



REPUBLIC OF KENYA



Nareshe Butchers Self Help Group v Kiambi & another (Environment and Land Appeal E001 of 2022) [2024] KEELC 5434 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E001 OF 2022
MN GICHERU, J
JULY 17, 2024**

BETWEEN

NARESHO BUTCHERS SELF HELP GROUP PLAINTIFF

AND

KENNETH KIAMBI 1ST DEFENDANT

COUNTY COUNCIL OF OLKEJUADO 2ND DEFENDANT

JUDGMENT

1. This appeal is against the judgment and decree in Case No. Kajiado/MC/ELC 90/2013. In the judgment dated 22/12/2021, the learned trial Magistrate Hon. I.M. Kahuya, Principal Magistrate found that the 1st respondent Kenneth Kiambi is the lawful owner of Plot No. 167 B(1) Industrial Noonkopir Trading Centre.
2. Dissatisfied with the judgment by the learned Magistrate, the appellant filed a memorandum of appeal dated 5/1/2022 challenging the decision on the following grounds. The learned Magistrate erred in law and/or fact in or by,
 - i. Finding that the plaintiff had prima facie proved ownership of the suit property.
 - ii. Finding that the suit land had been allotted to the appellant,
 - iii. In disregarding the evidence and report dated 25/7/2019 by the County Surveyor, Mr. Joshua Lemaikai.
 - iv. Failing to take into account the evidence of Mr. Okoth Charles Agira, PW 2.
 - v. Disregarding the evidence of the County Land Registrar Mr. Jonathan Oseur.
 - vi. Disregarding the 2nd defendants submissions dated 26/10/2021.



- vii. Finding in favour of the plaintiff.
3. The appellant therefore seeks the following orders.
- a. This appeal be allowed.
 - b. Review, variation and the setting aside of the judgment of the trial court made on 22/12/2021.
 - c. A finding by this court that the 1st respondent has encroached on the appellants land being Plot No. 212/Industrial Noonkopir Trading Centre.
 - d. The costs of this appeal be awarded to the appellant.
 - e. Such further orders as may be deemed fit by this court.
4. The brief facts of the case according to the 1st respondent are as follows. The suit premises Plot No. 167B(1) was allocated to one Mugambi Murwithania on 13/8/2001 by the predecessor of the 2nd respondent the Olkejuado County Council. On 14/8/2010, the said Mugambi Murwithania sold the suit land to the 1st respondent. Prior to the purchase, the 1st respondent carried out a search that confirmed Mugambi as the lawful owner of the suit land. Thirdly, the 2nd respondent issued the 1st respondent with an allotment letter. Fourthly, the 2nd respondent issued the 1st respondent with permission to subdivide the suit land. Fifthly, the 1st respondent built a house on the suit land which he occupies. Sixthly, on 3/4/2013 he received a letter from the 2nd respondent requiring him to vacate the suit land and remove his structures therefrom. When he approached the 2nd respondent with all the evidence of his ownership, they insisted that the 1st respondent did not own the suit land. It is then that he filed the suit in the lower court.
5. On the part of the appellant and the 2nd respondent, the facts are as follows. The land allocated to appellant was number 212/Industrial – Noonkipir Trading Centre which is separate for the 1st respondent's land to 167(B) (1). This is according to the evidence by Okoth Charles Ameso Angira vide a report dated 3/12/2018. He is a retired surveyor of the 2nd respondent familiar with the dispute. A later report dated 25/7/2019 by Joshua Lemaikai is not clear but it implies that the 1st respondent's plot does not exist on the ground. A report by the County Director Land Registry Mr. Jonathan Oseur dated 27/8/2021 says that the documents of the 1st respondent do not exist. The ones in existence are those of the appellant.
6. Counsel for the appellant and the 1st respondent filed written submissions dated 9/10/2023 and 7/12/2023 respectively. The issues identified by the appellants' counsel are as follows.
- i. Whether the applicant's application to adduce addition evidence should be allowed.
 - ii. Whether the plaintiff had proved ownership of Plot No. 167B (1).
 - iii. Whether the 1st respondent has encroached on the appellants' land.
 - iv. Whether the 2nd respondent should be struck off from this appeal.
- On the other hand, the 1st respondent's counsel identified the following issues.
- i. Whether this court can strike out a party from this appeal.
 - ii. Whether this court can strike out documents filed during appeal.
 - iii. Whether a party who did not participate in a suit can appeal against the same.



- iv. Whether the 1st respondent will be prejudiced if the party and documents are allowed (sic).
- v. Is this a gross abuse of court process.

This being a first appeal, I am bound by the decision of the court of appeal in *Selle and another v Associated Motor Boat Company Limited and others* [1968] EA 123 whose ratio decidendi is as follows.

“An appeal to the High Court from a trial is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put, they are that this 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, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

7. I have carefully considered the entire appeal including the memorandum and the grounds, the record, the submissions by learned counsel and the issues as well as the case. I have also considered the notice of motion dated 28/11/2022. I make the following findings on the ground of appeal as well as the issues as set out in the submissions.
8. On the first of the appellant’s issues, I find that the application to adduce additional evidence should not be allowed for the following reasons. Firstly, the application is not anchored on any of the seven grounds set out in the memorandum of appeal dated 5/1/2022. A party is bound by his pleadings and since none of the grounds mentions the need to adduce additional evidence it would amount to ambush to file an application outside the pleadings. Secondly, the application falls outside the parameters set by the Supreme Court of Kenya in the case of *Mohamed Abdi Mahamud –versus- Ahmed Abdullahi Mohamad and 3 others* [2018] eKLR for allowing additional evidence in appellate courts in Kenya. In the said parameters relevance of the new evidence, its impact on the case and other considerations are set out.
9. Regarding the second issue, I find that the 1st respondent proved ownership of Plot No. 167B (1). He was able to prove possession of the suit land as well as development of the same with the authority of the second respondent. The trial Magistrate did not err in this regard. The plaintiff’s evidence was corroborated by that of Okoth Charles Amero Angira as to allotment and development of the suit land in favour of the 1st respondent.
10. As for the third issue, I find that encroachment by the 1st respondent on the appellant’s land was never proved. The 2nd respondent’s lack of records cannot be blamed on the 1st respondent. As the trial Magistrate correctly found, the 1st respondent’s allocation of the suit land was the earlier in time than that of the appellant and it had to prevail over that of the appellant.
11. On whether the 2nd respondent should be struck off from this appeal, I find that it should not be struck off. It is a necessary party because it participated in the trial before the lower court and if any orders are made in this appeal, they will affect the second respondent. The grounds of appeal aver that the trial Magistrate disregarded the evidence of Okoth Charles Ngira Jonathan Oseur and Joshua Lemaikai. I find that this is not so because at pages 278 and 279, this evidence is considered at length except that



of Charles Agira Okoth which was very favourable to the 2nd respondent. At page 281 the learned trial Magistrate made a finding where she said

“In other words the present dispute was one of double allocation of land occasioned by either the defunct County Council of Olkejuado or by the 1st defendant’s mismanagement of records during their countywide validation exercise”.

It is my finding that the trial Magistrate was right in her finding that the 2nd respondent’s mismanagement of its records cannot be blamed on the 1st respondent.

12. Having made my findings on the appellants’ issues, I find that it would be superfluous to make any findings on the 1st respondent’s issues or even consider the application dated 28/11/2022 which have also been considered in the findings above.

For the above stated reasons, I find no merit in the appeal and I uphold the decision of the learned trial Magistrate. Costs to the 1st respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 17TH DAY OF JULY 2024.

M.N. GICHERU

.....

JUDGE

