



REPUBLIC OF KENYA



**Mutai v Serem & 3 others (Environment and Land Appeal
E002 of 2023) [2024] KEELC 4149 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

MN MWANYALE, J

MAY 16, 2024

BETWEEN

JAMES KIPTANUI MUTAI APPELLANT

AND

JOSEPH KIPKOSGEI SEREM 1ST RESPONDENT

MARK KIPRUTO LIMO 2ND RESPONDENT

DANIEL KIPSCHOGE 3RD RESPONDENT

JULIUS KIPKOSGEI MAIYO 4TH RESPONDENT

JUDGMENT

1. Vide his Memorandum of Appeal dated 16th February 2023, the Appellant James Kiptanui Mutai, had prayed to this Court to;
 - i. Allow the Appeal in its entirety
 - ii. To set aside the judgment of the Chief Magistrate Hon. S. M. Mokuia delivered on 6/2/2023
 - iii. The Honourable Court be pleased to make its own finding
 - iv. Costs of this appeal to be awarded to the Appellant
 - v. Any other relief this Honourable Court deems fit and just to grant.
2. Seven grounds of Appeal were penned down in respect of the judgment delivered by Hon. S. M. Mokuia CM dated and delivered on 6/2/2023 in Kapsabet CMs Civil case No. 201/2016 between Joseph Kipkosgei Serem v James Kiptanui and 3 others, to wit,
 - i. The Learned Trial Magistrate erred in law and in fact in failing to find that the Appellants counter claim was unmerited (sic).



- ii. The Learned trial Magistrate erred in law and in fact in failing to scrutinize the prayers sought in the counter claim and the Appellant's pleadings in its entirety.
 - iii. The Learned Trial Magistrate erred in law in disregarding issues raised in submissions filed by Counsel for the Appellant.
 - iv. The Learned Trial Magistrate erred in fact and in law by ignoring relevant, guiding facts to reach a fair and reasoned determination and thereby dismissed Appellants counterclaim without justification.
 - v. The Learned Trial Magistrate erred in law and in fact in failing to take into consideration the fact that the Appellant tendered evidence by proving a sale agreement proving her has rights over a part of the suit land.
 - vi. The Learned Trial Magistrate erred in law and in fact by refusing or failing to consider the counter claim and the evidence on record thereby arrived at an erroneous and/or wrong decision that the 1st Appellant has not proved his entitlement of 0.2 acres out of land parcel No. Nandi/kaptumek/780.
3. On the strength of the above grounds of Appeal, the Appellant sought for the prayers set out at paragraph of this judgment.
 4. Upon admission of the Appeal on 26/2/2024 parties (The protagonists Appellant and 1st Respondent as the Respondent as the Respondents did not take part in the Appeal) were directed to file and exchange submissions, with an initial date of highlighting set for 20/3/2024, but the same could not proceed since the Appellant had not filed his submissions.
 5. The Court thus extended time for filing of submission to 10/4/2024 and reserved judgment for today.
 6. Both sets of submissions were filed and the lower Court record was also availed, it is to be noted that three of the original Defendants did not Appeal hence they are Respondents In this appeal hence the new title of the parties which differs from what the Appellant had filed, as an appeal is only filed by an Appellant, the rest of the parties would thus be Respondents.

Appellant's Submission: -

7. The Appellant submits that this being a first appeal the Court has a duty to review the evidence adduced before the Trial Court and satisfy itself that the decision was well founded. In support of this limb of submissions the Appellant cited the decision in the case of *Selle & another v Associated Motor Boat Company Ltd. & others* (1968) E. A.
8. The Appellant thereafter framed two issues for determination to wit;
 - i. Whether the trial Court erred in law and in fact in granting the orders sought the Plaintiff (if the answer is in the affirmative, whether the said judgment and decree should be set aside in its entirety).
 - ii. Who shall bear costs.
9. On issue number 1, the Appellant submits that Nandi/kaptumek/780 is a subdivision of Nandi/kaptumek/158 and that the Appellants were in occupation of 3 plots thereof measuring approximately 0.2 acres.



10. The Appellant submits that the suit property was acquired through transmissions in succession cause No. 79/2004 and that the beneficiary of suit land Sally Jepkemei was entitled to 1.2 acres as per the green card, yet she disposed of a portion measuring 1.4 acres which including the Appellant's portion.
11. The Appellant further submits that the Plaintiffs property was not absolute in accordance with Section 28 of the Land Registration as read together with Section 62 (1) of the [Land Registration Act](#).
12. On costs, the Appellant submits that costs follow the event and places reliance on Section 27 of the [Civil Procedure Act](#). The Appellant urges the Court to allow the appeal.

