



**Raphael & another v Righa (Environment and Land Appeal E007 of 2023)
[2024] KEELC 13472 (KLR) (Environment and Land) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E007 OF 2023
EK WABWOTO, J
NOVEMBER 22, 2024**

BETWEEN

MATILDA JUMWA RAPHAEL 1ST APPELLANT

MARRIAM KIRERI MWANDA 2ND APPELLANT

AND

PAULINE WAKIO RIGHA RESPONDENT

*(Being an appeal from Judgment delivered by Hon. T. N. Sinkiyian (PM) in Voi
Chief Magistrate's Court Case No. E020 of 2023 on 5th December 2023 at Voi)*

JUDGMENT

The Appeal

1. The Appellants have filed this appeal against the Judgment of Hon. T. N. Sinkiyian (PM) delivered on the 5th December 2023 in respect to Voi Chief Magistrate's Court ELC Case No. E020 of 2021 on the following grounds:-
 1. That the honourable Magistrate erred in both law and fact in finding that the Appellants had not proved their case to the required standard against the weight of the evidence on record.
 2. That the honourable Magistrate erred in both law and fact in finding that the Respondent had purchased a portion measuring 1 ½ acres when there was no evidence to that effect on record.
 3. That the honourable Magistrate erred in both law and fact by taking into account extraneous matters in arriving at her decision.



4. That the honourable Magistrate erred in both law and fact in placing reliance on the sale agreement produced by the Respondent in confirming her ownership of 1 ½ acres when indeed the said sale agreement did not prove such a fact.
2. The Appellants have sought the following reliefs:-
 - a. That the judgment delivered on 5th December 2023 by Hon. T. N. Sinkiyian (PM) be set aside and/or varied.
 - b. That costs of this appeal be borne by the Respondent.
3. This being the first appeal the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that the 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 ...”

Submissions

4. The Appeal was canvassed by way of written submissions pursuant to the directions issued by this court. The Appellants filed written submissions dated 29th July 2024 while the Respondents filed written submissions dated 30th October 2024.
5. The Appellant submitted on the following issues:-
 - i. Whether the Hon. Magistrate erred in both law and fact in finding that the Appellants had not proved their case to the required standard.
 - ii. What are the orders as to costs.
6. It was submitted by the Appellant that the suit property was owned by the late Mwenda Ramadhan Mwarema as was acknowledged by both parties in their evidence and the contention lies in determining whether the deceased sold only a portion of the land measuring approximately 50ft by 100ft, rather than the entire 1 ½ acres. The Appellants had produced minutes dated 13th December 2020 and 27th February 2021 which indicated the portion sold as 50ft by 100ft a fact unchallenged by the Respondent. The Respondent never produced any evidence to prove that she acquired the entire parcel. The case of *Caroline Awinja Ochieng =Versus= Jane Anne Mbithe Gitau* eKLR was cited in support.
7. The Appellant faulted the Learned Magistrate for failing to appreciate the fact that the evidence before it from the Appellants altogether proved that the Respondent had only purchased a portion measuring 50ft x 100ft and not 1 ½ acres of the land.
8. The Appellants concluded their submissions by urging the court to grant the reliefs sought in the Appeal together with costs.
9. The Respondent submitted on the following issues:-



- i. Whether the Respondent purchased a portion measuring approximately 50ft by 100ft or the whole parcel in dispute.
 - ii. Whether the Appellants have proved their case on a balance of probability to warrant the grant of the prayer sought.
10. It was submitted that the Appellants did not produce an agreement to show that the Respondent bought land measuring 50ft by 100ft at a purchase price of Kshs. 100,000/= from their father and not the whole parcel. It was submitted that the Respondent was in possession of the whole parcel ever since when the Appellants father was alive and no dispute even arose between the Respondent and the Appellants' father. It was argued that the Respondent produced a sale agreement between herself and the Appellants father though the initial agreement did not capture the actual size of the land, the subsequent agreement and acknowledgment of the final instalment of Kshs. 54,000/= made by the Appellants father on 19th May 2013 confirmed that the Respondent bought the whole parcel. The case of Caroline Awinja Ochieng & Another =Versus= Jane Anne Mbithe Gitau & 2 Others (Supra) was equally cited.
11. It was further submitted that the Respondent had exclusive possession of the suit parcel since purchasing the same and that the Magistrate did not err in law and arriving at her decision. The court was urged to dismiss the Appeal with costs.

