



**Githogori v Mwangi (Environment and Land Appeal 117 of 2022)
[2024] KEELC 7261 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 117 OF 2022**

**BM EBOSO, J
OCTOBER 23, 2024**

BETWEEN

ROBERT MUREITHI GITHOGORI APPELLANT

AND

ALBERT MWANGI RESPONDENT

((Being an Appeal against the Judgment of Hon M. W Kurumbu, Senior Resident Magistrate, delivered on 17/11/2022 in Thika Senior Resident Magistrate Court Civil Case No. 98 of 2019))

JUDGMENT

1. This appeal challenges the Judgment rendered on 17/11/2022 by Hon M W Kurumbu SRM in Thika CMC MCL & E Case No 98 of 2019. Robert Mureithi Githogori [the appellant in this appeal] was the plaintiff in the trial court. Albert Mwangi [the respondent in this appeal] was sued as the 1st defendant. Basin Investment Company Ltd was sued as the 2nd defendant. The claim against M/s Basin Investment Co Ltd was withdrawn vide a notice of withdrawal of suit dated 11/11/2019.
2. The dispute in the trial court revolved around the question of ownership of an unsurveyed piece of land [a plot] located in Juja [referred to in this Judgment as “the suit land”]. The appellant described the said piece of land as “Plot Number 85”. The respondent described the land as “Plot 82 of title number Juja/Juja East Block 2/842”. Neither of the parties to this appeal exhibited authenticated survey or registration records of the land. The two key issues that fell for determination in the trial court were: (i) Whether the appellant was the legitimate owner of the suit land; and (ii) Whether the respondent was a trespasser on the suit land. Invariably, these are the two key issues that fall for determination in this appeal. Before I analyze and dispose the issues, I will outline a brief background to the appeal, setting out the parties’ respective cases in the trial court; the grounds of appeal; and the parties’ respective submissions before this court.



Background

3. The suit in the trial court was instituted by the appellant vide a plaint dated 17/5/2019. He named the respondent and M/s Basin Investment Company Ltd as the two defendants. He subsequently withdrew the claim against M/s Basin Investment Co Ltd. He sought: (i) a declaration that the certificate of ownership issued to the respondent by M/s Basin Investment Co Ltd was null and void ab initio; (ii) a permanent injunction restraining the two defendants against trespassing on, encroaching into or remaining on the suit land; (iii) damages for loss of user of the suit land; and (iv) costs of the suit.
4. The case of the appellant was that he was the legitimate owner of the suit land. He contended that he purchased the suit land from M/s New Soweto Mbeceni Women Group in 1994. He added that it came to his attention that M/s Basin Investment Co Ltd had issued an illegal share certificate relating to the suit land to the respondent. In his evidence, he stated that when he visited the suit land in 2019, he found rental units on the land. He subsequently established that the respondent was the one who had erected the rental units on the land.
5. The respondent contested the appellant's claim through a statement of defence dated 16/3/2021. His case was that he was the legitimate owner of the suit land which he described as "plot number 82 of title number Juja/Juja East Block 2/842". He contended that he bought the suit land from M/s Basin Investment Co Ltd in 2017, adding that he subsequently developed the land extensively without any resistance from any quarter. He urged the court to reject the appellant's claim.
6. Upon conclusion of trial, and upon receiving submissions from the parties, the trial court rendered the impugned Judgment on 17/11/2022. It was the finding of the trial court that the appellant had failed to prove his case to the required standard, adding that the appellant failed to prove ownership of the land. The trial court further found that trespass could only be deemed to have been committed if the appellant had established ownership of the land. Consequently, the trial court dismissed the appellant's case and awarded the respondent costs of the suit.

