



**Sikolo & another v Oketch (Environment and Land Appeal E017 of 2023)  
[2024] KEELC 13300 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13300 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E017 OF 2023  
MAO ODENY, J  
NOVEMBER 20, 2024**

**BETWEEN**

**BETTY NEKESA SIKOLO ..... 1<sup>ST</sup> APPELLANT**

**JOY NALIAKA BARASA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**COSMAS OKETCH ..... RESPONDENT**

*(Being and Appeal from a Judgment delivered by Hon. E. S Soita Senior Resident Magistrate on 15th August, 2023 in Nakuru C.M.C.C ELC NO 107 OF 2020)*

**JUDGMENT**

1. This appeal arises from the Judgment dated 15<sup>th</sup> August 2023 by Hon. E.S Soita Senior Resident Magistrate Nakuru delivered in Nakuru CMCC, ELC No. 107 of 2020. The Appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 13<sup>th</sup> September 2023 and listed the following grounds:
  1. That the learned Trial Magistrate erred in law in and fact by failing to establish that the Appellants had established their case on a balance of probability while the Respondent's evidence on record was unsatisfactory.
  2. That the learned Trial Magistrate misdirected himself as to the application of Section 24 (a) of the *Land Registration Act*.
  3. That the learned Trial Magistrate erred in law and fact in failing to give any consideration to the fact that the Appellants produced copy of title deed as proof of ownership thereof.



4. That the learned Trial Magistrate misdirected himself as to the application of Section 26 (1) of the *Land Registration Act*.
  5. That the learned Trial Magistrate erred in law and fact in failing to give any consideration to the weighty issues raised in the Appellants case and submissions to the case.
  6. That the learned Trial Magistrate erred in law and fact in not finding that the evidence raised by the Appellants was merited.
  7. That the learned Trial Magistrate erred in law and in fact in failing to properly analyze the Appellants exhibits produced.
  8. That the learned Trial Magistrate erred in law and in fact in failing to properly analyze the Appellants exhibits produced.
  9. That the learned Trial Magistrate erred in law and fact in failing to have any regard to the principle of substantive justice when dealing with the suit.
  10. That the learned Trial Magistrate in arriving at the decision took into consideration extraneous matters.
2. The Appellants had sued the Defendant in the lower court vide a plaint dated 19<sup>th</sup> June 2020 seeking the following orders:
- a. An order of permanent temporary and injunction restraining the Defendant by himself agents, representatives, servants and/or employees from trespassing, cultivating, constructing, leasing, charging, selling and/or in any way interfering with parcel of land Title No. Solai/Ndungiri Block 9/263 (Ampiva).
  - b. An order for the Defendant to give vacant possession of parcel of land referred to Solai/Ndungiri Block 9/263 (Ampiva) or in default eviction to issue.
  - c. Costs of the suit.
  - d. Any other relief this honorable court may deem fit to grant.
3. The suit was heard and the Trial Magistrate in his Judgment dated 15<sup>th</sup> August, 2023 dismissed the Appellants' suit against the Respondent which led to the Appellants' filing the present appeal.

### **Appellants' Submissions**

4. Counsel for the Appellant filed submissions dated 13<sup>th</sup> September, 2024 and identified the issues for determination as:
- a. Whether the 1<sup>st</sup> Appellant is the lawful registered owner of parcel of land Title No. Solai/Ndungiri Block 9/263 (Ampiva)?
  - b. Whether this honorable court should issue an order of permanent injunction restraining the Respondent from interfering with parcel of land Title No. Solai/Ndungiri Block 9/263 (Ampiva)?
  - c. Whether the court should issue eviction orders against the Respondent from parcels of land known as Solai/Ndungiri Block 9/263 (Ampiva)?



- d. Whether this honorable court should set aside judgment of 15<sup>th</sup> August, 2023 and this court be pleased to enter judgment in favour of the Appellants?
5. On the first issue, counsel submitted that the 1<sup>st</sup> Appellant followed due procedure in obtaining title deed for the suit land and is the lawful owner of the suit land having purchased the same from one Francis Kamau Njuguna on 9<sup>th</sup> December, 2017 at a consideration of Ksh 500,000/=.
6. Counsel submitted that the 1<sup>st</sup> Appellant produced a copy of the mutation form, application to the Land Control Board to obtain consent to sub-divide which led to the transfer of the suit land from the seller Francis Kamau Njuguna to the 1<sup>st</sup> Appellant who was issued with a title deed on 13<sup>th</sup> December, 2017.
7. Counsel relied on Section 24 and 26 of the *Land Registration Act* and the cases of Margaret Njeri Wachira vs Eliud Waweru Njenga [2018] eKLR, Stephen Kipkorir Kerich & another v David Kiprono Langat & 3 others [2015] eKLR, Mahendrakumar Keshavlal Ladha Shah & Sushma Mahendrakumar Shah v Peter Kinoro Mwicigi [2021] eKLR and Phyllis Wangui Ktavi & another vs Stephen Parasho Kaito [2021] eKLR.
8. Counsel urged the court to allow the Appeal and issue a permanent injunction restraining the Respondent from interfering with the 1<sup>st</sup> Appellant's quiet enjoyment and eviction from the suit land. Counsel relied on the cases of Jacob Ernest Ambala Odoni vs Violet Shikuku [2021] eKLR and Mathias Masiva Ahaza & 2 others vs Samuel Gichuki & 2 others [2018] eKLR.

