



**Nganga v Mbugua (Environment and Land Appeal 110 of 2022)
[2024] KEELC 4918 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 110 OF 2022**

**JG KEMEI, J
JUNE 20, 2024**

BETWEEN

PETER NGANGA APPELLANT

AND

ANTHONY MUNGAI MBUGUA RESPONDENT

*(Being an appeal against the Judgment and Decree of Hon Atiang Mutullah,
SPM in MCL&E No. 255 of 2018 in Thika delivered on 25/10/2022)*

JUDGMENT

1. Aggrieved by the Judgment of the trial Court rendered on the 25/10/2022 the Appellant proffered an appeal based on the following grounds;
 - a. That the Learned trial Court erred in law and in fact by entering Judgment against the Appellant despite there being insufficient evidence to do so as the burden of proof was not discharged of the applicable standard.
 - b. That the trial Magistrate erred in law and in fact when it delivered Judgment which fell short of reasonable rationale to warrant dismissal of the Appellant's defence.
 - c. That the Learned trial Magistrate erred in law and in fact when she relied on evidence which was not corroborated by facts of law or otherwise.
 - d. That the Learned trial Court erred in law and in fact when she failed to appreciate that it was not her duty to declare the rightful plot encroached and the person to be evicted. Both the Appellant and the Respondent with their own respective Share Certificates are claiming the same plot on the ground and no surveyor was engaged to visit the site to ascertain the ground position. Learned trial Court had no known procedure and process to determine plot and ground.



- e. That the Learned Magistrate erred in law and in fact by proceeding to hear the case ex-parte on 7/12/2021 when neither the Appellant nor his Counsel were in Court and that date had not been given by Consent of all parties thereby failing to accord Appellant opportunity to tender evidence though he had duly filed a defence.
2. The Appellant sought orders allowing the appeal and that the Judgement be set aside.
3. On the 14/3/24 parties elected to canvass the appeal by way of written submissions. The Appellant filed written submissions while the Respondent failed to do so.

The written submissions

4. The Appellant filed his undated submissions in Kiswahili and urged this Court to dismiss the trial Court Judgment because he was ill and not notified (served) of the hearing. That in the year 2002 he approached THETTA Deltas Investments and bought two plots PHIX 028 and PHIX 027.
5. That on 2/4/2022 he bought parcel PHIX 028 vide certificate no 422 and ballot no A22 while PHIX 027 was purchased on 26/4/2003 vide certificate no. 497 and ballot no. A21. That both parcels were purchased from Wainaina Kiburuti of Thetta Deltas Investment. That in the year 2004 he started constructing his house which he completed in 2005 without any qualms. Later he learnt that someone was constructing prompting the appellant to report at Juja police vide OB No 24/29/12/2016 and he was taken in circles to no avail. That at the time of his Purchase, he had asked Wainaina if any problem might arise and Wainaina gave him the names of previous sellers namely;
 - i. Patrick Chege Ngoni (son) Plot No. 233 and 235
 - ii. Mr. Ngoni Muchiri (father) Plot 1082/218/KARURA UMOJA INVESTMENT COMPANY. L.R 1082/218/KARURA B.
6. The appellant submitted that additionally, Wainaina gave him the previous sale agreements and Patrick Chege Ngoni's certificate. That after purchasing the land, Wainaina subdivided it into smaller plots and sold to other buyers alongside the appellant. That this mzee (to mean the Respondent) bought plot no. 225 but was shown a different plot no. 223 which does not belong to him. That the appellant owns plot no 223 but the respondent proceeded to construct his house thereon using the material he found on that plot. That this despite a notice on the said plot stating "NOT FOR SALE BEWARE OF CONMEN" including his phone number there 0728138580/0712087761 the Respondent never called him. That completing his construction the Respondent rubbed off the said notice without any regard. That there are three plots separating the Respondent's plot from the Appellant's plot and therefore they are not adjacent to each other. He urged the Court to dismiss the earlier Judgment and asked this Court to order the Respondent to bring a genuine surveyor to forthwith point out Plot numbers 225 and 223 to the rival parties.

Analysis and determination

7. The key issues for determination are;
 - a. Whether the Respondent proved his case
 - b. Whether the trial Court erred in hearing the suit exparte; and
 - c. Costs of the suit



8. Section 78 of the *Civil Procedure Act* states;

“(1) Subject to conditions and limitations as may be prescribed, an appellate Court shall have power –

- a) to determine a case finally;
- b) to remand a case;
- c) to frame issues and refer them for trial;
- d) to take additional evidence or to require the evidence to be taken;
- e) to order a new trial.

2. Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

9. The duty of the appellate Court is further enunciated in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court pronounced thus:

“... 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 ...”

10. Bearing in mind the duty of the appellate Court aforesaid, I shall evaluate the appeal as follows;

11. Vide a Complaint dated the 4/12/2018, the Respondent filed suit against the Appellant and another seeking orders of eviction and demolition of the illegal structures erected by the Respondent on parcel No 225 of LR 10821/2/8 and costs of the suit. It was the case of the Respondent that the Appellant had encroached on his land without his consent and constructed some structures thereon.

