



Inzalo (Suing as Legal Representative of Isaaya Inzalo) v Muchiti (Environment and Land Appeal E005 of 2021) [2024] KEELC 4291 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E005 OF 2021**

MN MWANYALE, J

MAY 27, 2024

BETWEEN

JOEL ESABWA INZALO (SUING AS LEGAL REPRESENTATIVE OF ISAAYA INZALO) APPELLANT

AND

ISAACK MUCHITI RESPONDENT

JUDGMENT

1. The Appellant, Joel Esabwa Inzalo, being dissatisfied by the judgment off Hon Jacinta A. Orwa Senior Principal Magistrate delivered in Kapsabet SPMCC no 45 of 2015 on 18th Day of October 2021 filed his Memorandum of Appeal dated 12th November 2021 and sought for orders that:
 - a. That the Judgment in the lower Court be set aside in its entirety and the Appeal be allowed.
 - b. That the Hon Court be pleased to Access, reevaluate the Appellants case on evidence on record and arrive on its own independent conclusion and enter judgment against the respondent as prayed for in the Plaint.
 - c. That the Hon court be pleased to award costs of this Appeal and in the lower court to the Appellants.
2. In his said Memorandum of Appeal, the Appellant through his counsel on record Messrs Kipkosgei Choge penned down 5 grounds of Appeal as follows:
 - i. That the Learned Magistrate erred in law and in fact in dismissing the Appellant’s case after failing to evaluate the entire evidence on record and the exhibits and make finding that the Appellant had an arguable case, a prima facie case against the Respondent and had proved his case on a balance of probabilities



- ii. That the Learned Trial Magistrate erred in law and in fact in failing to establish that the Defendant /Respondent had not proved his case on a balance of probabilities where no evidence was led on how the Respondent came the proprietor of the suit land Chepkumia / block 2 Yala 179 thereby arriving on a wrong finding and decision against the weight of evidence before her.
 - iii. That the Learned trial Magistrate erred in law and in fact in disregarding and ignoring the evidence and submissions of the Defendants and the Law touching on Titles and in particular she failed to ensure that the Principles on a title deed under the provisions of section(not inserted) of the *Land Registration Act*.
 - iv. That the Learned Magistrate erred in law and fact in failing to take into consideration the Appellants submissions as she deliberately failed to render herself on the same yet the Appellant was the Registered Proprietor had filed and served his written submissions and the exhibits on the same and in particular that the Respondent was not in the Area list.
 - v. That the Judgment of the Learned Trial Magistrate is contrary to the evidence on record and consequently manifestly unsafe and unjust and deserved being vacated in its entirety through failure to interrogate the pleadings and evidence by parties and witnesses.
3. On the strength on the above grounds of Appeal the Appellant seeks the Prayers sought for as set out at paragraph 1 of this Judgment. The original Record of Appeal filed was not accurate as it had left out some pages of the proceedings as was pointed out to court by Mr. Kiprono Learned counsel of the Respondent and leave was granted to the Appellant to file a supplementary record of appeal which he did and the Appeal was admitted and directions issued for the same to proceed by way of written submissions. The parties filed their respective submissions which the court summaries as here follows;

Appellants Submission:

- 4. The Appellant through Messrs. Kipkosgei Choge Advocates, condensed and submitted on ground 1, the Appellant submits placing reliance that he had established a prima facie and places reliance on the decision in the case of Mrao Limited vs First American Bank of Kenya Limited on the definition of a prima facie case.
- 5. The Appellant submits that he was the owner of the land and Respondent was a trespasser, the Appellant submits that he had been allocated the parcel and the same could not have been reallocated to the Respondent; as the first allocation was and is still valid until cancelled.
- 6. The Appellant submits that under Section 24 (a) and (25 (i) of the *Land Registration Act*, he had acquired proprietary interest by virtue of the allotment letter.
- 7. The Appellant submits that the Respondent did not prove that the title was procured illegally, unprocedurally or through a corrupt scheme.
- 8. The Appellant in support of his submissions has further placed reliance in the case of Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another, Munyu Maina vs Hiram Gathina Maina (2013) eKLR.
- 9. The Appellant thus submits the Court to allow his appeal.



Respondent's Submission:

10. The Respondent's submission was erroneously titled "Appellants written submissions" and were filed by Messrs. Cheruiyot Melly Advocates for the Respondents.
11. The Respondents had framed 4
 - a. Whether the Appellant established by cogent evidence that he is the absolute proprietor of the suit land
 - b. Whether the Appellant established by cogent evidence that the Respondent was a trespasser on the suit land and/or had no legal basis staying thereon to warrant eviction
 - c. Whether the Trial Court erred in law and fact in disallowing the orders sought by the Plaintiff, if no, should this Court set aside the judgment and decree thereof?
 - d. Who shall bear costs?
12. The Respondent submits that the Appellant did not prove compliance with the conditions set out in the subdivision scheme approval including formal letter of acceptance as well as making of the requisite payments. No structures were constructed thereon, by the Appellant.
13. The Respondent relying on Section 107 of Evidence Act, submits that the Appellant as Plaintiff in the Lower Court did not prove his case.
14. The Respondent submits since there was no registration of any title to the Appellant, the provisions of Section 26 of Land Registration Act do not apply in the case.
15. On issue No. 2, the Respondent submits placing reliance on paragraph 576, volume 76 of Halbussey law of England, that the right to sue for trespass accrues to the person in possession at the time of trespass; and since it is the Respondent who was in possession of the suit property the Appellant had no cause of action.
16. On issue no. 3 the Respondent submits that the reliefs sought could not issue to the Appellant, as the Appellant is neither the registered owner neither has he constructed any structures on the suit land, the reliefs of a permanent injunction would not thus not accrue to him and that the Court was right in its judgment.
17. The Respondent thus argues the Court to dismiss the Appeal with costs as costs follow the event.

