



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng & another v Gitau & 2 others (Civil Appeal 287 of 2017)
[2023] KECA 122 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 122 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 287 OF 2017
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

CAROLINE AWINJA OCHIENG 1ST APPELLANT

DAVID ZAKARIA OYOLO 2ND APPELLANT

AND

JANE ANNA MBITHE GITAU 1ST RESPONDENT

PETRONILLA NJERI NGAARA 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

*(Being an appeal from the judgment and decree of the Environment
and Land Court of Kenya at Nairobi (J. L. Onguto, J.) delivered on
7th May 2015 in Environment and Land Court Case No. 694 of 2012)*

JUDGMENT

1. By way of background, this appeal concerns an unregistered parcel of land known as Plot No C255 Kayole in Nairobi County. As noted by the trial court, the main issue between the parties is one that consistently emerges in cases involving unregistered land and is a common occurrence in Nairobi. The plot in dispute, No C255 Kayole, is claimed by both the appellants and the respondents.
2. By a plaint dated October 10, 2012, the appellants who are wife and husband, claimed that they bought the plot from one Martin Katambi Robert on November 27, 2008 for a sum of Kshs 180,000/=. They claim that the plot was originally under the auspices of Matopeni squatters and police station settlement scheme and that later, the plot number was changed to Plot No 242 Kayole by the 3rd respondent.



3. According to the appellants, the plot was vacant and they took possession and developed a matrimonial house on the suit plot. They claimed that before payment for the plot, the second respondent accompanied them to the plot for due diligence and that they were later issued with the relevant scheme land documents upon payment of the requisite fees. The appellants prayed for the following orders:
- ' 1. Interim and permanent injunctions restraining the 1st, 2nd and 3rd defendants, their agents, servants and or whomsoever from interfering, evicting, claiming, taking possession, alienating, transferring and or in whatsoever manner interfering with the 1st and 2nd plaintiffs' rights, possession and ownership of the suit property plot known as plot Number C255 Kayole area Matopeni squatters and police station resettlement scheme (also known as Kayole Plot Number 242).
 2. A declaration that the 1st and 2nd plaintiffs are the lawful and legal owners of plot Number C255 Kayole area Matopeni squatters and police station resettlement scheme (also known as Kayole Plot Number 242) and further directing the 3rd defendant to effect the transfer of their names and process title documents.
 3. Damages and costs of the suit.'
4. In her statement of defence and counterclaim dated July 17, 2013, the 1st respondent claimed that the appellants had occupied the suit property illegally since November 2008 and that she was the legal owner of the plot in dispute. She claimed that the plot was allocated to her in the year 2001 and upon payment of the requisite fees, she was issued with a receipt for the security fees and the allotment card.
5. According to the 1st respondent, she then constructed a two roomed iron sheet house which cost her approximately Kshs 30,000/- and allowed an old lady, one Margaret Wagichu to live in it. The said lady stayed for two years, and vacated, after which another old lady by the name Njeri moved in. She then travelled for medical treatment and upon return, she visited the plot in June 2009, and to her shock, she found that her house had been demolished and replaced with a temporary structure.
6. She lodged a criminal complaint against the appellant, who was charged with the offence of forcible detainer contrary to section 91 of the Penal Code in criminal case No 2985 of 2009 in Makadara chief magistrate court.
7. In a nutshell, the 1st respondent claimed that she was the lawful owner of the disputed plot and filed a counterclaim seeking the following orders:
- a. Vacant possession of the suit property;
 - b. Kshs 30,000/= being approximate cost of the demolished house;
 - c. Mesne profits from November 2008 to the date the plaintiffs give vacant possession;
 - d. Costs of the counterclaim;
 - e. Interest on (b) (c) and (d) above at court rates from the date of filing this counterclaim until payment in full; and
 - f. Such further or other relief as this honourable court may deem fit to grant.