12. He sought orders as follows;

- a. A declaration that the Plaintiff is the bonafide legal owner of plot No. 225 to be exercised from LR No. 10821/2/8 Karura Umoja Investment Co. Ltd.
- b. An order of eviction and demolition of all illegal structures erected by the Defendant illegal structures erected by the Defendant on land parcel 225 of LR No. 10821/2/8 so as to give the Plaintiff vacant full possession thereof.
- c. Cost and interest of the suit.
- d. Any other further relief that this Honourable Court deems fit to grant.

13. The Appellant denied the claim of the Respondent vide a statement of defence filed on the 5/2/2019 wherein he contended that he bought the suit land plot No Phix 28 from Deltas Investments and was issued with a Share Certificate No A22 by a director namely Paul Wainaina Kiburuti. That he proceeded to construct his house in the year 2004 -2005. He denied that his house is on plot 225 as



alleged but on a ground separate from that of the Respondent. He urged the Court to dismiss the claim of the Appellant.

14. The Court has perused the record and finds that the Respondent led evidence that he is a shareholder of Karura Umoja Investment Company Limited, a land buying Company. That he holds ballot No 225 and Share Certificate No 0095. A certificate of official search from the land buying Company dated the 7/6/2019 was produced in evidence in support of the Respondent's claim. The ground area map was also produced which denotes the plot No 225 on the ground against the Respondent's name. A surveyor's report produced in evidence dated the 9/1/2021 and produced in evidence stated as follows;

“Plot No 225 is on the 1st row of the block and falls in second position from the boundary between L.R No. 10821/8 and L.R. No. 10821/34. The property is fully developed with a perimeter wall enclosing it. The location of the property conforms with the Advisory Scheme provided by the owners. The particulars relating to the ownership question can only be determined by the officials of the Company since that is beyond my terms of reference (ToRs) with the Company.”

15. Alongside the surveyor's report the Respondent adduced evidence in form of ownership Certificate No 0095 as well as the letter dated the 13/10//2021 which read in part as follows;

“RE; Sale agreement of plot No 225 on our farm LR No 10821/8

The directors of Karura Umoja Investment Company wish to confirm that the above plot was sold to the bearer Mr Antony Mbugua Mungai on the 29/9/2014. Certificate serial No 0095 was issued to him and can be confirmed in our counterfoil.”

16. PW2 – Peter Kihoro Kiiri testified and informed the Court that he is one of the directors of the Karura Umoja Investments limited, a land buying Company and authorised to testify in the case. That the Company owned parcel No 10821/2/8 and later subdivided it into smaller plots and issued through balloting to its paid up members, one of whom was the Respondent. He confirmed that the Respondent is a member of the Company and balloted for plot No 225 upon paying the requisite charges to the Company. That he was issued with a Share Certificate No. 0095 in the Company.

17. The witness further stated that the Appellant was not one of the members of the Company. That Paul Wainaina Kiburuti whom the Appellant claimed to have acquired the plot from was not a member either.

18. It is trite that parties are bound by their pleadings. See the Court of Appeal decision in Pacific Frontier Seas Ltd Vs. Kyengo & Another [2022] eKLR. He who asserts must prove. In CMC Aviation Ltd. Vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”



19. The fact that a defence is filed in no way lessens the burden on the Plaintiff to proof her case. The Court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another [2016] eKLR the Court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a Court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.”

20. Further in the case of Gichinga Kibutha Vs. Caroline Nduku (2018)eKLR where the Court stated:-

“It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

21. I am in agreement with the trial Court that in the absence of any evidence to the contrary, the Respondent proved his case on a balance of probability.

22. The Appellant filed a defence dated the 5/2/2019 where he denied the claim of the Respondent and added that he acquired plot No PHIX 28 from Deltas Investments and was issued with Share Certificate No A22 by a director by the name of Paul Wainaina Kiburuti. That he took possession and constructed a house on the plot between 2004 and 2005. He added that plot No. 225 is situate on separate ground from his plot.

23. It is to be noted that the said Wainaina Kiburuti although sued as 2nd Defendant in the trial Court failed to enter appearance nor file a defence to the Respondent’s claim. The case of the Respondent against the 2nd Defendant was therefore undefended.

24. It is on record that the Appellant did not attend the hearing despite being served with the hearing notice. In the trial Court the Appellant was represented by the firm of Kamiro R N & Co Advocates. According to the Affidavit of Service sworn on 4/12/2021 the said firm was served on the 15/10/21 with the hearing notice dated the 14/9/21 for 7/12/2021. Come the hearing date of 7/12/21, the Court having satisfied itself of the service upon the Appellant proceeded to hear the Respondent’s case exparte. I find no fault on the part of the trial Court in proceeding as it did. I say so because the Appellant was duly served with the hearing notice and therefore he cannot turn around and state that he was not aware of the hearing and elected to stay away. In any event this would not be a matter for appeal in my view.

25. In the end I find no grounds to fault the decision of the trial Court.

26. The Appeal is devoid of merit. It is dismissed with costs to the Respondent.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF JUNE 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – present in person



Kanyi for Respondent

Court Assistants – Phyllis/Oliver

