



**Kaibiru v Mwenda (Environment and Land Appeal E002 of 2023)
[2024] KEELC 13294 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

CK YANO, J

NOVEMBER 20, 2024

BETWEEN

JOHN KATHENYA KAIBIRU APPELLANT

AND

DANIEL MUTEGI MWENDA RESPONDENT

*(An appeal against the judgment and decree of Hon. Mbayaki Wafula,
PM in Marimanti PMC ELC No. 24 of 2017 delivered on 29/6/2023)*

JUDGMENT

Introduction

1. The respondent herein filed suit in the subordinate court vide a plaint dated 29th January, 2016 seeking for an order of permanent injunction restraining the Appellant from entering or trespassing into Land Parcel No. Tharaka/Marimanti/1764 or cultivating or causing any acts of waste or at all, costs of the suit and any other relief that the court deems fit to grant.
2. The respondent pleaded that at all material times since 1997 he had been and was still the registered owner of the suit land absolutely. That he got so registered after winning Arbitration Case 69/88 way back on 28th March, 1990 pursuant to the provisions of the Land Adjudication Act Cap 284 Laws of Kenya.
3. The respondent stated that prior to the said case, the land was ancestral land having inherited it from his father. That on various dates and occasions in 2015, the Appellant unlawfully trespassed into the respondent's said land parcel claiming half share of it and quite often destroyed the respondent's crops.
4. The respondent further pleaded that on various occasions, the appellant threatened to harm him and his family resulting to reports being made at the Marimanti Police Station who advised that the case is of a Civil nature, hence the filing of the suit.



5. The Appellant filed a defence and counterclaim dated 19th February, 2016 wherein he denied the respondent's claim. The Appellant denied trespassing upon the suit land and put the respondent to strict proof.
6. In his counter claim, the Appellant pleaded that the suit land was his ancestral land having inherited it from his father who passed on before the adjudication process started in the area. That when the adjudication process started, the respondent by use of his office and position as the then area councilor caused the suit land to be recorded in his name without the knowledge of the Appellant. The appellant stated that he became aware of the unlawful act of the respondent and filed objections against the respondent and the matter ended in an appeal to the Minister in charge of lands. The Appellant stated that the Minister for Lands through the District Commissioner, Tharaka District heard the appeal and decided in the year 2004 awarding him one half share of the suit land and the other half share to the respondent. The appellant pleaded that the respondent did not seek to quash the decision of the Minister for lands in the High Court and the Minister's decision became final as to ownership of the land in dispute. It was the appellant's contention that the registration of the entire land in the name of the respondent while the adjudication was still pending before the minister for lands was fraudulent and a mistake. The appellant enumerated the particulars of fraud as pursuing the registration of the land in his name while aware that the matter was pending on appeal before the Minister for Lands, failing to inform the Chief Land Registrar of the pendency of the appeal before the Minister for Lands, proceeding to secure registration and issuance of title in his name while fully aware of the minister's decision to have the land shared equally and acting dishonestly.
7. The Appellant pleaded that the decision of the Minister for Lands was communicated to the Director of Land Adjudication & Settlement who directed the District surveyor in conjunction with the District Land Adjudication & Settlement Officer to fully implement the minister's decision. That the District Surveyor in conjunction with the Land Adjudication & Settlement Officer surveyed the land, subdivided it into two equal parts, giving the respondent LR. 3343 and the Appellant No. 3342 each measuring 4.18 hectares.
8. The Appellant stated that he took possession of his share of the land being LR. No. 3342, fenced it and started developing it, but the respondent has been trespassing on the land making it impossible for him to enjoy his land. The appellant stated that he is entitled to half share of the suit land measuring 4.18 hectares as clearly surveyed on the ground.
9. The Appellant prayed for the dismissal of the respondent's suit and for judgment to be entered against the respondent for subdivision of LR. No. Tharaka/Marimanti/1764 into two equal shares and one half be transferred and registered in the name of the Appellant.
10. In his judgment delivered on 29th June, 2023, the learned trial magistrate found that the Minister rendered his decision on 15th December, 2015 and the same had not been challenged. That the Appellant had not done equity even as he sought equity and did not have clean hands. The trial court ordered for revocation of LR. N. Tharaka/Marimanti/3342 and 3343 and the title reverted to the respondent. That the respondent to retain LR. No. N. Tharaka/Marimanti/1764 pending the proper implementation of the Minister's decision. The order of injunction sought by the respondent was therefore allowed.
11. Being aggrieved by that judgment, the appellant filed this appeal on the following grounds: -
 1. The learned Trial Magistrate erred in law and fact in holding that the minister's decision was not complied with whereas there is sufficient evidence on record to show that the decision was



fully and regularly complied with in subdivision of LR. N. Tharaka/Marimanti/1764 into two equal portions.

