



**Kemboi v Kimetei (Environment and Land Appeal E006 of 2024)
[2024] KEELC 7284 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E006 OF 2024
A OMBWAYO, J
OCTOBER 31, 2024**

BETWEEN

BERNARD KIPSANG KEMBOI APPELLANT

AND

VERONICA KIMETEI RESPONDENT

*(appeal arising from the judgment of Honourable K.I Oenge Principal Magistrate,
Nakuru delivered on 12th January, 2018 in Nakuru ELC No. 261 of 2018)*

JUDGMENT

1. This is an appeal arising from the judgment of Honourable K.I Oenge Principal Magistrate, Nakuru delivered on 12th January, 2018 in Nakuru ELC No. 261 of 2018. The Appellant filed a Memorandum of Appeal dated 18th January, 2024 appealing against the said judgment on grounds that the honourable Magistrate erred in law and fact by relying on an allotment by the ADC dated 24th May 1995 which was in respect of land that had not been surveyed.
2. Moreover, that the honourable Magistrate erred in fact and law by finding that the land was not available for allotment after allotment by ADC in the year 1995 where it is common knowledge(sic) that all allotments for the suit property were canceled in the year 2009. That the honourable Magistrate erred in fact and law by finding that the Respondent had been displaced whereas it is here testimony that she never utilized the land.
3. Furthermore that the honourable Magistrate erred in fact and law by finding that the Respondent was displaced and as a result fled to Baringo whereas she has another property in the said scheme. The appellant contends that the honourable Magistrate erred in fact and law by failing to consider that ground occupation mattered and that it was the objective of the government to settlement occupants in the ground.



4. It is the appellant argument that the honourable Magistrate erred in fact and law by relying on a written statement drawn by the firm of Karanja Mbugua and Company Advocates which was withdrawn by the Appellant.
5. The appelleant asserts that the honourable Magistrate erred in fact and law by failing to admit evidence of persons on the ground who testified to the fact that the Appellant was in occupation of the ground from the year 2005 and that the honourable Magistrate erred in fact and law by failing to consider(sic) the statement of the adjudicating officer who confirmed that on verification of the ground, the Appellant had settled on the said property.
6. The honourable Magistrate erred in fact and law by dismissing the statement of the member of committee of Kongasis-Block D (DW) on account that he had not produced any document to support that.
7. The honourable Magistrate erred in fact and law by failing to consider that the disputes was already lodged before the District land Adjudication office and settlement officer and the report from their investigation which shed light on the stators(sic) of the land.
8. The honourable Magistrate erred in fact and law by finding that a beneficiary could be apportioned 2 shares on a settlernent scheme to exclusion of other beneficiaries.
9. The honourable Magistrate erred in fact and law by finding that the Appellant was the beneficiary of the allotment of ADC whereas it is the Respondent who is the beneficiary of ADC.
10. The honourable Magistrate erred in fact and law by misinterpreting the evidence of Mr. Wachira which was clear that all allotments were cancelled in the year 2010.
11. The Appellant seeks orders allowing the appeal and that the decision of the trial Magistrate be varied and/or set aside.

Brief Facts

12. The Respondent filed a suit against the Appellant vide a plaint dated 4th March, 2014 seeking eviction orders and injunction orders restraining the Appellant and his agents from interfering with her parcel of land known as PLOT NO 1266. The matter was heard to completion and the trial magistrate delivered his judgment on 12th January, 2024 in favour of the Respondent. It is on this basis that the Appellant being dissatisfied with the trial court's judgment lodged the instant appeal before this court.

