



**Namukana v Makungu (Environment and Land Appeal 1 of 2022)
[2024] KEELC 13432 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

E ASATI, J

NOVEMBER 14, 2024

BETWEEN

PETER NAMUKANA APPELLANT

AND

SABET MAKUNGU RESPONDENT

*(An appeal from the judgement and decision of Hon. M. Ochieng Principal
Magistrate dated 14th January 2022 in Hamisi PMC E & L Case No. 28 of 2020)*

JUDGMENT

Background

1. The Record of appeal dated 7th of June 2024 filed herein shows that the appellant was the plaintiff in Hamisi Pm Court Me & L Case No. 28 of 2020 (the suit). It shows that vide the plaint dated 23rd September 2020, the appellant sued the Respondent herein over a parcel of land known as Kakamega/Shiru/908 (the suit land herein)
2. The appellant claimed in the suit that sometimes in 1990s he borrowed a soft loan from the Respondent so as to buy the suit land. That upon granting him the soft loan, the Respondent demanded that the suit land be registered in their joint names. That upon repayment of the loan the Respondent has failed to transfer the land to the appellant.
3. The appellant sought for an order for cancellation of entries made in the register in respect of the name of the Respondent as a registered co-owner to the suit land and retaining the name of the appellant as the absolute proprietor thereof. The appellant also sought for costs of the suit.
4. The record shows that the Respondent filed Defendant's Written Statement of Defence dated 25th October 2020 denying the claim.



5. The record further shows that the suit was heard by the trial court which vide the judgment delivered on 14th January 2022 found that the appellant had failed to prove his case on a balance of probabilities. The court proceeded to dismiss the appellant's case.

The Appeal.

6. Dissatisfied with the judgment the appellant preferred the appeal herein vide the Memorandum of Appeal dated 3rd February 2022. The appellant seeks that the appeal be allowed, the ruling made on 14th January 2022, dismissing the appellant's application dated 21st July 2021 be set aside and the same be substituted with an order allowing the appellants prayers as prayed in the application, that the court be pleased to order the transfer of Hamisi PMC's ELC No. 28 of 2020 from the trial court that issued the ruling subject of impugment herein to another court of competent jurisdiction for determination. That the appellant be awarded the cost of the appeal and in the lower court.
7. On 12/6/2024 the court gave directions that the appeal be argued by way of written submissions but as at the date hereof, none of the parties had filed their written submissions.
8. The grounds of appeal as contained in the Memorandum of Appeal dated 3rd February 2023 are: -
 1. The Learned Magistrate erred in law and fact by ignoring the plaintiff's evidence together with his witnesses.
 2. The Learned Magistrate erred in law and fact when she -brought in extraneous issues which were not part of the evidence adduced.
 3. The Learned Magistrate erred in fact and law when she awarded the whole of land parcel number Kakamega/Shiru/908 against the weight of evidence.
 4. The Learned trial Magistrate erred in law and fact when she ignored documentary evidence produced by the plaintiff and relying on extraneous issues which were not part of the evidence adduced.
 5. The Learned Magistrate erred in law and in fact when she failed to correctly analyze the evidence on record thereby arriving at a wrong decision
 6. The ruling made on 14th January 2022 dismissing the appellant's application dated 21st July 2021 be set aside and the same be substituted with an order allowing the appellant's prayer as prayed in the application.
 7. The court be pleased to order the transfer of Hamisi PMC's ELC NO. 28 OF 2020 from the trial court that issued the ruling subject of impugment herein to another court of competent jurisdiction for determination.
 8. The appellant be awarded the costs of this Appeal and in the lower Court
9. While appeal is against the judgement in the suit, the Memorandum of appeal seeks orders in respect of a ruling dated 14/1/2022. The record shows that it is a judgement delivered on 14/1/2022 and not a ruling.

Analysis and determination

10. The substantive issue raised by the grounds of appeal is whether or not the trial court erred in law and fact in dismissing the plaintiff's suit in the lower court



