



**Wairagu v Mathenge (Environment and Land Appeal E006 of 2023)  
[2024] KEELC 6411 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6411 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL E006 OF 2023  
AK BOR, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**STEPHEN MURIITHI WAIRAGU ..... PLAINTIFF**

**AND**

**MARTHA NYAGAKI MATHENGE ..... RESPONDENT**

**JUDGMENT**

1. Through the amended memorandum of appeal filed in court on 4/6/2024, the Appellant challenges the findings of the Hon. Mr. B. Mararo, SPM delivered on 4/8/2023 in Nanyuki Chief Magistrates Court ELC Case No. E004 of 2021. The grounds of the appeal are that the Learned Magistrate erred firstly, by allowing a third party to testify instead of the Respondent under an invalid power of attorney; secondly, by denying the Appellant the right to testify in his defence after mistakenly recording that the Appellant had not appeared on the date fixed for defence hearing; thirdly, by not making a finding that the Respondent had failed to prove that she acquired the title over the suit land procedurally and for awarding unwarranted damages which were inordinately high in light of the circumstances. The Appellant sought to have the judgment of the Learned Magistrate set aside and in its place, the Respondent's suit dismissed with costs to the Appellant. Alternatively, she sought to have the suit retried before the same or a different magistrate.
2. The court gave directions for the appeal to be canvassed through written submissions. The court has considered the submissions filed by the parties. The Appellant submitted that the Respondent filed a plaint dated 19/1/2021 seeking a declaration that the Appellant was a trespasser on the land known as Laikipia Nanyuki West Timau Block 2/761 (Matanya Marura) ("suit land"). She sought to have the Appellant evicted from the land, damages for trespass mesne profits, loss of user and costs. In response, the Appellant filed a defense whose substratum was that the Appellant had acquired title to the suit property through adverse possession. After hearing the suit, the Learned Magistrate gave judgment for the Respondent by declaring the Appellant a trespasser, mandated eviction and required payment of general damages for trespass amounting to Kshs. 500,000/=. The Appellant contended that under the



- Law of Contract Act a person must have the mental capacity to understand the nature and effects of their actions for any contract including a power of attorney to be valid.
3. The Appellant cited the decision *In the Matter of the Estate of GKK (Deceased)* [2013] eKLR where the court dealt with issues surrounding mental incapacity of an individual and the legal validity of actions taken by such persons who lacked capacity. Unfortunately, a copy of the decision was not furnished to the court. The Appellant submitted that the Respondent's son, Joseph Wanyiri Mathenge, made a statement claiming that the Respondent had developed problems with her ears and memory and had therefore given him the Power of Attorney to act on her behalf. The Appellant's contention is that if indeed the Respondent was mentally incapacitated, then she did not have the legal capacity to execute a valid power of attorney. Further, that the court did not authenticate the Power of Attorney as it was held in *Wiltshire v Cain* [1958-60] 2 Barb. L. R149. This decision was also not availed to the court. The Appellant also relied on *Re Estate of Alice Mumbua Mutua (deceased)* [2017] eKLR.
  4. The Appellant submitted that when the case came up for defence hearing on 21/2/2023, the court record showed that the Learned Magistrate indicated that there was no appearance without specifying who between the plaintiff and the defendant or both was not present. The Appellant asserted that he was present in court. Further, that despite Order 12 Rules 1 and 2 of the *Civil Procedure Rules* providing that the suit should be called out for hearing outside the court together with the names of the parties, there was no evidence on record to show that this was complied with which makes it impossible to ascertain whether or not he was present in court. The Appellant relied on decisions underscoring the principles of fair hearing and upholding Article 25 of the *Constitution* which guarantees the right of each party to be present and to participate in proceedings. He argued that the uncertainty of attendance or nonattendance should have been resolved in his favour.
  5. The Appellant contended that it was not enough for the Respondent to simply state that she was the registered owner of the suit property, that she was required to prove that she acquired the title lawfully. He went on to argue that he had filed his documents including a ballot card assigned to him by Matanya Company Estate Limited, sale agreement from the original allottee, clearance certificate from Matanya limited together with the register of members but unfortunately he was not afforded the opportunity to testify and authenticate the documents. He maintained that the Respondent solely relied on her registration as the owner of the suit property without demonstrating to the court how she came by that ownership. Further, he argued that the process through which a title was acquired was of cardinal importance and a person claiming such ownership had to demonstrate that they came by the ownership through a legally recognised process. The Appellant relied on *Wreck Motor Enterprises v The Commissioner of Lands and 3 Others* [1997] in support of this argument. The Appellant argued that the Respondent failed to prove her case convincingly before the trial court.
  6. The Appellant submitted that the damages awarded by the trial court were inordinately high yet the Respondent did not provide any evidence of loss incurred due to the Appellant's actions. That without such proof, the award of Kshs. 500,000/= given by the court was unjustified and excessively high. The Appellant invited the court to interfere with the award of the Learned Magistrate and set it aside.
  7. The Respondent gave a chronology of what happened in February 2021 after the Respondent was served and he entered appearance. She adverted to the application dated 4/2/2021 which sought the setting aside of the eviction orders and the subsequent court appearances resting with the application made by the advocates for the Appellant on 14/9/2021 to cease acting for him. She went on to add that the matter came up for hearing on 15/11/2022 when the Appellant appeared in person and cross-examined the plaintiff's witness. Further, that the Appellant was aware of the date when the defence hearing was to proceed.