Submissions

13. Counsel for the Appellant filed his submissions dated 2nd October, 2024 where he submitted that the trial magistrate erred in relying on the allotment letter dated 24th May 1995 by the Agricultural Development Corporation (ADC) for un-surveyed land. Counsel submitted that such reliance was a legal and factual error since the allotment process requires clarity on the land boundaries. He relied on Section 7 of the *Land Registration Act* and the case of Wreck Motors Enterprises v. Commissioner of Lands & Others and submitted that the said letter was an offer that had not matured into a legal interest due to the absence of a survey and subsequent title issuance. He submitted that failure to survey the land at the time of the 1995 allotment created uncertainty and increased the risk of double allocation. He submitted that without clearly defined boundaries, more than one party could be issued with overlapping rights over the same piece of land, as in the instant suit. He cited the Court of Appeal case of Kenya Ports Authority v. Fadhil Juma Kisuwa, (2017)eKLR



14. It was counsel's submission that the trial court failed to appreciate the undisputed fact that all allotments for the suit property were canceled in 2009 hence the 1995 allotment had already been nullified. He submitted that the trial Magistrate erred in concluding that the land was unavailable for allotment post 1995. Counsel argued that the trial court should have recognized the cancellation of the 1995 allotment in 2009 and applied the legal principle that such cancellation made the land available for redistribution. It was counsel's submission that the trial magistrate erred in finding that the respondent had been displaced when there was no evidence presented to show that the respondent was in possession or occupation of the suit property at any time. He argued that the respondent's admission during cross examination that she never utilized the land or built any structure on it confirmed that she was never in possession of the property in the first place. He submitted that the appellant presented evidence that he had been in exclusive possession and use of the suit property.
15. It was counsel's submission that the trial magistrate erred in failing to consider that ground occupation was a crucial determining factor in land allocation and settlement. He added that the appellant having been in physical occupation of the suit property, should have been given priority in any allocation process. He further submitted that the learned magistrate failed to appreciate that the government's settlement programs was intended to regularize the tenure of those on the ground. He also submitted that the trial magistrate disregarded the appellant's witness who confirmed that the appellant had been in occupation of the suit property since 2005. Counsel submitted that the trial magistrate failed to consider that one of the reasons the allotments were cancelled in 2009 was to rectify errors in allocation that did not align with ground occupation. He urged the court to find that the appellant's occupation of the suit property from 2005 entitled him to recognition as the rightful occupant under the government's settlement policy.
16. Counsel submitted that the learned magistrate erred in fact by relying on a written statement drawn by the firm of Karanja Mbugua, which had been withdrawn by the appellant prior to the hearing. He argued that reliance on the withdrawn statement caused substantial prejudice to the appellant's case as it influenced the magistrate's reasoning, leading to a judgment that was not based on the actual evidence properly before the court. Counsel added that the trial magistrate's failure to admit critical evidence from witnesses on the ground who testified that the appellant had been in occupation of the suit property since 2005. He argued that the selective admission of certain pieces of evidence, while rejecting others that were equally relevant, created an imbalanced factual record which prejudiced the appellant's case. He also submitted that the learned magistrate erred by failing to adequately consider the statement of the adjudicating officer, who confirmed that upon verification of the ground, the appellant had settled on the suit property. He relied on Section 35 of the *Evidence Act* Cap 80. It was his submission that learned magistrate erred by dismissing the statement of a member of the Kongasis Block D Committee on the basis that he had not produced a document proving his membership. He argued that the said approach was flawed since it ignored the principle that oral testimony which was sufficient to establish material facts, particularly where there was no legal requirement for documentary proof of such membership. He relied on Section 63 of the *Evidence Act* and submitted that the magistrate ignored the substance of the evidence, which was critical in determining the rightful occupant or owner of the suit property.
17. It was counsel's submission that the magistrate's decision to dismiss the witness's statement on technical grounds was contrary to the principles of substantive justice, which require that all material evidence be fully considered in the determination of a dispute. He relied on Article 159(2)(d) of *the constitution*. He relied on the case of *Mwangi V Wambugu* [1984] KLR 453 and submitted that the trial court in dismissing the testimony of the committee member, excluded critical evidence that could have clarified the history of the property and the appellant's involvement. Counsel further submitted



that the learned magistrate erred by failing to consider that the dispute over the suit property had already been lodged before the District Land Adjudication Officer and the Settlement Officer, and that a report from their investigation was available. He submitted that the said report provided critical insights into the status and ownership of the land in dispute and by disregarding the said report, the magistrate failed to fully appreciate the context and factual background of the case. He added that by finding that a member of a settlement scheme could be apportioned two shares to the exclusion of other members, the trial magistrate failed to apply the principles of equity and fairness that are central to the distribution of land in settlement schemes. He relied on the case of *Mwangi V Mwangi* [2010] eKLR.

