



Komen v BOG Kiroboni Girls High School & 2 others (Environment and Land Appeal E016 of 2023) [2024] KEELC 13824 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E016 OF 2023
MAO ODENY, J
DECEMBER 18, 2024**

BETWEEN

RACHEAL KOMEN APPELLANT

AND

THE BOG KIROBONI GIRLS HIGH SCHOOL 1ST DEFENDANT

PRINCIPAL SECRETARY, INTERIOR MINISTRY 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

(Being an appeal arising from the Judgement of Honourable Orege K. I- P.M delivered on 19th May, 2023, in Nakuru CMELC No 47 of 2019)

JUDGMENT

1. This appeal arises from the Judgment of the Honourable Orege K. I- Principal Magistrate delivered on 19th May, 2023, in Nakuru CMELC No 47 of 2019. The Appellant being aggrieved by the said judgment lodged a Memorandum of Appeal dated 24th May, 2023 and listed the following grounds:
 1. That the Learned Honourable Magistrate erred in law and in fact in failing to appreciate the nature of the claim from the pleadings filed, the evidence adduced and therefore delivered judgment that was totally at odds and at variance with the same and totally unsound.
 2. That the Learned Honourable Magistrate erred in law in fact in importing and misapplying doctrines of equity in a matter that revolves purely and exclusively on legal rights and estate in the suit property and erroneously giving preeminence to equity over the law.
 3. That the Learned Honourable Magistrate erred in law in failing to appreciate and to uphold the uncontested position that the plaintiff was the registered proprietor of the suit property and that at best the Respondents could only have been holders of license respecting the suit



property and upon its termination by notice by whatever motive actuated, the appellant was entitled to possession of the suit land and was entitled to eviction orders sought in the suit.

4. That the learned Magistrate erred in law in failing to appreciate and had that the only defence the Respondents could raise but did not raise to the appellant claim in was adverse possession or limitation neither of which were or could have been pleaded and pursued in the circumstances of the case before the honorable Magistrate.
 5. That the learned Magistrate erred in law in applying the doctrine of laches to defeat the appellant's proprietary legal rights when limitation period had not lapsed and when limitation was not pleaded by the appellants.
 6. That the learned Magistrate erred in law by failing to appreciate that acquiescence by the appellant if any could not confer any estate or rights or interest in the suit property to the respondents in the absence of any written agreement in law and therefore erroneously held that the appellant was not therefore entitled to regain possession of her property after giving ample notice to the respondent.
 7. That the Judgment the Honourable court has the absurd effect of conferring title in respect of part of the appellant's parcel of land to the respondent without any legal basis at all and without the known processes for conveyance of property.
 8. That the Judgment is erroneous, unreasonable and untenable.
2. The Appellant sought the following orders:
- a. The Judgment of the Honorable Magistrate be set aside and in its place be substituted judgment allowing the Appellant's case before the Chief Magistrate's court with costs and interest. (sic)
 - b. That costs of the appeal be granted to the appellant.
3. A brief background to this appeal is that the Appellant filed a suit against the Respondents in the lower court seeking the following orders:
- a. An Eviction Order compelling the defendant, their agents, officers and any person claiming under it to vacate the plaintiff's parcel of land known as LR No 10013/3.
 - b. Permanent Injunction restraining the defendant, their employees, agents, officials or any person claiming under it from trespassing, occupying, construction of a borehole, remaining ng onto or in any way dealing with the plaintiff's parcel of land known as LR No 10013/3.
 - c. General damages for trespass.
 - d. Costs of the suit.
 - e. Interest on c and d hereinabove at court rate.
 - f. Any other relief the Honourable court may be pleased to decree.
4. The suit was heard and the Trial Magistrate in a Judgment dated 19th May, 2023 dismissed the Plaintiff's suit with costs to the Defendant.



Appellant's Submissions

5. Counsel for the Appellant filed submissions dated 13th September, 2024 and identified the issue for determination as to whether or not the appeal is merited? Counsel submitted that the learned Magistrate erred in law and facts in applying the doctrine of laches when the circumstances did not permit such.
6. Mr. Kisila submitted that the doctrine of laches applies in instances where it would be practically unjust to give a remedy and where the other party has been put in a situation whereby it would be unreasonable to grant the remedy. Counsel further submitted that in the instant case, it is only the borehole and the chief's alleged structure that is at stake and that cannot be sufficient reason to apply the doctrine.
7. Counsel relied on the cases of Maisha (Suing as administrator and personal representative of the *Estate of Said Masha Nyamani*) vs *Directline Assurance Co Limited (Civil Appeal 15 of 2022)* [2023] KEHC 25339 (KLR), *Ogando vs Watu Credit Limited & another (Civil Suit E098 of 2022)* [2024] KEHC 3074 (KLR), Privy Council in the *Lindsay Petroleum Co v Hurd* (1874) L.R 5 P.C 221 and *Joshua Ngatu vs Jane Mpinda & 3 others* [2019] eKLR.
8. Mr. Kisila also submitted that parties are bound by their pleadings and a court of law has no power or authority to rule out of an issue that the parties have neither pleaded nor given evidence on. Further that in this case the respondents did not submit on the doctrine of laches. Counsel therefore stated that the Learned Magistrate erred in principle in arriving at his decision.
9. It was counsel's further submission that the Appellant is the registered owner of the suit parcel thus entitled to exclusive possession thereof and relied on the cases of *Embakasi Properties Limited & another vs Commissioner of Lands & another* [2019] eKLR and *Margaret Njeri Wachira vs Eliud Waweru Njenga* [2018] eKLR.
10. According to counsel, the Appellant did not have any intention to gift the Respondents the suit parcel and that there is no proof of an application of transfer of the suit parcel from the Appellant to the Respondents. Further, that the alleged gift is not complete hence is not valid or enforceable. Counsel relied on the cases of *Micheni Aphaxard Nyaga & 2 others vs Robert Njue & 2 others* [2021] eKLR, *Re Estate of Biruri Kihoria (Deceased)* [2019] eKLR and *Kimani vs Njeri & 3 others (Environment and land Case 10 of 2022)* [2023] KEELC 17771 (KLR).
11. Counsel submitted that the appellant is automatically entitled to general damages upon proof of trespass and that the learned Magistrate erred in law in failing to acknowledge that the Respondents are trespassers on the Appellant's parcel. Counsel relied on the cases of *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Limited and another* [2013] eKLR and *Ajit Bhogal vs Kenya Power and Lighting Co. Ltd* [2020] eKLR and urged the court to allow the Appeal with costs.

