



**Mwaura v Kimani (Environment & Land Case E029 of 2023)
[2024] KEELC 5747 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E029 OF 2023**

JG KEMEI, J

JULY 30, 2024

BETWEEN

FRANCIS KANGERE MWAURA APPELLANT

AND

STEPHEN JOSEPH KAMAY KIMANI RESPONDENT

*(An appeal from the judgement of Hon C K Kisiangani (SRM)
in MCL&E No 140 of 2022 Ruiru delivered on the 16/3/2023)*

JUDGMENT

1. Aggrieved by the aforestated Judgment the Appellant moved this Court on Appeal on the following grounds;
 - a. That the learned Magistrate erred in law and in fact by ignoring the evidence tendered by the Appellant that he is the registered proprietor of the parcel of land known as Ruiru/Kiu Block 12/223.
 - b. That the learned Magistrate erred in law and in fact by tally ignoring the Appellant's possession of a valid Certificate of Lease and other relevant documents as proof of ownership of land parcel number Ruiru/Kiu Block 12/223 which were not challenged by the Respondent on grounds of fraud, illegality or any other grounds.
 - c. That the learned trial Magistrate erred in fact and in basing her findings on issues that were not pleased.
 - d. That the rationale for the decision in the Judgment is flawed and not supported by evidence and the law. The fact that the Respondent alleged to have been in occupation of the suit land purporting to having purchased the same, without any proof whatsoever is not a legal justification to decide irrationally, and inconsistently with evidence and the law.



- e. That the learned trial Magistrate erred in law and in fact by failing to evaluate, appreciate, consider and analyse the weight of evidence in support and pleadings filed by the Appellant.
 - f. That the learned trial Magistrate erred in law and in fact by totally ignoring the written submissions by the Appellant's Advocates on record.
 - g. That the Judgment dated 16th March 2023 comprises an error of facts and law and is unjust and an abrogation of the principles of justice.
2. Consequently, the Appellant sought orders that the appeal be allowed and the judgement delivered on the 16/3/2023 be set aside and costs of the appeal be in his favour.
 3. By way of a brief background, the Appellant filed suit against the Respondent seeking in the main eviction orders against the Respondent from the suit land. In addition, he sought damages for trespass and costs of the suit. It was the case of the Appellant that at all material times he was the registered owner of the suit land having acquired in 1994 from Ngara Mucokaniriria Company Limited (the Company) where in a clearance certificate was issue to him on 29/12/94. It was averred that the Respondent has trespassed onto the land without his knowledge and consent denying him the right to use and enjoyment of the suit land.
 4. In denying the Appellants claim the Respondent filed a Statement of Defence dated the 11/10/2022 and contended that he bought the shares from the Company under Share Certificate No. 258 entitling him a portion of 1/8 of an acre – plot No 550B. That the plot on the ground plan was No 223. That he immediately took possession of the said plot and developed a residential unit and connected water and electricity utilities thereon. He further argued that if the Appellant acquired the plot in 1994 then his rights were subject to his having acquired the land in 1981 and if that be the case then his rights have been extinguished by the doctrine of adverse possession. That the Appellant was all along aware of his presence on the land and did nothing to remove him. Lastly, he urged the Court to dismiss the suit.
 5. Upon hearing the parties the trial Court dismissed the case of the Appellant triggering this appeal.
 6. Counsel for the Appellant framed one issue for determination which is whether the Appellant is the registered proprietor of the suit land. It was submitted that the Appellant is the registered owner of the suit land having acquired the same in 1994 from the Company. That the Appellant was showed the land with other purchasers whose boundaries were clearly marked with beacons. Later he followed up the title processing with the Company and finally obtained title in 2020. In between he would frequently visit the land and at one such visit in 2015 he found some building material at the edge of the land and assumed they were for the neighbor and did not read much into it. He went back three years later and found the two structures had been erected on the land as well as a fence made of iron sheets. Alarmed he reported the matter to the local chief who summoned the Respondent who came with a clearance certificate for plot No 550 alleging to be for suit land. The Company's advocates confirmed that indeed the plot was parcel 223 and that it belonged to him unlike plot 550 alluded to by the Respondent which was said to be non-existent.
 7. It was further submitted that the Appellant produced the relevant documents in support of his title unlike the Respondent who stated that he purchased the land from a Mama Njoki and the only documents he had was a Share Certificate for plot No 550. That the Respondent has not successfully impeached the title of the Appellant. The Court was urged to allow the appeal.
 8. Counsel for the Respondent faulted the Appellant's submissions for failing to address the grounds of appeal and instead going on a frolic of his own. That the appeal is incurably defective for lack of a decree as provided for under Order 42 Rule 13(4) of the [Civil Procedure Rules](#) read together with Section



