



Ndetei v Muia (Civil Appeal 123 of 2019) [2023] KECA 849 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 849 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 123 OF 2019
HM OKWENGU, K M'INOTI & S OLE KANTAI, JJA
JULY 7, 2023

BETWEEN

EDWARD MUTINDA NDETEI APPELLANT

AND

ALOIS MUIA RESPONDENT

(Appeal from the Judgment of the Environment and Land Court of Kenya at Makueni (Mbogo, J.) dated 28th December, 2018 in ELC Cause No. 1017 of 2013)

JUDGMENT

Judgment of Kantai, JA

1. It was alleged in the plaint filed at the High Court of Kenya at Nairobi (Land and Environment Case No. 1017 of 2013) that the respondent Alois Muia was the registered proprietor of land known as Title Number Emali Township Block 1/198 (the suit land) and that the appellant Edward Mutinda Ndetei had trespassed upon the said land by erecting permanent structures on the same. The respondent therefore prayed for damages for wrongful entry into his land by the appellant; an injunction restraining the appellant from entering the land or interfering with it and an order to evict anyone who had trespassed on the land.
2. In a Statement of Defence the appellant denied the claim stating that he had not trespassed on the respondent's land. He stated that he had purchased the land for valuable consideration; that he had been in litigation with the seller of the land over the same matter; that he had constructed on the land without objection by the respondent and he claimed that the respondent was a vexatious litigant

“... who goes against the principles of law that litigation ought to come to an end. He is keen on ensuring the Defendant is constantly in a state of emotional turmoil and constantly litigating on the same issues, year in, year out ...”.



3. The suit was transferred to the Environment and Land Court at Makueni and was heard by Mbogo, J., who in a Judgment delivered on 28th December, 2018 found for the respondent. The Judge issued a permanent injunction restraining the appellant and the County Government of Makueni (it had been joined in the suit but did not file a Notice of Appearance or defence) from interfering with the suit land; it was declared that the respondent was the absolute owner of the suit land and an order of eviction was issued against any person who had trespassed on the suit land. The respondent was awarded general damages Ksh.200,000 interest and costs. Those orders provoked this appeal through a Memorandum of Appeal drawn for the appellant by his lawyers M/S Mwagambo & Okongo Advocates where 7 grounds of appeal are set out. It is stated in sum that the Judge erred in not finding that the suit was *res judicata*; that the Judge should have found that the appellant had built and run a business on the suit land; that the Judge should have found that the appellant was a purchaser for valuable consideration and that the Judge did not consider the evidence given by the appellant in the case.
4. When the appeal came up for hearing before us on 26th June, 2022 learned counsel Miss Nyandera held brief for Mr. Mwagambo for the appellant while learned counsel Mr. Mbindyo appeared for the respondent. Counsel informed us that they had filed written submissions which they fully relied on without the need for highlight.
5. I have gone through the whole record and I have considered the same, submissions made, and the law.
6. The trial Judge considered the case and found two issues for consideration
 - i. who was the owner of the suit land?
 - ii. whether the respondent was entitled to the reliefs he sought.

I think that the Judge properly identified the issues before him.

7. A Certificate of Lease for the suit land (Emali Township Block 1/198) was produced in evidence before the trial Court. The same was issued on 17th July, 2001 by the Land Registrar, Makueni District Registry to the respondent for a term of 99 years from 1st December, 1995.
8. The [Land Registration Act](#) No. 3 of 2012 which replaced the [Registered Land Act](#) Cap. 300 of the Laws of Kenya defines proprietor of land at Section 2 as:
 - (a) in relation to land or a lease, the person named in the register as the proprietor;and
 - (b) in relation to a charge of land or a lease, the person named in the register of the land or lease as the person in whose favour the charge is made;”
9. Sections 24, 25 and 26 of the said Act which is a replica of the provision in the repealed [Registered Land Act](#) provides:
 24. Interest conferred by registration.
Subject to this Act—
 - a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together



with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

With regard to proof of ownership, the Act states at Section 26

26. Certificate of title to be held as conclusive evidence of proprietorship.

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

10. The appellant in our case alleged that he held a letter of allotment issued by the County of Makueni. This was against the title held by the respondent.



11. In the case of *Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara (deceased))* [2002] eKLR this Court held on the issue of the status of an allotment letter:

"Precisely put, a letter of allotment cannot supersede or override a Title Deed or Certificate of Lease. In this case, therefore, we are in agreement with the learned Judge that the suit property lawfully belonged to the respondent's late husband. His Title to the land could only be impeached if it was demonstrated that the transaction leading to the deceased's registration as the owner of the suit property was fraudulent, and that the deceased was party to such fraud."

12. In the earlier case of *Dr. Joseph M.K. Arap Ngok v Justice Moiyo Ole Keiwua & Anor* Civil Application No. 60 Of 1997 (ur) it was held:

"It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held."

13. In the face of the Certificate of Lease held by the respondent the Judge was right to find that the appellant had no right to the suit land at all. I find no merit in this appeal which I would dismiss with costs to the respondent.

Judgment of Okwengu JA

14. I have read the judgment of Kantai JA in draft and I am fully in agreement with the learned Judge. I have nothing further to add. As Minoti JA is also in agreement, the final orders are that the appeal is dismissed with costs.

Judgment of M'inoti, JA

15. I have read in draft the judgment of my brother, Kantai, JA., with which I am in agreement. I have nothing useful to add to the judgment.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

S. OLE KANTAI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

