



**Kibunja v Kuria & another (Environment and Land Appeal
E008 of 2023) [2024] KEELC 4544 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

A OMBWAYO, J

JUNE 6, 2024

BETWEEN

JOSEPH NG'ETHE KIBUNJA APPELLANT

AND

KARANI KURIA 1ST RESPONDENT

LAND REGISTRAR NAKURU 2ND RESPONDENT

*(Being an Appeal from the judgement of the Chief Magistrate's Court at Nakuru delivered
by Hon. R. Kefa (P.M) on 1st March, 2023 in NAKURU C.M E.L.C CASE NO 59 OF 2019)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 23rd March, 2023 the Appellant appeals against the judgment of Hon. R. Kefa which was delivered on 1st March, 2023 in Nakuru C.M ELC CASE NO 59 OF 2019.
2. The grounds of appeal are as follows:
 1. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence adduced, the submissions filed and the authorities in support hence arriving at an erroneous finding and determination.
 2. That the learned trial Magistrate erred in law and in fact in failing to evaluate the uncontroverted evidence adduced by the Appellant showing that Gerishon Gioche who purportedly sold the suit property to the 1st Respondent, irregularly, fraudulently and un-procedurally acquired the suit property and therefore had no good title to pass to the Respondent thus arriving at a very erroneous finding and determination.



3. That the learned trial Magistrate erred in law and in fact in failing to evaluate the uncontroverted evidence of the 2nd Respondent, the custodian of ownership documents, showing that the documents of ownership produced by the 1st Respondent were not the same as the ones under the custody of the 2nd Respondent hence arriving at an erroneous finding and determination.
 4. That the learned trial Magistrate erred in law and in fact in disregarding the corroborative evidence tendered by the Appellant's witnesses touching on the suit property hence arriving at an unfair finding and determination.
 5. That the learned trial Magistrate erred in law and in fact by failing to consider the standard of proof expected of the 1st Respondent and his failure to discharge the same hence arriving at an unfair finding and determination.
 6. That the learned trial Magistrate erred in law and in fact in failing to find that the indefeasibility of the 1st Respondent's title was successfully impeached by the Appellant hence arriving at erroneous finding and determination.
 7. That the learned trial Magistrate erred in law and in fact in misapplying the principles set out under Section 26 of the *Land Registration Act* No. 3 of 2012 hence arriving at erroneous finding and determination.
 8. That the learned trial Magistrate erred in law and in fact by shifting the legal burden of proof to the Appellant hence arriving at an erroneous finding and determination.
 9. That the learned trial Magistrate erred in law and in fact in addressing herself on extraneous issues not borne of the pleadings and evidence hence arriving at an erroneous finding and determination.
3. The Appellant prays that the appeal be allowed with costs to the Appellant and the said judgment be set aside and substituted with a judgement of this court.

Factual Background

4. The suit before the subordinate court was commenced vide a Complaint dated 2nd May, 2017. The Plaintiff (now 1st Respondent) averred that at all material times leading to this suit, he is the registered owner of all that piece of land known as Mau Narok/Siapei Block 3/520 (Mutukanio 'A'). He avers that sometimes in the year 2007, without colour or right and or his consent, the 1st Defendant (now Appellant) unlawfully trespassed into the said land, put up a slaughter house on the 1st Respondent's property thereby depriving the 1st Respondent user thereof as a result of which the 1st Respondent has suffered both loss and damages.
5. The 1st Respondent listed the particulars of fraud and illegality on the part of the Appellant as:
 - a. Dealing in the suit land while he knew the owner was there.
 - b. Misrepresenting himself with a view to having himself registered as the owner of the land when he knew and or ought to have known that such dealing was illegal.
 - c. Misleading officials of the 2nd Defendant to make entries in the land registry while knowing the same were fraudulent.
6. The 1st Respondent listed the particulars of fraud and illegality on the part of the 2nd Respondent as:



