



**Igoki v Kimondo & 2 others (Environment and Land Appeal E009 of 2023)  
[2024] KEELC 13551 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13551 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL E009 OF 2023  
AK BOR, J  
NOVEMBER 19, 2024**

**BETWEEN**

**PRISCILLA IGOKI ..... APPELLANT**

**AND**

**ALEX MWANGI KIMONDO ..... 1<sup>ST</sup> RESPONDENT**

**LUCY KAREMA ..... 2<sup>ND</sup> RESPONDENT**

**MWIRERI ESTATE LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Being dissatisfied with the judgment of the Hon. Mr. B. Mararo, Senior Principal Magistrate, delivered on 26/9/2023 which directed her to give vacant position and remove all the illegal structures from the land known as Daiga/Umande Block 2/3939 (Mwireri) (the suit property) to the 1<sup>st</sup> Respondent, the Appellant lodged this appeal challenging the findings of the Learned Magistrate.
2. The 1<sup>st</sup> Respondent filed Nanyuki CMCC No. 128 of 2017 on 17/11/2017 claiming that the Appellant had encroached onto a portion of his land known as Daiga/Umande Block 2/3939 (Mwireri) and erected illegal temporary structures without his consent. He sought an order directing the Appellant to give vacant possession of the land. In her amended defence and counterclaim filed on 19/2/2019 the Appellant denied the 1<sup>st</sup> Respondent's claim and averred that he only purchased a portion measuring 0.025 hectares but wanted to claim the entire plot including the Appellant's portion and had deposited building materials on her portion.
3. In her counterclaim, the Appellant disputed that the 1<sup>st</sup> Respondent owned the plot of land which included her portion while maintaining that her land was different from the land which the 1<sup>st</sup> Respondent purchased from Naomi Nkirote Muthomi. She averred that she was a member of Mwireri Estate Limited (the Company) and held shares in the Company which resulted in her being allocated a plot within Daiga/Umande Block 2. She averred that the allocation of the plot was subject to payment



which she made leaving a balance of Kshs. 3,000/=. Further, that the director of Mwireri Estate Limited died leaving the company affairs and land allocations including the issuance of clearances to the 2<sup>nd</sup> Respondent who was his daughter. When she attempted to contact the 2<sup>nd</sup> Respondent with a view to clearing the balance of Kshs. 3,000/= so that she could be issued as clearance certificate, the 2<sup>nd</sup> Respondent threatened to sell the plot if the Appellant did not pay the current purchase price for the land.

4. She maintained that the plot sold to the 1<sup>st</sup> Respondent was different from her plot and that the 3<sup>rd</sup> Respondent was aware about the big problem with ownership and possession of plots in Mwireri which were caused at the time of allocation of plots to members. The Appellant averred that she had been in possession of the suit property since 1989 and had developed it extensively by fencing, building a residential house where she lived, rearing sheep and goats and farming on the land.
5. She sought an order for cancellation of the title deed issued in the 1<sup>st</sup> Respondent's name and an order directing the Land Registrar to register her as proprietor of the suit property upon proof of payment of the outstanding balance of Kshs. 3,000/=. Additionally, she sought an order directing the 3<sup>rd</sup> Respondent to issue a clearance to the 1<sup>st</sup> Respondent for purposes of registration and issuance of title in respect of Daiga Umande Block 2/3940 (Mwireri). In the alternative, she sought to have the Land Registrar directed to dispense with the clearance and to issue a title deed to the 1<sup>st</sup> Respondent in respect of Daiga Umande Block 2/3940 (Mwireri).
6. The hearing of the matter proceeded before the trial court when the 1<sup>st</sup> Respondent gave evidence. He relied on various documents including his title deed issued on 12/4/2017 and the sale agreement dated 5/1/2017 which he entered into with Naomi Nkirote Muthomi for the sale of the suit property. Clause 5 of the special conditions of the agreement stipulated that the purchaser had seen the location and extent of the said property and had full knowledge of the existence of boundaries and beacons and was satisfied about that. Clause 7 stipulated that the seller was to demolish the structures on the suit property and take the materials available for her own use.
7. The 1<sup>st</sup> Respondent also produced a copy of the transfer of land together with the stamp duty declaration assessment and payment leave. He relied on the demand letter dated 2/8/2017 addressed to the Appellant regarding encroachment on the suit property. The 1<sup>st</sup> Respondent produced a copy of the mutation form for the subdivision of Daiga/Umande Block 2/1533 which resulted in the creation of parcel numbers 3936 to 3949. The mutation was received by the District Surveyor Nanyuki on 21/7/2017.
8. The Appellant stated in her evidence that she was the rightful owner of the suit property since 1989 when the late Karema Ngacha, a Director of Mwireri Estate Limited allocated her the plot. She stated that when she was allocated the plot as a member, she took possession and built a house where she lived to date and was carrying out some farming on the land. That in 1989 she deposited Kshs. 3,000/= for the land leaving a balance of Kshs. 3,000/= which she was willing to pay so that she could be issued a clearance to process her title deed but the 2<sup>nd</sup> Respondent refused to accept the payment.
9. She stated that in 2017, her neighbour Naomi Nkirote Muthomi sold her plot where she had been living to the 1<sup>st</sup> Respondent and delivered vacant possession to the 1<sup>st</sup> Respondent. She maintained that the 1<sup>st</sup> Respondent had refused to take possession of his own land. Further, that she had been staying on the plot since 1989 while the 1<sup>st</sup> Respondent purchased his plot in 2017. She added that Naomi Nkirote Muthomi who sold the plot to the 1<sup>st</sup> Respondent had never made any claims of encroachment against her.



