



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Macharia & another v County Surveyor, Murang'a County & another (Environment and Land Appeal E017 of 2023) [2025] KEELC 301 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 301 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E017 OF 2023
LN GACHERU, J
JANUARY 30, 2025

BETWEEN

CAROLINE WAITHIRA MACHARIA 1ST APPELLANT

SIMON MACHARIA KAIRU 2ND APPELLANT

AND

COUNTY SURVEYOR, MURANG'A COUNTY 1ST RESPONDENT

JOHN S NJIRE MAINA 2ND RESPONDENT

(Appeal from the Judgment of the Murang'a CM ELC Case No. E081 of 2024 delivered on 7th September, 2023 by E M Nyagah - SPM)

JUDGMENT

1. The Appellants herein had commenced Murang'a CM ELC Case No. E081 of 2024, before the trial Court vide a Plaint dated 10th December 2021, wherein they sought for various prayers among them; -
 - i. A Permanent Injunction restraining the 1st and 2nd Defendants (now the 1st and 2nd Respondents) from interfering or adversely dealing in any manner with Plot number UNS Plot 548 Mukuyu (the suit property).
 - ii. A declaration that the 2nd Respondent trespassed, invaded and demolished property located on the suit land in breach of the Appellants' proprietary rights.
 - iii. An Order directing the 1st Respondent to place beacons on the suit land so as to clearly demarcate the boundary between the suit property and land parcel No. LOC.11/Maragi 1193/92, and to restore the Appellants' access way.



- iv. Special damages on account of loss of use of premises in the amount of Kshs.5,000/=, per day as from 18th June 2021, as well as General damages for trespass and loss of property occasioned by the 2nd Respondent (then 2nd Defendant).
2. The above suit before the trial court was opposed by the 1st Defendant (1st Respondent), through an amended Statement of Defence dated 15th February 2022, who averred that the allotment of the suit land to the Plaintiff was not confirmed by any Minutes or Physical Development Plan, and the said allotment was registered as a kiosk according to the available records. Hence the said allotment cannot confer any ownership rights upon the Plaintiffs (Appellants) pursuant to the Land Act, 2012.
3. The 2nd Defendant (now 2nd Respondent) also opposed the said suit vide his Statement of Defence dated 17th February 2022, and contended that any approvals granted to the 1st Plaintiff (now 1st Appellant) to erect permanent structures were illegal and irregular, and in any event are of no effect over the 2nd Defendant's Plot No. LOC.11/MARAGI 1193/92. He refuted claims of an "ease way" located next to his mentioned plot as averred by the 1st Plaintiff and he also denied encroaching on the latter's land parcel.
4. The matter proceeded for hearing via viva voce evidence, wherein parties called witnesses, produced exhibits, cross examined the opponents, filed their respective written submissions, and finally the trial court delivered its judgement, which aggrieved the Appellants herein.
5. Vide its Judgement dated on 7th September 2023, the trial court found and held that the Appellants were paying ground rent and not rates to Murang'a County Government on account of the premises in contention. Further, that the Appellants were not the owners of the suit property, which meant that they were also not in possession of the said land, which rendered moot their claim of encroachment by the 2nd Defendant. Further, the trial Court held that the Appellants failed to prove their case on the required standard of balance of probabilities.
6. Grieved by the said decision of the trial court, the Appellants filed the instant Appeal, vide a Memorandum of Appeal dated 6th October 2023, and which was filed on 20th February 2024. The Appellants sought for the following Orders;
 - a. This Appeal be allowed with costs.
 - b. The Judgment of the court made on 7th September 2023, be set aside and be substituted with an Order allowing the Plaintiffs' suit.
 - c. The court grants any Order upon such terms as this Court deems fair and just.
7. The Appeal herein is premised on the following seven (7) grounds:
 1. That the trial Court erred in law and in fact and misapprehended the evidence of record by holding that the Appellants had not proved their case on a balance of probabilities despite the overwhelming evidence on record.
 2. The trial Court erred in law and in fact in holding that the appellants were not the owners of Plot Uns/548 in effect disregarding the evidence that the appellants' occupation of the said property was with the consent of the 1st Respondent to whom the Appellants paid rates and carried business therein and hence entitled to peaceful possession and occupation of the property.
 3. The trial Court erred in law and in fact in failing to hold that the 2nd Defendant had a duty to ensure that his construction activities would not interfere with the Plaintiffs' portions.



