



**Mwalili & another (Suing as the Joint Legal Administrators of the Estate of the Late Patrick Henry Mwalili - Deceased) v Ndila (Defending as Legal Representative of the Late Ivory Chris Musovya - Deceased) (Environment and Land Appeal 20 of 2023) [2024] KEELC 13680 (KLR) (Environment and Land) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13680 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL 20 OF 2023  
EK WABWOTO, J  
DECEMBER 6, 2024**

**BETWEEN**

**GILBERT NZOMO MWALILI ..... 1<sup>ST</sup> APPELLANT**

**VIRGINIA MBULIA MWALILI ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE JOINT LEGAL ADMINISTRATORS OF THE ESTATE OF THE  
LATE PATRICK HENRY MWALILI - DECEASED**

**AND**

**KALII NDILA ..... RESPONDENT**

**DEFENDING AS LEGAL REPRESENTATIVE OF THE LATE IVORY CHRIS  
MUSOVYA - DECEASED**

*(Being an appeal from Judgment delivered by Hon. A. M. Obura  
(Mrs.) (CM) in ELC Case No. 134 of 2013 on 30th June 2022 at Voi)*

**JUDGMENT**

1. This is an appeal from the judgment of Hon. A. M. Obura (CM) delivered on 21<sup>st</sup> day of July 2022 in respect to Voi MCELC No. 35 of 2021. In the said judgment the Learned Magistrate dismissed the Appellants suit on the basis that the Appellant had failed to prove ownership of the suit property and thus she could not conclude that the Appellant had encroached on the suit parcel.
2. This being the first appeal the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that the Court lacks the advantage of the trial Magistrate who saw and heard



the witnesses. See, the often-cited case of *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where this Court stated:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 ...”

### **The Appeal**

3. The Appellant being aggrieved by the judgment of the Learned Magistrate filed the instant appeal vide a Memorandum of Appeal dated 2<sup>nd</sup> August 2022. The following grounds were raised in the Memorandum of Appeal:-
  1. That the Learned Magistrate erred in law and fact in holding that the Appellant was not the registered bona fide/true owner of the suit property with absolutely no cogent evidence to substantiate such findings.
  2. That the Learned Magistrate erred in law and in fact in impliedly holding that the Appellant acquired the title deed to the suit property through illegal/dubious means yet there was no cogent evidence to support such findings. The Magistrate’s findings were based in mere conjecture.
  3. That the Learned Magistrate erred in law and fact in holding that the Appellant did not prove ownership of the suit property to the required standard in law despite clear and obvious evidence to the contrary. The Magistrate findings were based on mere conjecture.
  4. The Learned Magistrate erred in law and fact by misdirecting herself in failing to find that the evidence on record, taken in its totality, proved on a balance of probability that the Respondent was a trespasser to the suit property.
  5. The Learned Magistrate erred in law and fact by misdirecting herself in failing to find that the Respondent having not produced any shred of evidence to substantiate its claim, the Appellant’s witnesses’ testimonies and evidence stood uncontroverted thus the Appellant satisfactorily proved its claim of ownership to the suit property.
  6. The Learned Magistrate erred in law and fact by considering unsubstantiated, uncorroborated and irrelevant testimonial evidence by the Respondent in respect of its claim of the suit property.
  7. The Learned Magistrate erred in law and fact by misdirecting herself with absolutely no shred of evidence in finding that the Appellant abused his powers and office as an O.C.S Railways Police Station to acquire the suit property, manipulate the entire process of title acquisition to the suit property and having a hand in the Respondent’s criminal prosecution for charges of forceable detainer. The Magistrate’s findings were based on mere conjecture.
  8. The Learned Magistrate erred in law and fact by misdirecting herself on the question of the issues for determination in the matter before her and just framed general issues that lacked a bearing on the matter at hand.
4. The Appellant prayed for the following reliefs in respect to his appeal:-



- a. This Appeal herein be allowed with costs.
  - b. The Judgment of the Chief Magistrate delivered on 30th June 2022 in Voi CMCC No. 134 of 2013 be set aside and judgment entered in favour of the Appellant against the Respondent as prayed in the suit.
  - c. Such and any other order this Court may deem just and expedient.
5. The appeal was contested by the Respondent and parties took directions to have it canvassed by way of written submissions. The Appellant filed written submissions dated 24<sup>th</sup> October 2024 while the Respondent filed written submissions dated 6<sup>th</sup> November 2024.

### **The Appellant's submissions**

6. Citing the cases of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR and *Noah Onyango Amwayo vs Sylvanus O. Otumba & Another* [2013] eKLR the Appellant submitted that the issue in contention before the lower court was mainly the ownership of the suit property being a parcel of land known as Plot No. 2551 measuring approximately 3.5Ha within Maungu Buguta Settlement Scheme in Voi Subcounty. It was also submitted that the deceased Patrick Henry Mwalili gave a sworn testimony giving a detailed account of how he acquired the land in question and had produced a letter of offer for Plot No. 2551 as Exhibit 2, Receipt for Payment as Exhibit 3 and Land Dispute Decision as Exhibit 4. The Court was urged to refer to pages 95 to 98 and page 130 of the Record of Appeal.
7. It was further submitted that the Chief Adjudication Officer who testified as PW2 had confirmed that the letter of offer issued to Patrick Henry Mwalili was legitimate having been issued on 20<sup>th</sup> March 2011.
8. In respect to the title deed, it was submitted that the same was not essential for the reasons that the owner had been able to show how he acquired the suit property. It was also submitted that the Respondent had not adduced any evidence to controvert the Appellant's case. Reliance was placed on the case of *North End Trading Company Limited (Carrying on the Business under the Registered Name of Kenya Refuse Handlers Limited) vs City Council of Nairobi* [2019] eKLR.
9. The court was urged to grant the reliefs sought together with costs of the Appeal.