10. The Appellant stated that on 26/6/2018, a District Surveyor visited the land and discovered that her plot was the same as the one indicated on the 1<sup>st</sup> Respondent's title. She was quick to add that there had been a problem around Mwireri brought about by the former directors of Mwireri Estate Limited where one person occupied a plot which reflected another person's title deed. She urged the court to revoke the title over the suit property registered in the 1<sup>st</sup> Respondent's name and have it registered in her name owing to the fact that she had been in possession for almost 30 years. She also sought to have the 3<sup>rd</sup> Respondent directed to issue a clearance to the 1<sup>st</sup> Respondent in respect of parcel no. 3940 which she claimed he purchased from Naomi. She produced photographs showing her developments on the suit property.
11. In the memorandum of appeal filed on 4/10/2023, the Appellant faulted the Learned Magistrate for finding that based on the evidence placed before the court she had no legal rights to the suit property. She urged that the court failed to appreciate that there was a serious problem on the ground caused by the 3<sup>rd</sup> Respondent which needed the court to rectify. She faulted the trial court for overlooking the fact that the portion of land purchased by the 1<sup>st</sup> Respondent was different from hers and for treating the suit property and the land purchased by the 1<sup>st</sup> Respondent as one piece of land. Further, she faulted the trial court for directing her to render vacant possession to the 1<sup>st</sup> Respondent yet vacant possession was already rendered to him by Naomi Nkirote. She was emphatic that the trial court failed to consider the fact that she had been in possession of the suit property since 1989 without any disruption and urged that the trial court failed to consider her evidence.
12. The court directed parties to file written submissions to dispose of the appeal, which it has considered. The Appellant relied on paragraph 5 of the sale agreement between the 1<sup>st</sup> Respondent and Naomi Nkirote which indicated that the 1<sup>st</sup> Respondent had seen the location and extent of the suit property and had full knowledge of the existence of its boundaries and beacons and was satisfied with that. She submitted that she produced photographs showing her house and the area which Naomi Nkirote sold to the 1<sup>st</sup> Respondent. She added that indeed Naomi Nkirote demolished her structures in accordance with the sale agreement and gave vacant position to the 1<sup>st</sup> Respondent. She clarified that her house had never been interfered with and that it was next to the plot purchased by the 1<sup>st</sup> Respondent.
13. She questioned why the 1<sup>st</sup> Respondent sued for possession yet the Appellant did not sell the land to him and the person who sold him the land showed it to him and removed structures. She maintained that during cross-examination, the 1<sup>st</sup> Respondent confirmed that the Appellant lived at her house which was still there and that Naomi Nkirote had given him possession. The Appellant questioned why the 1<sup>st</sup> Respondent did not call Naomi Nkirote as a witness to explain or show him the extent of the plot that he purchased from her.
14. She claimed that she tried to point out to the trial court that the problem existed on the ground and that the 1<sup>st</sup> Respondent confirmed when asked that he would be willing to be registered as the owner of the plot he purchased if the issue was rectified on the ground.
15. The Appellant invited this court to help rectify the situation on the ground by issuing orders to allow fresh registration and to allow exchange of details to reflect her name against the suit property and that of the 1<sup>st</sup> Respondent in relation to parcel no. 3940. According to her, the issue was that she was allocated plot no. 3940 but occupied plot no. 3939 whereas Naomi Nkorite was allocated plot no. 3939 but on the ground she occupied plot no. 3940. She implored the court to make directions for rectification to reflect the true owners while maintaining that the plot which the 1<sup>st</sup> Respondent purchased was different from the one she occupied.