4. The trial Court erred in law and in fact in failing to determine prayer number (c) on the Plaintiff requiring the 1st Appellant to place beacons distinguishing the boundary between the Appellant's property and restore the access way.
5. The trial Court erred in law and in fact by failing to address the merits of prayer number (c) and (d) of the Plaintiff on the award of special and general damages.
6. The trial Court erred in law in failing to consider all issues raised by the Appellant in both written and oral submissions made before him.
7. The trial Court erred in law by ruling the way it ruled.
8. After the Appeal was admitted under Section 79B of the *Civil Procedure Act*, the Court directed that the said Appeal be dispensed by way of written submissions, which the parties complied with.

The Appellants' Submissions

9. The Appellants filed written submissions dated 3rd July, 2024 through Bikundo Associates & Co Advocates, and reiterated that the 1st Appellant is the lawful allottee of Plot UNS Plot/548 Mukuyu, pursuant to an allotment letter dated 1992, and which parcel borders Plot number Loc.11/Maragi 1193/92.
10. Further, that the 1st Appellant procured the necessary approvals allowing him to construct a 14-room accommodation facility with 5 toilets on the said premises. That the Appellants and their clients were utilizing the ease/access way between the 1st Appellant's Plot UNS PLOT/548 Mukuyu, and the 2nd Respondent's Plot number Loc.11/Maragi 1193/92, for over 20 years without any incident until 18th June 2021, when the 2nd Respondent dug a deep trench on his property, which encroached on the 1st Appellant's property by blocking the access way, destruction of the following items belonging to the Appellants: a temporary wall, car wash yard, 5 permanent toilets and 5000 liters of water.
11. It was further submitted that this Court, in exercising its appellate jurisdiction, is not bound to follow the decision of the trial Court, but is bound to re-evaluate the available evidence, and then arrive at its own independent decision. For this, reliance was sought in the holding of the Court in the case of *Selle Vs Associated Motor Boat Co.* [1968] EA 123; and, *Mohamed Athman Kombo Vs Maua Mohamed* [2019] eKLR.
12. Further, that the trial Court disregarded the Appellant's prayer for a permanent injunction as against the 2nd Respondent, and also ignored their prayer for beacons to be put in place by the 1st Respondent separating the Appellants' property from the 2nd Respondent's land parcel. That the trial Court ignored evidence to the effect that the Appellants were paying both ground rent and rates to the County Government of Murang'a.
13. Further, that the trial Court failed to make a determination as to whether the 2nd Respondent owed the Appellants a duty of care of ensuring that his construction activities would not interfere with the Appellants occupation of the land in question. They relied on the Judgment of the Court in the case on *Chandaria vs Nyeri* [1982] KLR 84, to anchor the proposition that failure to deal with any of the issues raised in the suit makes the resultant Judgment unsatisfactory and amounts to a mistrial.

1st Respondent's Submissions

14. The 1st Respondent filed written submissions dated 1st July 2024, through Kimwere Josphat & Co Advocates, and submitted that the Appellants failed to avail sufficient evidence before the trial Court to



demonstrate that their temporary kiosks which they were awarded were ever converted into a leasehold. Furthermore, the plot occupied by the Appellants is neither surveyed nor registered, hence this Court cannot legalize an illegality by finding that the Appellants hold any proprietary rights in the same as claimed.

15. With regard to the question of erecting beacons to demarcate the Appellants' land holding, it was argued that the parcel of land in question being un-surveyed, it is not possible for beacons to be placed in respect of the same.

1st Respondent's Further Submissions

16. The 1st Respondent filed further submissions dated 26th August 2024, in response to the Appellants written submissions, and submitted that the Appellants have not approached this Court with clean hands, having erected illegal structures on the property in question. Further, there can be no boundaries in respect of an un-surveyed plot, and a permanent injunction cannot be issued to licensees such the Appellants.

The 2nd Respondent's Submissions

17. The 2nd Respondent filed written submissions dated 1st August 2024, through Waiganjo Gichuki & Co Advocates, and submitted that the Appellants have attempted to mislead the court by arguing that they have been paying land rate to the County Government of Murang'a, whereas the exhibits which they produced are receipts issued by the said County Government and which indicate that the payment was for a temporary kiosk.
18. Further, that the trial Court was correct in its finding that Plot No. UNS 548 Mukuyu, did not exist on the ground. That the 1st Respondent confirmed during the proceedings before the trial Court that the 2nd Respondent did not move outside the boundaries of his land parcel.
19. The Court has considered the instant Appeal, the Memo and Record of Appeal, the rival written submissions and relevant provisions of law, and it finds the issues for determination are: -
 - i. Whether the instant Appeal is merited.
 - ii. Who shall bear the costs of the appeal?

i. Whether the instant Appeal is merited?