- 65(1) (a) of the [Civil Procedure Act](#). That the decree of the lower Court was not included in the Record of Appeal which omission is fatal making the appeal defective thereby warranting summary dismissal.
9. Having considered the appeal comprised in the Record of Appeal, the trial Court file and the rival written submissions there are two issues for determination; Whether the appeal is competent; Whether the appeal has merit and lastly the costs on appeal.
 10. The guiding parameters for this Court are therefore, on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before him; and lastly it is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.
 11. Order 42 rule 13(1) (4) of the [Civil Procedure Rules](#) provides as follows;
 - a. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
 - b.
 - c.
 - d. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial Magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the Magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
- Provided that—
- i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).
12. It is clear that the essential documents that must comprise an appeal include the Judgment, order or the decree appealed from. In this case the judgement of the Court that is sought to be appealed against is on pages 12 – 16 of the Record of Appeal. I find that the Record of Appeal is competently before the Court. Issue number one is therefore disallowed.
13. The key issue for determination under the second limb is who between the parties is the owner of the suit land. Evidence was led by the Appellant that he acquired the land in 1994 from the Company



and made payments in installments. The receipts in support are found on pages 25, 28 and 29 of the Record of Appeal dated the 19/5/94, 18/6/94, 9/7/94, 21/8/2002, 13/8/2002 and 9/2/1994. It is the latter receipt which shows the installment payments made by the Appellant leading to the issuance of the clearance certificate No 219 for plot No 223 and dated the 29/12/1994.

14. The Appellant led evidence that he obtained title in 2020 in his name and nothing has come to his knowledge in form of a challenge to his title.
15. Section 26 of the *Land Registration Act* provides that:-

“26. Certificate of title to be held as conclusive evidence of proprietorship

- 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 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.
2. A certified copy of registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

16. The evidence of the Respondent in as far as the pleadings are concerned contradicts his evidence at the hearing. In his statement of defence he stated that he purchased the land from the Company in 1981 and was issued with Share Certificate No 258 for plot No 550B. He produced a Share Certificate No 258 on page 41 of the Record of Appeal. The land is 1/8 of an acre and is plot No 550B. During the hearing the Respondent led evidence as follows;

“I bought the land from the Company. I was not a shareholder. I bought the plot from a lady who was a shareholder. We worked together. It was 1981. We went to the Company. I was given a map and was shown by a Mwaura. The vendor was Mama Njoki. She was present when I was shown the plot. I bought it at Kshs 600,000/- . I do not have the sale agreement. I cannot trace it. I paid Kshs 2800/- to the Company for transfer. I have not produced the receipt but I was issued with certificate. Mama Njoki said the beacon number for the plot is 550B. It was taken to the lands office and given plot No 223.”

17. From the above evidence it is clear that the Respondent failed to produce evidence in form of a ballot; Share Certificate; payment receipts; sale agreement; transfer or Land Control Board consent to support that he acquired the land from the Company or the said Mama Njoki. There was no evidence to support that the said Mama Njoki was even a member of the Company.



18. In the case of *Munvu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009 where the Court of Appeal held that:-

“... We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

19. In this case it is manifestly clear that the Respondent did not produce evidence of how he acquired the suit land. At best the clearance certificate shows that his plot is Plot 550B. The map he produced is in support of Plot No 223 belonging to the Appellant. He failed to demonstrate the nexus between plot No 550B and plot No 223 on the Registry Index Map (RIM). He explained that No 550B is the beacon number and in the absence of a beacon certificate in support, the Court finds that the Respondent failed to show how he acquired the land.

20. Further the Court finds credence in the letter dated the 9/2/2022 authored by Kamere & Co Advocates which stated that according to the records of the Company plot No 223 belongs to the Appellant. This was not challenged.

21. In the absence of any evidence to the contrary and on a balance of probabilities, the Appellant proved that he is the registered owner of the suit land.

22. Having held that the Appellant is the owner of the land I find that the Respondent is a trespasser and award the sum of Kshs 200,000/- being general damages for trespass. The Court has considered the period of trespass and the denial of the use and enjoyment occasioned to the Appellant.

23. Having carefully considered the appeal in totality, I find that the learned Magistrate erred and misdirected herself to the facts and the law thus arriving at a flawed decision.

24. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follows the event. The Supreme Court in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise.

25. In the end the appeal is meritorious and it is allowed as follows;

- a. The appeal is allowed
- b. The judgement of the Hon C K Kisiangani (SRM) Delivered in Ruiru on the 16/3/2023 be set aside.
- c. General damages for trespass in favour of the Appellant in the sum of Kshs 200,000/-
- d. Costs of the suit and appeal shall be in favour of the Appellant.

26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE



Delivered online in the presence of;
Ms. Mwangi for the Appellant
Muhoro for the Respondent
Court Assistants – Phyllis/Oliver