8. In his judgment dated May 7, 2015, the learned judge (J L Onguto, J) in dismissing the appellant's claim held as follows:

30. The plaintiffs also testified that their deeds or documents showing ownership to the suit plot were kept by the police department following the arrest and ultimate arraignment of the plaintiffs in court. I have read the entire typed proceedings in Criminal case No 2985 of 2009 (Makadara). I was unable to identify any instance or reference by any of the witnesses to documents belonging to the plaintiffs except for the reference to a sale agreement. It is also to be noted that the sale agreement was presented to the court in the criminal case, yet the plaintiffs were still able to obtain a copy for use in these proceedings. The plaintiffs must have had a copy elsewhere but not for the other documents like the plot card. I also hasten to add that the plaintiffs did not illustrate to the court the steps taken to retrieve the documents of ownership from the police department or otherwise. I must consequently not speculate but conclude that the plaintiffs' case rested on the sale agreement only as attempts to produce a plot allotment card in its copy form were rejected by the defendants. Is that enough to prove an unbroken chain to the root of title? I sincerely would not so conclude. The plaintiffs were never the original owners of the suit plot. It is unclear how the vendor himself obtained ownership of the property. I hold the view that the chain was broken the moment the paper trail ceased.
31. A sale agreement alone in the absence of any other documentation would not and does not prove ownership of an unregistered parcel of land. There is no link between the plaintiffs and the title paramount except for the finding by the subordinate court in the criminal proceedings that the plaintiff had been erroneously allocated the suit plot (see the penultimate paragraph of the judgment). Yet this too is doubtful. The plaintiffs' own testimony was to the effect that the suit plot had been allocated to one Martin Katambi from whom they bought the plot. It is not stated when this happened. Effectively, it meant that the chain was broken in the absence of evidence to show when and if Martin Katambi actually owned the suit plot. Doubts are also raised in the plaintiffs testimony when they state that they had their own plot allotment cards, yet by the same breath they also state that they had bought the plot from Martin Katambi. The plaintiffs were never allottees.
32. On the other hand, the 1st defendant stands in better stead. Through the proceedings in the criminal case, the 1st defendant established a dominion over the suit property when Margaret Wagichu testified that she had been in possession of the suit property at the behest of the 1st defendant. This fact was established by the court in the criminal proceedings and though not conclusive for the purposes of the proceedings herein would certainly be corroborative.
33. The 1st defendant also testified with documents in support that she owned the suit plot. The documents availed by the 1st defendant were receipts as well as an allotment card issued by the intermediary of the title paramount. The allotment card confirmed that the 1st defendant had been allocated the plot. A plot card issued by the title paramount, the 3rd defendant, continued the



chain leading to the root of title. Alongside the plot card issued by the 3rd defendant were also copies of the rates payment receipts to the 3rd defendant. I perused the documents and I have no doubt as to their authenticity. In my view, these documents were adequate to establish on a balance of probabilities that the 1st defendant was the owner of the suit plot. This fact was further confirmed by the 3rd defendant's position in this matter as reflected from the statement of defence. The 1st defendant's position was also corroborated by the 2nd defendant's testimony.

34. With regard to the claim for Kshs 1,500,000/= by the plaintiffs, the same being a special damages claim, I find that the same was not strictly pleaded and proved as required by the law: see [Ouma vs Nairobi City Council \[1976\] KLR 297](#), [Kenya Bus Services vs Mayenda \[1991\]2 KAR 242](#) and the recent Court of Appeal decision of [Paul N Njoroge vs Abdul Sabuni Sabonyo \[2015\]eKLR](#). The same would apply to the 1st defendant's claim for Kshs 30,000/=. The 1st defendant did not lead any evidence to show what had been destroyed and neither did the 1st defendant lead any evidence to show the actual value of the loss, if any. In cross examination the 1st defendant also expressly admitted that she had no evidence to prove that she had spent Kshs 30,000/=. Like the plaintiff the 1st defendant failed to strictly prove her special damages claim. I would dismiss both claims.
35. There is also the 1st defendant's claim for mesne profits. My understanding as far as mesne profits are concerned is that as damages it arises out of a relationship of a landlord and tenant where the latter becomes a trespasser: see [Inverugie Investments vs Hackett \[1995\] 3 All E R 842](#). As stated [Stroud's Judicial Dictionary 4th Edition Vol 3](#) mesne profits is

' Another term for damages for trespass arising from particular relationship of landlord and tenant.'

