



**James v Mburu (Environment and Land Appeal E026 of 2022)
[2024] KEELC 3479 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E026 OF 2022
LC KOMINGOI, J
APRIL 25, 2024**

BETWEEN

JOHNSON GATAUWA JAMES APPELLANT

AND

LEAH WANJIRU MBURU RESPONDENT

*(Being an Appeal from the judgement and order of the Hon. P. Achieng
in MC ELC No. 34 of 2018 at Ngong' delivered on 23rd May 2022)*

JUDGMENT

1. In her Judgement dated 23rd May 2022 Honourable P. Achieng (Senior Principal Magistrate) held;

“.....The bottom line however is the Plot No. 198 (Residential) Ongata Rongai which belongs to the defendant was the first allotment. The Plaintiff is therefore not entitled to the prayers sought. I therefore find no merit in the Plaintiff’s claim and proceed to dismiss the suit with costs to the defendant.”
2. Aggrieved by the said Judgement, the Appellant filed a Memorandum of Appeal dated 17th June 2022. The Appeal seeks to set aside the judgement and that the Appellant be awarded prayers in the Plaint with costs, on grounds that:
 1. That the learned Magistrate erred in law and in fact by concluding that the only issue for consideration was which allotment of the Plots Numbers 220 and 198 was first in time.
 2. That the learned Magistrate erred in law and in fact by concluding without evidence that plot No. 220 and 198 were one and the same plot.



3. That the learned Magistrate erred in law and in fact by failing to appreciate and consider that the Defendant did not have a letter of allotment or even a land sale agreement for plot No. 198 or any other plot.
 4. That the learned Magistrate erred in law and in fact by relying on evidence that Plot No. 198 as per the Olkejuado County Council records belonged to a third party yet found in her judgement that the Defendant was its rightful owner.
 5. That the learned Magistrate erred in law and in fact by dismissing the suit by relying on extraneous evidence thereby arriving at the wrong decision.
 6. That the learned Magistrate erred in law and in fact by introducing new evidence which was not on the pleadings of the parties.
 7. That the learned Magistrate erred in law and in fact by failing to consider vital evidence tabled by the Appellant at the time of the hearing.
 8. That the learned Magistrate erred in law and in fact by failing to appreciate that in view of the nature of the case, it was only in line with the Court's overriding objectives to consider the Appellant's pleadings and evidence, and not just that of the respondent.
 9. That the judgement of the learned Magistrate was against the weight of evidence and facts adduced and was not just in dismissing the Appeal.
 10. That the learned Magistrate erred in law and in fact by failing to consider and apply the well laid down principles of the law appropriately.
 11. That the learned Magistrate erred in law and in fact by being biased towards the Appellant in the lower court.
3. The Appeal was canvassed by way of written submissions.

The Appellant's submissions

4. Counsel submitted that the trial court was wrong in dismissing the Appellant's case on the grounds that prior to the Appellant purchasing the suit property (plot No. 220) in 2009 from Samuel G. Kamau and Richard G. Wairi for Kshs. 800,000 there was a dispute on ownership of the property between the vendors and the Respondent sometime in 2008. This dispute was adjudicated upon by the Olkejuado County Council and the previous owners then sold off the property. The Appellant possessed it peacefully until 2014 when the Respondent began to construct on plot No. 220.
5. It is also submitted that the Learned Trial magistrate therefore erred by finding that the only issue for determination was which allotment was first in time in total disregard of the Appellant's evidence of purchase, possession and development of the plot No. 220. The Learned Trial Magistrate also erred by finding that the Respondent's allotment of plot No. 198 was first in time when there was no evidence to that effect such as a sale agreement, letter of allotment and rates payment. Further, it was on record from the Clerk of the County Council of Olkejuado that plot No. 198 was allocated to one Joyce N. Silanke on 29th November 1977 and it had never been transferred to any other person. Therefore, plot No. 198 never belonged to the Respondent or one Nancy Wambui who allegedly sold it to the Respondent and it was an error for the lower court to find that plot No. 220 and 198 was one and the same with plot No. 198 being the first in time.
6. Counsel also submitted that Olkejuado County Council which was the lessor of both plots had already made a determination that the plot be subdivided to accommodate the two parties and this decision



had never been vacated. It was thus binding on the parties and the trial court had ignored pertinent evidence in arriving at its decision. Reference was made to the Court of Appeal case of *Dorcas Indombi Wasike v Benson Wamalwa Khisa & another* [2010] eKLR.

