



**Ngerechi & 3 others v Ngerechi (Environment and Land Appeal  
21 of 2020) [2023] KEELC 15687 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 21 OF 2020  
CG MBOGO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**SAMUEL K NGERECHI ..... 1<sup>ST</sup> APPELLANT  
RICHARD K BOSEK ..... 2<sup>ND</sup> APPELLANT  
WILSON K SANG ..... 3<sup>RD</sup> APPELLANT  
JOSEPH MOSONIK ..... 4<sup>TH</sup> APPELLANT**

**AND**

**JOSEPH KIPKOECH NGERECHI ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein being aggrieved by part of the ruling of Hon T. A. Sitati, Senior Resident Magistrate Narok delivered on 23<sup>rd</sup> December, 2015 in Narok SRMCC No. 1 of 2007 appealed to this court vide a memorandum of appeal dated 6<sup>th</sup> July, 2020 against part of the decision on the following grounds: -
  1. The trial magistrate erred in law in making post judgment orders for the eviction of the appellants who were the decree holders in the suit.
  2. Having found that the appellants were the true owners of land parcels No. Cis-Mara/Lemek Nos. 2814, 2838, 2840, 2841 and 2848 in the judgment of 28<sup>th</sup> April, 2015 the trial magistrate was without jurisdiction to order an eviction of the appellants.
  3. The trial magistrate erred in law in stating that he had no jurisdiction to cancel mutation from No. 190106 and the derivative title No. Cis-Mara/Lemek/2814.



4. That the trial magistrate erred grievously in offering legal advice to the appellants to file judicial review proceedings in order to cancel the mutation of the respondent and the title issued in reference to No. Cis-Mara/Lemek/2814.
  5. The trial magistrate having found evidence of fraud in issuance of title No. Cis-Mara/Lemek/2814 erred in ordering the eviction of the successive plaintiffs who were the innocent parties.
  6. The order of the trial magistrate for the eviction of the appellants who were the successful parties constitutes a travesty of justice.
2. The appellant prays for: -
1. That this appeal be and is hereby allowed.\*\*
  2. The portion of the ruling of the trial magistrate ordering the eviction of the appellants from land parcels Cis Mara/Lemek Nos. 2814,2838,2849,2841 and 2848 be hereby reviewed and set aside.
  3. Costs of this appeal and of the subordinate court be awarded to the appellants.
4. This court directed that the appeal be canvassed by way of written submissions. The appellants filed written submissions dated 28<sup>th</sup> October, 2022. The appellants submitted that there are three contradicting decrees in the suit i.e. 28<sup>th</sup> April, 2015, 4<sup>th</sup> April, 2016 and 29<sup>th</sup> June, 2016 which have not been reconciled so that the correct position can be ascertained. They further submitted that the court had jurisdiction to make the correct judgment and they relied on the case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Limited [1989] KLR. The appellants submitted that the court acted ultra vires on its mandate and its orders issued thereafter for their eviction.
  5. The appellants drew the attention of the court to note that the judgment delivered on 28<sup>th</sup> April, 2015 was in favour of the appellants and no review to set aside the same decree was entered. Further, that it was not possible for the same court to order evictions and at the same time ignore the fact that it has jurisdiction to cancel the mutation form no 190106 and the derivative title thereto.
  6. The appellants further submitted that *the Constitution* under Articles 47,48 and 50 guarantees a person a right to a fair administrative action, the right to access justice and a right to be heard in an open and fair manner. And, that all these rights were denied with consequence that their right to property was violated. The appellants further submitted that the powers to cancel titles are the preserve of the court as is provided under Section 80 read together with Section 26 of the *Land Registration Act*. The appellants relied on the case of Macfoy versus United Africa Co. Ltd [1961] 2 ALL ER 1169.
  7. The appellants submitted that the trial court cannot enforce orders that were a nullity and void ab initio and to give effect to these orders would be aiding an illegality. Reliance was placed in the case of Arthi Highway Developers Limited versus West End Butchery Limited & 6 Others, Civil Appeal No. 246 of 2013 [2015] eKLR.
  8. The respondent filed written submissions dated 29<sup>th</sup> August, 2022. The respondent raised seven issues for determination as follows: -
    1. Whether the defendants became the decree holders after the judgment.
    2. Whether the Defendant unregistered mutation giving rise to Cismara/Lemek/2838,2840,2841 and 2848 can confer legal ownership of land as opposed to registered one.