20. This being the first Appeal, the court will consider both the facts and the law as provided by section 65(b) of the [Civil Procedure Act](#), which provides: -
 - (1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
 - (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;
21. Further, this court is bound to reconsider, re-evaluate and re-assess the available evidence as adduced before the trial court, and then decide independently, its findings, while taking into account that it never saw nor heard the witnesses as did the trial court. The appellate court will also give due deference to the trial court's findings, while taking into account that the trial court had discretion



to determine the matter, which discretion stems from the Constitution and statutes. See the case of *Mbogo & Another vs Shah*, [1968] EA, p.15, the Court held that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

22. Further the court will rely on the case of *Selle vs Associated Motor Boat Co.* [1968]EA 123, where the Court held;

“the appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the court of Appeal acts are that the 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 in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account in particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

23. See also the case of *Mohamed Athman Kombo vs Maua Mohamed*[2019]eKLR wherein the court held that: -

“This being a first appeal, the court is under a duty to reconsider and evaluate the evidence 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. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –v- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).” Emphasis supplied.

24. The gist of the instant Appeal is that the 1st Appellant was allocated plot No. UNS 548 MUKUYU, by the County Government of Murang’a and has been paying land rates thereof for about 20 years, and has developed the said plot by putting up an accommodation facility thereon, which facility was rendered inaccessible as from 18th June 2021, on which the 2nd Respondent dug a trench on his land parcel, Plot No. LOC.11/MARAGI, therein , destroying the access road between the two parcels of land.

25. In the impugned decision, the trial Court dismissed the Appellant’s case on grounds that the 1st Appellant failed to establish his ownership over land parcel number UNS 548 MUKUYU.

26. Section 24 of the Land Registration Act, 2012 provides as follows:

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

27. Further, Section 25 of the [Land Registration Act](#), 2012 stipulates as follows:

“25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

28. Again Section 26 of the [Land Registration Act](#), 2012 states as follows:

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

29. In the instant Appeal as well as in the suit before the trial Court, it was incumbent upon the 1st Appellant to demonstrate that he is the registered proprietor of land parcel No. UNS 548 MUKUYU in order to benefit from the protections set out under Sections 24, 25 and 26(1) of the [Land Registration Act](#), as reproduced hereinabove. See the provisions of Sections 107, 108, 109 and 112 of the [Evidence Act](#), on the duty of a person who alleges.

30. In Civil Appeal No. 246 of 2013: Arthi Highway Developers Limited vs West End Butchery Limited and Others, the Court of Appeal declared as follows:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and



indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

31. The Court has carefully considered the pleadings and the totality of the evidence adduced by the parties before the trial Court as well the parties’ rival submissions tendered before it. In the Plaintiffs’(Appellants) document marked CWM-1 which is described by as a copy of Allotment Letter dated October 1992, and signed by H.G MWANGI – TOWN CLERK, the subject-heading of the said document reads as hereunder: “RE: ALLOCATION FOR A KIOSK/CANTEEN/548”. From the foregoing, it is evident that the document in question is incapable of creating a leasehold in favour of the 1st Appellant as claimed.
32. Further, the court has perused the Plaintiffs(Appellants)’ documents marked CWM-3 and appearing on pages 13 up to 17 of the Plaintiffs’ bundle of documents. It is very clear that the above mentioned documents are receipts issued by the County Government of Murang’a in respect of “Ground Rent” paid by the 1st Appellant.
33. In the circumstances, this Court finds and holds that the 1st Appellant was not making payment in regard to land rates to the County Government of Murang’a as contended, but was paying ground rent.
34. Having considered the entirety of the evidence placed before the trial Court, this court in its appellate jurisdiction finds and holds that the Judgment of the trial Court dated 7th September 2023, was based upon proper and sound reading of the applicable law. Consequently, the Court finds no good reasons to interfere with and/or set aside the said determination, and proceeds to uphold the said Judgement of the trial Court delivered on 7th September 2023.
35. Accordingly, the instant Appeal is found not merited and is hereby dismissed entirely.
36. On the issue of costs, it is trite that costs follow the event, and are awarded to the successful litigant in a suit pursuant to the provisions of Section 27 of the *Civil Procedure Act*. See the decision of the Court in the case of Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR.
37. Having dismissed this Appeal, the Respondents are therefore the successful litigants and are awarded costs of this Appeal and also costs of the suit before the trial Court. The said costs to be met by the 1st and 2nd Appellants jointly and severally.

The Appeal is dismissed accordingly.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 30TH DAY OF JANUARY 2025.

L. GACHERU

JUDGE

30/1/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant



Mr Ongeru for the Appellant

Mr Kimwere for 1st Respondent

Mr Waiganjo Gichuki for 2nd Respondent

L. GACHERU

JUDGE

30/01/2025.