- a. Dealing with the Plaintiff's land without proper documentation.
 - b. Sanctioning, dealings in the Plaintiff's land without his knowledge and deliberately keeping him in darkness.
 - c. Authorizing transactions over the subject land irregularly.
 - d. Dealing in the land, registering and issuing the Title Deed without proper documents and without following proper procedure.
7. The Plaintiff (now 1st Respondent) prayed for judgement against the Defendants (now Appellant and 2nd Respondent) jointly and severally for:
- a. An order that the 1st Defendant (now Appellant) is a trespasser as the Plaintiff (now 1st Respondent) is the registered owner with a valid title deed.
 - b. An order of eviction do issue against the 1st Defendant (now Appellant), his agents, servants, employees and or any other person by whatsoever name claiming through the 1st Defendant.
 - c. Costs of this suit.
 - d. Any other relief that this court may deem fit and just to grant.
8. The 1st Defendant (now Appellant) filed his statement of defence dated 23rd March, 2018. In the statement of defence he admitted that the 1st Respondent is the registered owner of Mau Narok/Siapei Block 3/520 (Mutukanio 'A') but avers that the title was obtained irregularly, unlawfully and fraudulently.
9. The Appellant denied trespassing into the 1st Respondent's parcel of land and stated that the slaughter house is on Mau Narok/Siapei Block 3/485 (Mutukanio 'A'). The Appellant denied each and every particular allegation of fraud and/or illegality pleaded against him and put the 1st Respondent to strict proof of the allegations thereof.
10. The 2nd Respondent filed a Statement of defence dated 7th December, 2017 and denied the averments in the Plaint. The 2nd Respondent denied the 1st Respondent's averments particularly the elements of fraud and illegality alleged on his part that he authorized irregular transactions over the suit property. The hearing commenced on 1st February, 2022 and the Learned Trial Magistrate delivered judgement on 1st March, 2023 in the following terms:
- a. It is hereby ordered that the 1st Defendant is a trespasser as the Plaintiff is the registered owner with a valid title deed.
 - b. An order of eviction is hereby issued against the 1st Defendant, his agents, servants, employees and or any other person by whatsoever name claiming through the 1st Defendant.
 - c. The Plaintiff shall have costs of the suit plus interest from time of delivery of judgment until payment in full.
 - d. Stay of execution 30 days.

Submissions

11. The Appellant filed submissions on 11th March, 2024 and identified the following issues for determination:



- a. Whether the Appellant is a trespasser on land parcel Mau Narok/Siapei Block 3/520 Mutukanio N A?
 - b. Whether the Trial Court misdirected itself on a material point of law?
 - c. Who should bear the costs of the appeal?
12. The Appellant submits that the 1st Respondent testified in cross examination, that he acquired the suit land from Gerishon Gioche in the year 2016. The Appellant submits that the 1st Respondent further testified that at the time of purchasing the suit land, he was not aware of a criminal case against the said Gerishon Gioche. He submits that he further averred that he was neither aware of the report from the district land registrar nor the complaint lodged before the land registrar by Eunice Kibunja (Appellant's mother) on 5th November 2010.
 13. The Appellant submits that it was his evidence on the other hand that Gerishon Gioche did not have a title deed to pass to the 1st respondent and thus the Title deed by the 1st Respondent was irregularly, unlawfully and fraudulently obtained. The Appellant placed reliance on Nakuru Chief Magistrate's Criminal Case No 2956 of 2006, Republic v Gerishon Gioche Macharia. The Appellant submits that he further testified that in 1992, his mother upon realizing that the surveyor had subdivided her portion of land thus creating Plot No 520, reported the issue to the Criminal Investigation Department office and in the course of investigations, the surveyor renounced the subdivision.
 14. The Appellant submits that his witness corroborated his case. He submits that DW2 confirmed that Humphrey sold the Land parcel to Eunice Kibunja and he witnessed the transaction. The Appellant submits that he further testified that he did not know how Gerishon Gioche acquired the suit land yet his grandmother was not a member of the Mutukanio land buying company. The Appellant submits that he confirmed that there is a slaughterhouse on the suit land constructed and owned by Eunice.
 15. The Appellant submits that DW3, the land registrar, in his testimony on cross-examination informed the court that there is always a member's register for Mutukanio land buying company which serves the purpose of identifying allottees. He submits that it was his testimony that Wairimu Gioche Macharia did not provide anything to show that she was a member of Mutukanio land buying company. He submits that as to whether the said Wairimu Gioche Macharia was an original allottee of the suit land, it was the Land Registrar's testimony that he was not in a position to confirm the same.
 16. The Appellant relies on the judicial decisions of *Abok James Odera & Associates v John Patrick Mahiri T/A & CO Advocates* [2013] eKLR, *Mwangi vs Wambugu* [1984] KLR 453, *Jacob Wekesa Bokoko Balongo v Kincho Olokio Adeya & Another* [2020] eKLR and *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR. The Appellant submits that for this court to successfully address trespass of the 1st Defendant's alleged land, it must address the issue of ownership and possession as the two are inextricably intertwined.
 17. The Appellant submits that the 1st Respondent not only failed to prove to the required legal threshold that he legally acquired Mau Narok/Siapei Block 3/520 (Mutukanio 'A') but also, that he was in possession of the same. The Appellant submits that it is not in dispute that the 1st Respondent is not in occupation of his purported land hence the prayers sought were not only not grantable but were not proved to the required threshold. The Appellant submits that the trial court thus erred in declaring that the Appellant had trespassed onto the suit property Mau Narok/Siapei Block 3/520 (Mutukanio 'A') notwithstanding that he legally remains in physical occupation to date. The Appellant relies on the judicial authorities of *Munyu Maina v Hiram Gathiba Maina* Civil Appeal No 239 of 2009 [2013]



