



**Mungai v Nyakundi (Environment and Land Appeal E039 of 2023)  
[2024] KEELC 14115 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14115 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E039 OF 2023  
A OMBWAYO, J  
DECEMBER 20, 2024**

**BETWEEN**

**SAMMY NDUNGU MUNGAI ..... APPELLANT**

**AND**

**PETER NYAKUNDI ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the judgment of Honourable E.A Nyaloti Chief Magistrate, Nakuru delivered on 20th June, 2023 in Nakuru CMC ELC No. 9 of 2020. The Appellant filed a Memorandum of Appeal dated 27th November, 2023 appealing against the said judgment on the following grounds:

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1. That The learned trial Magistrate erred both in law and fact by failing to appreciate that the appellant is the registered owner of the parcel of land known as Nakuru Municipality block 23/817 and that he held an original valid certificate of lease.
2. The learned trial Magistrate erred both in law and fact by failing to distinguish and/or to draw a distinction between the appellant's number Nakuru Municipality block 23/817 and the respondent's parcels of land parcel number Nakuru Municipality block 23/814 since each of them held certificates of lease to their respective parcels of land.
3. The learned magistrate erred in law and fact by making a finding that the respondent produced a lease certificate and the appellant had not disputed that the same is a forgery or fake, when it was the respondent's burden to show prove that the certificate of lease he held for parcel number 814, was actually for the parcel of land occupied by the defendant, parcel number 817.



4. The learned magistrate erred in law and fact by making a finding that the respondent produced a lease certificate and the appellant had not disputed that the same is a forgery or fake, when the subject certificate was issued 13 years from the date of purchase, and that from the entries made therein, the respondent is entry number 2, yet he is the 3rd owner.
  5. The learned magistrate erred in law and fact in shifting the burden of proof to the appellant of ownership of his parcel number 817, when the parcel land in dispute was number 814.
  6. The learned trial Magistrate erred both in law and fact by issuing an order of eviction of the appellant from the respondent parcel of land, without making a determination on whether the appellant had encroached onto the respondent's parcel of land number 814, despite making it an issue for determination.
  7. The learned magistrate erred both in law and fact by failing to make a determination as to whether the respondent's parcel of land number Nakuru Municipality block 23/814 on the certificate of lease was the same parcel occupied by the appellant on the ground and the location was the same.
  8. The learned magistrate erred in law and fact by placing a lot of reliance on the evidence of PW2, as having identified the respondent parcel of land no; 814 on the Survey map, yet the said witness could not identify the adjacent parcels of land from the said survey map and the acreage/size of the respondent's parcel of land.
  9. The learned trial Magistrate erred both in law and fact by relying on the letter/survey report dated 18/3/21 which report was not conclusive and did not indicate whether there was encroachment and neither did it identify whether the respondent's parcel of land exists on ground as ordered by the trial court.
  9. The learned trial Magistrate erred both in law and fact by relying on surveyor's report dated 18/3/21 despite the surveyor making it clear that the RIM for both Nakuru Municipality block 23/817 and Nakuru Municipality block 23/814 could not be traced.
  10. The learned trial Magistrate erred both in law and fact by failing to consider the submissions of the appellant and the issues for determination raised and submitted on by the appellant.
  11. The learned trial Magistrate erred both in law and fact by issuing a vague order, an order for the appellant to vacate a parcel of land, whose number is not expressly mentioned in the order, on top of not making a finding as to that the appellant was in actual occupation of the respondent's parcel of land, and or that the appellant had encroached.
  12. The learned trial Magistrate erred both in law and fact by disregarding and/or ignoring the appellant's certificate of lease for parcel number 817, and his evidence that he was in occupation of parcel number 817 which he had developed.
  13. The learned trial Magistrate erred both in law and fact by awarding the respondent Ksh.200,000/= being damages for trespass without making a finding that the appellant had encroached and or trespass passed onto the respondent's parcel of land without any evidence presented to court to show proof of the said trespass.
2. The Appellant seeks orders allowing the appeal and setting aside the judgment.