16. She submitted that Naomi Nkirote sold plot no. 3939 to the 1<sup>st</sup> Respondent yet on the ground she had been occupying plot no. 3940 which was supposed to be her plot. However, on the ground she was shown plot no. 3939 by the 3<sup>rd</sup> Respondent. She attributed the mistake to the 3<sup>rd</sup> Respondent at the time it allocated plots to its members including the Appellant. She added that the 1<sup>st</sup> Respondent did not know that he had purchased plot no. 3940 on the ground until the 2<sup>nd</sup> Respondent informed him that the Appellant was occupying plot no. 3939 and that the 2<sup>nd</sup> Respondent promised to help the 1<sup>st</sup> Respondent secure the two plots if he filed a suit to evict her. That was after the 2<sup>nd</sup> Respondent had attempted to extort money from the Appellant. She stated that she reported the matter to the area Chief when the 2<sup>nd</sup> Respondent attempted to evict her from the suit property.
17. She maintained that the plot was issued to her by the 2<sup>nd</sup> Respondent's father who was the director of the 3<sup>rd</sup> Respondent. She submitted that the 2<sup>nd</sup> Respondent had refused to collect the balance of Kshs. 3,000/= and urged the court to protect her rights to property due to her advanced age and the fact that the suit property belonged to her. That if the court were to sanction her eviction, it would affect her life and render her homeless.
18. She maintained that the 1<sup>st</sup> Respondent's rights would not be taken away if the 2<sup>nd</sup> Respondent rectified the details at the land registry and caused registration of the suit property in the Appellant's name with the 1<sup>st</sup> Respondent as the owner of parcel no. 3940. She faulted the trial court for relying on Section 107 of the *Evidence Act* and Section 26 of the *Land Registration Act* while arguing that the trial court ought to have directed the Executive Officer of the court to sign the transfer forms on behalf of the 3<sup>rd</sup> Respondent when the 2<sup>nd</sup> Respondent denied being a caretaker so that parcel no. 3940 could be registered in the 1<sup>st</sup> Respondent's name.
19. Further, she contended that the court should have ordered the exchange and transfer of parcel numbers 3939 and 3940. The Appellant relied on *Samuel Kariuki Mwangi v Njuru Mwangi [1996] eKLR* where the court held that the rights of a person in possession or occupation of land were equitable rights which were binding on the land and that the land was subject to those rights. She argued that the 3<sup>rd</sup> Respondent became a trustee holding the suit property for her benefit once she paid a deposit to the 3<sup>rd</sup> Respondent. Additionally, that when she took possession of the suit property she acquired an equitable beneficial interest over the land.
20. The 1<sup>st</sup> Respondent submitted that the Appellant did not produce any ownership documents to prove her proprietary interest in the suit property. Further, that she merely stated that she had been in possession for 30 years but could not state the title number of her land unlike the 1<sup>st</sup> Respondent who tendered a title deed, search and surveyor's report to prove ownership of the suit land. Further, that he had proved that the Appellant encroached and occupied a portion of his land.
21. Regarding rectification and exchange of details, the 1<sup>st</sup> Respondent submitted that that issue was not pleaded and such orders were not sought in the counterclaim. The 1<sup>st</sup> Respondent maintained that the Appellant was bound by her pleadings. The 1<sup>st</sup> Respondent submitted that the surveyor's report showed that the Appellant lacked ownership documents and added that the Appellant failed to prove that she owned any known property which was different from the 1<sup>st</sup> Respondent's land that she occupied. Further, that the surveyor's report confirmed that the Appellant had encroached onto his land and that this had not been controverted.
22. The 1<sup>st</sup> Respondent maintained that the Appellant had not produced any evidence to show that she was not occupying a portion of his land and that the trial court was right in arriving at the findings that it did. The 1<sup>st</sup> Respondent emphasised that the trial court analysed and considered the evidence adduced before it and arrived at a sound judgment.