18. The appellant's counsel relied on the case of *Kenyatta v. Republic* [2009] 1 KLR (G&F) 164 and submitted that the trial magistrate misinterpreted the evidence before it. He submitted that the appellant proved his case as to how the trial court erred in its judgment and thus he was entitled to costs of the appeal. In conclusion, he urged the court to allow the appeal as prayed. The Respondent did not file her submissions.

Analysis and Determination

19. Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal and Record of Appeal, the following issues for determination:

1. Whether the Appeal is merited
2. Who should bear the cost of the appeal.

20. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

21. Further as was held in the case of *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

22. The gist of this appeal is largely that the learned trial magistrate failed to consider documents that were produced in evidence as well as testimonies given, and therefore arrived at the wrong conclusion. The same can be deciphered from the grounds of appeal. This court should therefore answer the question whether indeed the learned magistrate did consider all the evidence adduced before it or allowed some of the important evidence slip away and be left by the wayside. I have perused the proceedings in the record of appeal with regard to ground 6 on the witness statement by Karanja Mbugua advocates. I note that the matter was initially before the Environment and Land Court High and on 5th October, 2018, the same was transferred to the Chief Magistrates court and the issue of statement was left to be determined by the trial court. I also note that when the same was before the trial magistrate, the Appellant never formally raised the issue with the magistrate, instead, the matter proceeded for hearing. This ground therefore fails since it was the Appellant's duty to object to the said witness statement in the trial court. Alternatively, the Appellant would have also followed up on a response to his letter to the court to have the statement withdrawn. I have also keenly perused the trial court's judgment vis a vis the proceedings and it is not in dispute that all the Appellant's witnesses gave their evidence and also



tendered their documents. It is clear that the trial magistrate heard all the witnesses and considered all the documents produced in reaching his determination. It is this court's view that the fact that the trial magistrate did not mention the said documents or the witnesses in the said judgment does not mean that he did not consider the said evidence in question. In view of the same grounds 6, 7, 8 and 9 of the appeal fail. On the issue of the allotment letter, this court is of the view that in as much as the allotment letter to the Respondent dated 24th May, 1995 stated that the land was un-surveyed, the said letter provided that the survey process was to be done. In addition, the letters dated 8th May, 2013 and 16th August, 2010 from the Ministry of Lands confirmed that she was indeed allocated the suit property being Plot No. 1266. The settlement officer PW1 also confirmed that the Respondent accepted the offer and paid the requisite fees in the offer letter. It is also not in contention that the Respondent produced evidence of receipt of payment of the same. It is not in dispute that the Appellant did not have an allotment letter to the suit land, instead, I note that the offer letter to the Appellant was in respect of Plot 143 measuring 1.20Ha while that of the Respondent was Plot 1266 measuring 2.02Ha. It is therefore clear that the two properties were distinct.

23. In the case of *Kangu V Nairobi City County & another* [2023] KEELC 16925 (KLR), the court cited with approval the Court of Appeal case of *Joseph N.K Arap Ngok V Justice Moijo Ole Keiwua & 5 Others CA No. 60 of 1997* where the court held as follows:

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”.

24. In the instant case, it is not in dispute that the Respondent met the terms in the said allotment letter and therefore the rightful owner of the suit property unless the same is challenged. I am therefore of the view that the trial magistrate correctly applied his mind on the issue the allotment letter. In view of the above, I find that grounds 1, 2, 3, 4, 5, 10, 11, 12 and 13 of the appeal fails. The upshot of the foregoing is that the appeal is without merit and is hereby dismissed with costs to the Respondent. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-10-31 12:49:17

