



**Maalim v Alio & another (Environment and Land Appeal
E003 of 2022) [2024] KEELC 3944 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

JM MUTUNGI, J

APRIL 25, 2024

BETWEEN

NURDIN ABASS MAALIM APPELLANT

AND

MOHAMUD IBRAHIM ALIO 1ST RESPONDENT

COUNTY GOVERNMENT OF MANDERA 2ND RESPONDENT

*(Being an Appeal against the Judgment of the Hon. Mukabi Kimani Senior Resident
Magistrate sitting in Mandera ELC Suit No. 13 of 2019 and dated 1.07.2022)*

JUDGMENT

1. This appeal arises from the Judgment of Hon. Mukabi Kimani delivered on 1st July 2022 in Mandera SPMC ELC No. 13 of 2019.
2. Briefly the claim before the Lower Court was that the 1st Respondent (as the Plaintiff) filed the suit in the Lower Court seeking orders to be declared as the legal owner of Plot No. 1182 Bulla Mpya III (suit property) and for a permanent injunction to issue against the Appellant (the 1st Defendant) restraining him from trespassing, selling, disposing of, transferring or interfering with the 1st Respondent's proprietary rights in the suit property.
3. The Appellant entered appearance and filed his Defence and Counterclaim. He denied the averments by the Plaintiff and pleaded that he was the legitimate owner of the suit land and had already built a septic tank on the adjacent land and had also deposited materials in preparation of building his home in the suit property. He averred that it was the 1st Respondent who had trespassed into his land. In his Counterclaim, the Appellant maintained that he was the legal owner of the suit land and prayed for the dismissal of the 1st Respondent's claim and for a permanent injunction to issue against the 1st Respondent from entering or interfering with the suit property.



4. By its Judgment dated 1st July 2022, the Learned Trial Magistrate made a determination that the ownership of the suit property could not be ascertained; that the Plaintiff had failed to establish that he was in possession of the suit land and as such his claim of trespass could not succeed; that despite the fact that the 1st Respondent had pleaded fraud, he had failed to prove it and a consequently, the Learned Trial Magistrate dismissed both the Plaint dated 1.12.2019 and the Appellant's Defence and Counterclaim dated 20th February 2020.
5. The Appellant was dissatisfied and aggrieved by the Learned Trial Magistrate's decision and has appealed to this Court against the Judgment on Seven grounds set out in the Memorandum of Appeal as follows:-
 1. That the Trial Magistrate erred in law and in fact by failing to acknowledge that the Appellant's Counter Claim was proved on a balance of probability that the land in question belongs to him.
 2. That the Learned Trial Magistrate erred in fact and in law by abdicating his obvious role of establishing who the owner of the impugned land had to be determined and not left in limbo.
 3. That the Trial Magistrate erred in law by failing to note the inconsistencies in the Respondent's evidence.
 4. That the Judgment in its entirety is not in consonance with the evidence on record.
 5. That the Trial Magistrate erroneously stated that the Defendant's witnesses had not filed their witness statements.
 6. That the Learned Trial Magistrate's Judgment is against the evidence of the two witnesses summoned from the 2nd Respondent.
 7. That the Learned Magistrate misdirected himself factually and legally hence the Judgment is affront to Justice.
6. The Appellant sought that his Counterclaim be allowed and that he be awarded the costs of the appeal.
7. In order to determine whether or not the decision of the Subordinate Court was justified or not justified, it is necessary that the Court reconsiders and re-evaluates the evidence that was adduced before the Subordinate Court. This being a first appeal, the Court is under a duty to relook and re-evaluate the evidence afresh and it is not necessarily bound by any findings of fact that the Court below may have made. The Court can reach its own conclusions if upon evaluation of the evidence, the Court is satisfied the Lower Court applied the wrong principles in reaching the decision that it did and/or if any finding was not supported by the evidence. This principle was aptly established in the Court of Appeal Case of *Selle & Another –vs- Associated Motor Boat Co Ltd & Others* (1968) EA 123 where the Court stated as follows: -

“--- this Court is not bound necessarily to accept the findings of fact of the Court below. An Appeal to this 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 the 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 allowance in this respect ----“
8. The evidence before the Lower Court was that the 1st Respondent who was the Plaintiff instituted the suit against the Appellant who was the Defendant seeking to be declared as the legal owner of Plot



No. 1182 Bulla Mpya III which is now Kamor location and to have the Appellant restrained from trespassing and interfering with the suit property. In his evidence the 1st Respondent stated that the suit land belonged to him having been allocated the same by the County Government. He admitted however that he did not have any document to prove the allotment. He stated that he had been paying land rent annually to the County Council of Mandera and to the County Government of Mandera post 2013. He averred that he did not have land rates receipts for the years before 2001. He testified that there had been a dispute between him and the Appellant and that the council of elders held that the land belonged to him. On being re-examined, the Respondent stated that he had a certificate of ownership and that the letter dated 1/3/2019 indicated that the land belonged to him. PW2 gave evidence to the effect that he was a neighbour to the 1st Respondent and that the 1st Respondent was the owner of the suit land.