## Brief Facts

3. The Respondent filed a suit against the Appellant vide a plaint dated 27th January, 2020 seeking a permanent injunction and eviction order against the Appellant from the Respondent's land Nakuru Municipality block 23/814 and costs of the suit.
4. It was the Respondent's case that he is the registered proprietor of Nakuru Municipality block 23/814 the suit property herein. That the Appellant in October, 2019 trespassed onto his property, dumped construction materials and fenced off the land in disregard of his rights and in violation of the law. He had sought for a permanent injunction restraining the Appellant from dealing with or interfering with the suit property.
5. The Appellant entered appearance and filed his statement of defence dated 28th February, 2020 where he denied the allegations in the plaint.
6. At the hearing, both the Respondent and Appellant testified and closed their cases. The trial magistrate found that the Respondent had proved his case against the Appellant on a balance of probabilities and proceeded to enter judgment in favour of the Respondent.
7. The Appellant being dissatisfied with the judgment lodged the instant appeal before this court which was canvassed by way of written submissions.

## Submissions

8. Counsel for the Appellant filed his submissions dated 14th November, 2024 where he identified four issues for determination. The first issue was whether the trial magistrate erred in law and fact to appreciate that the Appellant is the legal registered owner of Nakuru Municipality block 23/817 and that he held an original valid certificate of lease. He submits that it is not in dispute that the Appellant holds a certificate of lease for Block 23/817 issued on 21st November, 2011. He relied on
9. Section 24, 25 and 26 of the *Land Registration Act* and the case of *Wainaina V Kiguru & Another* (Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR). He submits that there was no evidence that the Appellant's land was fraudulently acquired.
10. The second issue was whether the trial magistrate erred both in law and fact by failing to distinguish Block 23/817 and the Respondent's Block 23/814 since each of them held a certificate of lease to their respective parcels and whether both refer to one and the same parcel. Counsel submits that it is not in dispute that the Respondent holds a certificate of lease for 23/814 and the Appellant for 23/817. He submits that PW3 lacked the RIM for the said plot numbers and that the survey report was inconclusive. He added that there was no evidence of encroachment or that the said parcels were one and the same. He relied on the case of *Kimaru V Njeri & 3 Others* (Environment & Land Case 10 of 2022) [2023] KEELC 17771 (KLR). He further submits that the evidence by the Respondent did not identify the exact acreage, adjacent land and added that the evidence was inconclusive to confirm that the Respondent's land was in existence. He submits that the same confirmed that the RIM for both properties could not be traced.
11. The third issue was whether the learned Magistrate erred in law and fact by making a finding that the Respondent produced a lease certificate and the Applicant had not produced the same is a forgery when it was the Respondent's burden to show that the certificate of lease for 23/814 was for 23/817. Counsel relied on the case of *Gichinga Kibutha V Caroline Nduku* (Environment & Land Case 16 of 2017) [2018] KEELC 3981 (KLR). He submits that there being no evidence of encroachment, fraudulent



acquisition, trespass or any loss or damage by the Appellant, he urged the court to find that the trial magistrate erred in finding any of the said elements.

12. On the final issue, he urged the court to allow the grounds as prayed for in the memorandum of appeal.
13. Counsel for the Respondent on the other hand filed his submissions dated 21st November, 2024. He submits that the appeal is fatally defective since it is in respect of LR 23/817 while the gravamen of the suit was LR 23/814. He further submits that the same is an invitation for the court to act in futility and issue orders that have no nexus with the judgment appealed and therefore should be dismissed. It was further his submission that the Appellant introduced at an appellate stage matters that were neither pleaded nor ventilated in the trial court. He also submits that the Appellant never referred to his ownership nor filed documents that put the Respondent on notice that he was the owner of the suit land.
14. He submits that grounds 3, 4 and 5 of the appeal cannot be canvassed at the appellate level having not been in issue at the trial court. He relied on the case of *William Kabogo Gitau V George Thuo & 2 Others* [2010] eKLR and submits that there were no gaps in the judgment since it resolved all matters in dispute. He also submits that the Appellant had not brought into contention 23/817 and only filed a copy of the title after the Respondent had already testified. He added that the Respondent was not examined or cross examined on 23/817. It was counsel's submission that both surveys indicated that 23/817 was not located at the parcel surveyed and could not be traced in the area.
15. He urged the court to dismiss the appeal with costs.