eKLR and [Dina Management Limited v County Government of Mombasa & 5 others](#) [2023] KESC 30 KLR.

18. The Appellant submits that the trial court erred in ignoring the history and/or genesis of the acquisition of the 1st Respondents title deed vis-à-vis the Appellant mother's title deed thus arriving at an erroneous finding. The Appellant relies on Section 26 of the [Land Registration Act](#) and submits that the trial court erred in law and in fact arriving at a finding that the 1st Respondent held prima facie, an indefensible title deed for the following reasons; the appellant relied on the proceedings and judgment in NKU Criminal Case No 2956 OF 2006, the uncontroverted evidence given by the Land Registrar in cross examination that Wairimu Gioche Macharia was never in the register of allottees of Mutukanio land buying company, the appellant produced a sale agreement dated 22nd September, 1986 and another dated 21st October, 1986, the appellant relied on and produced the ballot card and payment receipts by Humphrey Mwangiru, the original owner of the suit land and the appellant produced the title deed for the suit land and the District officer letter dated 16th June 2010 and 4th November 2010. The Appellant relies on the judicial decision of [Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another](#) [2013] eKLR.
19. The Appellant submits that the 1st Respondent acquired the title deed to the suit land in the year 2016, ten years after Gerishon Gioche (the vendor) was charged in a court of law, found guilty and convicted on account of obtaining execution of security by false pretense relating to the suit land. The Appellant submits that the said judgment of the Court was never set aside, reviewed and/or appealed against, thus stands to date. The Appellant submits that as at the time of entering into a transaction with the 1st Respondent, Gerishon did not have any clean title deed to pass. He submits that the same was void ab initio.
20. The Appellant submits that it is a well settled principle that courts should pronounce judgments on issues arising from pleadings. The Appellant submits that he was sued by the 1st Defendant not as a registered owner of the suit property but as a trespasser. The Appellant submits that that the court misdirected itself in entering an un-pleaded issue on legal administration by the Appellant who was merely sued as a trespasser.
21. The Appellant relies on the judicial decisions of [Daniel Kiprugut Maiyura v Rebecca Chepkrugat Maina](#) [2019] eKLR, [Paul Hirbo Isatu v Abdirahaman Ake](#) [2018] eKLR, [Sai Office Supplies Limited v Rosemary Alivista Luseno & another](#) [2014] eKLR, [Milankumar Shah & 2 others v City Council of Nairobi & Attorney General \(Nairobi HCC SUIT NO 1024 OF 2005 \(5\), Kenya Agricultural & Livestock Research Organization v Leah Okoko & Another](#) [2022] KEHC 3302 (KLR) and [Kipngetich Kalya Kones \(suing as the Administrator of the estate of Kipkalya Kiprono Kones \(deceased\) v Wilson Kiplagat Kones](#) [2021] eKLR. The Appellant submits that his appeal is merited. The Appellant relies on Section 27 of the [Civil Procedure Act](#) and prays for costs.
22. The 1st Respondent filed submissions on 23rd April, 2024. He submits that at all material times, he is the Registered owner of all that piece of land known as Mau Narok/Siapei Block 3/520 (Mutukanio 'A'). He submits that sometimes in the year 2007 without his consent, the Appellant unlawfully trespassed into his land, put up a slaughter house on his property thereby depriving him use of his property as a result he has suffered both loss and damage.
2. The 1st Respondent submits that the Appellant committed fraud and illegalities by dealing in the suit property while he knew the owner was there, misrepresenting himself with a view to have himself registered as the owner of the land when he knew and or ought to have known that such dealing was illegal. He submits that the Appellant went ahead to mislead the officials of the 2nd Respondent to make entries in the land registry while knowing the same were fraudulent.