Issues For Determination:

18. Before framing issues for determination, the Courts notes the following undisputed facts arising from the Appeal.
 - i. That neither the Appellant nor the Respondent, as Plaintiff and Defendant before the trial Court produced a title deed over Nandi/chepkumia Block 2/yala. Hence none of the parties herein are the registered owner of the suit parcel.
 - ii. It is also not disputed that the Respondent took possession and constructed structures on the suit parcel between the years 2000 and 2002.
19. Having analyzed the record of Appeal, the rival submissions of the parties herein, the Court frames the following as issues for determination; -



- i. Whether the Plaintiff proved absolute ownership of Nandi/chepkumia Block 2/yala (2) 179 and whether the Plaintiff proved before the trial Court.
- ii. Whether the Appeal is merited
- iii. What reliefs ought to issue?
- iv. Who bears the costs of the Appeal?

Analysis And Determination?

20. This is a first appeal and the duties of the first appellate Court were summarized in the decision in the case of *Selle & Another vs Associated Motor Boat Court Limited*.
21. It is common ground between the Appellant and the Respondent that neither of them is the registered owner of Nandi/chepkumia Block 2/yala/179. It follows that the protection offered to an absolute proprietor under Sections 24 -26 of the *Land Registration Act* are not available to either of them. It follows further that the investigations to the root and validity of a title under the decisions of *Munyu vs Maina (2013) eKLR* cited by both the Appellant and the Respondent as well as the decision in *Herbert L. Martin & 2 others vs Margaret J. Kamar & 5 others 2016 eKLR* cited by the Respondent are not applicable in the circumstances of this case.
22. It is also to be noted that the principles of establishment of prima facie are applicable in an application for a temporary injunction as laid out in *Giella vs Cassman Brown and the Mrao Limited* cases and not in a full trial of a suit.
23. From the evidence adduced before the trial Court, the Plaintiff produced an area list and a subdivision approval letter, which he referred to as “an allotment letter”, and on the basis of the said two documents pleaded at paragraph 3 of his plaint to be the legal owner and thus sought eviction of the Respondent from Nandi/chepkumia Block 2/yala/179. On the basis of the said two documents the Appellant submitted to being on absolute registered owner enjoying the right under Section 26 of the *Land Registration Act*.
24. Does the “letter of allotment” confer such rights? The Appellant submits placing reliance that the letter of allotment conferred registered rights to him and cites the case of *Rukaya Ali Mohamed vs David Gikonyo Nambacha and Another* in support of that position.
25. The Respondent submits that the Appellant did not prove that he met the conditions set out in the letter of allotment, (subdivision scheme approval), and thus had no proprietary interest.
26. The decision in *Rukaya Ali Mohamed vs David Gikonyo Nambacha and another*; supposes that the allottee has met the conditions for allotment for the allotment letter to be irrevocable by the allotting authority. In the suit before Court, the burden to prove that the conditions in the letter of allotment were met, were this on the Plaintiff now Appellant under section 107 of the *Evidence Act* as the Appellant sought judgment based on that fact, of the allotment, while the Respondent sought judgment based on occupation.
27. The conditions in the subdivision approval letter (letter of allotment) included letter of acceptance and payment receipts. Having not provided proof of compliance with terms of allotment. It follows that no registrable interests capable of protection by the registration of title accrued to the Plaintiff now Appellant.



28. The trial Court was right not to enter judgment for the Plaintiff now Appellant as this evidential burden was clearly not proven, and I find no fault in the decision reached by the Learned Trial Magistrate.
29. Thus, in answer to issue number 1, the Plaintiff did not prove to be the absolute owner of the suit property and he did not prove his case on a balance of probabilities.
30. On issue number 2, whether the Appeal is merited, as observed above the Appellant did not prove ownership of the suit property and thus did not prove his case, it follows that his appeal is not merited and that he Learned Magistrate did not err in law and in fact and this Appeal before Court is thus not merited.
31. On issue number 3, the relief that commends itself to the Court, the Appellant having not succeeded in this Appeal is thus to dismiss the same.
32. On costs, the Respondent submits that costs follow the event and the Court thus awards costs in the Lower Court and in this Appeal to the Respondent, the Appeal having being dismissed.
33. Judgment accordingly

JUDGMENT DELIVERED AND DATED AT KAPSABET THIS 27TH DAY OF MAY 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of; -

1. Mr. Sang holding brief for Mr. Choge for the Appellant
2. Mr. Melly and Mr. Kiprono for the Respondent

