



**Ringera v M’uga (Environment & Land Case E001 of 2022)
[2024] KEELC 3964 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE E001 OF 2022**

PM NJOROGE, J

MAY 20, 2024

BETWEEN

SIMON KAMENCHU RINGERA APPELLANT

AND

ELIAS KIRIMI M’MUGA RESPONDENT

(Being an appeal from the Judgment and Decree issued in Isiolo Chief Magistrate’s ELC Case No.13 of 2013 by the Honourable E. Ngigi – Principal Magistrate on 30/11/2021)

JUDGMENT

1. The Memorandum of Appeal in this matter states as follows;
 1. That the Learned Trial Magistrate erred in law and facts by failing to seriously interrogate and analyse the evidence tendered by the parties herein and therefore reached at a wrong decision.
 2. That the Learned trial magistrate erred in law and facts by discrediting the Appellant’s exhibits tendered during trial which exhibits proved that plot No.26 was allocated to the Appellant, was registered in the electronic plots register, rates and rent had been paid to the allocating authority and that an enforcement notice had been issued against the respondent to vacate Plot No. 26 Kiwanjani.
 3. That the Learned trial magistrate erred in facts by believing that the respondent held an allotment letter over Plot No. 26 Kiwanjani yet none was exhibited before court.
 4. That the Learned Trial Magistrate fell into a grievous error by believing that the respondent purchased the subject Plot no. 26 from DW2, yet there was no evidence tabled by DW2 to prove that he owned any land that he could legally and procedurally sell to the respondent.
 5. That the trial magistrate erred in law by failing to detect gaping anomalies in the evidence tendered by the respondent, more so on how and when, did the alleged land owned by DW2,



come to be surveyed by frontier engineering which issued Dexh 7 a letter dated 10/6/2007. How did private land, owned by DW2 in 1992, turn into trust land owned by the then County Council of Isiolo, so that it could be surveyed and be given to the respondent in 2007?

6. That the Learned Trial Magistrate erred in law by failing to find that the respondent did not have any minutes of the Town and Planning committee allocating him Plot No. 26 and also the Respondent did not have full council minutes approving the allocation of Plot No. 26 to the respondent.
7. That the Learned Trial Magistrate, erred in law by failing to address the issue of the registration of Plot No.26 in the electronic register of Plots, to both the Appellant and the Respondent.
8. That the Learned Trial Magistrate failed to consider the weight of the answer given by DW5 during his cross examination, which answer, proved that the respondent did not own Plot No.26 Kiwanjani.
9. That the Learned Trial Magistrate erred in law by failing to find that the defendant's ownership of plot No.26 was hinged on purchase from DW2 and as such, the defence put forward by the defendant was at variance with the evidence tendered in court, contrary to the settled principle that parties are bound by their pleadings.
10. That the learned trial magistrate erred in law by relying wholly on the evidence by DW5 who was an exparte witness and whose evidence is mere opinion which does not bind the court and as such, fell into grave error in passing judgment based on DW5's evidence.
11. That the learned magistrate erred in law by failing to analyse the answers by DW5 during his cross examination, so as to gauge the probative value to be attached to his evidence.
12. That the judgment of the court was against the weight of evidence and law placed before the court.

Dated at Meru this 10th Day of January, 2021

For: Mwirigi Kaburu & Co.

Advocates for the Appellant

2. The appeal was canvassed by way of written submissions.
3. As my decision in this matter relies on the proceedings in the lower court, I find it necessary to produce the claims made by the parties in the lower court.
4. In his plaint, the plaintiff in the lower court and now the appellant prayed for judgment against the defendant for;-
 - a. An order for demolition and removal of the building structure constructed on Plot No. 26 Kiwanjani Isiolo.
 - b. A permanent order of Injunction against the Defendant, his assigns, successors in title, against employees, contractors or anybody acting at his behest, direction or contract, restraining the Defendant from entering, interfering, building or trespassing in the plaintiff's Plot No. 26, Kiwanjani, Isiolo.
 - c. Damages for trespass and mesne profits.
 - d. Cost and interests of the suit.



