



**Muthoni (Suing as Legal Representatives of the Estate of Michael Anjere) v Namadi & another (Environment and Land Appeal E024 of 2023) [2024] KEELC 7421 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7421 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E024 OF 2023  
LC KOMINGOI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**MONICA MUTHONI ..... APPELLANT  
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF MICHAEL  
ANJERE**

**AND**

**DANIEL SOLITEI NAMADI ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF KAJIADO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement of Hon. L. Gicheha (CM) in  
Kajiado ELC Case No. E087 of 2022 delivered on 30th May 2023)*

**JUDGMENT**

1. In her Judgment dated and delivered on 30<sup>th</sup> May 2023 in Kajiado ELC Case No. E087 of 2022, the learned trial Magistrate Honourable L. Gicheha held:

“Though the defendant did not file any defence but the plaintiff having disclosed in her evidence that the dispute related to the location of the two plots. Being that both the plaintiff was claiming one plot which it appears had two title umbers. The plaintiff was under an obligation to prove that the land the 1st defendant is in occupation is Plot No. 840 Noonkopir Trading Centre and not 1275 now A447. By failing to prove this, she did not prove that the 1st defendant has trespassed on her land.

For this reason I find that the prayer sought by the plaintiff cannot be granted as firstly, she has not proved that the parcel of land the defendant is in occupation is Plot No. 840 Noon kopir Trading Centre and not 1275 now A447.



The plaintiff case is therefore dismissed with no orders as to costs.”

2. Aggrieved by the said Judgement, the Appellant filed this Appeal seeking that the judgement be set aside on grounds that:
  1. The Hon. Magistrate did not consider the evidence on record.
  2. The Hon. Magistrate failed to consider that the Appellant had proved the allegations of fraud against the Respondents.
  3. The Hon. Magistrate did not give reasons for her judgement.
  4. The Hon. Magistrate erred by failing to consider that plot No. 840 Business Noonkopir has been allocated to the Appellant earlier and could not be allocated afresh.
  5. The Hon. Magistrate erred in law and fact by failing to consider that the Respondent had not defended the case.
  6. The Hon. Magistrate erred in law and fact by failing to consider that the Appellant had proved her case to the required standards.
3. This appeal was canvassed by way of written submissions.

#### **The Appellant’s submissions**

4. Counsel submitted that the learned Magistrate did not give a reason as to why she held that the Appellant had not proved her case on a balance of probability despite producing evidence of how her late husband acquired the suit property in 2001 which was subsequently transferred to him and he had been in occupation and paying land rates since then. Therefore the allocation and transfer to the Respondent in 2010 was fraudulent since the property was not available for allocation citing *Nelson Ndumberi Harun vs County Governmnet of Kajiado (2020) eKLR*. Counsel added that the Appellant’s case and evidence was uncontroverted and that she had proved her case as required under Section 107 and 108 of the *Evidence Act* as was held in *Margaret Njeri wachira vs Eliud Waweru Njenga (2018) eKLR* and *Mbuthia Macharia vs Annah Mutua Ndwiga & another (2017) eKLR*.
5. He therefore sought that the Appeal be allowed.
6. The Respondents did not participate in this Appeal.

#### **The Respondents’ submissions**

7. The Respondents did not participate in this Appeal.

#### **Analysis and Determination**

8. I have considered the grounds of appeal, the record of appeal, the written submissions and authorities cited. I find that the six grounds of appeal can be compressed into two issues for determination which are:
  - i. Whether the learned Magistrate erred in finding that the Appellant had not proved her case on the required evidential burden of proof;
  - ii. Whether this appeal is merited;
  - iii. Who should bear costs of the appeal?



9. This being a first appeal, this court has a duty to re-evaluate the evidence and make its own determination with due regard to the fact that it neither saw nor heard the witnesses. As held in *Muiruri & 2 others v Blaetermann (Suing through Shabir Hatim Ali) & another* [2024] KECA 1160 (KLR):

“This being a first appeal, this Court’s mandate as espoused in the case of *Peters v Sunday Post Ltd* [1958] E.A 424 is that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