8. The Respondent submitted that had the Appellant wished to be heard on his defence, he ought to have filed an application seeking to be heard instead of filing the written submissions in court on 23/2/2023. The Respondent argued that had the Appellant been present in court when the matter came up for hearing as he contended, he should have raised his hand for the trial court to see him when the matter was called out. She maintained that it was proper for the court to record that the defence had closed its case while noting that the Appellant went to the registry and filed his submissions on the date given by the court.
9. The Respondent maintained that the Learned Magistrate delivered a sound and just judgment after giving parties a chance to argue their cases. She urged that setting aside the judgment and decree would cause a great injustice to her. She cited various decisions including *Zingo Investments Ltd v Jundu Enterprises Ltd* (Civil Appeal 454 of 2019 [2023] KEHC 19078 eKLR and *Wachira Karani v Bildad Wachira* [2016] eKLR. The Respondent's counsel did not furnish the decisions to the court.
10. Regarding the validity of the Power of Attorney, the Respondent submitted that that issue should have been addressed at the trial court and not at the appeal stage as this will give rise to a completely new point of law for the first time on appeal. The Respondent cited the decision in *George Owen Nandy v Ruth Watiri Kibe* [2016] eKLR. The court has not had the benefit of reading that decision as well as the other decisions referred to in support of this point. The Respondent emphasised that she produced a title over the suit property and led evidence during the trial which showed that she acquired the suit land through a ballot issued to her by Matanya Estates Limited on 9/1/1982 yet the Appellant claims to have acquired the land vide a sale agreement dated 13/6/1987.
11. The Respondent relied on Sections 24, 25 and 26 of the *Land Registration Act*. She went further to argue that having been issued a ballot in 1982, there was doubt as to how the Appellant acquired his ballot in 1987. She added that she was issued a clearance certificate after payment of the requisite charges, a copy of which she tendered in evidence. The Respondent mentioned the discovery of a title over the suit property which had previously been issued to Allan Karinga Gituha. She urged that the Gazette Notice No. 14066 dated 25/10/2013 confirmed that a title over the suit property was issued to her on 7/8/2015. She maintained that the official search did not show that the Appellant was the registered owner of the suit property and that he ought to have challenged the notice in the Kenya Gazette by lodging an objection to it. She added that she served an eviction notice dated 30/10/2010 on the Appellant in accordance with Section 152 E and 152 F of the *Land Act*. She maintained that her title was first in time and was therefore valid.
12. On the Appellant's reliance on the documents which he had filed in court, the Respondent maintained that those documents were not tendered in evidence because the Appellant did not produce them at the trial. The Respondent invited the court to disregard those documents and dismiss the appeal for lack of merit.
13. What falls for determination in this appeal is whether the court should set aside the decision of the trial court to give the Appellant the opportunity to defend the Respondent's successful claim of ownership of the suit land. He contended that the Respondent lacked the legal capacity to donate a power of attorney to her son. The court agrees with the Respondent that this issue ought to have been argued before the trial court. The court notes that the Appellant conducted the trial in person after his advocate applied to cease acting for him.
14. Looking at the typed copy of the proceedings which took place before the trial court, it is apparent that the hearing of the suit proceeded on 15/11/2022 when the Appellant appeared in person while Mr. Karanja Maina represented the Respondent, who was the plaintiff in the suit. Both parties informed the court that they were ready to proceed with the matter. The hearing went on and Joseph Wanyiri



Mathenge gave evidence on behalf of the Respondent and was cross-examined by the Appellant. The Respondent closed her case and the court set down the suit for defence hearing on 21/2/2023.

