



**Nginai v Amir (Environment and Land Appeal E002 of 2023)
[2024] KEELC 5352 (KLR) (Appeals) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
APPEALS
ENVIRONMENT AND LAND APPEAL E002 OF 2023
EK WABWOTO, J
JULY 19, 2024**

BETWEEN

ANNE NGINAI APPELLANT

AND

AHMED JULIUS AMIR RESPONDENT

(Being an appeal from Judgment delivered by Hon. A. M. Obura (Mrs.) Chief Magistrate in ELC Case No. 7 of 2018 at Voi Law Courts on 6th July 2023)

JUDGMENT

1. This appeal arises from the Judgment of Hon. A. M. Obura (Mrs.) Chief Magistrate in ELC Case No. 7 of 2018 at Chief Magistrate Court in Voi on 6th July 2023. The Learned Magistrate having considered the suit before her entered judgment in favour of the Respondent by issuing a declaration to the effect that the suit plot being unsurveyed land at Soko la Zamani in Mwatate Town belongs to the Respondent. The Learned Magistrate also awarded costs of the suit to the Respondent.
2. The Appellant being aggrieved by the Judgment of the Learned Magistrate filed the instant appeal vide a Memorandum of Appeal dated 7th August 2023. Four (4) grounds were raised in the said Memorandum of Appeal which in summary were to the effect that the Learned Magistrate erred in law and fact by not considering the evidence given by the Appellant. The Appellant now seeks that the entire judgment delivered by the Learned Magistrate be set aside and judgment be entered in her favour. The Appellant also seeks costs of the Appeal.
3. The Appeal was canvassed by way of written submissions. The Appellant filed her written submissions dated 13th May 2024. No submissions were filed by the Respondent neither did he participate in the appeal. That notwithstanding the court has a duty to consider the entire record and render its judgment.



4. The Appellant in her submissions began by reiterating the facts of the case as presented before the trial court. She also submitted that the said parcel of land was bought by her late husband by the name Jonathan Tsuma Kazungu (Deceased) and her late husband had bought the said parcel of land from Mr. Kimani Mbagite Mwaura sometime in 1999 and later on made an agreement for sale on 7th June 2010, before the Area Chief Mwatate location and before M/s Charles K. Mutusi Advocates. Her late husband was paying ground rates to the County Council since he bought the land until the time he passed on that is October 2015. They started constructing a family house which house was completed sometimes in September 2015 and they moved in around October 2015 and started living in the said house, without anyone trying to stop them or claiming any interest to the said property.
5. She also submitted that on 28th November 2015 her husband passed away just one month after they had moved to their family house. Sometimes in 2018 after her husband passed away the Respondent herein with his friend one Bilal Mumo Mwasi both being land selling agents started claiming that the said parcel of land known as Plot Number 368 located at Soko ya Zamani in Mwatate belonged to them. She reported the matter to the area chief and both of them were summoned by the Chief. Mr. Bilal Mumo Mwasi attended the meeting but Ahmed Julius Amir did not attend and in that meeting an agreement was written which said that the land belong to her and her family and Mr. Bilal Mumo Mwasi signed and assured her of no further interference with the property.
6. It was also submitted that her Advocate who was on record forgot or omitted to produce the sale agreement and receipts which showed her late husband had bought the land from Mr. Kimani Mbagite Mwaura and was paying land rates to the County Council from the time he bought the land until the time he passed away in 2015.
7. The Appellant concluded her submissions by urging the court to set aside the judgment of the trial Magistrate and in the alternative she be given a second chance to defend her suit.
8. I have considered the appeal, submissions and the applicable law. This court has noted the Appellant's submissions introduced new evidence that was unpleaded and uncanvassed before the trial court and the learned trial magistrate did not pronounce on this evidence. The Appellant submits that the said evidence was not produced in court by her previous advocate on record. It is notable that in the appeal the hearing is confined to issues raised in the Memorandum of Appeal and one cannot raise an issue that was not raised in his or her Memorandum of Appeal. In the circumstances the court is unable to accede to the Appellant's request.
9. The Appellant has not sought leave to adduce new evidence and on that basis, I will disregard that line of evidence. See [Kenya Hotels Limited v Oriental Commercial Bank Limited](#) [2018] eKLR
10. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties in the record of appeal and lower court record and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.
11. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the learned trial magistrate was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused his discretion.



