



**Mwasungia & another v Kimbo (Environment and Land Appeal E005 of 2023)
[2024] KEELC 5960 (KLR) (Environment and Land) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E005 OF 2023
EK WABWOTO, J
SEPTEMBER 19, 2024**

BETWEEN

**KELVIN MWAKABA MWASUNGIA 1ST APPELLANT
BETHUEL NGUTA 2ND APPELLANT**

AND

THOMAS WANDETO KIMBO RESPONDENT

*(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM) delivered on
30th day of October, 2023 at Voi Magistrates Courts ELC Case No. E040 of 2021)*

JUDGMENT

1. This is an appeal from the judgment of and decree issued at the Chief Magistrate's Court at Voi by HON C.K Kithinji (PM) in ELC Case No. E040 of 2021 on 30th October 2023. In the said judgement, the trial court entered judgement in favour of the Respondent and granted the following orders: -
 1. A permanent injunction is hereby issued against the Defendant (Now appellants) their agents, servants and or workers from trespassing, selling, leasing and or interfering with the suit property located at junction area along Mombasa Nairobi highway within Kishamba B group ranch.
 2. The defendants now appellants shall vacate and hand over the suit premises to the plaintiff (now respondent) by close of business on 30th December 2023, in default the plaintiff shall be at liberty to exit them from the property.
 3. The Defendants will bear the Plaintiff's cost of the suit.



2. The Appellants being aggrieved by the said decision filed this instant appeal vide a Memorandum of Appeal dated 10th November 2023 upon which the following grounds of appeal were raised: -
 1. That the Honourable Magistrate erred in both law and fact in finding that the Respondent had proved his case to the required standard against the weight of the evidence on record.
 2. That the Honourable Magistrate erred in both Law and Fact in relying on evidence that did not exist and which was never presented before the honourable court in making her decision.
 3. That the Honourable Magistrate erred in both Law and Fact by taking into account extraneous matters in arriving at her decision.
 4. That the Honourable Magistrate erred in both Law and Fact in placing reliance on the documents produced by the Respondents in tracing root of title when indeed the said documents did not prove such a fact.
 5. That the Honourable Magistrate erred in both Law and Fact in failing to appreciate the fact that the Appellants had settled on the suit property by the fact of their membership to the Ranch.
 6. That the Honourable Magistrate erred in both Law and Fact in finding that the evidence produced by the Respondents had proved the fact of trespass to land.
3. The Appellant sought the following reliefs in respect to their appeal:-
 - a. That the judgment delivered on 30th October 2023 by HON C.K. Kithinji (PM) be set aside and or varied.
 - b. That Costs of this appeal be borne by the Respondent.
4. The Appeal was Canvassed by way of written submissions. The Appellants filed written submissions dated 14th June 2024 while the Respondent filed written submissions dated 5th July 2024.
5. The Appellant submitted on the following issues; whether the Honourable Trial Magistrate erred in both Law and Fact in finding that the Respondent had proved his case to the required standard against the weight of the evidence on record and who is to bear the costs of the appeal.
6. Relying on the cases of Caroline Aumiya Ochieng & Another -vs- Jare Anne Mbithe Gitau & 2 others (2015) eKLR and Mwanja & 5 others -vs- National Land Commission & Another (Environment & Land Case 100 of 2021) (2023) KEELC 16458 (KLR))27th March 2023 (Judgement), it was submitted that the land falls within a former group ranch now community land and hence proof of ownership has to be ascertained from documentation and ascertainable shares. It also requires demonstrating the history of the property from the time of adjudication.
7. In their submissions, the Appellants contended that the documentary evidence presented before the trial court by the Respondent in form of letters purportedly addressed to the Appellants did not prove ownership of the suit property and that the observations made by the trial court during the site visit casts doubt to the Respondent's evidence of ownership of the suit property.
8. It was submitted that the letters dated 4th March 2019, 12th April 2016 and 2nd August 2021 were never produced in evidence and as such those documents did not form the evidence before the trial court for consideration even if they were never disputed. The case of Kenneth Nyaga Mwige, Austin Kiguta & others (2015) eKLR Was cited in support.