Analysis and Determination

12. Having considered the entire Record of Appeal and written submissions filed by the parties, the issues arising for determination are as follows:-
 - i. Whether the Appeal is merited.
 - ii. What are the appropriate reliefs.
13. The Appellants case before the trial court was that they are the lawful owners by inheritance of property situated at Birikani part of Kishamba "B" Group Ranch. Their father now deceased was a member of Kishamba B Group Ranch as Member No. 917 and the Respondent had bought part of their land measuring 50 by 100feet. It was averred that the Respondent has purported to lay claim to the whole of the land measuring 1 ½ acres without the colour of right or lawful sanction and further the Respondent and her family have on several occasions chased the Appellants with a panga threatening to kill them whenever they went to cultivate their land. The Appellants thus sought declaratory and injunctive orders.
14. The Respondent's denied the Appellant's averments and stated that she is the one who has been threatened and assaulted while on the suit property by the 1st Appellant.
15. The trial court upon considering the evidence dismissed the suit after arriving at the conclusion that the Appellants had not proved their case to the required standard.
16. From the analysis of the evidence tendered herein and the Record of Appeal, the Appellants were not parties to the agreement between the Respondent and their father (now deceased). The Appellants never produced any agreement before the trial court while the Respondent produced an agreement dated 13th November 2011. The said agreement indicated that the purchase price was Kshs. 100,000/= upon which a deposit of Kshs. 18,000/= had been paid. This agreement did not indicate the size of the property nor the location and the type of the property that was being sold. The 1st Appellant was a witness to the said agreement.



17. Both parties have cited the case of *Caroline Awinja Ochieng & Another =Versus= Jane Anne Mbithe Gitau (Supra)* where the court held as follows:-

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

18. From the materials presented to the court, there was no agreement produced by the parties showing that the parties had agreed on the purchase of 50ft by 100ft on the entire 1 ½ acres as alleged by the Respondent. Towards this end this Court cannot solely rely on the said agreement per se considering that the said property was unregistered. The Appellants in demonstration of the fact that the Respondent was only entitled to 50ft by 100ft went further and made reference to minutes of the meeting dated 13th December 2020 that confirmed that the Respondent had only purchase a portion of the land measuring 50 by 100. From the minutes of the said meeting which the court has considered, Mr. Mwandonyi who was the Respondent’s witness to the said agreement and who was present in the said meeting together with the Respondent confirmed that the Respondent only purchased 50 by 100 from the Appellants’ father. The Respondent was present in the said meeting and she did not dispute the same. Without any other evidence to the contrary this Court is unable to uphold and consider the Respondent’s contention that she was entitled to the entire parcel measuring approximately 1 ½ acres and in the circumstances, it is the finding of this court that the Respondent was only entitled to the portion measuring 50ft by 100ft which was purchased from the Appellants’ father.
19. Having addressed and considered the said issue, it is the finding of this court that the Appellants appeal is merited and the Learned Magistrate erred while arriving at her decision.
20. In respect to the appropriate reliefs to grant. The Appellants have sought and prayed that the judgment delivered on 5th December 2023 by the lower court be set aside and or varied together with the costs of the appeal.
21. Section 78(2) of the *Civil Procedure Act* provides that:



2. Subject aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.”
22. The purpose of the above provision is to enable an appellate Court to intervene where there is manifest misdirection by the trial Court either on point of law or fact. Flowing from the foregoing discussion and this Court having found that the learned Magistrate erred, the judgment of the trial court delivered herein warrants the interference of this Court.

Final Orders

23. In conclusion, the Appeal succeeds and the judgment of the lower court is hereby set aside and substituted with the following orders:-
 - a. An order of injunction is hereby issued restraining the Respondent from trespassing upon the Appellants land and or carrying any activities therein.
 - b. It is hereby declared that the Respondent is only entitled to the portion of land measuring 50ft by 100ft and the remaining portion belongs to the Appellants.
 - c. Costs of the Appeal and costs of the lower court to be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 22ND DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Wambura for the Appellants.

Pauline Wakio Righa the Respondent appearing in person.

Court Assistants: Mary Ngoira and Norah Chao