10. In the Complaint dated 23<sup>rd</sup> August 2022, the Appellant claimed that the 1<sup>st</sup> Respondent had trespassed on her property known as Plot No. 840 Noonkopir Centre. She stated that this property was allotted to her late husband by the defunct Kajiado Town Council and registered in his name. He took possession and had been paying rates since then until sometime on 16<sup>th</sup> August 2022 when the 1<sup>st</sup> Respondent illegally entered, took possession of the plot and began putting up structures thus denying the Appellant quiet enjoyment of the property.
11. The Appellant further asserted that the 1<sup>st</sup> Respondent had fraudulently acquired the property through a series of illicit and unlawful actions aimed at dispossessing her of her rightful ownership. The particulars of the alleged fraud were set out with specificity, detailing the wrongful acts attributed to both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. These included, inter alia: (i) the alteration of records at the 2<sup>nd</sup> Respondent’s office to reflect the 1<sup>st</sup> Respondent as the rightful owner of Plot No. 840; (ii) the forgery of critical documents, including the property ownership records, purporting to transfer ownership from the Appellant to the 1<sup>st</sup> Respondent; (iii) the intentional destruction and tampering with the Appellant’s ownership records held by the 2<sup>nd</sup> Respondent; and (iv) the 2<sup>nd</sup> Respondent’s fraudulent transfer of the Appellant’s property to the 1<sup>st</sup> Respondent without any lawful justification. As a result of these acts, the Appellant sought several remedies from the court: a permanent injunction to restrain the Respondents from further interfering with her property, an order for the eviction of the 1<sup>st</sup> Respondent from Plot No. 840, the revocation of the fraudulent allotment letter in possession of the 1<sup>st</sup> Respondent for Plot No. 1275 (New A447), as well as the costs of the suit.
12. In support of her case, the Appellant adduced evidence to substantiate her claim to Plot No. 840 Noonkopir Trading Centre. The evidence included a transfer document dated 28<sup>th</sup> June 2001, showing the transfer of the said plot from one Harris Nenkikua Romo to her late husband, Michael Anjere. This transfer document bore the necessary endorsements, including the signature of the then Clerk of the Olkejuado County Council and the stamp of the County Surveyor, confirming that the plot in question had been properly identified and confirmed as Plot No. 840. Additionally, the Appellant produced several receipts confirming the payment of rates by the previous owner from the year 2000 to 2012, further establishing a history of lawful ownership and occupation. To reinforce her claim, the Appellant tendered a Certificate of Search dated 24<sup>th</sup> January 2012, which unequivocally confirmed that Plot No. 840 Noonkopir remained registered in the name of her late husband, Michael Anjere. The Respondents failed to enter an appearance and/or file any defence in response to the Appellant’s claims, leaving her case uncontroverted and unchallenged in its entirety.



13. The learned trial Magistrate in her impugned judgement found that:

“... it was not in dispute that the Appellant was the rightful owner of plot No. 840 Noonkopir Trading Centre...”

14. From the above except, the learned trial Magistrate found that indeed the Appellant was the registered owner of the property 840 Noonkopir Trading Centre. This finding by the learned Magistrate conclusively established that the Appellant’s proprietary interest in Plot No. 840 was not a matter of contention. I have also gone through the record of Appeal and after reviewing the evidence presented, I find that the Appellant is indeed the rightful registered owner of property plot No. 840 Noonkopir Trading Centre.

15. It was the Appellant’s case in the lower court that the 1<sup>st</sup> Respondent possessed a letter of Allotment issued in 2010 for Plot No. 1275 (Now A447). It was also her case that the 1<sup>st</sup> Respondent on 16<sup>th</sup> August 2022 wrongfully entered and illegally took possession of the plot and started developing it. She produced photographs to demonstrate the acts on the suit plot.

16. The learned trial magistrate in her judgment stated thus; “Though the Defendant did not file any defence, but the plaintiff having disclosed in her evidence that the dispute related to the location of the two plots. Being that both the plaintiff was claiming one plot which it appears had two title numbers....”

17. With due respect to the learned Trial Magistrate, I find this to be speculative. I have gone through the pleadings and the evidence tendered, nowhere does the Appellant states that the plot has two numbers. It was her case that the 1<sup>st</sup> Respondent wrongfully entered her plot and started constructing.

18. It was upon the 1<sup>st</sup> Respondent to file a defence and demonstrate ownership of this plot and how he acquired it.

In paragraph 4 of her witness statement the Appellant (Plaintiff then) states; “The 1<sup>st</sup> defendant claims ownership of the suit property using allotment letter for plot 1275 new 447.”

19. I am aware that though the Appellant’s case was unchallenged and uncontroverted, she was still required to prove her case to the required standard of balance of probability. See the case of *Shanebal Limited Vs. County Government of Machakos* (2018) eKLR where the court cited the case of *Karuru Munyororo Vs. Joseph Ndumia Murage, Nyeri HCCC NO. 95 of 1988* where it was held that;

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants’ and their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

20. Similarly in *Gichinga Kibutha Vs. Caroline Nduku* (2018) eKLR, the court held;

“It is not automatic that instances where the evidence is not controverted, the claimant shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

I am guided by the above authorities in finding that the learned trial magistrate erred in finding that the Appellant have not proved her case on a balance of probability.



21. I also find that the appellant was able to prove that the 1<sup>st</sup> Respondent had trespassed on her plot. The 1<sup>st</sup> Respondent squandered the opportunity to prove his claim by failing to participate in the case in the lower court.

Likewise the 2<sup>nd</sup> Respondent, did not participate in the said proceedings. This leaves the Appellant's evidence uncontroverted.

22. The upshot of the matter is that the learned Trial Magistrate erred in dismissing the Appellant's suit.

23. I find merit in this Appeal and the same is allowed.

24. In essence, the Judgement dated 30<sup>th</sup> May 2023 is hereby set aside and substituted with an order allowing the Appellant's prayers in the plaint dated 23<sup>rd</sup> May 2022.

The Appellant shall have costs of this Appeal to be borne by the 1<sup>st</sup> Respondent.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

N/A for the Appellant.

N/A for the 1<sup>st</sup> Respondent.

N/A for the 2<sup>nd</sup> Respondent.

Court Assistant – Mutisya.

