



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v Kasuki (Civil Appeal E014 of 2020)
[2023] KECA 65 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 65 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E014 OF 2020
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
FEBRUARY 3, 2023**

BETWEEN

JOYCE AKINYI ODHIAMBO APPELLANT

AND

GIDEON KATHIANI KASUKI RESPONDENT

*(An appeal arising from the judgment by N.A Matheka delivered in Mombasa
on 14th June 2019, in the Environment and Land Case No. 327 of 2016)*

JUDGMENT

1. By a plaint dated November 3, 2016, the appellant, who was the plaintiff, sued the respondent claiming to be the registered owner of land parcel No 1219 measuring approximately 0.0077 hectares at Ziwa la Ngombe settlement scheme in Kisauni District. The basis of her claim was a letter of offer dated January 2, 2013 ref NAS/C/158 Vol II (1219) signed by the Director of Land Adjudication and Settlement, in which she was offered to buy plot No 1219 measuring approximately 0.0077 hectares. The appellant's case was that she complied with the letter of offer by paying the outright purchase price of Kshs 6,762/- on February 3, 2013, and that since has paid the annual property rates to the County Government. That in October 2013 she was registered as the owner of the plot and issued with a title deed No Mombasa Ziwa La Ngombe/Settlement Scheme/1219 and had quiet possession until the respondent entered into the suit property and erected permanent buildings thereon. The appellant sought prohibitive and permanent injunctions to restrain the respondent from entering the suit premises; an order compelling the respondent to remove or demolish all structure erected on the suit property; and costs of the suit.
2. The respondent, by a defence dated May 25, 2017, pleaded that he had no claim over the property known as parcel No 1219 Ziwa La Ng'ombe Squatter Settlement Scheme in Mombasa. He stated that he purchased plot No 1276 at Ziwa La Ng'ombe Squatter Settlement Scheme in Mombasa from the



original allottee, one Eunice Kulombe on February 14, 2011, for the sum of Kshs 140,000/-, and that he took possession of the property and has extensively developed since then.

3. The respondent pleaded that if any survey was conducted by the Ministry of Lands involving the appellant, the same was in respect of plot No 1355 and plot No 1219 Ziwa La Ng'ombe Settlement Scheme, and that it did not involve his plot No 1276. The respondent averred that the appellant has never been in possession of the plot 1276.
4. After hearing the parties, the ELC (N Matheka, J) in a judgment rendered on June 14, 2019 dismissed the appellant's suit with costs, stating that the appellant had failed to establish her claim.
5. The appellant was aggrieved by the judgment and filed this appeal. She raises nine grounds in the memorandum of appeal filed. We have summarized them. The appellant faults the learned ELC judge for failing:
 - a) To find that Mombasa Ziwa La Ngombe /Scheme/1219 and Mombasa Ziwa La Ngombe / Scheme/1355 are one and the same;
 - b) To give directions as to expert evidence requisite to assist the court; for finding without evidence that the appellant obtained the suit property a corrupt scheme; failing to find that DW2 had no good title to pass to the respondent;
 - c) To give the appellant protection of the Law as prescribed under the Constitution;
 - d) To consider the uncontroverted evidence of PW2 which confirmed the appellant's title to the suit property; and,
 - e) Making determinations on issues that were neither framed nor advanced by the parties.

The appellant seeks to have the appeal allowed, the judgment of the ELC set aside and her case before the ELC allowed with costs.

6. The appeal was heard on the virtual platform on October 11, 2022. Learned counsel Mr Akanga and learned counsel Ms Ngige appeared for the appellant and the respondent respectively. Mr Akanga relied on his filed written submissions dated October 5, 2021, list and bundles of authorities. He highlighted the submissions. Ms Ngige relied on her written submissions dated September 30, 2022 and list of authorities of even date. Counsel highlighted her written submissions.
7. This is a first appeal from the decision of the ELC. This being a first appeal, it behooves this court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 this court espoused that mandate or duty as follows:-

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

8. Having considered the judgment of the court, the learned judge of the ELC identified two issues for determination; the first issue was whether or not the respondent trespassed onto the appellant's land and the second whether or not the appellant holds a good title.