23. The 1st Respondent submits that the Appellant started dealing with his land without proper documentation, without his knowledge and deliberately keeping him in the dark. The 1st Respondent submits that the Appellant went ahead and started authorizing transactions over the subject land irregularly, dealing in the land registration, issuance of title deed without proper documentation and unprocedurally.
24. The 1st Respondent submits that despite several demands and notices, the Appellant ignored, refused and deliberately continued to trespass, commit fraud and illegalities which prompted him to file the case at the trial court where he was granted the reliefs that he sought.
25. The 1st Respondent submits that the Land Registrar who testified in the trial court confirmed that the suit property exists and he is the registered proprietor. He submits that the registrar produced a green card that confirmed that the suit property is registered in his names as from 12th January 2016 and the title deed issued. The 1st Respondent submits that the Appellant did not and has not adduced any evidence that he is the registered proprietor of the suit property both at the trial court and in this appeal.
26. The 1st Respondent relies on Section 26 of the *Land Registration Act* and the judicial decisions of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR, *Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua, Embakasi Properties Limited & Another vs Commissioner of Lands & Another* [2019] eKLR and *Margaret Wanjiru Ndirangu & 4 others vs A.G* [2020] eKLR. The 1st Respondent prays that this appeal be disallowed with costs awarded to him.

Analysis And Determination

27. The Appellant raised nine grounds of appeal. In order to determine if the appeal has merit, the following issue in my view arises for determination:
 - a. Whether the Appellant is a trespasser on land parcel Mau Narok/Siapei Block 3/520 Mutukanio N A?
 - b. Who should bear the costs of this appeal?

A. Whether the Appellant is a trespasser on land parcel Mau Narok/Siapei Block 3/520 Mutukanio N A?

28. It is the Appellant's case that Gerishon Gioche did not have a title deed to pass to the 1st Defendant (now 1st Respondent) and thus the title deed by the 1st Respondent was irregularly, unlawfully and fraudulently obtained. The Appellant placed reliance on Nakuru Chief Magistrate's Criminal Case No 2956 of 2006, *Republic v Gerishon Gioche Macharia*. It is the 1st Respondent's case that he is the registered owner of all that piece of land known as Mau Narok/Siapei Block 3/520 (Mutukanio 'A'). It is also his case that sometimes in the year 2007 without his consent, the Appellant unlawfully trespassed into his land, put up a slaughter house on his property thereby depriving him use of his property as a result he has suffered both loss and damage.
29. The Appellant was sued in the trial court as a trespasser and among the orders sought by the 1st Respondent were that: An order that the 1st Defendant (now Appellant) is a trespasser as the Plaintiff is the registered owner with a valid title deed.



