



**Mwatele v Mwakulomba (Environment and Land Appeal E019 of 2023)
[2024] KEELC 7083 (KLR) (Environment and Land) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E019 OF 2023
EK WABWOTO, J
OCTOBER 17, 2024
(FORMERLY MOMBASA ELCA NO. E044 OF 2022)**

BETWEEN

CASSIAN MWIKAMBA MWATELE APPELLANT

AND

AGNES MKAMAGHANGA MWAKULOMBA RESPONDENT

*(Being an appeal from the judgment/decree of Hon. T. N. Sinkiyian
(SRM) delivered on 3rd October 2022 in ELC Suit No. 5 of 2020 at Voi)*

JUDGMENT

1. Litigation giving note to this appeal started in the subordinate court vide a plaint dated 27th February 2020 which suit was filed by the Appellant on 27th February 2020.
2. The Appellant averred in the plaint that on or about the year 2012, he purchased plots No. 897 and 898 which combined measured 100ft x 100ft situated at Kaloleni – Majengo Voi Sub County from one Ramadhan Kidisa Mwalufu and a sale agreement was written to that effect.
3. It was also averred that he had made developments on the plot which includes fencing and construction of his house. The Respondent entered the said plot in 2020 and commenced developments as a trespasser. The Appellant therefore prayed for judgment against the Respondent for a permanent injunction restraining her from trespassing and interfering with the property known as Plot No. 897 and 898 which combined both measured 100ft x 100ft x 50ft situated at Kaloleni – Majengo, Voi Sub County and costs of the suit, interest thereon and any other relief that the subordinate court may deem fit to grant.



4. The Respondent who was the defendant before the proceedings at the lower court filed a statement of defence dated 29th July 2021. The Defendant denied the contents of the plaint and averred that on 4th March 2017 she purchased Plot No. 884 measuring approximately 100ft by 50ft together with a three-bedroom house from the owner Daniel Gona Elizabeth Wambui at a price of Kshs. 2,200,000/= She also averred that she paid a deposit of Kshs. 1,500,000/= to the seller and a balance of Kshs. 700,000/= remained to be paid in monthly instalments of Kshs. 20,000/= for a period of 35 months which amount is still being paid as at the time of filing her defence.
5. The Respondent also averred that she conducted due diligence and got a confirmation from the first owner one Juma Fundi Mohamed as well as through the letters written by the Municipal Council of Voi dated 8th October 2012 and 10th April 2012 respectively confirming that the plot solely belonged to the seller Daniel Gona Elizabeth Wambui. It was also averred that Plot No. 884 which is owned by the Respondent is distinct from the Plot No. 891 and 898 owned by the Appellant.
6. The Respondent further averred that she is an innocent purchaser for value of the plot No. 884 with no notice of any defect in the title of the person selling and has paid money for a good title and any defect in the title of the person selling and has paid money for a good title cannot be set up against an innocent purchaser but only against the seller. It was also averred that any claim for the land should be made against the seller DANIEL GOMA ELIZABETH WAMBUI and not the Respondent since she is an innocent purchaser for value. The Respondent prayed for dismissal of the lower court suit with costs.
7. Upon hearing the matter, the learned trial Magistrate Hon. T. N. Sinkiyian, PM delivered a judgment on 3rd October 2022 dismissing the suit with costs to the Respondent.
8. Aggrieved with the outcome, the Appellant filed this appeal vide a Memorandum of Appeal dated 28th October 2022. The grounds of appeal are as listed on the face of the Memorandum of Appeal. The Appellant prayed that the appeal be allowed and judgment of the lower court be set aside. The Appellant also prayed for costs of the appeal and costs of the lower court.
9. The Appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 4th August 2024 while the Respondent filed written submissions dated 4th July 2024. The court has duly considered all the written submissions filed by the parties.
10. Upon considering the court record, pleadings, evidence tendered, grounds of appeal, written submissions as earlier stated and the law, this court has settled on the following issues for determination herein:-
 - i. Whether the trial court erred in considering upleaded issues.
 - ii. Whether the trial court erred in law and fact in arriving at the decree.
 - iii. What are the appropriate reliefs to grant herein.
11. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
12. Similarly In *China Zhingxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:



- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”
13. The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:-
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs-Thomas (1)*, [1947] A.C. 484.”
14. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
15. The court shall proceed to determine the said issues simultaneously. The Appellant in his submissions dated 4th August 2024 submitted that the trial court erred in determining an unpleaded matter and further assumed an unfamiliar role of litigating on an issue not before the said court. It was further submitted that the circumstances of the case did not warrant or offer an exception to the court to determine an unpleaded matter and the parties did not leave the said issue to the court.
16. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. In this Appeal, the Appellant’s case was based on the plaint dated 27th February 2020 seeking the following reliefs:-
- a. An order of permanent injunction against the Defendant and or servants from trespassing or in any manner interfering with the Plaintiff’s Plot Nos. 897 and 898 which combined measured 100ftx100ftx50ft situated at Kaloleni – Majengo Voi Sub County.
 - b. Costs of the suit and interest at court rates.
17. The Appellant pleaded that the Defendant had trespassed into Plot No. 897 and 893 which he had purchased in 2012.
18. The Respondent on the other hand filed a defence dated 29th July 2021 and pleaded that she is an innocent purchaser for value of Plot No. 884 which is distinct from Plot 897 and 898 as pleaded by the Appellant. The Appellant also pleaded that she did due diligence before purchase of the same.
19. A perusal of the judgment delivered by the Learned Magistrate shows that the Learned Magistrate did not specifically outline the issues for determination therein but proceeded to analyse the facts and the law in respect to the dispute that was before her court and proceeded to render her decision.



20. The Learned Magistrate held that the Appellant ought to have proved that the Respondent entered Plots 897 and 898 without any lawful authority since trespass is actionable without proof of damage. The Learned Magistrate then arrived at the finding that there was no basis upon which the Respondent had trespassed on Plots 898 and 897.
21. From the perusal of the pleadings before the trial court, the dispute before court resolved around Plots 898 and 897 as pleaded by the Appellant and Plot No. 884 which was pleaded by the Respondent.
22. A perusal of the plaint filed by the Appellant before the trial court shows that the manner, particulars and extent of trespass were not pleaded by the Appellant. The Appellant had sought injunctive orders in respect to parcel 897 and 898 and the Respondent denied the allegations of trespass.
23. Trespass is defined under Section 3 (1) (d) of the *Trespass Act* as an entry into or remaining on or undertaking acts on private land without reasonable excuse and consent of the occupier. In *PM 6 & another vs P.N.E.C.* (2019) eKLR, the court cited *Kuene & Nagel Ltd vs Forward International Ltd* (2011) 1 E. A 252 that trespass or detinue lies at the suit of the person who has an immediate right to possession of the good against another, who is in actual possession of them and who, upon proper demand, fails or refuses to deliver them up without lawful excuse.
24. From the evidence on record, there was no indication that a survey report had been produced before the trial court to confirm, ascertain and demonstrate the extend of the trespass. The dispute before the trial court was an alleged encroachment or trespass. If then there was any interference or trespass then no evidence was availed by the Appellant to prove his case. Considering that there were differences as to what properties had been encroached and given that there was no specific survey report confirming the same, it is indeed evident that the Appellant had failed to prove any trespass or encroachment of his parcels by the Respondent.
25. In view of the foregoing, it is the finding of this court that the trial Magistrate properly addressed herself on the issues that were pleaded by the parties and the facts in dispute before the court. The contention by the Appellant that the trial court considered unpleaded issues is misplaced.
26. On whether the trial court erred basing on the law and facts in arriving at its decision, it is the finding of this court that the trial court having found that the Appellant had not tendered any evidence to support the allegations of trespass, it had no basis to grant the relief of injunction as was sought by the Appellant.
27. It therefore follows that the Learned Magistrate did not err in law and fact in arriving at her decision.
28. The upshot is that 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. It is therefore not open for this court to interfere with the same. Consequently, the Appeal fails and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 17TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Sewe for the Appellant.

Mr. Mutinda for Respondent.

Court Assistants: Mary Ngoira.