Respondents Submissions

12. Counsel for the Respondents filed submissions dated 2nd May, 2024 and identified the following issues for determination:
 - a. Whether this honourable court should disturb the decision of the trial court.
 - b. Whether the Appellants should fail on account of estoppel.
 - c. Whether the trial court erred in applying the doctrines of equity to the facts.



- d. Whether the trial court misapplied the doctrines of equity to the facts.
13. On the first issue, counsel relied on the cases of Mbogo & another vs Shah [1968] EA and Shanzu Investment Ltd vs Commissioner of Lands [1993] and submitted that to disturb the trial court's decision would occasion injustice to the local residents.
 14. On the second issue, counsel relied on Section 120 of the *Evidence Act* and the cases of Carol Construction Engineers Limited and Another vs National Bank of Kenya [2020] eKLR, Serah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR and First Assurance Company Limited vs Seascapes Limited [2008]. Counsel submitted that the scales of justice tilt in favour of the honourable court affirming the trial court's decision as there being consent, misrepresentation by the Appellant and absence of fraud, illegality on the part of the Respondents regarding acquisition of the suit land.
 15. On the third issue, counsel submitted that the Appellant's averment that the court should have overlooked the principles of equity fails to appreciate the nature and place of the said principles in our legal system. On the fourth issue counsel submitted that the trial court did not misapply the doctrines of equity and relied on the case of Benjoh Amalgamated Limited and another vs Kenya Commercial Bank Ltd [2004] eKLR. Counsel urged the court to dismiss the Appeal with costs.

Analysis And Determination

16. I have considered the Record of Appeal, the grounds in the Memorandum of Appeal, submissions by counsel and this being a first appeal the court is cognizant of its primary role which is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Magistrate are to stand or not and give reasons either way as was held in the case of Abok James Odera t/a AnJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR.
17. Similarly, in the case of Selle & another v Associated Motor Boat Co Ltd & others (1968) EA 123 the court stated that:

“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 EACA 270).”
18. The Court of Appeal for East Africa took the same position in Peters v Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“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.”



19. The issue for determination is whether the learned Magistrate erred in law and fact in applying the doctrine of equity and or laches in the case thereby coming to an erroneous decision.
20. A background to this case is that by an amended plaint dated 15th May, 2020, the Appellant sued the Respondent in the lower court for an order of a permanent injunction restraining the Respondent from trespassing, occupying and constructing a borehole on the suit land, order of eviction and general damages for trespass.
21. It was the Appellant's case that sometimes in the month of November 2018, she allowed the Assistant Chief Milimani Sub location Rongai location Ms. Veronica to temporarily occupy a portion of the parcel of land for purposes of putting up her offices pending government acquisition. It was further the Appellant's case that the Respondent without her permission/consent intruded onto the suit parcel, drilled a borehole, and enclosed the same with iron sheets.
22. The Appellant averred at the trial court that the acts complained of amounted to trespass by Respondent and are a breach of the license granted to the Assistant Chief. The learned Trial Magistrate heard the case and dismissed the Appellant's claim basing his decision on the doctrine of laches to defeat the Appellant's proprietary rights when limitation period had not lapsed.
23. It was and is not disputed that the Appellant is the registered owner of the suit land and that is not one of the prayers sought. It was further not disputed that the Appellant gave permission to the Assistant Chief to construct an office and an Administration Police Post vide a DCC's Baraza (meeting) at Ogilgei Location Milimani Sub location on 12th January 2016. In the meeting, the Appellant spoke and told the Deputy County Commissioner that the Family of the Late Komen had allocated land to build a Chief's office and an A.P post and that they had already demarcated the land.
24. The Appellant was aware of the activities of the construction of the Chief's office and she was only pissed off when a borehole was dug on the suit land. The Appellant had indicated that they had donated half an acre.
25. Having found that there was no trespass as the Appellant granted the permission for the use of a portion of the suit land for the construction of a Chief's office, it follows that the Appellant is not entitled to general damages for trespass.
26. I have considered the Appeal, the submissions by counsel and find that the Appeal lacks merit and is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

