



REPUBLIC OF KENYA



**Kagoro v Zomolo (Environment and Land Appeal E033 of 2023)  
[2024] KEELC 6154 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E033 OF 2023  
NA MATHEKA, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**MARGARET KAGORO ..... APPELLANT**

**AND**

**ANTONY MUHUBU ZOMOLO ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein being dissatisfied with the decision of Hon. M.L. Nabibya in Chief Magistrate Environment and Land Cause No. 80B of 2022 delivered on 18th May 2023 wish to Appeal against the entire judgment & decree on the following grounds;
  1. The learned trial Magistrate erred in law and fact by reaching a finding that Respondent had proved ownership of the suit property without proving root of the title.
  2. The learned trial Magistrate erred in law and fact by tracing in the Case Tracing System (CTS) High Court Appeal No.126 of 2022 of Court of Appeal Case No. 126 of 2019.
  3. The learned trial Magistrate erred in law and fact by reaching a finding that Respondent was entitled to all reliefs sought yet the Respondent had failed to discharge the burden of proof to set the standard.
  4. The learned trial Magistrate erred in law and fact in reaching a finding that the suit by the Respondent was not statute barred.
  5. The learned trial magistrate erred in law and fact in finding to consider that the Respondent had not produced surveyors report that confirmed that the Appellant was in occupation of the suit property.
  6. The learned trial Magistrate erred in law and fact when she failed to consider the Appellant arguments, submissions and authorities when arriving at his decision.



2. The Appellant prays that the appeal against the Judgment & Decree of the learned trial magistrate delivered on 18<sup>th</sup> May 2023 be allowed with costs.
3. This court has considered the appeal and the submissions therein. This is an appeal from a judgement delivered on 18<sup>th</sup> May 2023 in CM ELC No. 80B of 2022 by Hon. Nabibya (SPM) in Antony Muhubu Zomolo vs Margaret Kagoro. The learned magistrate held that the respondent (plaintiff therein) had proved ownership of Land Parcel No. MN/II/9195 by producing a certificate of title and copy of transfer, while the appellant (defendant therein) had not presented any tangible evidence to prove she had occupied the suit property. The learned magistrate further found that the respondent only became aware of the appellant's occupation on 9<sup>th</sup> December 2015 and filed the suit the same month, hence not time-barred.
4. The appellant dissatisfied with the judgement, filed a Memorandum of Appeal dated 17<sup>th</sup> October 2023 seeking to set aside the judgment. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

5. In the trial court, the respondent averred to be the registered proprietor of Land Parcel No MN/II/9195 having purchased the same from one Saleh Mohamed Ramzan Nurmohamed. He produced a Certificate of Title No. CR 39165 Subdivision MN/II/9195 dated 26<sup>th</sup> April 2005. The respondent also produced a Transfer executed on 26<sup>th</sup> April 2005 in his favour by Saleh Mohamed Ramzan Nurmohamed for consideration of Kshs 100,000/=. The respondent stated at the time of purchase, he took vacant possession and placed beacons on the suit property, however on 9<sup>th</sup> December 2015, he found the appellant in occupation. The respondent on the other hand claimed to have been in occupation of the suit property with the appellant being aware of her occupation. She argued that the respondent had never taken possession of the suit property and urged the court to dismiss his claim as it was time-barred.
6. Having produced a certificate of title alongside its transfer form, the respondent established himself as the registered proprietor of the suit property. A certificate of title is conclusive evidence of proprietorship and the plaintiff having produced a title in their name, I find that he is the absolute and indefeasible owner of the suit property. Section 26 of the [Land Registration Act](#) states;

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.”

7. The appellant claimed the respondent’s suit was statute-barred, however, she did not come out expressly and seek the protection of the law under the doctrine of adverse possession, which is a limitation to the rights of a registered proprietor of land, provided by Section 7 of the *Limitation of Actions Act*, which states that;

an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

8. When the appellant claimed in her defence that the respondent was aware of her occupation of the suit property it clearly showed she did not oppose his ownership of the suit property but rather the physical occupation. The learned magistrate did not err in finding that the appellant did not produce any evidence to challenge respondent’s title to the suit property. The respondent as the registered proprietor is protected by the doctrine of indefeasibility of title as established under the Torrens system of registration anchored on Section 26 of the *Land Registration Act*. His title to the suit property as a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation and proved he is a party to that fraud. The appellant did not present any evidence before the learned magistrate to challenge the respondent’s title to the suit property within the confines of the law. The learned magistrate did not err in finding the defendant is an illegal occupant on the suit property and her eviction is imminent. I find no probable reason to disturb the judgement of the trial court and this appeal is dismissed with costs to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

