



**Dzombo v Ngebe & 3 others (Appeal 3 of 2022)
[2024] KEELC 4258 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL 3 OF 2022
EK MAKORI, J
MAY 24, 2024**

BETWEEN

FREDRICK MWAGOSI GILBERT DZOMBO APPELLANT

AND

LARRYSON CHIMAKO NGEBE 1ST RESPONDENT

NGEBE KAZUNGU NGEBE 2ND RESPONDENT

ALPHONCE MUDZOMBA KAZUNGU 3RD RESPONDENT

LAND REGISTRAR, KILIFI 4TH RESPONDENT

RULING

1. The crucial points of this Court’s ruling on 7th March 2023 are: The appeal was allowed, setting aside the orders and decree made by the trial Court at Kaloleni in Kaloleni MELC No. E10 of 2021. The appellant’s prayer for his appeal to be allowed, the judgment and decree of the trial court to be set aside, and the respondent’s suit in the Lower Court to be dismissed with costs to him was granted. This is what the Court said, ensuring a fair and just outcome:

“In this case, I find no evidence adduced to support the Respondents’ allegations of fraud on the part of the Appellant, the deceased, or the 4th Respondent herein. Indeed, PW1 and PW2 confirmed that they did not have any evidence to prove that the deceased fraudulently caused the suit property to be registered in his name. The trial court was of a similar opinion. This is evidenced on page 8 of the impugned judgment. What I find unsettling, however, is that the learned magistrate, despite arriving at that conclusion, proceeded to find that the Respondents were lawful occupants. The finding by the trial court on this point was incongruent with both the pleadings and evidence on record.



As already stated, to impeach a title, one has to prove that the title was obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme, both of which were not proven in the instant case. The deceased's title, therefore, remains unchallenged and is vested with absolute ownership together with all rights and privileges thereto to the exclusion of the 1st- 3rd Respondents or any other person.

In any case, there was enough evidence to show that the deceased had been involved in a never-ending legal battle with the Respondents and their predecessors over the suit property. Furthermore, and in my view, it is contradictory to hold that the deceased's title is indefeasible while at the same time finding the Respondents to be lawful occupants. This amounts to approbating and reprobating at the same time, leading to a scenario – as we have here - establishing two parallel ownership rights over the same property, which is a recipe for chaos.

In view of the foregoing, I find that the learned magistrate erred in law and in principle in awarding the reliefs as she did. The upshot is that the appeal is merited and succeeds with costs here and in the Lower Court to the Appellant.”

2. A decree was duly extracted, affirming the outcome of the appeal that the Lower Court judgment was set aside in entirety. In the appeal before this Court, there was no request for eviction of the respondents who were plaintiffs in the Lower Court. Mr. Odunga, for the appellant, had asked the Court, in passing and in view of the judgment, to order eviction. The Court declined, as it was not part of the appeal and had not crystallized.
3. after the judgment, the appellant used this Court's decision to move the Lower Court for eviction (sic). The application was allowed, creating a new legal dispute. The applicant, in the application dated 9th August 2023, seeks to set aside the orders of eviction issued by Hon.Rita Amwayi on 30th of June 2023; in that application, the applicants also seek a rehearing of the appeal, claiming they were not only unaware of it, but they were also unheard before this Court arrived at its verdict.
4. On the other hand, the respondent contends that the orders sought here are unavailable and that the Lower Court's orders cannot be mixed with an appeal already concluded. The Court, having been rendered *functus officio*, should find that the application is misconceived and should be dismissed.
5. From the material and submissions placed before me, I frame the issues for this Court's decision as whether to rehear the appeal afresh because the applicants who were respondents in the appeal were never heard in the first place, whether to set aside eviction orders issued in the Lower Court and who should bear the costs of the current application.
6. Regarding whether I should rehear the appeal, the applicant's request is quite strange. This Court was quite elaborate in its judgment on 7th March 2023 on the gist of the appeal. After that judgment, the only channel available to the parties was to appeal to the Court of Appeal. The unambiguous ruling left no room for confusion or misinterpretation. As I can garner from what the applicants desire, fresh orders were issued in the Lower Court after I had issued the judgment, and I am being asked to set aside my earlier judgment ostensibly because it was entirely misinterpreted that this Court gave orders directing the Lower Court to issue the orders now appealed against. The applicants mixed up the orders by the Magistrate, which do not correlate with the appeal I already disposed of. The orders from the Magistrate gave rise to new grounds for a separate appeal. In [*Trans Mara Sugar Co Ltd v James Omondi*](#)



Obudho [2020] eKLR, Mrima J. provided a roadmap on how to appeal from orders issued in a Lower Court as follows:

“Appeals from orders are provided for in Sections 75 and 76 of the Act and Order 43 of the Rules. Order 42 Rule 1 of the Rules provides that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.

16. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in Order 42 Rule 13(4) of the Rules as follows: -

Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say:

- (a) the memorandum of appeal;
- (b) the pleadings
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes, electronic recording, or palantypist notes made at the hearing;
- (e) all affidavits, maps, and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order, or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

- (i) A translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

17. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of incompleteness of Records of Appeal.”

7. The scenario is different. It is what I would call an appeal on top of another appeal. The procedure adopted is unknown in law and procedure. There is no record of appeal for this Court to review.
8. The applicants' participation in the former appeal is neither here nor there. There is a total mix-up between the issues I dealt with on the earlier appeal and what transpired afterward. Reopening the appeal for a fresh hearing will not save the situation, nor will it clothe this Court with the necessary



jurisdiction to issue the orders sought. It will be an exercise in futility. It is declined. There ought to have been a separate appeal against the orders issued by Hon. Rita Amwayi.

9. This leads me to consider the issue of setting aside the orders issued by Hon. Rita Amwayi. This is also strange because this Court did not direct the eviction applicants (plaintiffs in Lower Court). It only dismissed their claim against the respondent (defendant in the Lower Court). Any fresh orders issued by the Lower Court should be subject to another appeal. I have nothing to show how the Magistrate proceeded or whether the evictions were issued in compliance with the dictates of Section 152E of the *Land Laws (Amendment) Act* No. 28 of 2016, which lays parameters on how evictions should be carried out when dealing with private land. Was there a fresh suit in the Lower Court leading to the evictions? Was it issued on the same file? Or should there have been a fresh cause of action? Was eviction part of what was tried in the Lower Court? Was it pleaded in the plaint? Was it a counter-claim? – all these required a separate Memorandum of Appeal and Record of Appeal. To proceed in the manner suggested by the applicant, in the current motion, will be acting outside the known procedures for originating appeals. The application dated 9th August 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 24TH DAY OF MAY 2024. SINCE THE COURT WAS AWAY ON OFFICIAL DUTIES WHEN THE JUDGMENT WAS DUE, THE PARTIES SHOULD BE SUPPLIED WITH A SOFT COPY OF THIS RULING VIA EMAIL.

E. K. MAKORI

JUDGE

