



REPUBLIC OF KENYA



**Masindano v Ambetsa (Environment and Land Appeal E005 of 2023)  
[2024] KEELC 6034 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6034 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
DO OHUNGO, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**REGINA NAFULA MASINDANO ..... APPELLANT**

**AND**

**ISAAC NANGENDO AMBETSA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal  
Magistrate's Court at Butere (Hon. E Wasike, Principal Magistrate)  
delivered on 4th July 2023 in Butere MCELC No. 13 of 2020)*

**JUDGMENT**

1. The background of this appeal is that the Respondent moved the Subordinate Court on 30<sup>th</sup> June 2020, through Plaintiff dated 5<sup>th</sup> March 2020, against the Appellant and Isabella Tsuma as First and Second Defendants, respectively. The Plaintiff was later replaced with Amended Plaintiff amended on 10<sup>th</sup> July 2020.
2. The Respondent averred in the Amended Plaintiff that he was the registered proprietor of the parcel of land known as Marama/Lunza/3749 (the suit property) which was a subdivision of Marama/Lunza/2107. He further averred that the Appellant and Isabella Tsuma had trespassed into the suit property and cultivated part thereof. He therefore prayed for judgment against the said defendants for a permanent injunction perpetually restraining them, their servants, agents and any persons claiming through them from trespassing onto, alienating, laying claim to, utilizing, developing, carrying out any works on, or interfering with his use of the suit property. He also sought costs of the suit.
3. The Appellant filed Defence and Counterclaim through which she denied the Respondent's averments and urged the Court to dismiss the case with costs. She averred in her counterclaim that on 9<sup>th</sup> July 1978, Benjamin Tsuma Amukaya, who was her late husband, purchased 2.5 acres of land parcel number Marama/Lunza/819 from Francis Ambetsa, who was the Respondent's father. That her husband paid



the purchase price and was given possession in 1978. She further averred that Francis Ambetsa passed away without passing title to her late husband. She therefore sought judgment against the Respondent for an order that 2.5 acres be carved out of the suit property and be transferred to her. In the alternative, she prayed that the Respondent refunds “the existing value of the land measuring 2.5 acres in such locality today and as shall be valued by this Honourable Court and/or by a registered valuer.” She also prayed for costs.

4. The claim against Isabella Tsuma was withdrawn through Notice of Withdrawal filed on 25<sup>th</sup> November 2021.
5. Upon hearing the matter, the Subordinate Court (Hon. E Wasike, Principal Magistrate) delivered judgment on 4<sup>th</sup> July 2023, dismissing the counterclaim and entering judgment in favour of the Respondent as sought.
6. Dissatisfied with the outcome, the Appellant filed this appeal on 14<sup>th</sup> July 2023, through Memorandum of Appeal of the same date. The grounds of appeal are as listed on the face of the Memorandum of Appeal. The Appellant prayed that the judgment of the Subordinate Court be set aside.
7. The appeal was canvassed through written submissions. The Appellant filed submissions dated 26<sup>th</sup> August 2023 through which she argued that although the sale agreements that she produced were not translated, the trial Magistrate disregarded the oral testimony of DW2, DW3 and DW4 who testified to the existence of the transaction referred to in the untranslated agreement. Further, that the trial Magistrate ought to have considered her occupation of suit property since 1978 and that she had established the ingredients of adverse possession. She relied on the case of Public Trustee v Wanduru Ndegwa [1984] eKLR in support that argument.
8. The Appellant went on to argue that the Respondent’s father did not evict the Appellant and her family in his lifetime and that even after getting title in 2015, the Respondent waited until 2020 to file the case before the Subordinate Court. Relying on the cases of Ibrahim Mungara Kamau v Francis Ndegwa Mwangi [2014] eKLR and Mehta v Shah [1965] E.A 321, she contended that equity aids the vigilant and not the indolent.
9. The Appellant also argued that the trial Court erred in failing to consider the fact that she had been in occupation of the suit property since 1978 and had buried several members of her family on the land. She wondered what becomes the fate of family graves and structures on the suit property, adding that the Respondent did not specifically seek eviction orders and that by allowing the claim as prayed, the trial Court was unjust to her. She therefore urged this Court to allow the Appeal with costs to her.
10. In reply, the Respondent filed submissions dated 25<sup>th</sup> October 2023. He argued that he is the registered proprietor of the suit property and that he had produced copies of his title deed, certificate of search, application for consent of the Land Control Board and transfer from his deceased father to himself to fortify his claim of ownership. He also relied on Section 26 of the *Land Registration Act*. Regarding the Appellant’s contention that the trial Court disregarded the sale agreement for no just cause, the Respondent contended that the agreement had no probative value since was not written in the language of the court and there was neither translation to the language of the court nor a certificate of translation.
11. The Respondent further argued that a party is bound by her pleadings and that there was no claim for adverse possession before the trial Court for consideration. That in any case, the Appellant did not prove the ingredients of adverse possession. He relied on the cases of Tabitha Waitherero Kimani v Joshua Ng’ang’a [2017] eKLR and Kimani Ruchire vs Swift Rutherford & Co. Ltd [1980] KLR 10