9. It was contended by the Appellants that's the trial court accepted hearsay evidence that was tendered by PW2 – PW5 who purported to have allocated the Respondent the land without any documentary evidence. No evidence was produced by the Respondent as to the precise location, size and boundaries of the purported land. There was no evidence that the Respondent was the owner of the suit property occupied by the Appellants. The evidence produced only proved that the Respondent was the owner of the portion he is currently occupying and not the portion occupied by the Respondent.
10. It was further contended that the documents produced by the Respondent were not sufficient proof of ownership of the portion occupied by the Appellants and their trespass should have been disregarded by the court
11. The Appellants also submitted that the trial court erred in disregarding the evidence of the Appellants being DEXH – 1 which differed the right of members to occupy and use land and limited the duties of clusters who had no power to allocate and disposes land or act independently but only to assist the committee in resolving village disputes.
12. The Appellants concluded their submissions by urging the court to allow the appeal with costs based on their contention that the trial court was at fault in finding that the Appellants were trespasses and that the Respondent was the owner of the suit property against the evidence adduced which proved each parties benefit share and entitlement.

The Respondent's submissions

13. In his submissions, the Respondent submitted on the following seven issues: -
 - i. Whether the Honourable Magistrate erred on both Law and Fact in finding that the Respondent had proved his case to the required standard against the weight of the evidence on record.
 - ii. Whether the Honourable Magistrate erred in both Law and Fact in relying on evidence that did not exist an which was never presented before the Honourable Court in making her decision.
 - iii. Whether the trial Magistrate erred in both Law and Fact, taking inti account extraneous matters in arriving at her decision.
 - iv. Whether the trial Magistrate erred in both Law and Fact in placing relevance on the documents produced ny the Respondent in tracing root of title when indeed the said documents did not prove such a fact.
 - v. Whether the trial Magistrate erred in both Law and Fact in failing to appreciate the fact that the Appellants had settled on the suit property by the fact of their membership to the ranch.
 - vi. Whether the trial Magistrate erred in both Law and Fact in finding that the evidence produced by the Respondent had proved the fact of the trespass to land.
 - vii. Who should bear cost of the Appeal.
14. In expounding on the said issues, it was submitted that the Respondent had proved his case that he was indeed the legal owner of the suit property. He produced evidence showing entitlement to the suit property which evidence was further corroborated by his witnesses who testified to support his case.
15. It was contended that the Appellants did not adduce sufficient evidence rebutting the Respondent's claim.



16. In respect to the failure to produce some documents in evidence, it was argued that failure to produce the said documents in evidence is not fatal to the suit since the court went on site and confirmed the testimony adduced by the witness. The case of Beatrice Nyonyo Ndungu & Another -vs- Samuel K. Kanyore & 2 others (2017) e KLR was cited in support.
17. As to whether the Magistrate erred in both law and fact in considering extraneous matters in arriving at the decision, it was argued that the evidence tendered in court was not extraneous and supervenient but was indeed necessary and pertinent to matters at hand. It was contended that the magistrate never diverted into unnecessary matters nor did she pronounce herself on any issues which were not in dispute as she gave her judgment dependant on the issues raised by parties and determined the same.
18. As to whether the Magistrate erred in both law and fact in placing reliance on the documents produced by the Respondent in tracing root of the title when indeed the said documents did not prove such a fact, it was submitted that the Respondent had proved the issue of ownership of the suit property to the required threshold since the cluster members who took part in the exercise testified, evidencing the ownership and that the trial Magistrate property decided on the said issue.
19. As to whether the trial Magistrate erred in both law and fact in failing to appreciate the fact that the Appellants had settled on the suit property by the fact of their membership to the ranch, the Respondent submitted that he had demonstrated that the suit land was allocated to him by the cluster members. The Appellants had trespassed into the Respondent's land and the issue had been addressed and resolved by the cluster members and the Appellants had even been offered another portion of land but the Appellants continued to occupy the said land. The Appellants had therefore illegally trespassed into the said land.
20. Counsel for the Respondent concluded his submissions by urging this court to dismiss the appeal with costs to the Respondent.

Analysis and Determination

21. This court having appreciated the parties' respective submissions and further considered the entire record of appeal, has outlined the following issues as salient issues for determination herein; -
 - I. Who among the parties has a clear root of ownership of the suit property.
 - II. Whether the trial court was justified based on the fact, evidence and the law in arriving at the decision to grant the Respondent reliefs that were sought.
 - III. What orders should issue as to the costs of the appeal.

