



**Game v Marsabit County Government & 5 others (Environment and Land Appeal E001 of 2021) [2024] KEELC 3464 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E001 OF 2021  
PM NJOROGE, J  
APRIL 29, 2024**

**BETWEEN**

**MARY GAME ..... APPELLANT**

**AND**

**MARSABIT COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**GALGALO BARILLE ..... 3<sup>RD</sup> RESPONDENT**

**BOKU GUFU ..... 4<sup>TH</sup> RESPONDENT**

**HABIBA BOKAYO ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon. Mbuyaki Wafula,  
SRM in Marsabit ELC Case No. 6 of 2018 delivered on 15/9/2021)*

**JUDGMENT**

1. The Memorandum of Appeal in this suit is in the following format;

Memorandum of Appeal

The Appellant having been dissatisfied by the judgment delivered on 15/9/2021 by Honourable Mbuyaki Wafula SRM in Marsabit ELC Case No. 6 of 2018 appeals against the whole judgment and puts forth the following grounds;

1. The Learned Senior Resident Magistrate erred in law and in fact in holding that the Plaintiff had not proved her case on a balance of probabilities as required by law.



2. The Honourable Magistrate erred in law and in fact in holding that allotment letter was not prove of ownership as held by the Appellant.
3. The Honourable Senior Resident Magistrate erred in law and in fact in holding that the parcels do revert back to the County Government of Marsabit when there was no counter-claim by the 1<sup>st</sup> Respondent to that effect.
4. That Learned Senior Magistrate erred in law and fact in not considering all the documents produced by the Appellant as exhibits.
5. The Honourable Senior Resident Magistrate erred in law and in fact in not considering the Appellant's submissions and evidence tendered by the Appellant.
6. The Honourable Magistrate considered extraneous issues and reached a conclusion not supported by the evidence on record.
7. The Honourable Learned Magistrate reached at a wrong conclusion not based on law and the evidence before him.

Dated at Isiolo this 14<sup>th</sup> Day of October, 2021

For: J.O. Ondieki & Company

Advocates for the Appellant

2. The Appeal was canvassed by way of written submissions.
3. In his submissions, the advocate for the Appellant submits that in accordance with Section 107 of the *Evidence Act*, the Appellant had proffered facts which asserted his legal right to the disputed land BUT her assertion of her legal right was ignored by the lower court. He says that the Appellant produced the minute that allocated the plot to her after which she satisfied all the conditions which were imposed on her before a letter of allotment granting her beneficial interest to the land was issued in her favour. The advocate buttresses the Appellants assertion by proffering the case of Mbau Saw Mills Limited Versus Attorney General & 2 Others [2014] eKLR and says that in order for an allotment letter to be operative, the allottee is required to comply with the conditions set out therein including payment of required amounts such as stand premium, ground rent etc within the prescribed period. The appellant's advocate asserts that all this was done.
4. The Appellant's advocate criticizes the decision of the Senior Resident Magistrate in holding that the suit property should revert back to the County Government of Marsabit when there was no counter claim by the 1<sup>st</sup> Respondent to that effect. He further submits that the appellants witness statements, her list of documents, her submissions and the evidence she had tendered were not considered by the Honourable Senior Resident Magistrate.
5. The Appellant's Advocate says that the Hon. Senior Resident Magistrate ignored evidence that plot Nos. 11, 12 and 13, Marsabit County were divisions of Plot No. 828, Marsabit County. He also says that the Learned Magistrate failed to visit and follow up the issue of the locus in Quo despite an unsuccessful attempt. He says that a site visit would have definitively shown that plot numbers 11, 12 and 13 Marsabit County, were subdivisions of Plot No. 828, Marsabit County, Originally allocated to the appellant. He concludes that the Learned Magistrate failed to appreciate the totality of the evidence tendered by the parties.