and contended that there is no fault in the judgment of the Subordinate Court. He therefore urged this Court to uphold the judgment.

12. This is a first appeal. The remit of a first appellate Court is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and to give reasons either way. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
13. I have considered the pleadings, evidence and submissions on record. The issues that arise for determination are whether the parties had established their respective cases and whether the reliefs sought were available.
14. There is no dispute that the Respondent is the registered proprietor of the suit property. His proprietorship is conceded by the Appellant and is captured in the certificate of search dated 27<sup>th</sup> January 2020 as well as the copy of title deed dated 14<sup>th</sup> January 2015. There is also no dispute that the Appellant had entered the suit property. Her own testimony was that she entered therein in the year 2020.
15. The rights of a registered proprietor of land are well defined in law. Such a proprietor is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. To successfully impeach a registered proprietor's title, a claimant must prove fraud or misrepresentation and that the registered proprietor was party to the fraud or misrepresentation. Alternatively, a claimant may demonstrate that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
16. Through her counterclaim, the Appellant contended that on 9<sup>th</sup> July 1978, Benjamin Tsuma Amukaya, who was her late husband purchased 2.5 acres of land parcel number Marama/Lunza/819 from Francis Ambetsa, who was the Respondent's father. She claimed that her husband paid the purchase price and was given possession in 1978, but Francis Ambetsa passed away without passing title to her late husband. A perusal of the copy of the register which the Respondent produced shows that Marama/Lunza/819 was subdivided to create Marama/Lunza/2107, among others. In turn, Marama/Lunza/2107 was subdivided to create the suit property and Marama/Lunza/3750.
17. The Appellant did not seek nullification of the Respondent's title at all. She did not approach the Subordinate Court under any of the options available under Section 26 of the *Land Registration Act*. She pegged her claim on 2.5 acres that she contends her husband purchased through what she claimed were two sale agreements dated 9<sup>th</sup> July 1978 and 5<sup>th</sup> May 1983. Pursuant to Article 7 (2) of *the Constitution* and Section 86 (1) of the *Civil Procedure Act*, the official languages of the Subordinate Court are Kiswahili and English. I have perused the two documents, and they are neither in Kiswahili nor English. No translation and certificate of translation were produced. The Appellant does not dispute that position. In those circumstances, the agreements, if any, were of no use to the Subordinate Court.
18. The Appellant sought to rely on the oral testimony of DW2, DW3 and DW4 to support her claims regarding existence of a sale transaction. The oral testimony does not avail her anything in view of the provisions of Section 97 of the *Evidence Act* which precludes admission of oral evidence to prove a written contract.



19. The Appellant argued in this appeal that the trial Magistrate ought to have considered her occupation of suit property since 1978 and that she had established the ingredients of adverse possession. It must however be noted that she did not plead adverse possession in her counterclaim and cannot be permitted to raise it at this stage. Parties are bound by their pleadings. See *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR. Even if she had pleaded it, such a claim could not succeed in view of her own admission that she was not in possession until the year 2020.
20. The Appellant did not prove her case and was not entitled to the reliefs that she sought in her counterclaim. On the other hand, the Respondent proved his case and was entitled to the reliefs that he sought.
21. I find no merit in this appeal, and I therefore dismiss it with costs to the Respondent.

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

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Appellant present

Ms Omar for the Respondent

Court Assistant: M Nguyayi

