



**Makau v Mutua & 2 others (Environment and Land Appeal 63 of 2019)
[2023] KEELC 15714 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 63 OF 2019
CA OCHIENG, J
FEBRUARY 23, 2023**

BETWEEN

BRIAN MAKAU APPELLANT

AND

FRANCISCO NGEI MUTUA 1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT

KWA MANGELI ATHI ESTATE ASSOCIATION 3RD RESPONDENT

*(Being an Appeal arising from the Judgment of the Chief Magistrates'
Court at Mavoko delivered by Honorable C.C Oluoch (Chief
Magistrate) on the 11th December, 2019 in Mavoko ELC No. 2 of 2018)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the December 18, 2019 the Appellant appealed against the Judgment of Hon CC Oluoch, Chief Magistrate, Mavoko made on the December 11, 2019 in Mavoko Chief Magistrate's Court Environment and Land Court Case No 2 of 2018 between Brian Makau Versus Francisco Ngei Mutua, County Government of Machakos and Kwa Mangeli Athi Estate Association. The genesis of this Appeal is the Judgment by Hon CC Oluoch Chief Magistrate where she dismissed the Appellant's suit with costs.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the December 18, 2019 which contains the following grounds:
 1. The Learned Magistrate erred in law and fact in making a finding that the Appellant had not proven his case on a balance of probability without giving any factual or legal justification for the said finding.



2. The Learned Magistrate erred in law in considering the Appellant's pleadings and the evidence tendered in proof thereof on an evidential standard of beyond reasonable doubt when she ought to have applied a balance of probability.
3. The Learned Magistrate erred in law and in fact by failing to consider at all and ignored the pleadings filed by the Appellant and the evidence tendered at the hearing.
4. The Learned Magistrate erred in law and in fact by failing to consider the entire Affidavits and Submissions of the Appellant in arriving at the decision to grant the 1st and 3rd Respondents ownership of the disputed plot.
5. The Learned Magistrate erred in law and in fact by misapprehending the facts obtaining in the Appellant's case and the law in reaching a finding that was based on the evidence tendered by the Appellant thereby relying on extraneous facts to arrive at a wrong decision.
6. The Learned Magistrate erred in law and fact by failing to correctly interpret the survey maps and all the documentary evidence tendered by the Appellant and hence arrived at an erroneous decision on facts and law.

Reasons Wherefore it is proposed to ask this Court for Orders that:

1. This appeal be allowed.
2. That the Judgement/Decree of the Chief Magistrate, Honourable CC Oluoch (CM) entered on December 11, 2019 in the Principal Magistrate's (Mavoko) Court, in ELC Case Number 2 of 2018 be and is hereby set aside and substituted with a Judgement/Decree of this Honourable Court.
3. The costs of this Appeal be borne by the Respondents.

The Appeal was canvassed by way of written submissions.

Submissions by the Appellant

3. The Appellant invited the court to vary the decision of the trial court by citing the case of *Mbogo Vs Shab & Anor (1968) EA 93* where the court set out circumstances upon which a Court of Appeal may interfere with the decisions of the trial court. He reiterated that the trial court erred upon the six (6) grounds as stated in the Memorandum of Appeal. The Appellant argued that the evidence of PW1 was corroborated by the evidence of PW4 that his father was the owner of Plot No 339. It was his contention that there was no evidence to rebut the legality and applicability of the survey map as presented by PW4. The Appellant insisted that justice was not served since the court ignored his evidence but upheld that of the Respondents even when it was shaky. He contended that in the misapplication of the law and the facts, the trial court arrived at a wrong decision which ought to be vacated.

Submissions by the 1st and 3rd Respondents

4. The 1st and 3rd Respondents in their submissions argued that the Appellant had miserably failed to prove his case on a balance of probabilities. They contested that PW1 was found to have manipulated and altered member's plot numbers and discharged off his duties by the 3rd Respondent. They also argued that PW2 had also tried to confuse the trial court that plot number 221 entirely belonged to him but later confirmed that he was only allocated ten plots which he distributed among his family members and left some for himself. They further challenged the evidence of PW3 as he confessed that



in 2008 he was still a minor and that he did not know the history of the suit property. They questioned the evidence of PW4 since he had confirmed that he did not complete his work with Kwa Mangeli Estate group and the same was never submitted to the relevant authority. The 1st and 3rd Respondents contended that the issue of double allocation was very clear and it was the burden of the Appellant to prove interference with his property. As to whether the Magistrate erred in law and in fact by failing to correctly interpret the survey maps and all documentary evidence by the Appellant, PW4 was clear that he did not complete his work and that the evidence of DW1 and the receipts for payment of rates found on pages 60-80 were sufficient proof of ownership by the 1st Respondent.