30. The court in the judicial decision of *Nashon Onyango Otieno v George Onyango Otieno* [2021] eKLR stated as follows at paragraph 16:

“This being a 1st appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded.”

31. Further in the judicial decision of *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR, the court while quoting the judicial decision of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, stated:

“...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...”

32. The Black’s Law Dictionary, 10th Edition at Page 1642 defines trespass as follows:

“Trespass is defined as unlawful act committed against the person or property of another especially wrongful entry of another’s land.”

33. The court has looked at the Appellant’s Statement of defence filed in the trial court on 4th August, 2023. The Appellant admits that the Plaintiff is the registered owner of Mau Narok/Siapei Block 3/520 (Mutukanio ‘A’) but avers that the title was obtained irregularly and fraudulently. The Appellant further denied trespassing into the Plaintiff’s parcel of land and avers that the slaughter house is on Mau Narok/Siapei Block 3/485 (Mutukanio ‘A’).

34. The Appellant’s case is thus that the title of the 1st Respondent was obtained irregularly, through illegality and through fraud. The Appellant has adduced a judgment in criminal case No 2956 of 2006 between Republic vs Gerishon Gioche Macharia (the accused) where the court found the accused guilty on 24th June, 2010. The accused was charged with obtaining execution of security by false pretense contrary to section 314 of the penal code. The particulars of the offence were that the accused on 6th March 2002, at Nakuru Lands Office in Nakuru by false pretense and with intent to defraud obtained from Mr. J.M Munguti, a land registrar in Nakuru District Lands office obtained title number Narok/Siapei Block 3 (Mutukano A) parcel number 520 and made J.M Munguti to endorse and make title in his name and fix a self (sic) in order that it may be afterwards used as a valuable security name by a land title deed for the above parcel of land. The root of the 1st Respondents title has been questioned. The Appellant submitted that for this court to successfully address trespass of the 1st Defendant’s alleged land, it must address the issue of ownership and possession as the two are inextricably intertwined. This court notes that Paragraph 576, Volume 97 of the Halsbury’s Laws of England reads as follows:

“Trespass is an injury to possessory right, and therefore the proper claimant in a claim of trespass to land is the person who was or is deemed to have been in possession at the time of trespass...the owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of trespass, since a mere right of property without possession is not sufficient to support the claim...” [Emphasis mine]



35. The Appellant submitted that the trial court erred in declaring that he had trespassed onto the suit property Mau Narok/Siapei Block 3/520 (Mutukanio 'A') notwithstanding that he legally remains in physical occupation to date. The 1st Respondent in his submissions filed in the trial court on 7th February, 2023 states that he has a valid title deed to the suit known as L.R NO Mau Narok/Siapei Block 3/520 (Mutukanio 'A') by way of purchase. The 1st Respondent also produced before the trial court a list of documents dated 14th July, 2020 and among them is a sale agreement dated 20th August, 2016. The parties in the sale agreement are the purchaser who is the 1st Respondent and Gerishon Gioche Macharia who was the vendor in respect of Mau Narok/Siapei Block 3/520 (Mutukanio 'A'). This court finds that the 1st Respondent did not acquire good title in respect of Mau Narok/Siapei Block 3/520 (Mutukanio 'A') given the implications of the judgment in criminal case No 2956 of 2006 between Republic vs Gerishon Gioche Macharia (the accused). This court also finds that the Appellant is not a trespasser as alleged in the Plaint filed by the 1st Respondent in the trial court dated 2nd May, 2017.

B. Who should bear the costs of this appeal?

36. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise

Disposition

37. It therefore follows that this Appeal is allowed and the judgment of the Chief Magistrate's Court at Nakuru delivered by Hon. R. Kefa on 1st March, 2023 in Nakuru C.M. E.L.C Case No 59 of 2019 is hereby set aside and is hereby substituted with this court's judgment that the suit is dismissed with costs. The costs of the Appeal are awarded to the Appellant. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 6TH DAY OF JUNE, 2024

A.O. OMBWAYO

JUDGE