12. Having considered the entire record of appeal together with the submissions filed by the Appellant, the main issues for consideration herein are as follows:-
 - a. Whether this appeal is merited.
 - b. What are the appropriate reliefs to grant.
13. It was the Appellant testimony before the trial court that her late husband purchased the suit plot from Kimani Mwaura sometime in 1999. She testified that there was a mud thatched house without windows and had doors, wooden frames which had been eaten by termites. She also testified that they eventually constructed their house on the suit plot without any resistance between 2013 and 2015 when it was completed. It was also her testimony that the Respondent attempted to destabilize her family but her husband stopped him. She also stated that the Respondent's deceased mother used to cohabit with Kimani Mwaura before they parted ways and that was when Kimani Mwaura sold them the suit property.
14. The Respondent on the other hand testified that his late mother owned the suit property and he inherited the same from her. He denied the allegations that his late mother was a lover to Kimani Mwaura and he also stated that after the death of his father, his mother never remarried. He also called 3 other witnesses to support his case Mariam Mohamed who testified as PW2 who was a neighbour to the Respondent's mother and she testified that the suit property was allocated by the elders to the Respondent's mother way back in 1998. She also stated that she did not know Kimani Mwaura. Jones Mwambela Mwandima a retired Assistant Chief also testified that the Respondent's mother and her neighbours were allocated plots at Soko ya Zamani by the elders in 1987. He also stated that when Kimani Mwaura was summoned to attend a meeting seeking to resolve the dispute, he did not honour the summons. Robert Mwandolo Malate testified as PW4. He stated that he was a businessman and Chairman of the village elders Soko ya Zamani village. He equally stated that he frantically tried to reach out to Kimani Mwaura with a view of resolving the issue but the same was not successful. He also stated that he did not know Kimani Mwaura. He further stated that there was a meeting held at the Chief's office which he attended and the Committee resolved that the suit property belonged to the Respondent's mother and that the suit property should be registered in the Respondent's name.
15. Section 26 of the [Land Registration Act](#), 2012 provides;
 - “(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.”
16. However However, the case herein relates to an unregistered land and in that context this court will seek to determine the Appeal by establishing which party had satisfactory proved the root of ownership of the suit property.



17. From the evidence that was tendered the Respondent was able to adduce evidence confirming that he is the owner of the suit plot. The Respondent produced minutes of the meeting held on 20th November 2013 by the Soko ya Zamani Community Group which confirmed that he was the owner of the suit property. The Respondent also produced subscription receipts from 2010 to 2017 paid to Mwatate Plot Owners Association showing that he had made the requisite subscriptions for the suit plot. The Appellant on the other hand was not able to adduce any evidence of how Kimani Mwaura acquired the suit property and sold it to her neither did she call the said Kimani Mwaura to testify on her behalf in the matter. In the absence of any other documentation it is the finding of this court that the Appellant was not able to prove her interest and or claim to the property and as such the appeal is not merited.
18. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the Learned Magistrate. Consequently, the appeal is devoid of merit and the same is hereby dismissed.
19. On the issue of costs, costs are a discretion of the court and in any event to a party who is successful. However in this case, the Appeal was not contested by the Respondent neither did he participate in the proceedings and in the circumstances the court directs each party to bear own costs of the appeal.
20. In conclusion this court makes the following final orders:-
 - i. The Appeal is devoid of merit and is dismissed.
 - ii. Each party to bear own costs of the Appeal.

Judgment accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT VOI THIS 19TH DAY OF JULY, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Anne Nginai the Appellant in person

N/A for the Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

