



**Mwamburi v Kasenge (Environment and Land Appeal 13 of 2023)
[2025] KEELC 790 (KLR) (Environment and Land) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 13 OF 2023
EK WABWOTO, J
FEBRUARY 25, 2025**

BETWEEN

PRISCILLA MAGHUWA MWAMBURI APPELLANT

AND

HUSNA WAKESHO KASENGE RESPONDENT

*(Being an appeal from the Judgment of Hon. A. M. Obura (CM)
in Voi CC No. 299 of 2017 delivered on 24th January 2022)*

JUDGMENT

1. This is the first appeal from the judgment delivered by Hon. A. M. Obura (Mrs.) CM on 24th January 2022. The trial court granted the Respondent the reliefs sought in her plaint and dismissed the Appellant's Counterclaim. Being the first appeal the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that court lacks the advantage of the trial Magistrate who saw and heard the witnesses. See, the often-cited case of *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where this Court stated:

“...this Court is not bound necessarily to accept the findings of fact by 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 this 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 ...”

2. The trial Magistrate granted the following orders:-



- a. A permanent injunction is hereby issued against the Defendant and or her servants or agents, restraining her from trespassing or in any manner interfering with the Plaintiff's land known as Plot No. 3580 situated at Mazeras Ndara "A" Adjudication Section – Voi District (now registered as LR. No. Voi/Ndara "A"/3580).
 - b. The Defendant is hereby ordered to remove all her developments, structures and any materials that encroach into the Plaintiff's land known as Plot No. 3580 situated at Mazeras Ndara "A" Adjudication Section – Voi District (now registered as LR. No. Voi/Ndara "A"/3580) within the next sixty (60) days.
 - c. In default of (b) above, the Plaintiff is at liberty to proceed to remove the said structures at the Defendant's cost.
 - d. The Plaintiff is awarded costs of this suit.
 - e. The Counterclaim is hereby dismissed with costs.
3. The Appellant being aggrieved by the said judgment filed the instant Appeal vide the Memorandum of Appeal dated 22nd February 2022 raising the following grounds:-
1. The learned trial Magistrate of the Magistrate Court erred in law and in fact in failing to appreciate that the demarcation and registration of the parcel of land was linked to fraud and misrepresentation.
 2. The learned trial Magistrate of the Court erred in law and in fact in failing to appreciate that the title issued, was born out of a fraudulent process during the pendency of the title.
 3. That the learned trial Magistrate was in error and in fact in failing to consider that a title obtained via fraud is not indefeasible and the law offers it no such protection.
 4. That the learned trial Magistrate was in error in law and in fact by failing to consider the authenticity of the sale agreement to the first seller (Dancol Kirama Kililo) as it bore glaring identification issues and also the one to the Respondent as the original seller totally denied his involvement and execution.
 5. That learned trial Magistrate of the Court erred in law and fact by disregarding the inherent contradictions and glaring gaps in the evidence given by the Respondent thereby making an erroneous judgment.
 6. That learned trial Magistrate of the court erred in law and fact by disregarding the inherent contradictions and glaring gaps in the evidence in terms of dates and price given by the Respondent's witnesses thereby making an erroneous judgment.
 7. That the learned trial Magistrate erred in law and fact as she failed to understand and properly apply the Land Consolidation act and the Land Adjudication Act and misled herself to arrive at the wrong conclusion.
4. The Appellant thus sought the following reliefs:-
- i. This appeal be and is hereby allowed with costs.
 - ii. The entire judgment delivered Voi on 24th January 2022 in Civil Suit No. 299 of 2017 – Husna Wakesho Kasenge =Versus Priscilla Maghuwa Mwamburi be set aside and/or vacated in its entirety.