Analysis and Determination

5. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivaling submissions, the only issue for determination is whether the Appeal is merited.
6. The background of this Appeal emanates from a dispute in respect to the location of plot No 339 Kwa Mangeli estate. In the lower court, it was not in dispute that the Appellant was owner of plot No 339 Kwa Mangeli Estate while the 1st Respondent was proprietor of plot No 221 in the same estate. The Appellant claimed that the 1st Respondent had interfered with the said plot which fact the 1st Respondent denied. Both parties tendered evidence to confirm location of their respective plots. The trial Court further undertook a site visit on June 19, 2019 to confirm position of the respective plots. The trial court after analyzing the evidence presented before it, concluded that the location of the two plots was distinct and there was no encroachment. It proceeded to dismiss the suit with costs, which forms the fulcrum of the Appeal herein.
7. I wish to reproduce an excerpt from the said Judgment:

'Key evidence on this point came from DW1 Mavoko Sub County Surveyor who took the court to the scene and identified the two plots. During the scene visit on June 19, 2019, DW1 showed the court Plot Number 339, an undeveloped property lying between Plot Number 340 and 152. The neighbouring plots 300, 152 and 340 were all not developed at the material time. There was a storey building on Plot 314. At a block off a road lay Plot 221 with a building under construction. Clearly, the evidence of this witness was not shaken on cross examination. The evidence of DW1 and survey report by Alfred Ogalo dated February 8, 2018 are in tandem with the observation I made during the site visit in presence of both parties and their advocates. There is no indication that any other person has laid a claim to the undeveloped and unoccupied Plot 339 that DW1 identified as rightfully belonging to the Plaintiff.'
8. At this juncture, the only issue in contention in this Appeal is hence the exact location of plot number 339 and if it is the same as plot number 221. As per the evidence tendered in the lower court, plot number 221 belongs to the 1st Respondent, Francisco Ngei Mutua which he purchased from one Sammy Musyoki Muia, a fact that was also not contested. The trial court in its determination held that the key evidence as to the existence of these two plots was adduced by DW1, the County Surveyor and that the same was in tandem with the observation of the court during the site visit conducted on June 19, 2019.



9. Madan JA (as he then was) in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] EA* in tendering his opinion as to when a court of appellate status could vary the determination of the lower court had this to say:

'The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'

See also the decision in *Mwangi V Wambugu (1984) KLR 453*.

10. I have taken keen perusal of the evidence tendered by the Appellant in the Lower Court including his witnesses which I wish to summarize hereunder.
11. PW1 Pastor Isaac Murumba testified that he was the vice-chair of Kwa Mangeli Estate Association and that Plot No 339 was allocated to the Appellant (Plaintiff). He confirmed that he had ceased to be an official of the group since 2015. He did not mention plot number 221 in his testimony nor did he refer to the physical location of the suit plot.
12. PW2 was the father to the Appellant (Plaintiff), who confirmed to have owned plot number 339 and nine other plots. He categorically mentioned plot numbers 320, 328, 329, 330, 332, 331, 333, and 340 disclosing the identities of the persons to whom the said plots were transferred to. He failed to mention plot number 221 in his testimony nor did he refer to the physical location of the suit plot.
13. Pw3 who was the Appellant (Plaintiff) confirmed that he did not know the history of the suit plot. On cross examination, he stated that he was allocated plot numbers 339 and 221. He did not know if Plot No 339 is the same as Plot No 221. He further confirmed that he was allocated the suit plot when he was still a minor.
14. PW4, the final witness by the Plaintiff, was a director of Jomax consultants who confirmed that they had been requested by the Kwa Mangeli Estate group to carry out a survey and that they subdivided the scheme into various plots including coming up with roads. He also confirmed that he advised the committee to forward the scheme to the relevant offices for completion of the process but that their contract was terminated before this could be done hence they were not privy to subsequent events. He consequently did not mention plot number 221 in his testimony nor did he refer to the physical location of the suit plot.
15. A common observation on all the Appellant's witnesses is that they did not demonstrate any link between the plot numbers 339 and 221 respectively. As afore-mentioned, the suit by the Appellant in the lower court was for alleged trespass on his suit plot, being plot number 339. On their part, the 1st and 3rd Respondents demonstrated by way of survey maps and physical visit that the 1st Respondent only occupied plot number 221 and that he was already developing the same, and that plot number 339 was situated at a different location.
16. The allegations by PW3 that plot number 221 and 339 referred to the same plot were not substantiated even remotely. The same only came out during cross-examination on PW3 but was not sufficiently brought to the attention of the court. From the record, it is clear that indeed the court had been taken for an actual site visit of the two plots and the surveyor physically identified the two plots 221



and 339 in the presence of the parties. From the proceedings in the Lower Court, it emerges that the Plaintiff's Advocate who was present during the site visit did not object or cross examine DW1 adversely on the location of plot numbers 221 and 339 respectively. This being the case, I find no reason to interfere with the trial court's findings that indeed there was no double allocation and that there was no evidence of a claim on plot number 339 by any other person other than the Plaintiff. From the evidence adduced in the lower court that I have analyzed above, I find that trial Magistrate did not err in law and in fact by making a finding that the Appellant had not proven his case on a balance of probability without giving any factual or legal justification for the said finding. Further, I do not find that learned Magistrate erred in law in failing to consider the Appellant's pleadings and the evidence tendered in proof thereof. I actually find that the Appellant failed to prove his case in the lower court on a balance of probability. I opine that the trial Magistrate considered the pleadings including affidavits and submissions filed by the Appellant and the evidence tendered before arriving at her decision. I find that the Learned Magistrate did not err in law and in fact and correctly interpreted the survey maps and all the documentary evidence including undertaking a site visit with the surveyor to confirm the distinct position of the two plots before arriving at her decision.

17. In the circumstance, I find this Appeal unmerited and will dismiss it with costs to the 1st and 3rd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