2. The Learned Trial Magistrate erred in Law and in fact by cancelling the registration of LR. N. Tharaka/Marimanti/3342 without sufficient evidence to legally warrant such cancellation.
 3. That the Learned Trial Magistrate erred in Law and in fact by dismissing the appellant's counter-claim when there was supporting evidence in support of the appellant's case.
 4. The Learned Trial Magistrate erred in fact and in Law by failing to analyse the evidence on record and in so failing, made a decision that is not legally tenable.
 5. The whole judgment of the Trial Learned Magistrate court is against the weight of evidence.
 6. The Learned Trial Magistrate erred in Law and fact by giving an order of injunction restraining the appellant from entering LR. N. Tharaka/Marimanti/1764 as such order amounts to evicting him from the land which he has been in occupation for years.
 7. The Learned Trial Magistrate misdirected himself in Law by granting such order of cancellation of the appellant's title to LR. N. Tharaka/Marimanti/3342 when there was not such relief/prayer sought by the respondent.
12. The appellant prays for the appeal to be allowed and the judgment of the lower court to be set aside with an order of dismissal of the respondent's case and judgment to be entered for the appellant as per the counterclaim thereof.
 13. Pursuant to directions given by the court, the parties agreed to canvass the appeal by way of written submissions. However, only the appellant filed his submissions dated 2nd August, 2024 through the firm of M/S Murango Mwenda & Company Advocates. The respondent's advocate informed the court that he had filed their submissions in the morning 24/9/2024, but there were no such submissions either in the file or the CTS.

Appellant's Submissions

14. The applicant gave a brief background of the matter. While arguing ground 1 of the appeal, the appellant submitted that he had filed Appeal No. 149 of 2004 to the Minister which the minister determined and held as follows:

“The appeal case has been partly accepted. Land parcel No. 1764 Marimanti to be subdivided into two equal portions. The District surveyor to note the interest of each party while subdividing the land.”
15. The appellant pointed out that the proceedings and award of the Minister was produced as Exhibit DW1. That this was admitted by the respondent during cross-examination. The appellant referred the court to the respondent's evidence at page 45 of the Record of Appeal where he stated that “I know the minister rendered his decision and order that the land be shared equally for each of us.”
16. The appellant submitted that there was indisputable evidence that the minister rendered his award sharing the suit land into two equal parts. That the said decision was not challenged. It is the appellant's submission that the respondent admitted having not challenged the Minister's decision and that he further admitted that he had filed Chuka ELC No. 1 of 2020 against the appellant challenging the subdivision, but the case was thrown out by the court.



17. The appellant submitted that although the respondent had earlier on stated that he did not know whether the Minister's decision was implemented, he later admitted that he had filed a case challenging the registration of the land in favour of the appellant.
18. On whether the Minister's decision was implemented, the appellant referred the court to his evidence which appears at pages 54-56 of the Record of Appeal. The appellant submitted that there is evidence that the surveyor visited the suit land No. Tharaka/Marimanti/1764 and subdivided it in accordance with the Minister's award. The appellant referred to Exhibit 2, 3, 4 and 5 which are a letter from the Director of Survey, Sketch Plan, Invitation letter and invitation forms respectively. The appellant submitted that subsequent to the surveyor's visit to the suit land and the sub-division in accordance with the minister's award, the minister's award was fully implemented. That the sub-division resulted into two parcels of land, known as LR. No Tharaka/Marimanti/3342 in the name of the appellant and LR. No. Tharaka/Marimanti/3343 in the name of the respondent. The appellant referred to the copy of the title deed for LR. No. Tharaka/Marimanti/3342 which he produced as Exhibit 7. It is the appellant's submission that the learned trial magistrate had no basis to conclude that the minister's decision was not complied with. That that finding was wholly erroneous and against the evidence on record. The appellant submitted that any attempt by the respondent to challenge the award of the Minister in these proceedings, is an exercise in futility. The appellant referred the court to Section 29 of the *Land Adjudication Act* which makes the Minister's decision final. That the only way to challenge it is through judicial review proceedings, which was not done.
19. With regard to ground 2 of the appeal, it was submitted on behalf of the appellant that the appellant's title to LR. No. Tharaka/Marimanti/3342 was acquired pursuant to the minister's decision. That there was no evidence tendered to show that that title was acquired by fraud, misrepresentation, unprocedurally or through corrupt means. It was therefore submitted that it was improper and a grave error for the trial court to revoke that title. It is the appellant's submission that his title is protected under Section 26 of the *Land Registration Act*.
20. The appellant argued grounds 3,4 and 5 of the appeal together and submitted that he demonstrated that there was a minister's award in his favour for half of the land. That he further demonstrated by evidence and documents that the minister's award was implemented by the relevant government officers and was given no more than he was awarded. That the sub-division resulted into two equal parcels of land and one was registered in favour of the appellant and the other in favour of the respondent. The appellant submitted that the learned trial magistrate did not, in his judgment, even attempt to consider and analyze this evidence as he was required to, resulting in miscarriage of justice. The appellant argued that had the trial magistrate analyzed the evidence as required of him, he would have arrived at a different verdict. That the appellant's evidence was not challenged and could not have been challenged as it was clear and straight forward with all supporting documents. The appellant faulted the trial court for dismissing his counter claim when there was overwhelming evidence. The appellant submitted that there is little mention of his evidence and the documents produced as exhibits. That the trial magistrate did not consider the sub-division of the land by the District Surveyor, the mutations and the subsequent registration. That the trial court did not consider all these steps taken to fully implement the award of the minister. It was submitted on behalf of the appellant that this court being the first appellate court is entitled to consider and re-evaluate the entire evidence as if it was the trial court. The appellant urged the court to find that there was sufficient evidence to allow the counterclaim and fault the trial court for failure to do so.
21. Regarding grounds 6 and 7 of the appeal, it was submitted on behalf of the appellant that the order of injunction issued against the appellant over LR. No. Tharaka/Marimanti/1764 was wrong since that land was at the time of filing suit and the judgment non-existent. That there is evidence that