In other words, mesne profits is a special type of damage incurred by the landlord when his tenants decides to hang on despite notification to vacate and is then dubbed a trespasser. It is not damages awarded for trespass quare clausum fregit. The latter is always awarded as general damages for the tort of trespass. The court may not however award both: see [Kenya Hotel Properties Limited vs Willesden Investments Limited \[2013\] eKLR](#).

36. The 1st defendant was duty bound to show loss by first illustrating the relationship and then the loss suffered by way of prove (sic) of the exact or reasonable rent ordinarily payable under the circumstances and during the period the unlawful occupier who was previously a tenant was in occupation. The 1st defendant did not lead any evidence along the lines of proving a claim for mesne profits as I have outlined above. I am not satisfied that the 1st defendant is entitled to mesne profits. I would dismiss that claim. Even though the plaintiffs in my view were unlawfully on the suit plot the 1st defendant did not seek damages in trespass and I will consequently not award the same.

Disposal



37. By way of disposal, having been satisfied that the 1st defendant has proved part of her counter-claim to the required standards and that the plaintiffs have failed to prove their claim, I make the following final orders by way of final judgment;
- a. By declaration, that the 1st defendant is the owner of the suit plot being plot No C 255 Kayole Matopeni Squatters & Police Station Resettlement Scheme also known as Kayole Plot No 242.
 - b. The plaintiffs will deliver up or cause to be delivered up the suit plot to the 1st defendant within the next thirty days, and in default eviction orders to issue.
 - c. The plaintiffs will remove and/or cause to be removed all the plaintiffs' property on the suit plot within the 30 days time limit.
 - d. The plaintiffs' suit is dismissed.'
9. Aggrieved by the judgment of the trial court, the appellants moved to this court on 11 grounds as set out in the memorandum of appeal dated August 16, 2017, which we need not set out in full but take the liberty to summarize as follows: that the appellants are innocent purchasers for value without knowledge of any interest by the 1st respondent; that the 2nd respondent had admitted that this was a case of double allocation; that the judge ignored the evidence they adduced on ownership; that the evidence of the 1st respondent did not prove ownership; that the conviction of the appellant was quashed by the High Court; and that the judgment was against the weight of evidence adduced by the appellants.
10. This being a first appeal, it is our duty, in addition to considering the written and oral submissions made by the counsel for the appellant and the respondents, to analyze and re-assess the evidence on record and reach our own conclusion. This approach was adopted by this court in *Artbi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR* citing the case of *Selle vs Associated Motor Boat Co Ltd [1968] EA p 123* in which the court held that:
- An appeal to this court from a trial by the High Court (as well as the ELRC) 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.'
11. In *Gitobu Imanyara & 2 others v 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.'
12. In *Peters v Sunday Post Ltd [1958] EA 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 if 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.'

13. Similarly, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, the same stated with regard to the duty of the first appellate court;

' This being a 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.'