9. Regarding the propriety of the appellant's title, the appellant's complaint is that the learned ELC judge erred for failing to grant to the appellant possession of the land despite finding that she had the title to the land. Mr Akanga urged that while the ELC correctly identified section 26 (1) of the [Land Registration Act](#) as the applicable law, which law declares the holder of a certificate of title "an absolute and indefeasible owner" and that "the title that proprietor shall not be subject to challenge" the court failed to apply the law in the appellant's favour. Counsel quoted from the ELC judgment what the court stated in regarding the appellant's title:

"It is not in dispute that the registered owner of the land, parcel Mombasa/Ziwa La Ngombe Scheme/1219 measuring approximately 0.0077 ha is the plaintiff,"
10. Mr Akanga urged us to apply Section 24 (a) and 25 of the [Land Registration Act](#) and rule that the learned ELC judge failed to give the appellant the benefit of this law, by failing to give her protection of her rights and privileges. Mr Akanga urged that the ELC judge relied on [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another \[2013\] eKLR](#), to find that appellant's title was proved to be illegally obtained. Counsel urged that that fraud must be pleaded and proved, which was not the case.
11. Ms Ngige in her submissions urged us to note that the appellant pleaded that her plot is No 1219, while the respondent pleaded that his plot is No 1276. She urged that the appellant did not bring any evidence to show that the two plots, Nos 1219 and 1276 refer to one and the same plot. Ms Ngige urged that in her evidence, the appellant claimed that initially she was allocated plot No 1355 Ziwa La Ngombe Settlement Scheme measuring 0.02 ha on February 15, 2002. That allotment letter was nullified following a re-survey by the Ministry of Lands and Settlement, pursuant to which she was issued with plot N 1219 and the title for the suit property.
12. Counsel urged that the Adjudication Officer who was called by the appellant as a witness did not add any value to the case as he brought no records to prove that the disputed plots are one and the same. That he failed to explain the difference in the acreage between the two plots No 1219 and 1276. Counsel, citing [Kiprotich Mosonik v Paul Kiptonui Koeh \[2006\] eKLR](#). Ms Ngige urged the court to find that the appellant was at liberty to call the evidence she intended to rely on.
13. Regarding the plot No 1355 Ms Ngige urged that the appellant was 16 years old in 2002 when her letter of allotment offered her plot No 1355. Counsel urged that the ELC Judge found that both the appellant and her mother had never lived on the land. She urged that the learned trial judge was right to find that PW1, the appellant's mother used her influence to get the allocation of the land for her daughter because she worked in the Adjudication Office at the time the allotments were being done.
14. Having considered the submissions by counsel, the evidence adduced by both sides, and the cited cases we are of the view that the issues that fall for our determination are two, namely,
 - a) Whether the appellant proved that plot No 1219, whose title she has is the same as plot No 1276, which the respondent occupies;
 - b) And if she proved the above, whether the respondent was a trespasser.
15. There was no dispute that the appellant was the registered owner of plot No 1219, which is the suit property. PW1, the appellant's mother testified that in 2002 her daughter applied for a piece of land at Zima La Ngombe Settlement Scheme, and was allocated plot No 1355. Later on, there was a cancellation of the allocation and a repeat of the exercise pursuant to which the appellant was allocated plot 1219, and the requisite title.



16. The evidence of PW2 was very important as he gave certainty to the fact that that after the committee repeated the exercise of allocation, it was confirmed that there was no case of double allocation. PW2 was a witness for the appellant. Even though the respondent did not find his evidence helpful, he actually supported the respondent's case, which in effect confirmed that any plot numbers issued out in the second exercise, which included that of DW2, were not subject of duplication.
17. The respondent's testimony confirmed that he purchased plot No 1276 from DW2 on November 14, 2011 for 140, 000/=; in this regard he produced the sale agreement together with receipts, marked D Exh 1 and 2 respectively. He also produced the allotment letter to DW2, marked as D Exh 3. He stated that one, Joan called him and told him that the plot he was living in was hers. In his defence, the respondent stated that he was not shown any surveyors report showing that he was living on plot 1219 and not 1276.
18. DW2 was Eunice Kalumba, who confirmed that in 2011 she sold her plot No 1276 to the respondent. She said that she bought the land in 1994 from one Kazungu and built a semi-permanent house on it. She revealed that in 1999, adjudication was conducted on the land and squatters who were living on the land, who included herself were allocated plot numbers, and that hers was No 1276. She testified that in 2004 a woman called Joan Odhiambo found her at the plot and told her that the plot was hers. That the two visited the lands office where she discovered Joan worked there. That after presenting the issue to her boss, the boss declined to effect any change on the ownership saying that the plot belonged to DW2. DW2 testified that she was still waiting for the title to the land as advised by the authorities.
19. The learned ELC judge made a finding that there was an initial allocation of land in 2002, through letters of offer, which was nullified and the exercise repeated with a committee that was to ensure that only persons living on the land were issued with the land. The learned ELC judge observed:
- “It has come out in evidence that the plaintiff was never a squatter there and worse still, PW1 used to work at the Land Adjudication Office in Mombasa at the material time. One can only draw the inference that she obtained the title through corrupt means. The plaintiff used her influence to have her daughter allocated the said plot.”
20. The conclusion arrived at by the learned ELC judge that the appellant's title was acquired corruptly, as Mr Akanga correctly submitted, did not arise from the pleadings filed in court by any of the parties, neither was it canvassed before the ELC. That also means that the second issue the learned Judge framed was in error. It is an established legal principle that parties are bound by their pleadings, that in turn limits the issues upon which a trial court may pronounce itself and no matter how well intentioned the court, it should not go beyond the matters raised by the parties. There are numerous cases which have considered this issue, for instance, *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule 7 3 others [2014] eKLR*. Further in *Anthony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR* this court held:
- “... cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings...”
21. The learned ELC judge was faulted for quoting sections 24 and 26 of the LRA and after finding that the plot No 1219 was registered in the appellant's name, failed to render judgment in favour of the appellant. Section 24 of the *Land Registration Act* provides that registration of a person as propriety of land shall vest in the person the absolute ownership of the land. While section 25 protects the rights