#### **Analysis and Determination**

16. Upon consideration of the evidence presented in respect to the Appeal herein including the Memorandum of Appeal and Record of Appeal, the following issues for determination:
  1. Whether the Appeal is merited
  2. Who should bear the cost of the appeal.
17. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”
18. Further as was held in the case of *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
19. In the Plaintiff which culminated to the impugned judgement, the Respondent/Plaintiff sought for the following orders:
  - a. An injunction restraining the Defendants their servants, workmen and agents from entering on and/or from erecting or causing to be erected on Nakuru Municipality block 23/814 any



structures or from in any way interfering with the Plaintiff's use and enjoyment of the Plaintiffs said property.

- b. An order of eviction from the said parcel.
  - c. Damages for trespass
  - d. Interest thereon
  - e. Costs of this suit
  - f. Any other relief the court deems fit to grant
20. It is the Respondent's case that the appeal is fatally defective since the Appellant's grounds of appeal refers to Nakuru Municipality block 23/817 which was not the suit property as pleaded. At the hearing the land surveyor (PW2) on cross examination confirmed that Block 23/814 did not sit where Block 23/817 was. The head of survey, Nakuru (PW3) produced the report dated 18th March, 2021 and testified that he had established the boundaries of 814. Upon cross examination, he confirmed that the adjacent parcels of land could not be identified. It is evident from the said report that there was no RIM that contained the disputed parcels. A perusal of the proceedings as well as the pleadings, confirms that issue of ownership was not in contention, but a boundary dispute. It is also noteworthy that, from the Plaint, the issue was not ownership but trespass.
21. Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya provides as follows:
- “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”
22. It is settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. It is incumbent upon the party to present to the court all the evidence reasonably available on a litigated factual issue. It is trite law that a party is bound by their own pleadings and the evidence they adduce in court. It is important to note that the purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination. In the instant case, it was incumbent upon the Respondent to prove that the Appellant had trespassed onto his land which he failed. I note that the court on 3rd December, 2020 had ordered the County Surveyor Nakuru to file a report on whether the Appellant had encroached onto the suit land but the report dated 18th March, 2021 did not confirm any encroachment by the Appellant on the suit property. Furthermore, the evidence by PW2 and PW3 could not establish that there was trespass onto the Respondent's parcel. It is this court's view that the trial court was right in finding that there were two distinct land parcels and that the issue was the location of the two parcels. The trial magistrate however misdirected herself by applying the wrong principles in reaching her determination. In as much as the Respondent contends that Block 23/817 was not pleaded during trial, it was clear that the same was mentioned since the issue leading to the claim of trespass was a boundary dispute. In view of the surveyor's report and the testimony by PW2 and PW3, it is evident that there was no encroachment onto the suit parcel Block 23/814 belonging to the Respondent. It is therefore this court's view that there was conclusive evidence that the Respondent failed to prove that the Appellant trespassed onto his parcel of land.
23. The upshot of the foregoing is that the Respondent failed to prove his case to the required standard and therefore, the appeal is merited.



24. Consequently, the trial court's judgment delivered on 20th June, 2023 in Nakuru C.m Elc Case No. 9 OF 2022 is hereby set aside. The suit in the lower court is dismissed. The Respondent shall bear costs of the appeal. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