1st Respondent's Submissions: -

13. The Respondent submits that this Court's duty as a first Appellate Court has unfettered power to consider, examine and analyze the evidence adduced during the trial, and has cited the decision in the case of [Abok James Odera & Associates v John Patrick Machira t/a Machira & Company Advocates](#).
14. The Respondents submitted on all the grounds of appeal, and submits that Section 3 of the [Trespass Act](#) defines trespass as follows; "any person who without reasonable excuse, enters is or remains upon or erects any structure on or cultivates or fills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offense."
15. The Respondent submits that the ingredients for proof of trespass are that one ought to prove that; -
 - a. They are the owners of the suit property
 - b. That the Defendants and/or their agents or employees entered and/or remained in the suit property
 - c. That the Defendants or their agents' employees entered and/or remained in the suit property without the lawful authority of the Plaintiff.
16. The Respondent submits that the Defendant indeed admitted to the Plaintiff's being the Registered owner of the suit property.
17. The Respondents submits that under Section 24 and 26 of the [Land Registration Act](#), the Plaintiffs title is protected; and has cited the decision in the case of Kinara v Liasa E & L Appeal No. E040 of 2021.
18. The Respondent submits that the Appellant pleaded, fraud, collusion and misrepresentation in their defence but the same were not proved as the Defence was a bare statement.
19. The Respondent cite the decision in the case in Opiyo and another v Olunje (Civil Appeal No. 148/2018). Where the Court stated "Finally under Section 26 of the [Land Registration Act](#), since there was no proof of fraud illegality or misrepresentation in the acquisition of Alfred's title to the suit property, the title deed provided conclusive evidence of Alfred's ownership of Kisumu/kisale/3270 as his title remains absolute and indefeasible. The Respondent thus urges the Court to dismiss the Appeal with costs."
20. In the course of hearing the Appeal which proceeded by way of written submission the Court noted undisputed facts, which it notes as follows; -
 - i. The suit property, Nandi/kaptumek/780 is a subdivision of Nandi/kaptumek/153 pursuant to Succession Cause No. 79/2004, Re Estate of Baraiywa Kiptallam.



- ii. That the Plaintiff purchased the suit property from Sally Jepkemei who was a beneficiary of the Estate of Baraiywa Kiptallam as distributed in the Certificate of Confirmation of Grant in the said succession cause.
 - iii. Both the Appellant and Respondent agree on the scope of the Courts duties and powers as a first Appellate Court as was stated in the decision in the case of *Selle & another v Associated Motor boat Company Ltd & others* cited by the Appellants and as summarized in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* cited by the Respondents.
21. In both decisions the role inter alia, includes to re-evaluate, reassess and reanalyze the record and then determine whether the conclusions reached are to stand and give reasons either way.
 22. Having analyzed the Record of Appeal, the rival submissions and considered the law, the Court frames the following as issues for determination.
 - i. What was the size of the land purchased by the Plaintiff/1st Respondent?
 - ii. Did the Plaintiff/1st Respondent prove his case and was he entitled to the relief's he sought in the plaint before the Trial Court?
 - iii. Is the Appeal merited and what reliefs ought to issue in this Appeal?
 - iv. Who bears the costs of the Appeal?
 23. On issue number 1, the Plaintiff had pleaded at paragraph 4 of his plaint that the Defendants, including the 1st Appellant had occupied 3 plots measuring approximately 2 points (0.2) acres out of Nandi/kaptumek/780.
 24. In her evidence before the Trial Court PW3 Sally Jepkemei said that she had sold 1.4 acres to the Plaintiff as she was entitled to the said 1.4 acres.
 25. The Plaintiff in his evidence stated that he had purchased 1.4 acres and produced an Agreement for Sale to that effect. PW2 stated that he had conducted due diligence on behalf of the Plaintiff and prepared the Agreement and that the Plaintiff was entitled to 1.4 acres and that the Defendants were thus trespassers.
 26. On their part the Defendants produced a copy of the certificate of confirmation of Grant issued in Succession Cause No. 79/2004 Estate of Baraiywa Kiptallam, and the same shows that Sally Jepkemei was bequeathed 1.2 acres in Nandi/kaptumek/153. The Certificate of Confirmation of Grant was registered in the green card, a copy of which was produced in evidence and entry No. 4 thereof shows the registration of the Certificate of Confirmation of Grant, and reveals further that Sally Jepkemei was entitled to 1.2 acres.
 27. The questions now to be answered is whether Sally Jepkemei could sell 1.4 acres, and whether the Plaintiff could buy 1.4 acres from Sally Jepkemei? I think not. In arriving at the said position, I am alive and guided by the principle of *Nemo Dat quod non Habet*, which states that “no one can give that one does not have.”
 28. This principle was first recognized and applied decision in the case of *Diamond Trust Bank Kenya Limited v Said Hamad Shamisi & 2 others* (2015 eKLR) and was aptly defined in the decision in *Daniel Kipkuirgat Maiywa v Rebeca Chepkurgat Maina* (2019 eKLR which decision was quoted in