### **The Respondent's submissions**

10. The Respondent submitted that the trial court rightly found that Appellant had not proved his case to the required standard since the Respondent had been in occupation of the land to date. The Appellant being a law enforcement officer could not have been a squatter on the said land.
11. It was also submitted that the Appeal is defective for the reasons that it offends the provisions of Section 65 (1) (b) of the *Civil Procedure Act* and Order 42 Rule 13 (4) of the Civil Procedure Rules. It was contended that the Appellant has not extracted the decree which he is appealing against 2 years after filing of his appeal and the cases of *Kiambu HCCA No. E246 OF 2021 Lucy Njoki Mburu & 6 Others vs Margaret Wanjiru Kirubu and Mombasa Civil Appeal No. E003 of 2022 Hakika Transport Services Ltd vs Hassan Hagar Idle*.
12. The Court was urged to strike out the appeal with costs.

### **Analysis and Determination**

13. Having considered the entire Record of Appeal and written submissions, this court proceeds to determine the Appeal on the following issues:-



- i. Whether the Appeal is merited.
  - ii. What are the appropriate reliefs to grant herein.
  - iii. What orders should issue as to costs.
14. The said issues shall be considered sequentially.

**Issue No. (i) Whether the Appeal herein is merited**

15. The Appellant's case before the lower court was that sometimes in the year 1998 while attached at Voi Railways Police Station as a Police Officer he acquired the suit parcel, connected water supply and constructed a two roomed house on the said plot. He also stated that he was later transferred to Mombasa and he left the Respondent to graze on the said land as a caretaker until when he later learnt that the Respondent had interfered with the boundary and planted crops on the property.
16. It was also his case that the Respondent declined to vacate the said property despite being requested to do so and this led him being charged with the offence of forcible detainer under Section 91 of the Penal Code before Voi Criminal Case No. 706 of 2012.
17. At the hearing before the lower, two witness PW1 Thomas Bosire, Chief Land Adjudication and Settlement Officer and PW2 Patrick Henry Mwalili testified in support of the Appellant's case reiterating that he was the owner of the suit property. The Appellant denied the claims that the Respondent had been on the land since 1972.
18. The Respondent's case before the trial court was that he is the actual owner of the suit property since 1970. He denied any of the Appellant's claim and interest to the said land and in respect to the criminal charges he stated that he lodged and appeal and was subsequently acquitted vide Mombasa High Court Criminal Appeal No. 170 of 2013.
19. During trial before the lower court he testified that he knew the Appellant since 1984 and had offered him a portion of his land next to the road and was later surprised when the Appellant claimed ownership of the entire land. He disputed any claims that he was issued with an allotment letter for another piece of land and he maintained that he has occupied the suit parcel since 1977.
20. From the record, both parties died before the trial court could render its judgment and this led to the substitution of the parties. The trial court upon considering the evidence adduced and the applicable law dismissed the Appellant's case on the grounds that the Appellant had not proved his ownership of the suit property.
21. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
- “(1) 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.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
22. In proving land ownership, a party must be able to demonstrate the history of the property from the time of its acquisition. The historical background of the acquisition of the property should be as good as the title itself. See the Court of Appeal decision in the case of Jacob Wekesa Bokoko Balongo vs Kincho Olokio Adeya & Another [2020] eKLR. In the instant case, the Respondent adduced evidence



confirming that he had been in occupation of the suit property from 1977 which was way earlier before the same was allocated to the Appellant. Equally from the evidence on record which the Court has considered and analysed, the Appellant is not occupation of the same. As rightly captured by the trial court, the Appellant was not able to prove his ownership to the suit property. The Appellant did not produce any title deed in respect to the same during trial and the attempt to sneak the same in his submissions was dismissed by the trial magistrate.

23. From the analysis of the evidence on record, there was irrefutable evidence that the Respondent continues to be in occupation of the suit property and the Appellant had never been in occupation on the same. It was thus illegal and contrary to the law for the Appellant to be allocated the said parcel without considering the interest of the Respondent over the same.
24. In view of the foregoing and considering the totality of the evidence adduced during trial, it is the finding of this court that the Appellant was not able to prove his case before the trial court and as such this Appeal is unmerited.

#### **Issue No. (ii) What are the appropriate reliefs to grant**

25. In respect to the reliefs sought in this Appeal, this court has already made a finding that the Appellant's case before the lower court was not proved to the required standard and further that the Appeal is not merited. Hence, it is the finding of this court that the Learned Magistrate did not err in law and in fact in arriving at her decision and it is therefore not open for this court to interfere with the same.
26. Consequently, the reliefs sought by the Appellant are not for granting.
27. In respect to costs, it is trite law that costs follow the event unless otherwise ordered by the court and considering that the Respondent has been the successful party to this appeal, this court directs that the costs of the appeal shall be paid to the Respondent.

#### **Final Orders**

28. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the Learned Magistrate and proceeds to uphold the judgment of the lower court delivered on 30<sup>th</sup> June 2022. This court has no reasons and cannot interfere with the same. In conclusion, this appeal is therefore determined as follows: -
  - i. The Appeal is devoid of merit and is dismissed.
  - ii. Costs of the Appeal shall be paid to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Motuka for the Appellant.

Mr. Muthami for the Respondent.

Court Assistant: Mary Ngoira.