5. In his defence and counter claim, the defendant prayed for the suit to be dismissed and judgment as follows;
 - a. A declaration that Plot No.26 Kiwanjani Isiolo is the property of the defendant with an absolute and indefeasible title.
 - b. A permanent injunction do issue barring, restraining and stopping and or prohibiting the Plaintiff by himself or any one claiming through him or as his servant, agent or employee or any other person whomsoever and whatsoever from entering into, taking possession of, or interfering with the defendant's quiet enjoyment of the suit land that is Plot No. 26 Kiwanjani.
 - c. Costs and interests of the suit.

6. As observed in the case of *Seile & Another versus Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this being a first Appeal, this court;

“Must reconsider evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

Regarding Ground 1 in the Memorandum of Appeal, the appellants advocate asserted that in the record of appeal he had produced:

1. Letter of allotment.
2. Receipts.
3. Minutes of the meeting held on 11/7/2012 at County Council of Isiolo.
4. Enforcement notice to the Defendant.
5. Letter dated 21/2/2023.

The appellant's advocate asserts that had the trial magistrate seriously interrogated and analysed the evidence tendered by the parties, he would have found in favour of the appellant. Similarly, when submitting for ground 2, the appellant's advocate says that the trial magistrate erred in law and fact by discrediting the exhibits that Plot No.26 was allocated to the appellant.

7. Concerning ground No. 3, the defendants advocate says that the trial magistrate erred in fact by believing that the respondent had an allotment letter over Plot No. 26 Kiwanjani when no exhibit was produced. On ground 4, the appellant's advocate asserts that the trial magistrate fell into a grievous error by finding that the respondent had purchased Plot No.26 from DW2 when no evidence was tabled.
8. Submissions concerning grounds Numbers 5,6,7,8,9,10, and11 have a common thread going through them that the trial Magistrate ignored various aspects which if they were considered would have impeached the claim of ownership by the respondent over the suit land. I have carefully considered the submissions made by the appellants advocate in this respect. I also note that in general the submissions made by the plaintiff's advocate reflect what is contained in the grounds proffered in the Memorandum of Appeal.
9. The plaintiffs advocate proffered the following authorities;



Authorities

1. [Margaret Mukami Macharia \(Administrator of The Estate Of Esther Wangu Macharia\) –vs– Jessie Maina Gitau](#) [2022] eKLR.
 2. [Daniel Otieno Migore –vs- South Nyanza Sugar Company Ltd](#) [2018] eKLR.
 3. [Kagina – vs – Kagina & 2 Others](#) (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) December 2021 (Judgment)
 4. [Samson Tela Akute -vs-republic](#) [2006] eKLR.
 5. [Nganga Kiangai -vs- Kimani Gicho](#) [2008] eKLR.
 6. [M. Oriental Bank Limited & Another -vs- Samuel Nyingi Matimu & Another](#) [2021] eKLR.
10. I note that ground No. 12 was very general and nebulous and stated that the judgment of the court was against the weight of evidence and law placed before the court.
11. In his submissions, the respondents advocate argues that the respondent had proved that he had bought a plot which was subdivided to make Plot Numbers 25 and 26 Kiwanjani. He also asserts that though the plaintiff had produced a letter of allotment, he had failed to abide by the conditions contained therein, which were to be met within 30 days upon issuance of the same. He further says that the appellant failed to pay several payments amounting to a cumulative sum of Kshs. 19555/=. He argues that this rendered the letter of allotment of no legal validity and continue to say that the appellant cannot purport to mount a claim based on an expired and therefore inconsequential document. He says that a letter of allotment constitutes a mere invitation to treat and where the offer therein is not consummated as per the conditions contained therein, it cannot confer interest in land at all. To buttress this position, the respondent’s advocate proffered the case of [Ali Mohamed Dagane versus Hakar Abshira & Others](#), Garrissa ELC Case No. 63 of 2017. He also proffered the case of [Mbau Saw Mils Ltd versus Attorney General for and on behalf of Commissioner of Lands & 2 Others](#) [2014] eKLR where the allottee had not complied with the terms of allotment and the court opined:
- “The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr Joseph M. Mugambi did not have any interest to transfer to the plaintiffs and therefore all transactions between the allottee and the plaintiff were a nullity in law.”
12. The respondents advocate contended that the appellant’s letter of allotment was not accompanied by a PDP and a definite number and was therefore inchoate and thus of no legal validity. For this assertion, the advocate proffered the case of [African Line Transport Co. Ltd versus the Hon. Attorney General](#) where the court opined that: -
- “A letter of allotment is invariably accompanied by a PDP with a definite number.”
13. The Respondent’s Advocate says that the appellant closed his case without providing the letter of allotment which he stresses was only marked as PMFI-1. He did not produce the Minutes marked PMFI-3 and which are at page 194 in the Record of Appeal. The Respondent’s Advocate postulates that the appellant, having not produced those documents, cannot stake a claim on the plot when he has no primary supporting documents.



