



**Mwandoe v Wamwandu & another (Environment and Land Appeal E004 of 2024)  
[2024] KEELC 13473 (KLR) (Environment and Land) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E004 OF 2024  
EK WABWOTO, J  
NOVEMBER 22, 2024**

**BETWEEN**

**MSAFIRI MWANDOE ..... APPELLANT**

**AND**

**NYANGE WAMWANDU ..... 1<sup>ST</sup> RESPONDENT**

**MWATATE LAND ADJUDICATION OFFICER ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from Judgment delivered by Hon. D. Wangeci – SPM  
in ELC Case No. E004 of 2024 on 6th February 2024 at Wundanyi)*

**JUDGMENT**

1. This is the first appeal from the judgment delivered by Hon. D. Wangeci SPM on 6<sup>th</sup> February 2024. The suit by the Appellant against the Respondent was dismissed on the reasons that the Appellant had not proved his case against the Respondent. Being the first appeal the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that court lacks the advantage of the trial Magistrate who saw and heard the witnesses. See, the often-cited case of *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where this Court stated:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 ...”



2. It was averred in the plaint dated 26<sup>th</sup> June 2023 that the Appellant was the bonafide and/or beneficial owner of land Parcel No. 977 within Mruru having inherited the same from his late father. That the 1<sup>st</sup> Respondent approached the Plaintiff in 1999 and requested him to temporarily put up structures on the parcel of land. That in 2022, the Appellant demanded vacant possession from the 1<sup>st</sup> Respondent which the 1<sup>st</sup> Respondent declined arguing that he owns the land and instead rushed to put up a permanent structure without the Appellant's knowledge, permission, agents and or representatives and further that he illegally, unlawfully and fraudulently went ahead to mark the beacons on 1 ½ acres without the knowledge of the Appellant and has a number allocated to the parcel of land. It was also averred that the 1<sup>st</sup> Respondent acted maliciously in defeating the Appellant's right to the suit property. The particulars of negligence as against the 2<sup>nd</sup> Respondent were pleaded and particularised in the plaint. It was also averred that the 1<sup>st</sup> Respondent has betrayed the Appellant's trust and acted while acting in collusion with the 2<sup>nd</sup> Respondent.
3. The 1<sup>st</sup> Respondent filed a defence dated 7<sup>th</sup> July 2023 where the Appellant's claim was denied and he sought to have the suit dismissed. It was averred that the 1<sup>st</sup> Respondent has been in that plot for over 25 years and knows its boundaries, where the Appellant's plot is No. 977 and the 1<sup>st</sup> Respondent's plot is No. 3714. On 25<sup>th</sup> November 2022, the Appellant sold part of his plot to a client and was paid Kshs. 400,000/= and the plot sold by the 1<sup>st</sup> Respondent was from Plot No. 3714 and not the Plaintiff's Plot No. 977.
4. From the record, 3 witnesses testified on behalf of the Appellant. The Appellant testified as PW1 relying on his witness statement dated 26<sup>th</sup> June 2023. It was his testimony that the land was 1 ½ acres which was demarcated in his absence. Steven Juma Mwandime testified as PW2 he stated that he was a childhood friend to the Appellant and he relied on his witness statement dated 30<sup>th</sup> August 2023 while Kennedy Warombo Msafari the son to the Appellant relied on his witness statement dated 30<sup>th</sup> August 2023. All the witnesses supported the Appellant's case and were not cross-examined since the Respondents did not participate during the trial despite being notified of the said proceedings.
5. The trial Magistrate upon considering the case dismissed the suit which necessitated the filing of the instant appeal. The Appellant instituted the instant appeal vide a Memorandum of Appeal dated 22<sup>nd</sup> February 2024 raising the following grounds:-
  1. That the Learned Magistrate erred in law and in fact by not considering the evidence given by the Appellant and thus dismissed the case for lack of evidence.
  2. That the Learned Magistrate erred in law and in fact by dismissing the matter which was never defended or which proceeded ex-parte in the absence of the Defendants.
  3. That the Learned Magistrate erred in law and fact by dismissing a case which was never defended.
6. The Appellant thus sought the following reliefs:-
  - a. The entire Judgment delivered in Wundanyi Law Court on 6<sup>th</sup> February 2024 in Wundanyi CMCC ELC Case No. E004 of 2023 Msafiri Mwandoe =Versus= Nyange Wamwandu & Another be set aside and/or vacated in entirety and new Judgment be entered.
  - b. In the alternative the said Judgment delivered in the Wundanyi Law Court on 6<sup>th</sup> February 2024 in Wundanyi CMCC ELC Case No. E004 of 2023 Msafiri Mwandoe =Versus= Nyange Wamwandu & Another be vacated and the matter be heard afresh in Voi Law Court.
  - c. Costs of and incidental to this appeal be awarded as against the Respondent herein.