9. The Appellant testified as DW1 and he adopted his recorded witness statement as his evidence in chief. It was his evidence that his Plot was No. 41, located at Hides and market Kamor location. He maintained that Bulla Mpya III and his Plot No. 41 were at different location. DW3 testified that the Appellant was his nephew and that he was the owner of Plot No. 41.
10. The Lower Court summoned a Surveyor from Mandera County Government to ascertain the location of plots 1182 Bulla Mpya III and plot No. 41 Kamor. The Surveyor gave evidence to the effect that the area was not planned or surveyed. He testified that the land was neither planned or surveyed and that the location of the 2 plots could not be ascertained. He also stated that he was not sure whether the plots were registered. Upon Cross Examination the Surveyor stated he could not ascertain to whom the plot belongs.
11. The Court further summoned the Land Administrator, Mandera County who testified that plot No. 1182 is registered in the name of the 1st Respondent who was paying land rates for the same and further affirmed that the suit property was not surveyed. The witness confirmed that the hides and skins store No. 39 and 41 were registered in the name of the Appellant who had purchased and had the same transferred to his name. The witness however could not affirm whether the plots in dispute related to the same plot on the ground as they were not surveyed.
12. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 21/09/2023 while those of the 2nd Respondent were filed on 27/09/2023. The 1st Respondent did not file his submissions.
13. Having reviewed the pleadings, the Appeal record, and the evidence adduced before the Lower Court, and further having considered the submissions made by the parties the issues that arise for determination in this appeal are: -
 1. Whether there was double allocation of the suit land and the legal effect thereof?
 - 2.. Who was the bona fide owner of the suit property?
 3. Whether the Learned Trial Magistrate erred in failing to determine ownership of the disputed property?
14. On the first issue, it is not in dispute that both the 1st Respondent hold ownership documents in form of receipts of rate payments, certificate of ownership and letters from the County Government of Mandera in Case of the 1st Respondent identifying the plot indispute as plot No. 1182 and in case of the Appellant identifying the plot as No. 39 & 41 Mandera. This was confirmed by the surveyor when he testified that "it is the same site that parties are claiming." In the Criminal Case No. 563 of



2019 where the 1st Respondent was the accused and the Appellant the complainant. Wasike SRM in his Judgment noted thus:-

“from the facts in this case, it is evident that the complainant and the accused are claiming the same physical plot though under different title or identification particulars.”

15. Similarly, in the Judgment the Trial Court noted that it ordered the County Surveyor to ascertain the location of Plot No. 1182 Bulla Mpya III and Plot 39 & 41 Kamor and whether the two plots were one and the same. The Surveyor stated that “the outcome of that exercise which was conducted on 21st October 2021 in the presence of the parties, was that the sites identified by the two parties was one and the same with different boundaries claimed by each party.”
16. It is therefore evident that the Appellant and the 1st Respondent were claiming to have been allocated the same plot on the ground though the plot Nos. were different. Hence this was a case of double allocation by the 2nd Respondent. In the premises ownership of the plot could only be determined by applying the fundamental priority rules.
17. In the Case of *Gitwany Investment Limited Vs. Tajmal Limited & 3 others*,(2006) eKLR the Court held that:

The legal effect of the said allocations can only be determined by applying the fundamental priority rules. These rules are that firstly, equitable rights bind the world except the bona fide purchaser for value of a legal estate without notice of the equitable right. Secondly, where the bona fide purchaser is a purchaser of an equitable interest, the rule is that as between competing equitable interests the first in time prevails, as it is an established principle that equitable interests rank in order of creation.

18. The Court in the case held that the Commissioner of Lands who was responsible for the double allocation was liable to pay the innocent party who had incurred expenses in developing the property on the basis of the allocation damages.
19. The Court is alive to the fact that there are circumstances where a property in dispute has no title like in the instant suit. This does not however mean that no rights can accrue therefrom. In such circumstances, the court will set out to establish whether the documentary evidence establishes an unbroken chain leading to the root of the title. That is the position that was persuasively stated by Onguto, J in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR where the Judge stated as follows:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history...

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen vs Headley* [1991] Ch 425 at 437.



The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al."