Appeal

7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following fifteen [15] verbatim grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact in making a conclusive determination without fairly considering the appellant's case and submissions.
 - ii. That the learned trial magistrate erred in law and fact in dismissing the appellant's evidence and allowing the respondent's evidence.
 - iii. That the learned trial magistrate erred in law and fact in finding that the appellant had not proved his specific plot whereas there was a share certificate.
 - iv. That the learned trial magistrate erred in law and fact in dismissing the appellant's share certificate as not conclusive evidence of ownership.
 - v. That the learned trial magistrate erred in law and in fact in dismissing the evidence of PW3 as proof of ownership and the nexus (sic).
 - vi. That the learned trial magistrate erred in law and fact in not deciding the respondent constructed on plot no. 85 belonging to the appellant.



- vii. That the learned trial magistrate erred in law and fact in construing that the groups Basin Investment Co. Ltd and new Soweto Mbeceni Women Group as similar (sic).
 - viii. That the learned magistrate erred in law and in fact in dismissing the evidence of the appellant and hence lacking the proper nexus between the parties (sic).
 - ix. That the learned magistrate erred in law and in fact considering a report that was inconclusive and dismissing the evidence of an official of the group.
 - x. That the learned magistrate erred in law and fact in inferring evidence from unknown sources.
 - xi. That the learned magistrate erred in law and fact in inferring without evidence [sic].
 - xiii. That the learned magistrate erred in law and in fact in dismissing the plaintiff with costs.
 - xiii. The learned magistrate erred in law and fact in not considering that the appellants have proved all aspects of granting the prayers sought.
 - xiv. That the learned magistrate erred in law and fact in not considering the evidence of the appellant witnesses.
 - xv. That the learned magistrate erred in law and fact in awarding the respondent's costs.
8. The appellant urged this Court to: (i) allow the appeal; (ii) set aside the Judgment of the trial court; and (iii) award him costs of the appeal.

Appellant's Submissions

- 9. The appeal was canvassed through written submissions dated 5/4/2024, filed by M/s Waweru Nyambura & Company Advocates. Counsel for the appellant submitted that the single issue that fell for determination in the appeal was whether the appeal had merit. Counsel faulted the lower court for deciding against the appellant without keenly considering his case, adding that the respondent only produced a share certificate as proof of ownership of Plot No. 82 while the appellant produced a certificate of ownership to prove that he was the owner of Plot No. 85. Counsel faulted the respondent for failing to avail a witness to corroborate his evidence. Counsel argued that the appellant availed witnesses who corroborated his evidence, among them, the Secretary of New Soweto Mbeceni Women Group who confirmed that the appellant was a member of the Group and was allocated Plot No. 85.
- 10. Counsel faulted the lower court for finding that the appellant had not proved his specific plot. Counsel submitted that PW2 adduced evidence that proved that the land on which the respondent built the rental units was the suit property. Counsel further submitted that PW2 testified during trial that the appellant and herself each bought one share from New Soweto Mbeceni Women Group and upon subdivision, she was allotted Plot No. 84 while the appellant was allocated Plot No. 85 which was adjacent to her property.
- 11. Counsel argued that the learned trial magistrate erred in contending that Basin Investment Co Ltd and New Soweto Mbeceni Women's Group were one and the same. Counsel further argued that the learned trial magistrate erroneously stated in the impugned Judgment that New Soweto Mbeceni Women Group was the initial 2nd defendant in the suit yet it is Basin Investment Co Ltd that was initially sued as the 2nd defendant
- 12. Counsel faulted the lower court for failing to consider the evidence of PW3 [the Secretary of New Soweto Mbeceni Women Group] who had testified that the share certificate issued to the appellant



showed that she had paid purchase price for Plot No 85. Counsel added that PW3 also confirmed that title deeds to the plots were still being processed.

13. Lastly, counsel submitted that the trial magistrate erred in relying on the Surveyor's report which was inconclusive, adding that the report did not indicate who owned the suit property. Counsel relied on the decisions in the cases of *Karis v Solanki* [1969] EA and *Ephantus Mwangi v Duncan Mwangi Wambugu* [1984]. Counsel urged the Court to set aside the Judgment of the lower court.

