



**Omolo v Pere & another (Environment and Land Appeal 7 of 2020)
[2024] KEELC 6965 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 7 OF 2020
LC KOMINGOI, J
OCTOBER 17, 2024**

BETWEEN

JOHN ONYANGO OMOLO APPELLANT

AND

JOYCE PERE 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

(Being an Appeal arising from the Judgement of the Principal Magistrate Hon. I.M Kahuya delivered at Kajiado on 30th April, 2020 in ELC Suit No.249 of 2018)

JUDGMENT

1. In her Judgement dated 30th April 2020 Honourable I.M Kahuya (P.M) held thus;

“Lastly the Plaintiff stated that he bought the subject piece of land from one Keiyian Ene Kamakia sometime in the year 2010 and that presently there were structures in place. However, he has not furnished the court with a sale agreement to prove this. Neither has he stated the price at which the land was bought and further furnished photographic evidence of the structures on the ground. As such, there was a disconnect in terms of the suit land initially belonging to the said Keiyian Ene Kamkia and later passing down to the plaintiff herein. That gap was in my view in favour of the Defendant who relied upon the letter of allotment dated 17/2/1999 and further allotment letter dated 13/11/2018 to prove her interests in the suit property.”

2. Aggrieved by the said Judgement, the Appellant has appealed to this court vide the Memorandum of Appeal dated 28th May 2020. The grounds are;



1. The Learned Magistrate erred both in fact and law and reached a manifestly wrong decision by failing to find on the strength of available evidence that the Appellant had proved his case on a balance of probabilities.
2. The Learned Magistrate misapprehended the facts and the evidence adduced in this case, inevitably arriving at a wrong conclusion.
3. The Learned Magistrate erred in law and fact by failing to distinguish and appreciate the distinction existing between the property known as Plot No. 1153/Bus-Noonkopir and the property known as Plot No. 717/Bus-Noonkopir, and having failed to distinguish the two, and treating the two pieces of property as if they were one and the same, arrived inevitably at a wrong and unjust determination.
4. The Learned Magistrate erred in fact and in law by failing to appreciate the significance of the Court's Orders directed against the 2nd Respondent to avail the land records for Plot No. 1153/Bus-Noonkopir.
5. The Learned Magistrate erred in law and fact by failing to appreciate that the refusal by the 2nd Respondent to participate in the proceedings and to avail the land records pertaining to Plot No. 1153/Bus-Noonkopir despite several court orders was in furtherance of the scheme to illegally rob the Appellant the suit property.
6. The Learned Magistrate erred in law and in fact by invoking the doctrine of res judicata that was neither pleaded nor proved by any of the parties to the suit.
7. The Learned Magistrate erred in law and fact by failing to consider the Appellant's response to the 1st Respondent's documents suggesting the existence of a separate suit contained in the Plaintiff's further affidavit of 19th March 2019.
8. The Learned Magistrate erred in law and in fact by relying on documents that were never tendered in evidence by any of the parties to the suit.
9. The Learned Magistrate erred in law and in fact by attaching greater weight to documents that were filed by the 1st Respondent but against which the Appellant did not have an opportunity to cross-examine the 1st Respondent as the 1st Respondent did not appear at the hearing of the main suit.
10. The Learned Magistrate erred in law and in fact by failing to appreciate that the suit related to the merits of the decision taken by the 2nd Defendant and not the procedural proprieties leading to the said decision and as such the proper forum was the environment and land court and not the judicial review court.
11. By adjudging that the Plaintiff was in the wrong forum, the Learned Magistrate erred in law and in fact by developing a defence against the plaintiff's case without granting the plaintiff an opportunity to reply against the legal question of jurisdiction.
12. The Learned Magistrate erred both in fact and law by entering Judgement as she did, failing to totally address her mind on the gravity of the issues raised by the Appellant and the totality of evidence adduced by the Appellant.
13. By requiring the Appellant to prove his case beyond a balance of probabilities, the Learned Magistrate failed to correctly apply the evidentiary test in civil cases.