The Respondent's submissions

7. Counsel for the Respondent submitted that the trial court did not err in finding that plot No. 198 was the first in time because it relied on evidence that plot No. 198 was first allocated to Joyce N. Silanke on 29th November 1977, who sold it to Nancy Wambui in 1983 and later sold to the Respondent on 28th October 1991. It was also established that plot No. 220 belonged to Lemalepo Maendeleo Group allotted in 2000 and later sold Samuel G. Kimani and Richard Wairi in 2003 who later sold it to the Appellant. The minutes of the County Council dated 16th September 2008 also indicated that plot 198 and 220 related to one and the same plot on the ground and sought to resolve the dispute by directing that plot No. 198 be subdivided into two to accommodate both parties, although this was never actualised. Counsel also pointed out that it was on record that plot No. 220 was a dumping site and the recommendation to have plot No. 198 subdivided would deprive the Respondent her rightful ownership of her property.
8. Therefore, the trial court was right in dismissing the suit and by not assisting the Appellant to acquire the Respondent's suit property illegally. As such, the appeal should be dismissed and the judgement delivered on 3rd May 2022 be upheld.

Analysis and Determination

9. I have considered the appeal, the grounds the record of appeal, the rival submissions and the authorities cited.

The Appellant has filed eleven (11) grounds of Appeal which I will compress into three, as they are intertwined.

The issues for determination are;

- i. Whether the learned trial magistrate erred in law and infact by concluding that the only issue for consideration was which allotment of the plot numbers 220 and 198 was first in time.
 - ii. Whether the learned trial magistrate erred in law and infact by failing to consider vital evidence tabled by the Appellant at the time of the hearing.
 - iii. Whether the Learned Trial Magistrate erred in law and in fact by failing to consider and apply the well laid down principles of the law.
 - iv. Whether the appeal is merited.
 - v. Who should bear costs of the Appeal?
10. This being a first Appeal, the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in *Peter Kamau Njau v Emmanuel Charo Tinga* (2016) eKLR where it was stated;

“Our duty in this Appeal being a first Appeal is to analyse a fresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion.

See Selle v Associated Motor Boat Co. (1968) EA 123.”



11. Similarly, the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR stated thus;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusion is reached by the learned trial judge are to stand or not and give reasons either way.....”

12. The dispute revolves around plot numbers 220 and 198 which has been acknowledged as one and the same plot. The Appellant claims that he purchased plot number 220 from Samuel G. Kimani and Richard and Richard G. Wairi in 2009. He also stated that prior to purchasing it he had been informed that there was a dispute regarding ownership of the property and the County Council on 16th October 2008 resolved to have the plot subdivided into two equal portions between Samuel G. Kimani and Richard G. Wairi and Leah Wanjiru Mburu. The Respondent stated that she was the owner of plot number 198 having purchased it from one Nancy Wambui in 1991 and the plot was not available for subsequent allocation. She also noted that the dispute lodged at the County Council was heard in her absence.
13. The trial court in its determination found that plot number 198 was allotted to one Joyce Silanke in 1977. Otherwise referred to as Joyce Wamukuru by Nancy Wambui. On 29th November 1977 she sold it to Nancy Wambui and that the Defendant purchased it from Nancy Wambui in 1991. As such, her allotment was first in time and the suit was dismissed.
14. It is not in dispute that plot number 220 and 198 is one and the same. This was acknowledged by the parties and their witnesses in their evidence before the trial court. It is also an established legal principle that where there are two allotment letters, the first in time should prevail if it was acquired regularly and procedurally see *Pbilemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others* [2019] eKLR as aptly held by the trial court. The Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR also held that where title to property is under challenge, the parties must show the history of title. It was stated;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

15. I find that the Learned Trial magistrate rightly found that the Respondent’s title can be traced back to 1991 when it was transferred to her by Nancy Wambui who had acquired it from Joyce Wamukuru.
16. The Respondent’s evidence in the trial court that she had been in possession of the plot for more than seventeen (17) years was not rebutted by the Appellant. It is her case that the Appellant found her repairing the fence and he lay claim to her plot.
17. The letter from the County Council of Olkejuado dated 16th October 2008 to the two parties, asking them to sub-divide the plot into two parties, asking them to sub-divide the plot into two equal portions shows that it had acknowledged that there was only one plot. It therefore means that the one allocated earlier ought to stand.



The said allocating authority could not confirm the existence of plot No.220 (Residential) Ongata Rongai.

18. I find that the Learned Trial Magistrate rightly held that the Appellant's title has no history before the year 2000 when it was allegedly allocated to Lemelepo Maendeleo Women Group.
19. I also find that the Learned Trial Magistrate did not err by making a finding that plot No. 220 (Residential) Ongata Ongai does not exist and the plot was rather plot No. 198 (Residential) Ongata Rongai.
20. I further find that the Learned Trial Magistrate considered all the evidence adduced before arriving at her decision.
21. The upshot of the matter is that I find no reason to interfere with the Judgement of the lower court and the same is upheld.
22. I find no merit in the appeal and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Nyambura for Ms. Kaberia for the Appellant.

Mr. Kinyanjui for Mr. Mwicigi.

Kinuthia for the Respondent.

Court Assistant – Mutisya.

