



REPUBLIC OF KENYA



Kioko v Mavoko Land Development Co Ltd (Environment and Land Appeal 31 of 2019) [2024] KEELC 5766 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 31 OF 2019**

**A NYUKURI, J
JULY 25, 2024**

BETWEEN

REUBEN MULWA KIOKO APPELLANT

AND

MAVOKO LAND DEVELOPMENT CO LTD RESPONDENT

(Being an Appeal from the judgment of Honourable Ocharo (Mrs) Senior Principal Magistrate, delivered on 24th June 2019 in Machakos CMCC Case No. 532'A of 2014)

JUDGMENT

Introduction

1. The appellant in this matter filed the instant appeal against the judgment of Honourable Ocharo (Mrs) Senior Principal Magistrate, delivered on 24th June 2019 in Machakos CMCC Case No. 532'A of 2014. In the impugned judgment, the learned magistrate dismissed the appellant's suit with costs to the respondent, finding that the appellant had not proved his claim on the suit property and therefore not entitled to the orders sought.

Background

2. Reuben Mulwa Kioko, the appellant herein who was the plaintiff in the original suit, filed a plaint dated 12th June 2014 against the respondent seeking the following orders;
 - a. A permanent injunction restraining the defendant either by themselves, their agents, servants and/or employees from trespassing, interfering, erecting any structures and/or in any other way dealing with plot Nos. 41 and 42 (Kasina Mlolongo) located within LR No.11895/35 (originally known as 11895/27).
 - b. General damages for trespass on the said land.



- c. Costs and interest
 - d. Any other relief that court may deem fit to grant.
3. It was the plaintiff's case that he was the legal owner of plot numbers 41 and 42 (Kasina Mlolongo) located within LR No. 11895/35 (originally known as LR 11895/27) in Mavoko Municipality (the suit property) having been in possession thereof since 2004. That the respondent through its agents and/or employees was trespassing onto the suit property without having any registrable interest thereon.
 4. The suit was opposed. The respondent filed a statement of defence dated 20th June 2014. He denied the plaintiff's claim and further denied knowledge of existence of LR 11895/27 or 11895/35 as claimed and termed the allegations as false, forgery and fraudulent. He also argued that the plaintiff was a trespasser onto the defendant's parcel of land LR No. 25062 measuring approximately 17.58 Ha. He further denied receipt of any notice to sue and averred that there was a pending suit in court over the same property between the parties.
 5. The matter proceeded for a full hearing. Consequently, upon considering the pleadings, evidence and parties' submissions, the trial court found that the plaintiff had not proved his case on a balance of probabilities and that it was not clear from the evidence before court that he was entitled to the orders sought.
 6. Aggrieved with the trial court's determination, the appellant appealed against the same by a Memorandum of Appeal dated 16th July 2019 citing the following grounds;
 - a. The learned magistrate erred in law and in fact by dismissing the plaintiff's suit against the defendant.
 - b. The learned magistrate erred in law and in fact by finding that the defendant is the rightful owner of the suit property.
 - c. The learned magistrate erred in law and in fact by issuing a permanent injunction against the plaintiff.
 - d. The learned magistrate erred in law and in fact by ordering the plaintiff to pay costs for the defendant.
 - e. The learned magistrate erred in law and in fact by failing to consider the evidence adduced by the plaintiff and his witnesses.
 - f. In all circumstances of the case, the findings of the learned magistrate are insupportable neither in law nor on the basis of the evidence adduced.
 7. The appellant then sought the following prayers from this court;
 - a. That the appeal be allowed.
 - b. The judgment in favour of the respondent herein be set aside.
 - c. The order made by the learned Magistrate in the subordinate court as to damages, interests and costs be set aside.
 - d. The appellant herein be awarded the costs of this appeal and in the subordinate court.
 8. Responding to the appeal, the respondent filed a notice of objection to the appeal dated 3rd May 2023 citing the following grounds;