14. Having considered the record of appeal, the rival submissions of the learned counsel for the parties, we are of the considered view that the appeal herein turns on only one issue namely; considering and evaluating the evidence that was adduced on the ownership of the plot, who between the appellants and the 1st respondent is more credible and the lawful owner of the parcel of land that is in dispute?
15. As already noted, the disputed plot is unregistered and both the appellants and the 1st respondent are claiming ownership. The appellants' case, relies heavily on: the doctrine of innocent purchaser for value; that they had no notice of any other interest by a third party; that they had conducted due diligence; that they took possession and constructed a home, a church and an orphanage; that they acquired equitable possessory overriding interest and constructive trust and that their conviction in the criminal case was overturned by the High Court.
16. The appellants further submitted that they produced a sale agreement for plot No 255 Kayole, receipt for Kshs 5,000/= for survey, security and drainage and allotment letter signed by the chairman, secretary and treasury of the settlement scheme and a certificate for the orphanage.
17. On her part, the 2nd respondent in her submissions stated as follows: the court properly addressed itself to the issues by tracing the root of the title through documentary evidence; the purported sale agreement between the applicants and one Martin Katambi dated November 27, 2008 was not produced; that the 1st respondent had proved proper ownership as she submitted the allotment card, receipts and that she had adduced corroborative evidence to prove her ownership.
18. In view of the foregoing and having carefully examined the record before us, we note that the learned judge was faced with a case in which he had to determine the credibility of the documents of ownership and determine who between the parties' evidence was credible in the absence of a certificate of title. The judge had to trace the root of the documents relied upon by the parties by taking an intricate journey of wading through documentary history. In doing so, he had to determine who between the appellants and the respondents had established an unbroken chain that demonstrated a good claim to ownership.
19. We note from the record that, as observed by the learned judge the appellants relied heavily on a sale agreement dated November 27, 2008 between them and one, Martin Katambi. They claimed to have paid an amount of Kshs 180,000/= in cash. From the record, there was not even, an iota of evidence that the said Martin Katambi owned the plot at all. Further, the appellants did not tender any evidence on payment of the alleged purchase price of Kshs 180,000/=. The only evidence tendered to show that they paid that sum, was just a hollow statement that was not supported by any documentary evidence. The appellants did not discharge the burden of proof in support of their case.
20. On their part, the 2nd respondent adduced evidence to the effect that, he and other officials had power to allot plots to the squatters, and confirmed that Martin Kitambi, who allegedly sold the plot to the appellants was not known to them. We note from the record, that the 1st respondent produced receipts and allotment card, and rate payment receipts for the plot.



21. The basis for the legal burden of proof is provided in section 107 of the [Evidence Act](#), Cap 80 of the Laws of Kenya. The said section states as follows:

- ' (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.'

22. The majority decision of the Supreme Court in [Presidential Election Petition No 1 of 2017 between Raila Amolo Odinga & Another vs IEBC & 2 Others \(2017\) eKLR](#) had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof:

- ' (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and 'remains constant through a trial with the plaintiff, however, 'depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.'

23. In our view, the appellants did not discharge the evidential burden in establishing the facts in support of their case, therefore the learned judge correctly addressed himself to the issues and properly traced the history of ownership of the plot. We agree with the learned judge that after analyzing the evidence on record, the 1st respondents' claim of ownership, has a chain of history which is not broken. The learned judge had the benefit of seeing and hearing the witnesses and the appellants have failed to show that the learned judge did not properly evaluate the evidence that was adduced or that he acted on wrong principles In [Jabane vs Olenja \[1986\] KLR 661](#), this court said as follows:

- ' More recently, however, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular [Ephantus Mwangi vs Duncan Mwangi Wambugu \(1982-88\) 1 KAR, 278](#) and [Mwana Sokoni vs Kenya Bus Service \(1982-88\) 1 KAR 870](#).'

24. We are persuaded that the learned judge did not act on wrong principles, and his findings on the question of ownership were reached after a careful and thorough analysis of the history of the ownership documents that were produced in evidence by the parties. Indeed, the evidence on record clearly demonstrates that the 1st respondents' ownership is backed by evidence that forms a credible trail from the point of allotment to the taking of possession. In contrast, the appellants' evidence, is a construction of pieces of evidence that are patched up and broken and cannot dislodge the evidence adduced by the 1st and 2nd respondents. In sum total the appellants did not adduce sufficient evidence to prove their allegations on the acquisition of title to the suit property.

25. This court has pronounced itself on cases where there are two or more titles to the same land. In [Hubert L Martin & 2 Others Vs Margaret J Kamar & 5 Others \[2016\] eKLR](#) the court held that:

- ' A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This



investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

26. With the above analysis, it should now be clear that what we have said addresses all the grounds raised by the appellant. Considering the record of appeal, grounds on which it is anchored, the impugned judgment and decree of the learned judge, the written and oral submissions of the learned counsel for the appellant and the respondents, we find that the appeal lacks merit and accordingly, hereby order and direct that:
- a. The appellants appeal be and is hereby dismissed.
 - b. The judgment and decree of the High Court of Kenya at Nairobi (J L Onguto, J) is hereby upheld; and
 - c. The costs of the appeal shall be borne by the appellants.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

K M'INOTI

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JUDGE OF APPEAL DR KI LAIBUTA

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JUDGE OF APPEAL

M GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