- d. Any such other or further Orders as this Honourable Court may deem appropriate to grant in the circumstances of this case.
7. The Appeal was canvassed by way of written submissions pursuant to the directions issued by this court. The Appellant filed his undated written submissions for consideration by the court. No written submissions had been filed by the Respondents for consideration by this court.
8. The Appellant submitted that he had called two witnesses and had demonstrated how the parcel of the land had been given to the Defendant but the Learned Magistrate still dismissed his case. It was submitted that the Learned Magistrate erred in shifting the burden of proof to the Appellant when the 1<sup>st</sup> Respondent had admitted that the Appellant and the 1<sup>st</sup> Respondent was the one who sold the plot to him and he followed the due process of getting a new number 3714. It was also submitted that the Respondents being aware of the fraud that had been committed failed to attend court to defend the suit.
9. It was further submitted that the Learned Magistrate ought to have considered the following questions before arriving at her decision:-
  - a. Is it possible for one to create a new number of the plot without involving the first owner?
  - b. If the 1<sup>st</sup> Defendant had really followed all due process why did he fail or neglect to attend court?
  - c. If at all the 1<sup>st</sup> Defendant had not fraudulently created a new number of the parcel of land why did they boycott the hearing?
  - d. If at all the 1<sup>st</sup> Defendant was the lawful owner why did he not produce sale agreement and all documents used to acquire the land?
10. The court was urged to set aside the judgment of the trial Magistrate delivered on 6<sup>th</sup> February 2024 and the Appellant be given a second chance to adduce evidence which was omitted during trial (sic).
11. The court has considered the entire record of appeal and the written submissions filed together with the Appellant's Memorandum of Appeal and the issues arising for determination are as follows:-
  - i. Whether the Appellant had proved his case before the trial court.
  - ii. What are the appropriate reliefs to grant herein.
12. As stated earlier the Respondents save for filing a Statement of Defence did not participate during trial. This notwithstanding the Appellant had a duty to prove his case.
13. The evidence before the trial court as adduced by the Appellant and his witnesses was that the 1<sup>st</sup> Respondent was allowed to stay in the land when he approached the Plaintiff sometimes in the year 1999. The said land was 1 ½ and he put up a temporary structure to enable him stay there with his family. Later in the year 2022, he was given a notice to vacate and hand over vacant possession. The 1<sup>st</sup> Respondent declined to vacate but instead put up a permanent structure without the Appellant's consent.
14. From the analysis of the evidence adduced herein PW2 and PW3 stated in their statements that they did not know how the 1<sup>st</sup> Respondent came to the suit property, however they maintained that the said land belonged to the Appellant.
15. While the Appellant pleaded negligence on the part of the 2<sup>nd</sup> Respondent which in a nutshell was to the effect that the 2<sup>nd</sup> Respondent facilitated and conspired with the 1<sup>st</sup> Respondent to take away his land, the Appellant failed to prove the said particulars to the satisfaction of this court. The evidence on



record clearly demonstrated that the Appellant welcomed the 1<sup>st</sup> Respondent to the suit parcel upon which the 1<sup>st</sup> Respondent put up a temporary structure and stayed there until 2022 when the Appellant gave him a notice to vacate which according to the Appellant was ignored and it further prompted the 1<sup>st</sup> Respondent to put up a permanent structure. The Appellant also produced a sale agreement dated 25<sup>th</sup> November 2022 which demonstrated that Plot No. 40 was being sold to one Wangai Njuguna.

16. In considering the grounds made in support of the Appeal the court notes that the Appellant has been unable to demonstrate how the Learned Magistrate erred in arriving at her decision. From the evidence on record, it would appear that the Appellant only wanted to evict the 1<sup>st</sup> Respondent from the land for the purpose of selling it to another third party having allowed and granted the 1<sup>st</sup> Respondent to be in the said land from 1999. Indeed, the Appellant having accepted to accommodate the 1<sup>st</sup> Respondent in the said parcel, the 1<sup>st</sup> Respondent further having put up some structures, he acquired some prescriptive rights and interest which could not be wished away and disregarded by this court at the whims of the Appellant.
17. This Court is a court of equity and that he who comes to equity must come with clean hands. In *Caliph Properties Limited vs. Barbel Sharma & Another* [2015] eKLR, the Court stated:-

“..... He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”
18. The Appellant’s conduct and actions towards the 1<sup>st</sup> Respondent works against him in seeking the reliefs sought in this Appeal.
19. In view of the foregoing, it is the finding of this court that the Appeal is devoid of merit and the same is dismissed with an order that each party to bear own costs of the Appeal.

### **Final Orders**

20. In the end the appeal is hereby determined as follows:-
  - i. The entire Appeal is hereby dismissed for lack of merit.
  - ii. Each party to bear own costs of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Msafiri Mwandoe the Appellant in person.

N/A for the 1<sup>st</sup> Respondent.

N/A for the 2<sup>nd</sup> Respondent.

Court Assistant: Mary Ngoira and Norah Chao.