1. The appeal was filed out of time without seeking the honourable court's leave to file out of time the said appeal.
2. That the appeal has been overtaken by events following ELC No. 366 of 2009 between [*Mavoko Land Development Company Limited v Kasina Housing Scheme*](#) which decided the fate of the appellant.
3. That the matter is res judicata and the appeal is malicious and a waste of the honourable court's time.
4. That the appellant has filed multiple suits in other courts over the same subject property against the same party which matters have been determined and rulings delivered accordingly;
 - a. Mavoko CMCC Civil Suit No.12 of 2020, *Reuben Mulwa Kioko v Benson Kithuku & Another* (Ruling delivered on 5th October 2020).
 - b. Mavoko Case No.18 of 2021, *Reuben Mulwa Kioko v Mavoko Land Development Company Limited & Another* (Ruling delivered on 17th November 2022).
 - c. Machakos Appeal No.12 of 2020, *Reuben Mulwa Kioko v Benson Kithuku & Another* (Ruling delivered on 9th February 2023).
9. The appeal was canvassed by way of written submissions. Both parties filed their respective submissions. The appellant's submissions are dated 2nd March 2023 whereas the respondent's submissions are dated 17th May 2023.

Submissions by the appellant

10. Counsel for the appellant laid down three issues for determination by the court. Regarding their first issue of whether the learned magistrate erred in law and in fact by finding that the defendant is the rightful owner of the suit property, counsel submitted that the respondent had not proved the legality of the said title deed as they did not call any expert witness or produce any evidence or call a document examiner to confirm the authenticity of the title. To buttress this argument, reliance was placed on section 109 of the [*Evidence Act*](#) and the case of [*Estate of Pradeep Bebal \(deceased\)*](#) [2019] eKLR.
11. The appellant's second issue was whether the trial magistrate erred in law and in fact by dismissing the plaintiff's suit against the defendant. In that regard, it was submitted for the appellant that the trial court erred by passing judgement without consideration of an expert witness or a document examiner. On their final issue of whether the learned magistrate erred in law and in fact by issuing a permanent injunction against the plaintiff, counsel argued that the respondent failed to prove that the title deed in possession of the appellant was forged, placing reliance on the case of [*Josphat Kuria Gathoni v James Maina Njoroge & 3 Others*](#) [2019] eKLR.

Submissions by the respondent

12. Counsel for the respondent started by giving a historical background of the matter, highlighting that the appellant filed Machakos CMCC No. 532A of 2014 when Machakos ELC Civil Suit No. 366 of 2009, was pending. It was also their submission that whereas the judgment was delivered on 24th June 2019, it was not until 30th June 2022 when this appeal was preferred against the respondent. Reliance was placed on Section 79G of the [*Civil Procedure Act*](#), arguing that the appeal was filed out of time. Further reliance was also placed on the case of [*Paul Njage Njeru v Dr. Kariya Mugambi*](#), Meru HC Misc Application No. 5 of 2020.



13. Counsel also argued its objection to the appeal and submitted that the appellant had filed several other suits over the same property, matters which had been determined already.

Analysis and determination

14. The court has carefully considered the appeal, the objection and the parties' rival submissions. Two issues arise for determination;
- a. Whether this appeal was filed out of time, and
 - b. Whether the trial court was right in dismissing the appellant's suit.
15. Section 79G of the *Civil Procedure Act* provides that appeals from the lower court to this court ought to be filed within 30 days, unless leave is granted to file appeal out of time where there is good and sufficient cause. In this case, judgment was delivered on 24th June 2019 and the appeal was filed on 10th July 2019. Therefore, it is clear that the appeal was filed on the 17th day after delivery of judgment and thus within the statutory period. The respondent's argument that the appeal was filed on 30th June 2022 is far fetched as this appeal was filed in 2019 and not 2022. Therefore, I find and hold that the appellant did not need leave of court to file this appeal, and the appeal before me is competent.
16. Sections 107, 108 and 109 of the *Evidence Act* places the burden of proof in a case on the plaintiff and requires that any person making an allegation is obligated to prove the allegation. The above provisions state as follows;
107. Burden of proof
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
17. The Supreme Court in Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another v. IEBC & 2 Others* (2017) eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden



shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....