the appellant had been using the land wherein he has also buried some of his family members. The appellant argued that when the learned magistrate issued the order of injunction, when the appellant was in occupation and had title to half of the suit land, it amounted to evicting him from the land. The appellant submitted that there was not such relief sought. That the learned trial magistrate fell in greater error by ordering the cancellation of the appellant's title to LR. No. Tharaka/Marimanti/3342 when the respondent had not sought such a relief. That a court of law cannot grant a relief that is not prayed for. The Appellant relied on the case of Paul Muiru Vs. Patrick Thindu Muiru [2006]eKLR.

22. It is the appellant's submission that the appeal has merit and urged the court to set aside the judgment of the lower court and substitute it with a judgment in favour of the appellant. The appellant also prayed for costs of the appeal and in the lower court.

Analysis And Determination

23. I have perused and considered the Record of Appeal, the grounds of appeal and the submissions filed together with the authority relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determining whether the conclusions reached by the trial magistrate were justified on the basis of the evidence presented and the law. In this case, both parties are claiming ownership of the suit land, each claiming that it was their fathers' ancestral land. The respondent's case was that he is the lawfully registered proprietor of parcel No. Tharaka/Marimanti/1764 having title issued to him on 1st April, 2010. The respondent accused the appellant of trespassing on the said land and sought an order of permanent injunction against him.
24. On his part, the appellant denied the respondent's claim and filed a counterclaim seeking to have LR. N. Tharaka/Marimanti/1764 divided into two equal portions, and one half to be transferred to him and the other half to be retained by the respondent. The appellant stated that pursuant to a decision in appeal case to the minister, the minister directed that the original parcel of land be sub-divided into two equal halves, one for the respondent (now LR. No. N. Tharaka/Marimanti/3343) and the other LR. No. N. Tharaka/Marimanti/3342 each measuring 4.18 Ha. The appellant accused the respondent of fraudulently registering parcel No. N. Tharaka/Marimanti/1764 in his name to the appellant's exclusion contrary to the minister's decision.
25. The issues for determination as I can deduce from the grounds of appeal are:
- i. Whether the respondent had proved that he wholly owns LR. No. N. Tharaka/Marimanti/1764 or whether the same was subject to sub-division into LR. No. N. Tharaka/Marimanti/3342 and 3343 as claimed by the appellant.
 - ii. Whether the decision of the trial court was against the weight of the evidence adduced.
 - iii. Whether the trial court was justified in cancelling the registration of LR.No. N. Tharaka/Marimanti/3342.
26. As rightly captured by the learned trial magistrate, the main issue was the ownership of parcel Nos. N. Tharaka/Marimanti/1764, 3342 and 3343. From the evidence on record, it is not in dispute that there was a decision by the minister dated 15/12/2005 in Appeal Case 149/2004. The Minister's decision was in respect of parcel No. 1764 and it was delivered by S.J. Otieno, District Commissioner, Tharaka District in the following terms:

“The appeal case has been partly accepted Land Parcel No. 1764 Marimanti to be sub-divided into two equal portions. The District Surveyor to note the interests of each party while sub-dividing the land.



Right of Appeal granted.”