15. The court record for 21/2/2023 reads as follows:

“No appearance.

Defense to close their case.

Mention for submissions on 11/4/2023.”

The court record shows that the Appellant appeared in person in the Civil Registry on 11/4/2023 when the matter was set down for submissions on 13/6/2023. The Appellant filed his submissions on 23/3/2023 and judgment was delivered on 4/8/2023.

16. In the judgment, the Learned Magistrate found that the Respondent had proved her case to the required standard and was entitled to the reliefs sought. The trial court cited decisions on the general damages to be awarded for trespass while noting that the Respondent had not adduced any evidence regarding the state or value of the suit property before and after the trespass making it difficult to access the general damages. The court took into account the fact that the Appellant had been in occupation of the suit property for a long period of time and proceeded to award general damages of Kshs. 500,000/=. The court declined to award mesne profits and loss of user. It issued a declaration that the Appellant was a trespasser on the suit property and ordered that he be evicted from the suit land.

17. In his written submissions before the trial court, the Appellant referred to his list of documents. This shows that he was under the mistaken belief that the court would consider his documents despite the fact that he had not adduced any evidence at the hearing. Although the submissions are written in layman language and approach, one can decipher the fact that the Appellant was making the point that he had brought documents to court confirming his ownership of the suit land. The court notes that the Appellant attached numerous documents to his submissions, which were omitted from the record of appeal. They include a permit dated 14/8/2013 granting approval for public prayers and collections towards the burial of Elijah Mwangi Muriithi on Block 2/761 Chuma Village.

18. Order 17 dealing with prosecution of suits frowns upon adjournments once a suit is set down for hearing at Rule 1 unless a party satisfies the court that it is just to grant the adjournment. When an adjournment is granted, the court is to give a date for further hearing or directions. Rule 2 brings in the aspect of a Notice to show cause being served upon parties by the court to show cause why the suit should not be dismissed where no application or step is taken in the suit for one year. The expectation is that a suit which is adjourned will be heard within a year from the date of the adjournment. Rule 3 stipulates that where parties fail to appear on a day to which the hearing of the suit is adjourned, the court may dispose of the suit in any of the modes prescribed by Order 12 or make such orders as it deems fit.

19. Order 12 of the *Civil Procedure Rules* which deals with hearing and consequence of non-attendance, gives the procedure to be followed when only the plaintiff or the defendant attends court on the date of hearing. It does not specifically address the scenario such as this one where both the plaintiff and the defendant attended court on 15/11/2022 when the plaintiff's case was heard but both parties do not seem to have been in court on 21/2/2023 when the defence hearing was scheduled to proceed. The Learned Magistrate proceeded to direct that the defence would close its case and set down the case for submissions after recording that there was no appearance for parties.

20. The Appellant contends that the matter was not called out by the clerk on 21/2/2023 when the trial court recorded that there was no appearance and that the defence was to close their case. If indeed



the Appellant was in court he ought to have made it known to the Learned magistrate that he was in court and proceeded with his defence even though the plaintiff was absent. This court is satisfied that by directing that the defence was to close its case in the absence of the parties, the trial court denied the Appellant who was acting in person, the opportunity to be heard on his defence. He averred in paragraph 3 of his defence that he had been in uninterrupted and continuous occupation of the suit property for 34 years and that the Respondent's rights over the land had been extinguished.

21. The court allows the appeal and sets aside the judgment and decree of the Learned Magistrate. The suit is remanded to the Chief Magistrates Court for trial by another Learned Magistrate other than the Hon. Mr. Mararo, SPM.
22. The Appellant will pay the Respondent's costs for the appeal.

**DELIVERED VIRTUALLY AT NANYUKI THIS 24<sup>TH</sup> OF SEPTEMBER 2024.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Mwangi Kariuki for the Appellant

Mr. Karanja Maina for the Respondent

Court Assistant- Diana Kemboi