3. The Appeal was canvassed by written submissions.

The Appellants Submissions.

4. They are dated 16th November 2023.

They raise four issues for determination;

- a. Whether the trial court misapprehended the facts and the evidence tendered before it thereby arriving at an erroneous decision.
 - b. Whether the trial court relied on documents that were neither produced nor admitted into evidence thereby arriving at an erroneous and manifestly unjust decision.
 - c. The implication of the failure of the 2nd Respondent to avail land records pertaining to Plot No. 1153/Bus – Noonkopir.
 - d. Costs.
5. Counsel submitted that the Plaintiff's documents in the Lower court were in relation to Plot No.1153/ Business – Noonkopir whereas the 1st Defendants documents attached to the Replying Affidavit were in respect of Plot No.717/Business Noonkopir.
6. It is further submitted that the 2nd Respondent's surveyor was summoned to produce the records in respect of the suit plot but he did not honour the summons.
7. Counsel also submitted that the trial court misapprehended the facts and the law by suggesting that the Appellant's suit may have been res judicata on account of ELC 730 of 2017. The court had relied on the documents filed by the 1st Respondent in her Replying Affidavit.
8. It is further submitted that the trial court erred where it relied on the said documents when they were never produced as exhibits before court and that the 1st Respondent was not cross-examined on the said documents.
9. Counsel also relied on Section 7 of the [Civil Procedure Act](#) and that the court was not furnished with any evidence to show that the purported suit had been heard and determined on its merits.
10. It is also submitted that the trial court failed to appreciate that in the absence of a defence and witnesses, the Respondents did not have any viable response to the Appellant's claim. The 1st Respondent was never cross examined on her Replying Affidavit.
11. Counsel cited the third last paragraph of the Judgement to state that the trial court misapprehended the law and the specific provisions of the [Civil Procedure Act](#) and Rules relating to service of pleadings and hearings and the rules of evidence as set out under the [Evidence Act](#).
12. It is also submitted that the Appellant's case was not controverted. He was able to prove that he was the legal and beneficial owner of the suit property.
13. It is also submitted that the trial court erred where it faulted the Appellant for the 2nd Respondent's refusal to participate in the proceedings and the refusal to produce crucial documents that would have aided the court. He has put forward the case of Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 Others [2012] eKLR.
14. Counsel also submitted that the 2nd Respondent's decision to unilaterally reallocate the plot to the 1st Respondent and yet it has in its custody the records pertaining to the same but neglected to appear



before the trial court to shed light. The trial court ought to have made adverse inference against the 2nd Respondent's refusal to produce the documents, that the production of the said documents would have aided the Appellant's case.

He prays that the Appeal be allowed.

15. The Respondents despite being served neglected and or refused to participate in these proceedings.

Analysis and Determination

16. I have considered the Grounds of Appeal, record of Appeal, the written submissions and the authorities cited. The issues for determination are;

- i. Whether the learned trial magistrate misapprehended the facts and the evidence tendered before court thereby arriving at an erroneous decision.
- ii. Whether the learned trial magistrate relied on documents that were neither produced nor admitted in evidence thereby arriving at an erroneous and manifestly unjust decision.
- iii. Is the appellant entitled to the orders sought?
- iv. Who should bear costs of this Appeal?

17. This being a first appeal the court ought to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions as was stated by the court of appeal in *Ratilal Gova Sumaria & Another v Allied Industires Ltd [2007] eklr* that;

“...this being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses...”

18. Similarly in *South Nyanza Sugar Company Limited v Leonard O. Arera [2020] eklr*; *Mrima J* observed thus;

“As the first appellate court it is ow well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter (see the case of *Selle & Another v Associated Motor Boalt Co. Ltd*)”.

19. The dispute herein revolves around the ownership of Plot No.1153/Business – Noonkopir. It is the Appellant's case that he bought the same from ne Keiyian Ene Kamakia for Kshs.400,000/= He produced a transfer instrument dated 18th November 2010 issued by the defunct Ol Kejuado County Council, the predecessor to the 2nd Respondent.

