons, given by the two courts below.
23. In sum, we find this appeal devoid of merit and dismiss it accordingly with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



Deputy Registrar