23. The other point taken up by the 1<sup>st</sup> Respondent was that a certified copy of the decree was omitted from the record of appeal contrary to Order 42 (2) of the Civil Procedure Rules. He cited decisions supporting the view that the omission of a decree was critical to an appeal and that the Appellant's failure to include the decree and surveyor's report dated 27/6/2018 rendered the record incomplete and incompetent.
24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the trial court did not err in law when it arrived at its findings including the one that the 1<sup>st</sup> Respondent was the registered proprietor of the land. The 3<sup>rd</sup> Respondent maintained that she was improperly joined in the proceedings and that the Appellant had no legal claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Further, that the Appellant did not prove that there was any serious problem on the ground caused by the 3<sup>rd</sup> Respondent or the original owners of the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the trial court correctly analysed the evidence tendered by the parties and that the judgment delivered by the court was valid. They urged the court to dismiss the appeal.
25. The issue for determination is whether the court should allow the appeal and set aside the findings of the trial court and in its place enter judgment in terms of the counterclaim filed by the Appellant. It is not in dispute that the 1<sup>st</sup> Respondent purchased the suit property from Naomi Nkirote Muthomi and it is also not in dispute that the Appellant has been living on the suit property for more than 20 years on the basis of her claim that she was a member of the 3<sup>rd</sup> Appellant and bought the land from the 2<sup>nd</sup> Respondent's father. She contended that the 2<sup>nd</sup> Respondent had declined to accept payment of the balance of the purchase price of Kshs. 3000/=.
26. The sale agreement which the 1<sup>st</sup> Respondent entered into on 5/1/2017 with Naomi Nkirote Muthomi indicated at clause 5 that the 1<sup>st</sup> Respondent had seen the location of the land which he was purchasing from Naomi.
27. The mutation forms which led to the subdivision of the land to create the parcel of land which the 1<sup>st</sup> Respondent claimed were prepared in 2017 when the Appellant was already living on the suit land. According to her evidence which was not controverted, she had occupied the suit property since 1989. She claimed that the 2<sup>nd</sup> Respondent's father gave her possession of the land after she had paid a deposit of Kshs. 3000/= leaving a balance of a similar sum.
28. The court sought further clarification from the parties and was told that the 2<sup>nd</sup> Respondent's father died on 25/6/2005. This means that the survey of the land was done much later after his death and after the Appellant had settled on the suit property and was already living on the land.
29. The parties referred to a surveyor's report in their submissions which was not in the Magistrates' court file and had been excluded from the record of appeal. The court requested parties to furnish a copy of that report and notes that in that report dated 27/6/2018, the District Surveyor merely addressed the issue of who had ownership documents without any mention of when the survey and registration of the parcel numbers was done. It would have been helpful if the report had dealt with the issue of the extent of the land which Naomi sold to the 1<sup>st</sup> Respondent and how the confusion on the parcel numbers and their exact location on the ground came about.
30. What can be deduced from the sale agreement is that when the 1<sup>st</sup> Respondent bought the parcel of land from Naomi Nkirote Muthomi, he was shown the parcel of land on which Naomi had erected some structures, which is why clause 7 of the agreement required her to demolish the structures on the parcel of land that she was selling and take the materials for her own use. It is an uncontroverted fact



that the Appellant was in possession of the suit property at that time even though she did not know the parcel number for the land which she occupied.

31. There is a disparity between the land reference indicated in the sale agreement as the land which Naomi Muthomi was selling to the 1<sup>st</sup> Respondent and the location of the actual land on the ground which the 1<sup>st</sup> Respondent confirmed through clause 5 of the sale agreement that he had seen and was satisfied with it. The disparity arose after the survey of the land in 2017. The Learned Magistrate erred by not taking this fact into consideration when he arrived at his judgment.
32. The 1<sup>st</sup> Respondent ought to occupy the parcel of land which he purchased and was shown by Naomi as the particular portion that Naomi was occupying before demolishing the structures she had erected on that specific portion of land. That is the land which the 1<sup>st</sup> Respondent ought to have a title deed over. According to the Appellant, that would be the land surveyed as Daiga Umande Block 2/3940 (Mwireri).
33. The appeal is allowed in the following terms:
  - i. An order is issued for cancellation of the title deed held by the 1<sup>st</sup> Respondent in respect of Daiga Umande Block 2/3939 (Mwireri).
  - ii. The Land Registrar is directed to register the Appellant as the proprietor of Daiga Umande Block 2/3939 (Mwireri) upon proof of payment of the outstanding balance of Kshs. 3000/= to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  - iii. The Land Registrar is directed to issue a title deed to the 1<sup>st</sup> Respondent for the land known as Daiga Umande Block 2/3940 (Mwireri) once it is established by a surveyor that that is the parcel number for the land which was previously occupied by Naomi Nkirote Muthomi and which she sold to the 1<sup>st</sup> Respondent.
  - iv. The Land Registrar is directed to dispense with the need for clearance certificates from the 3<sup>rd</sup> Respondent for purposes of issuing title deeds to the Appellant and the 1<sup>st</sup> Respondent for the parcels of land known as Daiga Umande Block 2/3939 (Mwireri) and Daiga Umande Block 2/3940 (Mwireri) respectively.
  - v. Each party will bear its costs for the appeal and the suit.

**DELIVERED VIRTUALLY AT NANYUKI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Solomon Mukhama for the Appellant

Mr. Amos Chweya for the 1<sup>st</sup> Respondent

Mr. William Bwonwonga for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant-Nancy Mwangi