Issue No. 1 Who among the parties has a clear root of ownership of the suit property.

22. The Appellants case before the trial court was that they have been in occupation of the suit property located at junction area along Mombasa – Nairobi Highway within Kishamba B group ranch since 2013 which had been allocated to them by the members of cluster. It was also the Appellants case that they are constructing permanent structures on the land and that the Respondent is their neighbour who was allocated a separate property and has no right to claim any interest in their land. The 1st Appellant who testified as DW1 stated that he is a member of Kishamba B group ranch and he entered the suit land in 2013 together with the 2nd Appellant who testified as DW2. It was his testimony that they found the Respondent on the land and occupied part of it. They cleared the land and developed the same without any objection from the Respondent.



23. The 2nd Appellant testified as DW2 and equally stated that they were neighbours with the Respondent. They entered the land in 2013 and they found the Respondent on the land.
24. The Respondent's case was that he is the owner of the suit property at the exclusion of the Appellants. The Respondents testified that the land was allocated to him by a cluster member Joseph Mwakima in 2015 upon which he tilled, fenced and built on the land. He also stated that the 1st Appellant had encroached on the land.
25. Joseph Mwakima Mwakanyu a cluster member and Chairman of the Kisumanzi cluster and has been a cluster member since registration of the ranch way back in 1975. He stated that he had shown the Respondent the land and that the 1st Appellant was asked to leave the same together with the 2nd Appellant who was also grabbing the land.
26. Lydia Monje Mwasi who testified as PW3 stated that the land belongs to the Respondent and that the Appellants had encroached on the same. Salim Mwaeke Lughe testified as PW4 and testified that the land belongs to the Respondent as the Appellants had encroached on the same. He further stated that the land was allocated to the Respondent. He further stated that there was a meeting to resolve the dispute.
27. Robin Patrick Mwabala a cluster member testified in support of the Respondent's case. He stated that there was a meeting to resolve the dispute wherein the dispute was resolved in favour of the Respondent.
28. The court has taken note of the fact that 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 satisfactorily proved the root of ownership of the suit property.
29. From the evidence that was tendered herein, the Respondent was able to adduce sufficient evidence tracing his acquisition of the suit property from the cluster members. The testimony of PW2 who was the chairman of Kisumanzi Cluster was crucial to the determination of the dispute herein since he had been a cluster member from 1975. He testified being the person who showed the Respondent the suit land before the Appellants acquired the same. The evidence on record also shows that the Appellants found the Respondent on the suit land and hence trespassed onto the same. The evidence on record which the court has also duly considered confirmed that the cluster in an attempt to resolve the dispute confirmed that the property indeed belongs to the Respondent.
30. In view of the foregoing, it is the finding of this court that the Respondent had satisfactorily established his root to the ownership of the suit property.

Issue No. 2 Whether the trial court was justified based on the fact, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought

31. It was submitted that the trial court erred in granting the Respondent the reliefs sought and further that the court considered letters which were marked but not produced in evidence.
32. From the evidence that was tendered herein and considering that the dispute was in respect to unregistered land, the trial court conducted a site visit and also considered the oral testimony adduced by several witnesses who tendered evidence demonstrating how the Respondent acquired the said property. Based on the oral evidence tendered, and the site visit that was conducted it is the finding of this court that the trial court cannot be faulted for the decision that it made since credible and uncontroverted evidence was tendered properly demonstrating the Respondent's interest and



acquisition of the property and as such the trial court properly considered and arrived at the finding that the Respondent had proved his case and was entitled to the reliefs sought which were granted.

Issue No. 3 What orders should issue as to costs

33. On the issue of costs, costs are a discretion of the court and in any event to a party who is successful. In the instant case, the Respondent is the successful party and thus deserving of the costs of this appeal and in view of the foregoing, this court awards costs of the appeal to the Respondent which shall be paid by the Appellants.

Final Orders

34. 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 trial Magistrate. Consequently, the entire appeal fails and is hereby dismissed.

35. In the end, the following final orders are hereby issued; -

- i. The Appeal is devoid of Merit and is dismissed.
- ii. Costs of the Appeal are awarded to the Respondent.

Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF SEPTEMBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Wambura for Appellants.

Mr. Mwazighe for Respondent.

Court Assistant: Mary Ngoira and Norah Chao.