3. Whether the honourable magistrate had jurisdiction to cancel mutation no. 190106 that gave rise to registration and issuance of title no. Cismara/Lemek/2814 in favour of the plaintiff.
  4. Whether it was unlawful for the Honourable magistrate to offer legal opinion or advice.
  5. Whether there was fraud in issuance of CisMara/Lemek/2814 in favour of the plaintiff.
  6. Whether there was travesty of justice by ordering the defendants' eviction.
  7. Whether the appellant appealed against the judgment of 23<sup>rd</sup> December, 2015 and or order of the court.
8. On the first issue, the respondent submitted that the appellants before the trial court were claiming ownership of CisMara/Lemek/2838,2840,2841 and 2848 which was as result of the subdivision of CisMara/Lemek/1751 and the respondent also claimed ownership of CisMara/Lemek/2814 which was a result of the subdivision of CisMara/Lemek/1751. That from the judgment delivered by the trial court, the court never pronounced the appellants as successful to be termed as decree holders as the mutation which could have given the appellants rights of ownership of the ground they were in occupation was never registered at the lands' registry and therefore they remained unlawful occupiers of the respondent's parcel of land.
  9. On the second issue, the respondent submitted that in the absence of the registration of mutation number 181719 belonging to the appellants, the mutation form number 190106 issued to him on 28<sup>th</sup> January, 2005 carried the day which means that the unregistered mutation cannot give legal ownership of land as opposed to one that is registered.
  10. On the third issue, the respondent submitted that the trial court found that it had no power to quash the actions already taken by the lands' officials and that only a superior court was vested with such powers and gave the appellants a chance to ventilate their claim which they never did.
  11. On the fourth issue, the respondent submitted that there was nothing wrong for the court to give a legal opinion as it was acting under discretionary provision and under *the constitution*. Further, from the evidence, the respondent was not connected to fraud in acquisition of the title.
  12. The respondent did not submit on the rest of the issues. Be that as it may, I have considered the grounds of appeal, submissions by counsel and the authorities cited. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd 1982 – 88 I KAR 278*. In addition, this court must also take into account the fact that it did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – *Selle & Another versus Associated Motor Boat Co. & Others 1968 EA 424*.
  13. The trial court delivered judgment in the matter on 28<sup>th</sup> April, 2015 and issued the following orders: -
    1. That the District Land Registrar and the District Land Surveyor to issue title deed to the defendants for which all approval had been obtained and who issuance had been delayed by the filing of the present case. This order is made because there is no dispute as to the ownership of 2838,2840,2841 and 2848 all of CisMara/Lemek.



2. That the District Land Registrar and District Land Surveyor shall visit parcels no. 2814,2838,2840, 2841,2848 all of Cismara/Lemek and carry out survey and fix boundaries in accordance with the survey act.
  3. That thereafter the Surveyor and the District Land Registrar shall show the parties their respective locations.
  4. That parties are at liberty to apply if dissatisfied with the surveyor report.
  5. That each party to bear its own costs.
14. Thereafter, the court delivered a ruling on 23<sup>rd</sup> December, 2015 which was “generated by the courts considered judgment dated 28<sup>th</sup> April, 2015”. The ruling was as a result of the report filed by both the surveyor and the land registrar and the court made observations on the same. In this ruling, the court issued orders that the respondent shall be entitled without further reference to the appellants to have the appellants evicted from such portion of his land which they are currently in occupation.
15. It is this ruling that culminated to the filing of the instant appeal and which the appellants seek that the same be set aside. In this ruling the trial court made the following observations: -
1. “The defendants mutation form no. 181719 that had properly been issued to them and signed on 05/10/2004 by the then District Surveyor had not been registered.
  2. Mutation form number 190106 issued to the plaintiff was signed on 28/01/2005.
  3. Despite the defendants getting mutation forms ahead of the plaintiff, theirs was not registered but the plaintiffs was registered.
  4. Mutation 181719 belonging to the defendants was duly presented for registration as confirmed by the mutation register but for unexplained reasons the lands office did not forward it for amendment/registration despite fees having been paid. This mutation was not rejected at all. It was just not registered despite presentation.
  5. The lands officer unprocedurally altered the details corresponding to the 2 mutation forms so that the resulting parcels that the defendants were entitled to were interchanged with the parcels that the plaintiff was entitled to.
  6. As a result of that unprocedural and possibly illegal inversion of parcel details, the defendants continued to occupy a location which they had initially acquired lawfully but whose corresponding entry in the registry was changed from one location to a different location.
  7. As a result of the unprocedural and probably illegal inversion, the plaintiff obtained the location occupied by the defendants through a registry change when in fact the plaintiffs original location was different.
  8. There are reasonable grounds to have the lands officials charged with abuse of office as far as the dealings in this case are concerned.
  9. Notwithstanding these findings the court lacks power to quash the actions already taken by the lands officials.”
10. The observation in the above ruling found that there was an inversion and possibly failure to register the mutation form belonging to the appellants herein which led the respondent to claim land belonging to the appellants. In my view, it was not the appellants fault that their mutation form was not registered in any case, they paid fees for the same and which was and has never been refunded. In that case, do you



evict the appellants from the land because of a fault that is not theirs' and more so where it is clear where the fault lies? My position would be to rectify the error instead of eviction. Equally, the respondent cannot also claim that his registration carried the day whereas there existed another mutation form which albeit not registered, had been presented for registration. By giving the respondents the orders to evict the appellants from their land, the trial magistrate erred and, in the process, occasioned to the appellants a miscarriage of justice. I intend to rectify that error because Section 78 (2) of the [Civil Procedure Act](#) grants this Court: - "...the same power and shall perform as nearly as may be the same duties as one conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein."

11. Similarly, Order 42 Rule 32 of the Civil Procedure Rules provides as follows:- "The Court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decrees or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondent may not have filed any appeal or cross – appeal".
12. I find that the interest of justice will best be served if the appellants mutation form no. 181719 is registered. This is because they had already paid for the same and were the first to be issued.
13. Arising from the above, the memorandum of appeal dated 6<sup>th</sup> July, 2020 is hereby allowed in the following terms;
  - i. The portion of the ruling delivered on 23rd December, 2015 by Hon T.A. Sitati ordering the eviction of the appellants from land parcels CisMara/Lemek/ Nos. 2814, 2838, 2840 and 2841 is hereby set aside.
  - ii. The District Land Registrar to cause registration of mutation form number 181719.
  - iii. Each party to bear its own costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 23RD DAY OF FEBRUARY, 2023.**

**MBOGO C.G.**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

CA:Chuma