### **Determination And Analysis**

9. This is a first appeal and therefore the court has a duty to reconsider, evaluate the evidence and draw its own conclusions based on the evidence on record. The court is also cognizant of the fact that it did not benefit from observing the demeanor or the testimony of the witnesses as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

10. The Appellant faulted the Trial Magistrate for failing to consider that the Appellant produced a copy of the title deed, a mutation form, the sale agreement, and land control board consent as proof of ownership of the suit land.
11. From the excerpt of the Trial Court's judgment it stated as follows:

“It should be noted that the 1<sup>st</sup> Plaintiff did not produce an official search of land parcel Solai/Ndugiri Block 9/263 (Ampiva) which she alleges belongs to her and the Defendant has trespassed on the same. The Plaintiffs have produced a copy of parcel of land Solai/



Ndungiri Block 9/173 (Ampiva) which shows the name of the Defendant. It should be further noted that there has been sub division as asserted by the Plaintiff from land parcel Solai/Ndungiri Block 9/24 which was divided five times to create land Solai/Ndungiri Block 9/263 (Ampiva). The Court asks itself, does land Solai/Ndungiri Block 9/263 (Ampiva) exist? The same would have been done through an official search to confirm ownership of the land in dispute in deed belongs to the 1<sup>st</sup> Plaintiff herein and further the Plaintiffs should have called the vendor, Francis Kamau Njuguna of ID 8041417 to confirm he did sale the land in dispute to the 1<sup>st</sup> Plaintiff.

12. In the Plaint dated 19<sup>th</sup> June, 2020, the property in dispute is Solai/Ndungiri Block 9/263 (Ampiva) and not Solai/ Ndungiri Block 9/ 173 (Ampiva) which purportedly belonged to the defendant.
13. It is on record that the Appellant produced a sale agreement between the Appellant and one Francis Kamau Njuguna dated 9<sup>th</sup> December 2017, a copy of the sellers ID, Application for consent for subdivision of Solai Ndungiri Bock 9/24, Consent to subdivide parcel No; Solai Ndungiri Bock 9/24 Copy of mutation of subdivision of parcel No. Solai Ndungiri Bock 9/24, Copy of transfer of parcel No; Solai/Ndungiri Bock 9/263 in the name of the Appellant Receipt dated 27<sup>th</sup> March, 2023 and a copy of the title deed for Solai Ndungiri Bock 9/173 (Ampiva) in the name of the Respondent.
14. The Appellant produced a copy of the title for parcel No. Solai/ Ndungiri Block 9/ 173 (Ampiva) belonging to the respondent to show that he had his own parcel of land and not that it was in dispute.
15. The Trial Magistrate went ahead and put weight on the production of a copy of the title belonging to the respondent which was not in dispute to come to a wrong conclusion that the plaintiff had not proved the ownership of the suit land. The court did not consider the evidence of ownership that was before it, the court went ahead to consider issues that were not before it as to whether after the suit land exists after the subdivision.
16. It is clear that the land that was subdivided through the consent to subdivide was parcel No Solai Ndungiri Bock 9/24 which resulted into five plots the Appellant's being plot No. Solai/Ndungiri Bock 9/263 and the Respondent is being plot No. Solai/ Ndungiri Block 9/ 173 (Ampiva).
17. There was no challenge to the existence of the Appellant's parcel of land having produced a title deed and a mutation and conveyance documents leading to the issuance of title. I find that the Trial Magistrate misdirected himself by dealing with extraneous issues leading to a wrong conclusion.
18. Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
19. The court needs to tread carefully with caution as was held in the case of *Peters v Sunday Post Ltd* [1958] EA 424 in a case where it deems it fit to review and set aside the judgment of the Trial court. In this Appeal I find it fit and just to review and set aside the judgment of the trial court and substitute it with one in favour of the Appellant in the following terms:
  - a. The Appeal is hereby allowed and the Judgment of the Trial Court dated 15<sup>th</sup> August, 2023 is hereby be set aside.
  - b. A permanent injunction is hereby issued restraining the Respondent by himself, agents, representatives, servants and/or employees from trespassing, cultivating, and constructing.



Leasing, charging, selling and/or in any way interfering with parcel of land Title No. Solai/  
Ndungiri Block 9/263 (Ampiva).

- c. The Respondent is hereby ordered to give vacant possession of parcel of land Title No. Solai/  
Ndungiri Block 9/263 (Ampiva) within 30 days failure to which eviction to issue.
- d. Respondent to pay costs of the suit and the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. A. ODENY**

**JUDGE**