18. In this case, the appellant alleged that he owns plot numbers 41 and 42 within parcel Number 11895/35 originally 11895/27 upon which the respondent trespassed. The respondent on the other had denied the existence of title number 11895/35 or 11895/27 and insisted that the land in issue is its own parcel title LR No. 25062. Therefore, the appellant had the burden to prove the following;
 - a. The existence of LR No. 11895/35
 - b. The process in which parcel 11895/27 was changed to title 11895/35 and that the said process was lawful.
 - c. That the suit property is not LR No. 25062.
 - d. The manner of his acquisition of the suit property.
 - e. That the respondent had trespassed on his property.
19. The evidential burden would only shift from the appellant to the respondent upon proof of the above elements.
20. Article 40 (1) and (6) of the *Constitution of Kenya* 2010 provides that the right to own and acquire property is protected only in regard to lawfully acquired property.
21. Section 26 of the *Land Registration Act* provides that a certificate of title is conclusive proof of absolute and indefeasible ownership of land unless it is proved that the title was acquired by fraud, misrepresentation, illegality, want of procedure or corrupt scheme.
22. Section 25 of the *Land Registration Act* provides that the rights of a registered proprietor of land are protected in law, against all other interests save in regard to interests specified therein.
23. I have considered the documents produced by the appellant before the trial court and there is no evidence of title No. 11895/27 or 11895/35 and or an official search thereof. I am therefore not convinced that parcel LR No. 11895/35 (formerly LR 11895/27) exists. I have considered the allotment letters produced by the appellant. They are alleged to be signed by the Commissioner of Lands and they are dated 14th December 2007.
24. As the suit property is alleged to have been allocated before the 2010 *Constitution*, therefore the applicable the legal regime would be the *repealed Constitution*, the *repealed Government Lands Act* and the *repealed Trust Lands Act*. The Commissioner of Lands was mandated to administer Government lands and Trust Lands only as was provided for under sections 5 of the *Government Lands Act* and section 53 of the *Trust Lands Act* respectively. There was nowhere within the law where the Commissioner of Lands could administer private property. Even regarding Government land, the land that was available for allocation was unalienated Government land only, and not any other Government land. Section 2 of the *repealed Government Lands Act* defined unalienated Government land to mean Government land which is not for the time being leased to any other person, or in respect of which the commission has not issued any letter of allotment. On the other hand, trust land was land vested in county councils then.



25. In this case, the appellant alleges to have purchased land registered in the name of a private entity, namely, Kasina Housing Scheme. Therefore, if the land that was allegedly allocated to the appellant was part of LR No. 11895/35 (originally LR No. 11895/27) belonging to Kasina Housing, then the same would have been private property and therefore outside the ambit and jurisdiction of the Commissioner of Lands, hence the latter would have no jurisdiction or legal basis to issue allotment letters in regard to the same. In the premises, the allotment letters produced by the appellant are irrelevant and not evidence of the appellant's ownership.
26. In addition, the appellant did not provide any evidence of acquisition of the two plots he alleged to have acquired from Kasina Housing Scheme. There was no sale agreement to show purchase or any other evidence to demonstrate the manner of the acquisition of the suit property. In the premises, the appellant has not demonstrated that he has proprietary rights capable of being protected under Article 40 (1) and (6) of the Constitution as read with section 26 of the Land Registration Act.
27. Trespass, according to the Black's Dictionary 11th Edition, is the unlawful entry into another's property. Hence, trespass is entry on another's land without their permission. Proof of ownership precedes proof of unlawful entry. Thus, a person alleging trespass against another person, must first prove that they own the land alleged to have been trespassed upon. In this case, the appellant failed to prove ownership of the suit property and therefore his claim of trespass has no basis.
28. As the appellant did not discharge his evidential burden of proof regarding his claim, the evidential burden did not shift to the respondent and therefore, the respondent was not obligated to prove anything since it was the appellant who sought for judgment as to his alleged legal right, and was under duty to prove his claim.
29. In the premises, I agree with the trial court that the appellant failed to prove on the required standard his claim over the suit property, and therefore the trial court was right in dismissing the same.
30. In the premises, there is no basis to upset the decision of the trial court. I therefore find no merit in this appeal and I dismiss the same with costs. This court takes judicial notice of the decision made in Machakos ELC No. 366 of 2009, which is against the appellant's claim, and takes into account the fact that the appellant has filed Mavoko CMCC No. 12 of 2020; Mavoko CMCC No. 18 of 2021; and Machakos Appeal No. 12 of 2020. It is therefore clear that the appellant is a vexatious litigant. As the appellant has filed several cases in regard to the suit property, I order that he will not file any other fresh suit before he settles the respondent's costs herein and in default, any fresh suit filed shall stand struck out.
31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the respondent

Court assistant – Josephine