Respondent's Submissions

14. The appeal was opposed through written submissions dated 24/5/2024, filed by M/s GNK & Associates LLP. Counsel submitted that the Government Surveyor, through his Report dated 15/3/2022, found that Plot No. 82 and Plot No 85 did not correspond to the suit land which the parties had pointed out to them. Counsel further submitted that the Surveyor stated that no copy of title, official search or survey plan showing Plot Nos. 82 and 85 were presented to them to enable them positively identify the actual registration area of the parcels in question. Counsel argued that the finding by the Government Surveyor contradicted the appellant's testimony that his plot number had been registered as 85 Juja/Juja East L.R. No. 843 Kiambu. Counsel pointed out that the appellant gave contradicting testimonies, adding that the appellant stated in his witness statement that he purchased Plot No. 85 in 1993 and immediately took possession but testified during cross-examination that he bought the land in 1984 and that he had never taken possession of the land. Counsel further pointed out that the share certificate produced by the appellant was expressed as issued in 2017. Counsel argued that the appellant's witnesses could not explain how the suit property was sold to them. Counsel further contended that during cross-examination, PW3 admitted that she knew nothing about the suit property. Counsel added that the share certificate produced by the appellant to establish ownership of the suit property did not contain the details of the property. Counsel argued that the lower court was left with no option but to correctly find that the appellant had not proved that he was the owner of the suit land.
15. Counsel added that the appellant's first, second, fifth, eighth, tenth, eleventh, twelfth, thirteenth and fourteenth grounds of appeal were all to the effect that the learned trial magistrate erred in dismissing the appellant's evidence. Counsel argued that the appellant failed to submit on the above grounds and failed to demonstrate how the lower court failed to consider his case, submissions and evidence.
16. On grounds three and four which relate to the share certificate produced by the appellant to prove ownership of the suit property, counsel submitted that it did not contain any details relating to land. Counsel added that the number 85 indicated was in reference to the share certificate number. Counsel relied on Section 107 and 109 of the *Evidence Act* and the decision of the Court of Appeal in the case of *Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR in submitting that the lower court examined all the documents presented by the appellant in support of his claim and it was satisfied that the evidence fell short of the required standard of proof.
17. On the sixth ground of appeal, counsel submitted that no evidence was led by the appellant to establish ownership of the suit land, hence there was no basis for the trial court to find in his favour. On the seventh ground, counsel submitted that it was not disputed that the appellant withdrew his case against Basin Investment Co Ltd. Counsel added that the said withdrawal weakened the appellant's case.
18. On the ninth ground of appeal through which the appellant faulted the learned trial magistrate for relying on the Government Surveyor's Report, counsel submitted that the said Report was clear that the two plots did not correspond to the ground pointed out to the Surveyor. Counsel further submitted that an appellate court should only interfere with the lower court's finding on facts in



instances where the court misapprehended the facts or misdirected itself in law. Counsel relied on the decision in the case of *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1984] eKLR. Counsel urged the Court to dismiss the appeal and award costs of the appeal to the respondent.

Analysis and Determination

19. The court has read and considered the original record of the trial court; the record of appeal; the grounds of appeal; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the introductory part of this Judgment, the two key issues that fall for determination in this appeal are: (i) Whether the appellant is the legitimate owner of the suit land; and (ii) Whether the respondent is a trespasser on the suit land. The two issues will be analyzed and disposed sequentially in the above order. Before I dispose the issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
20. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
21. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
22. Is the appellant the legitimate owner of the suit land? The appellant went to the trial court alleging that he was the legitimate owner of the suit land. It was his case that the respondent was a trespasser on the suit land. Under Sections 107 and 109 of the *Evidence Act*, the appellant bore the burden of proving the above allegation. The first duty of the appellant was to properly identify the suit land. The second duty of the appellant was to prove ownership of the suit land.
23. Did the appellant identify the suit land? Did he prove ownership of the suit land? I do not think so. The appellant went to the trial court waving what he described as a share certificate. The share certificate was expressed as issued by New Soweto Mbeceni Women Group. The share certificate did not contain details of the land it denoted. The share certificate did not disclose the land sub division scheme it related to. The appellant did not tender any evidence identifying the land constituting the sub-division scheme in which plot number 85 fell. He did not tender any approved subdivision plan containing plot number 85. That is not all.
24. It does emerge that on 15/11/2021, the appellant, through his advocate, invited the court to order the Government Surveyor to visit the suit land and prepare a surveyor's report that would assist the trial