20. In the present case I have perused the record of Appeal and not that both parties filed documents in support of their ownership claim of the suit property. The Appellant's evidence is to the effect that he purchased the suit property from one Sheikh Osman Mohamed (deceased). He produced an application between him and Sheikh Osman dated 23/06/2015. He also produced a certificate of ownership that he was issued by the Mandera County Government on 14th February 2017. He produced transfer receipts and land rents receipts dating from the year 2013 that had been paid by himself and the deceased. He also had a letter from the land administrator of Mandera County who confirmed that the Appellant was the owner of stores No. 39 and 41 Kamor and that the same were legally transferred to him and that he had duly paid all the necessary rates. On the other hand, the 1st Respondent produced land rents receipts for the years dating from the year 2013 to 2019. He also produced minutes of a plot dispute that was heard and determined on 10/03/2018 by the elders. As per the minutes, it was decided that the 1st Respondent was the owner of the disputed land. He annexed a letter from the Mandera County Government which had been addressed to the Directorate of Criminal Investigation and which was produced by the land administrator, Mr. Ibrahim M. Abdi. In the letter, the land administrator stated that the 1st Respondent was the owner of Plot No. 1182 Bulla Mpya, that the land was still in the name of the beneficiary and that the County's record showed that the 1st Respondent had been paying land rents from the year 2003. Based on the strength of this letter, the minutes by the council of elders and the land rents receipts, it is my finding that the 1st Respondent was able to establish on a balance of probability that his equitable rights ranked first in time than those of the Appellant. Applying the fundamental priority rules as in the Case of Gitwan Investment Ltd –vs- Tajmad (supra). I find and hold that the 1st Respondent's ranked first and he was therefore the bonafide owner of the suit property.
21. I now turn to consider whether the 1st Respondent was entitled to the remedies he had sought. The Trial Court held that the 1st Respondent could not succeed in claiming trespass because he had failed to establish possession of the suit property. With respect, trespass is not dependent on the claimant establishing that he or she was in possession of the land he or she claims to have been trespassed upon. In my view the tort of trespass is committed by a person's if he enters onto another persons land without the owner's permission. I have made a finding that the instant matter was one where there was double allocation and as such until the issue of who the rightful owner of the property was, the question of damages for trespass could not arise. Concerning the issue of award of damages, I am guided by the case of Amritlal vs City Council of Nairobi (1982) KLR 75 where the Court held that in cases of double allocation the appropriate remedy is damages to be paid by the allocating authority, especially in circumstances where they are financially capable.
22. I agree with the Court's reasoning and finding because making the Appellant pay damages for trespass would cause unwarranted hardship on the Appellant given that he was just an innocent purchaser for value, and he had been diligent in the payment of the suit property's land rates to the 2nd Respondent who was the allocating authority. In the present matter the 2nd Respondent and/or its predecessor was responsible for the double allocation of the same plot to both the Appellant and the 1st Respondent and over time continued to collect and receive rent/rates from both the Appellant and the 1st Respondent.



The 2nd Respondent ought to bear responsibility for either by compensating the Appellant the value of the plot and/or by allocating him an alternative plot in compensation in an appropriate location.

23. Upon a full and careful evaluation of the evidence presented before the Lower Court it is my determination that the Learned Trial Magistrate erred in failing to make a determination as to who between the Appellant and the 1st Defendant was entitled to the beneficial ownership of the disputed land. I have held that in the circumstances of the instant case where there was evidence of double allocation, the priority test was applicable such that the person who it was demonstrated was allocated the land first was entitled to be held to be the rightful owner. Where there are competing equities as in the present case, the first in time takes priority. The 1st Respondent's allocation on the basis of the evidence tendered predated the allocation to the Appellant. In the premises the Learned Trial Magistrate ought to have reached the finding that the 1st Respondent was the lawful owner of the disputed plot (No. 1182) and allowed the 1st Respondent's claim. The Appellant's Counterclaim was rightfully dismissed.
24. The net result is that though the 1st Respondent did not appeal against the Lower Court's Judgment and the Appellant who was the 1st Defendant before the Lower Court appealed against the dismissal of his counterclaim, the Court finds no merit in the Appellant's Appeal and the same is hereby dismissed. The Court having been called upon to re-evaluate the evidence adduced by the parties, the Court has come to the conclusion that the Lower Court reached the wrong decision and this Court in its appellate and review jurisdiction sets aside the Judgment delivered by the Learned Trial Magistrate on 1st July 2022 and in place thereof substitutes Judgment in favour of the 1st Respondent (Plaintiff in the Lower Court) in terms of prayers (a), (b) and (c) of the Plaint. The parties shall bear their own costs of the appeal and of the Court below.
25. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK THIS 25TH DAY OF APRIL 2024.

J. M. MUTUNGI

ELC- JUDGE