27. It is apparent from the material on record that no appeal was preferred by any of the parties against the Minister’s decision. Therefore, the same still stands.
28. Article 40(6) of *the Constitution* only protects rights to property if lawfully acquired. Further, Section 26(1) of the *Land Registration Act* only sanctifies title which is devoid of fraud or misrepresentation and which has been acquired legally, procedurally and not through a corrupt scheme. And as noted by the trial court, the root of the title must be devoid of any blemish and the title holder must have clean hands and come to court with clean hands.
29. In the instant case, the appellant had filed appeal to the minister, being Appeal No. 149 of 2004. The subject matter was land parcel No. 1764 Marimanti. The minister made a decision on 15/12/2005 directing that the said land be sub-divided into two equal portions. Each of the parties herein was to get half. The District Surveyor was further directed to note the interest of each party while subdividing the land. The said decision was not challenged and there is sufficient evidence on record to show that the minister’s decision was implemented. The evidence on record show that the surveyor visited the suit land No. 1764 and sub-divided it in accordance with the Minister’s decision. This is confirmed by the sketch plan which was produced as Exhibit 3. Exhibit 4 is a copy of a letter confirming that the respondent was invited to attend the sub-division. There are also mutation forms (Exhibit 5) over the said sub-division. According to the appellant, the sub-division that was done pursuant to the minister’s decision resulted into two parcels, namely, LR. No. THARAKA/MARIMANTI/3342 in the name of the appellant and LR. No. THARAKA/MARIMANT/3343 in the name of the respondent. According to the documents produced as exhibits, including the mutation forms, and title deed (Exhibit 7) for LR. No. Tharaka/Marimanti/3342, each of the sub-divisions is measuring 4.18 Ha. In my humble view, the decision of the minister was duly implemented in accordance with the decision. It is my considered view that the learned trial magistrate misdirected himself when he concluded that the Minister’s decision was not complied with. The trial court’s finding and holding was wholly erroneous and against the evidence on record. It should also be noted that under Section 29 of the *Land Adjudication Act*, the Minister’s decision is final. The only lawful way to challenge it is through judicial review proceedings which was not done.
30. In this case, the respondent’s claim was based on the Title Deed for Title No. N. Tharaka/Marimanti/1764 issued on 1st April, 2010. The acreage is shown as 9.94 Ha. The respondent claimed that he got so registered after winning Arbitration Case No. 18/1988 on 28/03/1990 pursuant to the provisions of the *Land Adjudication Act*. The respondent produced the proceedings in Arbitration Case No. 18/1988. Although the Arbitration Board Committee may have awarded the respondent the whole of land parcel No. 1764, it is clear from the documents on record that there was an Appeal No. 149/2004 that was filed by the appellant pursuant to Section 29 of the said Act. By the time a title deed was being issued to the respondent on 1st April, 2010, it is clear that there was an appeal that was pending before the minister over the suit land. The appeal decided that the land be sub-divided equally between the two parties. From the material on record, there was sufficient evidence to prove that the respondent’s title was overtaken by events since the proceedings that led to its issuance were later set aside and replaced by the minister’s decision that directed the sub-division of the land into two. Taking into account the evidence on record, it is my finding and I so hold that the registration of the entire land in the name of the respondent while the adjudication dispute was still pending before the minister was fraudulent and a mistake. I am persuaded that the appellant had proved his counter claim. Considering that the minister’s decision was final, and it was not challenged either by way of judicial review or otherwise, the same still stands.



31. Considering the totality of the evidence adduced at the trial court, it is my finding that the decision of the learned trial magistrate was not well founded and there are sufficient reasons to disturb it.
32. Consequently, this court finds that the appellant's appeal has merit and the same is allowed. The judgment of the lower court is hereby set aside and substituted with an order dismissing the respondent's suit and allowing the appellant's counterclaim. I note however, that in the counterclaim, the appellant sought an order for sub-division of LR. No. N. Tharaka/Marimanti/1764 into two equal shares and one half to be transferred and registered in the appellant's name. Since the land is already sub-divided pursuant to the minister's decision, and the appellant already holds a title deed in his favour for one portion, being LR. No. N. Tharaka/Marimanti/3342, I direct that title No. N. Tharaka/Marimanti/3343 be issued in the name of the respondent. Further, in view of the fact that LR. No. N. Tharaka/Marimanti/1764 was already sub-divided and therefore was non-existent at the time of filing suit and judgment, the most appropriate order to issue, which I hereby do, is for the same to be cancelled.
33. I further order that each party shall bear their own costs of the appeal and in the lower court.
34. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

Ms. Gumato holding brief for Murango Mwenda for Appellant

Kaaria for Respondent

C. K. YANO

JUDGE

