



**Mutuku v Kaminza (Environment and Land Appeal 18 of 2021)
[2024] KEELC 5457 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 18 OF 2021**

NA MATHEKA, J

JULY 24, 2024

BETWEEN

DICKSON MUOKI MUTUKU APPELLANT

AND

MRS. FESTUS KAMINZA RESPONDENT

JUDGMENT

1. This appeal lies from the Judgment/Decree of Chief Magistrate Hon. E.K Makori (as he was then) delivered on 18th February 2021 in MCCC NO. 991 of 2015 on the following grounds that;
 1. The Honourable Chief Magistrate erred in determining the matter in favour of the Respondent, despite the Appellant producing in court overwhelming evidence that the Respondent was and still is trespassing the suit premises;
 2. The learned Honourable Chief Magistrate erred in not holding that the Respondent had failed to strictly prove his claim;
 3. The learned Honourable Chief Magistrate erred in not considering the evidence adduced and submissions made on behalf of the Appellant and the Authorities cited before him;
 4. The learned Honourable Chief Magistrate erred in his evaluation and analysis of the evidence adduced and in not appreciating the Appellant’s testimony properly, equitably, judiciously and sufficiently or at all and further erred in drawing the inference it did, adverse to the appellant’s case;
 5. The learned Honourable Chief Magistrate’s decision was contrary to the weight of the evidence placed before him;
 6. The learned Honourable Chief Magistrate ought in all circumstances to have dismissed the Respondent’s case.



2. The appellant had sought a permanent injunction against the defendant from trespassing onto an untitled plot of land measuring 110 x 44 ft situated at Jomvu Aldina, Majengo Mapya hereafter known as the suit property. It was his contention that he bought the suit property from one Elizabeth Odhiambo on 29th August 2011 and the defendant trespassed onto the same and started roofing a house he had already began constructing. The defendant contends that her husband the late Festus Kaminza bought the suit property on 29th April 2008 and she started building a seven roomed house as well as a pit latrine. The learned Hon. E.K Makori (as he then was) decided in favour of the respondent due to the fact that the original purchaser was the defendant's deceased husband and that the claim by the said Elizabeth Odhiambo that she was the wife to the deceased and she contributed to the purchase of the plot was not convincing enough and that there is a gap on how title moved from the deceased to the said Elizabeth Odhiambo. The court also blamed the appellant for not conducting due diligence before buying the suit property.
3. The appellant in the above memorandum of appeal sought the following prayers:
 - a. That this appeal be allowed;
 - b. That the judgment/decree of the Chief Magistrate given on the 18th February, 2021 be reversed and set aside;
 - c. That an order be made dismissing the Respondent's case with costs to the Appellant;
 - d. That the costs of this Appeal be awarded to the Appellant.
4. Counsel for the appellant and the respondent filed their submissions on 12th February 2024 and 21st May 2024 respectively. Having considered the pleadings and the rival submissions and the case precedents cited the court has found the following issues for determination;
 - i. Whether the plaintiff proved his case on a preponderance of evidence?
 - ii. What appropriate orders can this court issue?
5. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123 and in *Peters v Sunday Post Limited* [1958] E.A. page 424.
6. Counsel for the plaintiff argues that the plaintiff entered into a written agreement with Elizabeth Odhiambo on 28th August 2011 as required under section 3 (3) of the Law of Contract Cap 23 and hence the respondent was trespassing as the plot belonged to the plaintiff. However, the said Elizabeth Odhiambo claims that she did not witness the agreement dated 29th April 2008 between the original owner Mbare Kahindi and the deceased. She claimed that she was developing the suit property and managing other plots with the deceased before he died. Further she testified that she did not know that the deceased was married to the defendant. Meanwhile the defendant claimed that the deceased had legally bought the suit property and fenced it and started constructing a seven roomed house. She denies that the deceased was a witness to the sale agreement between Elizabeth Odhiambo and the plaintiff.
7. As the trial court rightfully put it, the common denominator was Elizabeth Odhiambo and she had portrayed herself as a wife to the deceased. Another person who would have greatly assisted the court



is the *'fundi'* known as Jackson Mbungu Ndaro as he is known by both the Elizabeth Odhiambo and the respondent. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -

- (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”

8. In *Miller vs Minister of Pensions 1947 All E.R. 372*, Lord Denning puts this standard of proof in the following terms;

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

9. In *James Muniu Mucheru vs National Bank Of Kenya Ltd C.A Civil Appeal No 365 Of 2017 [2019] eKLR*, the Court stated as follows:

Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”

10. It is not disputed by both parties that the original owner is Mbare Kahindi, however the clash comes in thereafter. On one hand, the appellant claims that the suit property belonged to Elizabeth Odhiambo who sold it to him and Elizabeth claims to have bought the suit property from Mbare Kahindi without producing any evidence. It is unclear how the said Elizabeth Odhiambo gained ownership. She did not have any title to pass on to the appellant at the time of the sale agreement. On the other hand, the respondent who is the legal wife of the deceased produced a sale agreement between Mbare Kahindi and the deceased Festus Kaminza. She later obtained letters of administration. She stated that by a sale dated 29th April 2008 Mr Festus Kaminzi purchased the suit land from Mbare Kahindi Mweri. DW2 and DW3 corroborated her evidence that the plot belonged to Festus Kaminza who died on the 21st July 2011. How then was Elizabeth Odhiambo able to sell the suit land on 29th August 2011 when the owner was already deceased. Even if she was the wife and this has not been established she had no capacity to meddle with the estate of the deceased without first obtaining letters of administration. I find that the respondent is the legitimate wife and owner of the suit land. I find that this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