14. Under paragraph 14,15,16,17,18 and 19 of the submissions, the appellants advocate asserts that the respondent had proved that he had purchased Plot No's 25 and 26, was in possession and wonders where the appellant was when the respondent developed those plots. He also said that the physical planner had testified that the apposite records showed that the respondent was owner of Plot No. 26 whereas the appellant did not adduce any countervailing evidence. He urges the court to dismiss the appeal.
15. Mine being the first appellate court, I have looked a fresh at the evidence tendered in the lower court and I have evaluated it to enable me draw my own conclusion. I have gone through the trial courts proceedings. I have juxtaposed the trial courts judgment to evaluate if it is congruent with the evidence tendered by the parties.
16. I have taken into account all the authorities proffered by the parties to buttress their veritably diametric assertions. I, however, opine that no two authorities are congruent to a degree of mathematical exactitude in their facts and circumstances. This court is also alive to the fact that this being a civil suit, it is decided on a balance of probabilities. Even where two positions are very close regarding the balance of probabilities, the judgment of the court will tilt in favour of the litigant whose balance of cogent evidence outweighs that one of the other or others.
17. I have juxtaposed each of the 12 grounds of appeal against the totality of the evidence tendered by the parties in the trial court. I have also carefully juxtaposed that evidence with the contents of the trial courts impugned judgment.
18. This court notes that the trial magistrates eruditely considered and analysed the evidence tendered by the parties. His consideration of the apposite issue does not evince any bias. An example of his broadmindedness and fairness is attested, for example by his finding that both sides, had failed to prove how they initially acquired the suit land.

I quote him as stating;

“I find that both sides failed to prove how they acquired the said plots through the initial allocation by the County Council. The parties as a matter of necessity would have produced the Minutes of Isiolo County Council approving the allocation.”

I agree with him and hasten to add that evidence cannot be adduced at the appellate stage by the parties, as the appellant has contrived to do. Even after the trial Magistrate's finding that both parties did not demonstrate how they initially obtained ownership of the land they claimed, a court of law has a duty to make its decision, one way or other, using the balance of probabilities as the universal yardstick. In doing so, I find that the trial magistrate eruditely considered all apposite issues based on the preponderance and totality of the cogent evidence proffered by the parties.

19. I find that despite the vociferous inveighing of the alleged errors committed by the trial magistrate when he arrived at his judgment, I opine that this does not inveigle this court in disturbing and overriding his judgment. I unequivocally, state that on a balance of probabilities, the learned magistrate arrived at a sound judgment which this court is not inclined to disturb.
20. In the circumstances, I dismiss all the 12 grounds of appeal filed by the appellant. I issue judgment for the respondent against the appellant in the following terms;
 - a. This appeal is hereby dismissed.
 - b. Costs shall follow the event and are awarded to the respondent.



DELIVERED IN OPEN COURT AT ISIOLO THIS 20TH DAY OF MAY, 2024 IN THE PRESENCE OF:

HON. P. M NJOROGÉ

JUDGE

Court Assistant: Balozi/Rahma

Ken Muriuki present for the Respondent.

Mwiti holding brief for Mwirigi Kaburu for the Appellant.