- iii. Costs of and incidental to this Appeal be awarded to the Appellant as against the Respondent herein.
 - iv. Any such other or further order(s) as this Honourable Court may deem appropriate to grant in the circumstances of this case.
5. The Appeal was canvassed by way of written submissions pursuant to the directions issued by this court. The Appellant filed written submissions dated 4th October 2024 while the Respondent filed written submissions dated 20th November 2024.
 6. The Appellant submitted that the Learned Magistrate erred in law and in fact in failing to appreciate that the demarcation and registration of the parcel of land was linked to fraud and misrepresentation. Reliance was placed on Section 26 of the *Land Registration Act* and the cases of Zacharia Wambugu Gathimu =Versus= John Ndungu Maina (2019) eKLR, Yalwala & 3 Others (sued in their capacity as Board of Trustees of Chavakali Yearly Meeting of Friends (Quakers) =Versus= Kadenge & 3 Others (ELC No. 4 of 2021) (2022).
 7. It was also submitted that the trial court erred in law and fact by disregarding the inherent contradictions and glaring gaps in the evidence given by the Respondent and thus made an erroneous judgment.
 8. The Appellant concluded her submissions by urging the court to allow the appeal and grant the reliefs sought together with costs of the suit.
 9. The Respondent began her submissions by arguing that the entire appeal is incompetent and ought to be struck out for offending the mandatory provisions of the law since the same offends provisions of Section 65(1)(b) of the *Civil Procedure Act* and Order 42 Rule 13(4)(f) of the Civil Procedure Rules. It was argued that the Appellant filed her record of appeal on 4th October 2024 which was over 2 years after judgment was delivered and the same did not have the decree appealed against. It was argued that lack of decree is fatal and renders the entire appeal for dismissal. The cases of Mburu & 6 Others =Versus= Kirubi (Civil Appeal E246 of 2021) (2023) KEHC 3599 (KLR) (20 April 2023) Judgment and Hakika Transport Services Limited =Versus= Idle (Civil Appeal E003 of 2022) (2023) KEELRC (KLR) (27th July 2023) Judgment were cited in support.
 10. It was further submitted that the Appellant did not prove any fraud on the part of the Respondent during trial before the lower court and hence cannot fault the trial Magistrate on her decision. The court was urged to dismiss the appeal with costs.
 11. The court has considered the record of appeal and written submissions filed and proceeds to determine the Appeal on the following issues:-
 - i. Whether the entire appeal is incompetent and ought to be struck of for non-compliance with the provisions of Section 65(1)(b) of the *Civil Procedure Act* and Order 42 Rule 13(4)(f) of the Civil Procedure Rules.
 - ii. Whether the Appellant proved her case before the trial court.
 - iii. Whether the Appellant is entitled to the reliefs sought.
 12. It was contended by the Respondent that the appeal is incompetent for offending the provisions of Section 65(1)(b) of the *Civil Procedure Act* and Order 42(f) of the Civil Procedure Rules since no decree was attached herein and further the Appellant had more than enough time to comply with the same.



13. A perusal of the record of appeal filed herein indeed confirms that the certified copy of the decree was not attached by the Appellant.
14. The Supreme Court in addressing itself on such a matter in the case of *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others* (2015) eKLR held as follows;

“...thus if the requisite bundle of documents is omitted, the appeal is incomplete and defective for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law or Constitution where appeal is incompetent. An incompetent appeal divests of a Court of jurisdiction to consider factual or legal controversies in the relevant issues...”
15. In its more recent decision of *Alfred Asidaga Mulima & 3 Others =Versus= The A. G. and 8 Others* (2019) eKLR, the Supreme Court while applying a more liberal approach held that while non filing of a document mentioned in a record of appeal without an explanation would be fatal and the whole record of appeal would attract the strict sanction of striking out, a party that explains itself sufficiently for an omission would be a favorable exercise of discretion by the court. Further where no prejudice is shown to be caused to the opposing party, the exercise of discretion would even be more warranted. In keeping with the doctrine of stare decisis, this Court is bound to apply the decision of the Apex Court.
16. In the instant case, the proceedings herein confirm that the Appellant took over 2 years to compile and file her record and never she never attached the certified decree and never bothered to offer any explanation as to why there was that delay and why the certified copy of the decree was not attached despite having had more than enough time to do so. For these reasons the court cannot exercise its discretion and hold otherwise. The delay and non-filing of the same was prejudicial to the Respondent who had been waiting for the fruits of her judgment which was delivered over 2 years ago as at the time the record of appeal was filed.
17. In view of the foregoing it is the finding of this court that the Record of Appeal is incomplete, no explanation was given for the same and therefore, the Appeal is deemed to be defective.
18. Having found that the Appeal herein is defective, this Court need not proceed to address itself on the other issues raised herein.
19. In the circumstances this Court has no option but to strike out the appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 25TH DAY OF FEBRUARY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Akello holding brief for Ms. Katema for the Appellant.

Ms. Atieno holding brief for Mr. Muthami for Respondent.

Court Assistant: Mary Ngoira.