He produced the rates clearance certificate and receipts for payment of rates to the 2nd Respondent from the year 2010 to 2017. He also relied on an approval for development dated 7th December 2016 issued by the 2nd Respondent for the construction of a perimeter wall over the suit plot. He told the trial court that the adjacent plot was 1152.

20. I have gone through the proceedings at the lower court. The 2nd Respondent did not enter appearance or file defence despite service. The 1st Respondent entered appearance only filed a Replying Affidavit in response to the Appellants application and thereafter did not participate in these proceedings. The Appellants case proceeded un defended. The Respondents neither called any witness nor produced any exhibits. The Appellant's case was therefore uncontroverted. That notwithstanding the learned trial magistrate dismissed the appellants suit.



21. I am cautious of the fact that though the case was uncontroverted, the Appellant still had to prove his case on a balance of probability. In the case of *Shanebal Limited v County Government of Machakos* [2018] eKLR the court observed;

“The defendant failed to enter appearance and there by defend the suit. The fact that the suit has not been opposed means that the plaintiff’s evidence remain unchallenged and uncontroverted. However the plaintiff is still required to prove his case to the required standard of a balance of probability.

The court cited with approval the case of *Kanini Munyororo v Joseph Ndumia Mwangi & Another Nyeri HCCC No.95 Of 1988*.

22. I have considered the evidence tendered by the Appellant in the lower court and I find that it met the threshold of a balance of probability.

23. To this extent I find that the learned trial magistrate erred in holding that the Appellant had not proved his case to the required standard.

Her reliance on the documents attached to the 1st Respondent in her Replying Affidavit but not produced as exhibits went against the rules of evidence.

24. In the third last paragraph of the Judgment she stated ...”my reasoning is further strengthened by the fact that we would never know why the said commission arrived at that decision. This is because the 2nd defendant did not participate in these proceedings despite having been summoned more than once.”

I find that the learned trial magistrate erred in arriving at the above conclusion because the Appellant was not in control of the affairs of the 2nd Respondent. Despite summons being issued by the court to it’s officers they failed to avail the records in respect of the suit plot.

In my view the learned trial magistrate ought to have compelled the officers of the 2nd respondent to appear in court and shed light in the suit plot. It was important to be seen that Justice had been served.

25. The letter dated 6th November 2018 from the National Land Commission to the 1st Respondent copied to the Appellant, informs the parties that the committee established to hear disputes had resolved to re-allocate the plot to the 1st Respondent.

Its states in part”.....in making determination, the team considered oral submissions from clients and their witness, examination of ownership and other supportive documents, report of the former county land management board where applicable and above all considered each case on its own merit....”

26. This letter cannot stand alone. There are no minutes on the record of proceedings to show that the Appellant was heard. These doubts could have been cleared if the 2nd respondent had participated in the said proceedings. I also find that the learned trial magistrate erred in relying on documents which had not been produced as exhibits. There was no evidence that the suit was re judicata.

27. I agree with the Appellant’s submissions that the trial court may have descended from its high seat of justice and assumed the role of one of the parties to the dispute.

28. The Appellant was able to prove that Plot No.1152/Business Noonkopir is the one adjacent to the suit plot and not plot not 717 business Noonkopir which the 1st respondent claims to be hers.

29. All in all I find that the Appellant is entitled to the prayers sought.



30. I find merit in this appeal and I grant the following orders;

- a. I hereby set aside the Judgement in the lower court dated 30/4/2020 and all consequential orders.
- b. That the prayers sought in the plaint dated 5/12/2018 are hereby allowed.
- c. The 1st Respondent shall bear costs of the suit in the lower court and in this appeal.

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

L. KOMINGOI

JUDGE.

In The Presence of

Mr. Odhiambo for Mr. Owuocha for the Appellant.

N/A for the Respondents.

Court Assistant – Mutisya.