11. From the contents of the plaint, the appellant's claim was based on the averment that the suit land belonged to the appellant exclusively, that the name of the Respondent was included on the register of the suit land as a co-registered owner for the sole purpose of securing a soft loan that the Respondent had advanced him to buy the suit land, and that since he had repaid the loan he desired that the Respondent's name be removed from the register.
12. The record of appeal shows that after analyzing the pleadings, evidence and submissions placed before it, the trial court found that purchase of the suit land was actually financed by the Respondent, that the money paid by the Respondent for the purchase was not a soft loan to the appellant. That the appellant's name was included because he was an employee of the Respondent and because they were to do a project together of breeding butterflies on the suit land. That the appellant's participation in the purchase of the land was that he searched for and identified the land for purchase.
13. The court found that the appellant had failed to prove his case on a balance of probability and dismissed it.
14. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
15. Firstly, the appellant produced no evidence to support his claim of purchase of the land. The appellant only stated that he bought the suit land from one Musa Lihotia Inyange in the year 1992. That he looked for the land and the Respondent gave the money. He did not produce a land sale agreement. He stated that they did not write any agreement.
16. On whether there was a written land sale agreement PW2 the widow of the seller alleged that there was an agreement which was signed but which her husband destroyed when he became insane. PW3 the appellant's wife had no idea whether the agreement was in writing or not.
17. While the appellant acknowledges that it was the Respondent who gave the money for purchase of the land he claimed that the money was a soft loan which he was to repay and that he had repaid it in full. He however produced no evidence that the money was a loan to him and that he had repaid the same. He produced no evidence that inclusion of the name of the Respondent in the register was purely for purposes of securing the loan amount.
18. On the other hand, evidence placed before the trial court by the Respondent explained how the suit land was bought and how and why it was registered in the joint names of the appellant and the Respondent. The Respondent produced land sale agreement and acknowledgement of payment of the purchase price and Mpesa messages. He testified that the appellant was his worker. That the Appellant never sought for a loan from him. That he bought the land. That he paid the purchase price to the seller directly and that the appellant was a witness.
19. Assessing all the material on record, I find no evidence in support of the appellant's narrative.
20. The appellant later filed amended Memorandum of Appeal dated 27th September 2023. The grounds of appeal therein were: -
 1. The learned trial magistrate erred in law when she disregarded the entire evidence of the plaintiff and his witnesses to the effect that he had purchased the suit property through the financing of the defendant.



2. ■ The learned magistrate erred when she concluded that in the absence of a land sale agreement, search, green card and original title deed, then the plaintiff had failed to prove his case when it had not been disputed by the defence that the suit property alluded to by the plaintiff was indeed the land that the appellant had purchased through the finance advanced to him by the respondent.
3. The learned trial magistrate erred when she declined to answer the questions posed by the appellant in his submissions and specifically why the respondent's name was on the title alongside the appellants when at the same time the respondent had claimed that the land belonged to him as he was the one who purchased it.
4. The learned magistrate erred in dismissing the appellant's case on the basis that the appellant's submissions had not quoted any section of the law and authorities in support thereof.
5. The learned trial magistrate erred in law when she misdirected herself to extraneous factors while dismissing the corroborative evidence of the appellant and his witnesses.
6. The learned magistrate erred when she declined to consider the evidence before her to the effect that the agreement for the purchase of land by the plaintiff was with the defendant alongside other documents including the appellant's passport and birth certificate and that the other copy had been destroyed by the seller when he was insane.
7. The learned magistrate erred in finding that the appellant had not proved his case thereby dismissing it when the respondent had indeed admitted that the land in question was indeed jointly owned by both of them.
8. The learned trial magistrate erred by failing to consider the totality of evidence and circumstances presented which would have implored her to then subdivide the property into two and generate two distinct titles.
9. The learned magistrate thus erred by dismissing the appellant's case without regard to interests of justice because both parties had testified that their relationship was no longer tenable.
10. The learned magistrate thus erred in dismissing the appellant's case when indeed the respondent had admitted that it was true the appellant had constructed a house thereon and had lived on the suit property for the period alluded.
21. The appellant sought in the amended Memorandum of Appeal for orders that the court: -
 - a. allows the appeal by setting aside the order of the learned Magistrate dismissing the appellant's case with costs.
 - b. substitutes the order with an order that L.R Parcel NO. Kakamega/Shiru/908 be subdivided into two equal parts and 2 titles be issued in separate name of the appellant and the Respondent.
 - c. costs of the appeal be awarded to the appellant
 - d. the court do issue any other further order it deems just and fit in the circumstances.
22. While the prayer in the amended Memorandum of Appeal that the land be subdivided cannot succeed as it was not part of the claim in the suit from which the appeal arises, it is an acknowledgement by the appellant that the Respondent is an owner to the suit land in equal share with the appellant and not a person whose name was included in the register as a way of securing the loan.



23. I find that the trial court analyzed the evidence before it correctly and came to the right conclusion. I find no reason to interfere with the findings and decision of the trial court.
24. The appeal lacks merit and is hereby dismissed. As none of the parties filed submissions, there is no order as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 14TH DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Chitwah for the appellant.

No appearance for the Respondent.