6. In the background and facts section of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's submissions their advocate seems to agree with the trial courts findings that the dispute which spawned this appeal concerns a parcel of Land known as Plot No. 828, Marsabit.
7. The Respondents cite the case of *Selle Versus Associated Motor Boat Company* [1968] EA 123 to buttress their assertion that an appellate court must reconsider the totality of the evidence tendered before the lower court and arrive at its own conclusion. They also proffer the case of *Jabane Versus Olenia* [1968] KLR 661, 664, 665 for their assertion that an appellate court will not lightly interfere with the findings of the lower court unless if they were not based on any evidence or based on wrong principles.
8. The Respondents have asked the court not to entertain this appeal as, according to them, it contravenes Order 42 Rule 13 (4) of the Procedure Rules regarding completeness of the record of appeal. They say that the appellant did not include the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' pleadings in the trial court including list of witnesses, written statements, list and bundle of documents and the supplementary copies of documents filed in the lower court. They say that the record of appeal does not contain a decree from the Magistrate's Court. They argue that because of its incompleteness, this appeal should be dismissed.
9. I find it necessary to deal with the alleged incompleteness of the appeal documents before I proceed any further. I find that the appellant moved diligently to have the lower court's file annexed to this appeal. This being the case, I find that all the documents complained about by the respondents are in the lower court's file, including the documents the appellant has included in his record of appeal. I am, therefore, inclined to dismiss the prayer that the appeal be dismissed on account of incompleteness. It is hereby dismissed. I also dismiss the submission that this court has been denied the opportunity to exercise its duty as the 1<sup>st</sup> Appellate Court of reviewing the evidence submitted at the trial court on account of an incomplete record of appeal. I unequivocally state that I have been able to peruse the complete record of proceedings in the lower court, and, I am therefore, able to review the apposite evidence and make my own conclusion.
10. The respondents argue that the appellant had not established her claim of ownership to the suit land and was therefore not entitled to an order for permanent injunction. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, to buttress this assertion, proffered the Case of *Giella Versus Cassman Brown* (no citation) and *Mrao Versus Republic* (no citation).
11. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents urge the court to uphold the Magistrate's Judgment and dismiss the appeal with costs to them.
12. On 5<sup>th</sup> February, 2024, advocate Benjamin Kimathi, Senior State Counsel in the Attorney General's Office informed the court that the 2<sup>nd</sup> Respondent, the National Land Commission, and the 6<sup>th</sup> defendant, the Attorney General, did not wish to file submissions.
13. I do note that in their submissions, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants only prayed for dismissal of the Plaintiff's case (Now the Appellant) with costs to themselves. The effect of the lower court's judgment was to deny the Appellant and the Respondents ownership of Plot No. 828, Marsabit and Plot Numbers 11, 12 and 13, Marsabit respectively. It is quite clear that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents did not appeal against this finding. It is only the appellant who has appealed against the lower court's judgment.
14. As the 1<sup>st</sup> Appellate Court, I am duty bound to consider all the evidence tendered in the trial court and based on the totality of that evidence, arrive at my own conclusion. I have done that.



15. I have already found that the appeal documents are complete enough to allow this court to comprehensively consider all apposite issues. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's main contention is their perception of the incompleteness of the Appellant's documents. The other contention is that the appellant had not discharged her burden of proof.
16. A careful consideration of the Lower Courts proceedings leads me to the conclusion that the appellants evidence was not given the weight it deserved. At no point did the defendants in the lower court disprove that Plot No. 828, Marsabit, had been allocated to the appellant by the defunct Marsabit County Council and that she was in occupation. The defendants (now the respondents) did not disprove the appellants claim that Plot numbers 11, 12 and 13 Marsabit were subdivisions of Plot No. 828, Marsabit.
17. I do agree with the Appellant that the Learned Trial Magistrate considered extraneous matters as evidenced by his decision to revert the suit properties to the County Government as there was no such prayer by the Respondents in the Lower Court.
- His decision that the existence of the allotment letters in the names of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents ranked in priority with the Appellants letter of allotment for Plot No. 828, Marsabit, notwithstanding that the Appellants letter of allotment was issued years before the issuance of allotment letters for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents smacks of extraneous considerations.
18. It would seem to me that since the trial court denied them ownership of their plots numbers 11, 12 and 13, they would be comfortable in also having the appellant lose his claim to Plot No. 828, Marsabit. Otherwise, to buttress their claim to Plot Numbers 11, 12, and 13, Marsabit, they ought to have appealed against the Lower Court's Judgment. Instead, they are asking the court to uphold that Judgment.
19. In the circumstance, I issue the following orders;
- a. This appeal is allowed and prayers (a) (b) (c) and (e) in the Appellants Plaint in the Lower Court are granted.
  - b. The prayer for General damages for fraud is denied.
  - c. Costs shall follow the event and are awarded to the appellant against the respondents.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 29<sup>TH</sup> DAY OF APRIL, 2024 IN THE PRESENCE OF:**

Court assistant: Balozi

Nyenyire for the Plaintiff

Mwiti h/b Ondari for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