the decision in the case of [Geoffrey Kiptarbei Rono v Johana Komen Rotich & Another](#) (2021 eKLR) in which the Court defined in the principle of Nemo dat quod non habet as follows

“The *nemo date* principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to the property holds the title thereto until he or she decides to transfer it to someone else.

Accordingly, an authorized transfer of the title by a person other than the owner generally has no legal effect; which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing....”

29. The principle has been applied by Court in Kenya in Land matters in decisions such as [Katan Kalume & another v Municipal Council of Mombasa & another](#) 2019 (eKLR) as well as [Margaret Mukami Macharia v Maina Gitau](#) 2022 eKLR, [Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim](#) (2019) eKLR, [Geoffrey Kiptarbei Rono v Johana Komen Rotich](#) 2021 eKLR among other decisions.
30. In this particular case, the Court finds the principle applicable as Sally Jepkemei was only entitled to sell 1.2 acres, which she had acquired and not 1.4 acres, as the extra 0.2 acres were not hers legally and she could not sell the same to the Plaintiff, as Land does not expand.
31. The Trial Court in finding that the Plaintiff had demonstrated a valid title at paragraph 14 of the judgment fell in error in light of the principle of Nemo dat quod non habet explained above.
32. The only entitlement the Plaintiff had was 1.2 acres which he legally bought from Sally Jepkemei and not 1.4 acres. The extra 0.2 acres did not rightfully belong to Sally Jepkemei and she could not transfer the same to the Plaintiff.
33. In answer to issue number 1, the Court finds that the Plaintiff could legally acquire only 1.2 acres in Nandi/kaptumek/780 and not 1.4 acres.
34. On issue no. 2 the gravamen of the Plaintiff's case was trespass with regard to 0.2 acres, and the reliefs sought by the Plaintiff were declaration as the ownership as well as injunction to stop the Defendants from interfering with the extra 0.2 acres.
35. The 1st Appellant as a Defendant having pleaded and proved evidence that the Plaintiff was only entitled to 1.2 acres and not 0.4 acres. His defence ought to have succeeded as the Plaintiff/1st Respondent did not prove entitlement to 1.4 acres but 1.2 acres and was not entitled to the reliefs issued the injunction against the 0.2 acres he had pleaded at paragraph 4 of his plaint as there was no trespass with regard to that parcel.
36. On issue 2, the Court finds that Plaintiff did not prove his case and was not entitled to the reliefs sought.
37. On issue number 3, is the Appeal merited, and what relief ought to issue, the Court finds that there is merit in the Appeal and under Section 78 (1) (a) of the [Civil Procedure Act](#) proceeds to set aside the entire judgment of the Trial Court and substitute it with its own judgment.
38. Under Section 26 of the [Land Registration Act](#), Certificate of title is conclusive evidence of proprietorship the same can be challenged on the ground set out at Section 26(1) (a) or (b) of the said Act.
39. Having found that the acreage contained in Nandi/kaptumek/780 to be inconsistent with the original acreage contained in entry 4 of the green card of Nandi/kaptumek/153, which is 1.2 acres, it must



be deemed that the title for Nandi/kaptumek/780 was issued irregularly hence unprocedurally as to details of the acreage and the Court enters judgment in terms that;

1. The appeal is hereby allowed; and the judgment of the trial Court set aside.
2. The Land Registrar, Nandi County is hereby ordered to rectify the register of Nandi/kaptumek/780, from 1.4 acres to reflect the correct acreage of 1.2 acres under section 80 of the [Land Registration Act](#).
3. The 1st Respondent is restricted to the use of his 1.2 acres in accordance with this judgment and not to interfere with the 0.2 acres that do not belong to him.
4. The Appellant, James Kiptanui Mutai is awarded the costs of the suit as well as costs of this Appeal.
5. Judgment accordingly.

DELIVERED AND DATED AT KAPSABET THIS 16TH DAY OF MAY, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of; -

1. Mr. Korir for the Appellant
2. Mr. Ombiro for the Respondent