of such proprietor from challenge. The learned judge of the ELC in her analyses of the entire evidence adduced before her delivered herself thus:

“The people on the ground were to be allocated the plots. There was a committee which was to identify the people on the ground. Plot No 1219 was allocated to the plaintiff. It is not in dispute that the defendant is the one now in possession and the defendant maintains that he bought plot No 1276 from DW2 in 2011 and has put up a permanent house. It is not clear to me whether or not we are talking of the same plot. No survey report was produced to confirm this.” [emphasis added]

22. The learned ELC Judge continued to state the following regarding the evidence:

“From the evidence on record one cannot say for certain whether or not the defendant is on plot No 1219. From the documentary evidence adduced in court the suit land parcel Mombasa/Ziwa La Ngombe Scheme/1219 is approximately 0.0077HA (PEXh 1 is the title deed issued on November 8, 2013) DW2’s allotment letter talks of plot No 1276 measuring approximately 0.02HA. I find that the plaintiff has failed to establish that the two plots are one and the same on the ground.” [added]

23. The learned trial judge found that there was insufficient evidence to determine the case in the appellant’s favour, identifying lack of a surveyor’s report as the culprit. The ELC found that the plot No 1276 owned by the respondent had different acreage from plot No 1219 owned by the appellant. Besides, DW2 and the respondent had been in possession of their plot since 1999 while the appellant has never been in occupation of any plot at the scheme; she then concluded that she had difficulty determining whether the two plots were the same or different plots. We agree with the learned ELC judge that there was insufficient evidence to determine whether the plot No 1219 and plot No 1276 was one plot. In any event, it is evident that the respondent has been in occupation of plot 1276 since 2011 and DW2 the original owner of the same plot since 1999.

24. In *CMC Aviation Ltd v Cruisair Ltd* (No 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth. ”

25. In this case, the appellant pleaded that the land occupied by the respondent belonged to her. She needed to bring evidence to prove that indeed the respondent was living on her land. She failed to bring such evidence, which was readily available at the lands office. What was required is not just the certificate of title, but proof of where the land described in the title was located on the ground. Without such evidence, the claim by the appellant remained unproven. We agree with the learned judge that there was need to have evidence from the land’s office to resolve these issues. Contrary to Mr Akanga’s views it was the appellant’s responsibility to call all the evidence she required to prove her case.



26. The 2nd issue we framed for determination is whether the respondent was a trespasser in the appellant’s land. In *M’Mukanya v M’Mbijiwe [1984] KLR 761*, 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 which is different from ownership (See *Thomson v Ward, [1953] 2QB 153.*”

27. Further, in *Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428* states as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].

28. The ELC had doubt that the appellant owned the plot Number 1276, for lack of evidence to prove that the said plot was the same as plot No 1219 for which the appellant had title. Furthermore. The respondent established that he and DW2 before him have been in occupation of the land since 1999. What the appellant required to prove is that she had right to immediate and exclusive possession of the land. The appellant failed to prove that the Certificate of Title she had, and on which she based her claim was in respect to the land occupied by the respondent. We agree with the learned ELC Judge that the appellant failed to prove that the respondent trespassed on her land.

29. The upshot is that we find no merit in the appellant’s appeal.

Accordingly, we uphold the judgment and dismiss the appeal in its entirety.

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

S GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