court reach a just determination. Counsel for the respondent contested the oral plea on the ground that “pleadings” had closed. The trial court allowed the appellant’s plea in the following verbatim terms:

“There is no harm in having the District Surveyor visit the land and establish Plot no 82 or 85 true position. I hereby direct Thika District Surveyor report to issue. Mention 16th December 2021”.

25. The Government Surveyor prepared and tendered a Report dated 15/3/2022 in which he stated as follows:

“RE: MCL & E CASE NO. 98 OF 2019

Reference is made to court order MCLE CASE NO. 98 of 2019 of 2nd December 2021 received on 10th December 2021 (copy attached) on the above subject matter.

- a. This is to inform you that a team of surveyors from the office visited the above mentioned land parcel on 4th February, 2022 in the presence of the plaintiff, defendant and the representative of the area chief.
- b. The survey was commenced by orientation to the site parcels. The proprietor of LR No 10821/30 positively identified his parcel of land on the ground which aided us to be able to relate the suit parcel of land as corresponding to LR No 10821/18 (10821/2/12). (See the drawing attached).
- c. It is worth noting that there is no document i.e copy of the title, official search or even survey plan showing parcels 85 and 82 is present to this office to enable us officially /positively identify the actual registration area of the parcels of question.
- d. The parcels mentioned on the court order mentioned above i.e plot No 85 and 82 of Juja/ Juja East Block 2/843 did not correspond to the ground pointed to us.

We are therefore requesting the honourable court to avail the documents showing parcels 82 and 85 to our office to enable us interpret the same in relation to the ground positions of the dispute plots (parcels).

(signed)

Kithui Lydia

FOR: National Government Surveyor

Thika, Kiambu County

26. It does emerge from the appellant’s pleadings and evidence, and from the Government Surveyor’s Report that the appellant, as the party who bore the burden of proof, did not bother to provide necessary documentary evidence to assist in establishing the identity of his land. He did not bother to provide necessary documentary evidence to establish his ownership of the parcel of land that he claimed. He did not demonstrate that the suit land fell within a subdivision scheme owned by New Soweto Mbeceni Women Group. Clearly, the appellant did not discharge his burden of proof. Consequently, it is the finding of this court that the appellant did not establish his ownership of the suit land. Consequently, it is the finding of this court that the trial court did not err in finding that the appellant had failed to prove ownership of the suit land.



27. Did the appellant prove trespass? The court has found that the appellant failed to properly identify the land that he claimed to be his. The court has also found that the appellant failed to prove ownership of the suit land. Without establishing the above two critical elements, the appellant cannot be said to have proved the claim of trespass. The trial magistrate properly observed that trespass can only be committed against a party who has established proprietorship /ownership of land.
28. On costs, no special circumstances have been demonstrated to warrant a departure from the general principle in Section 27 of the Civil Procedure Act; that costs follow the event. Consequently, the unsuccessful party will bear costs of the appeal.
29. For the above reasons, this court has not found merit in this appeal. The appeal is rejected and dismissed for lack of merit. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF OCTOBER 2024

B M EBOSO

JUDGE

In the presence of:

Ms Weyimi for the Appellant

Court Assistant: Melita

