



**Wanjiku v Subuku Farmers Co-operative Society Ltd (Environment and Land Appeal E001 of 2023) [2025] KEELC 2976 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**LN MBUGUA, J  
MARCH 27, 2025**

**BETWEEN**

**GLADYS WANJIKU ..... APPELLANT**

**AND**

**SUBUKU FARMERS CO-OPERATIVE SOCIETY LTD ..... RESPONDENT**

*(Being an appeal from the judgement of Hon Charles Obulutsa (CM) delivered in Nyabururu CMELC No. E042 of 2021 BY Hon Stephen Mogute (PM))*

**JUDGMENT**

1. The appellant was the defendant in the suit before the magistrate's court. The said suit was instituted by the current respondent vide a plaint dated 24.5.2021 where they claimed that they are the registered owners of the suit parcel Laikipia Marmanet/Siron /Block 1/81 measuring 1.726 hectares, but the defendant had trespassed on it. They therefore sought the following orders;
  - a) A declaration that the plaintiff is the absolute registered proprietor of L.R. Laikipia/ Marmanet/Siron Block 1/81 (Subuku) and the defendant is a trespasser thereon.
  - b) An order to vacate the suit land and in default evictions to issue.
  - c) A permanent injunction restraining the defendant by herself, her servants, employees, agents, proxies or otherwise howsoever from returning on, entering on, remaining on, cultivating on, erecting fences, structures or carrying out any activity whatsoever on the suit land or any part thereof.
  - d) General damages for trespass.
  - e) Costs and interest at court rates



2. The defendant opposed the suit vide her statement of defence and counterclaim dated 25.6.2021 averring that the suit parcel Block 1/81 was hived off illegally from her mother's parcel Laikipia/Marmanet/Siron Block/1/125, of which her mother had filed a case against that plaintiff; Nyahururu SRM Civil Case No. 79 of 1991 in which the issues regarding the legality of plaintiff's title were determined. She contends that she is the legal administratrix of the estate of the deceased and she has been on the suit land since 1970s.
3. The defendant therefore sought the following orders in her Counter claim;
  - i. That the registration of the plaintiffs as the registered proprietors of LR Laikipia/Marmanet/Siron Block 1/81 (Subuku) be declared illegal having been fraudulently obtained and subsequently, the said title be cancelled and be reverted back into the estate of Kagure Wambugu.
  - ii. That in the alternative, a declaration that the defendant has obtained title to the suit land by way of adverse possession having been in uninterrupted occupation of the suit land since 1970s.
  - iii. That this suit be dismissed with costs and the counterclaim be allowed as prayed with costs.
  - iv. Any other or further relief this honourable court may deem fit to grant.
4. The matter proceeded for hearing on 4.8.2022 when both parties closed their cases. In a judgment delivered on 15.12.2022, the court allowed plaintiffs case in the following terms;
  - a) A declaration is hereby issued that the plaintiff is the absolute registered owner of land reference number Laikipia/Marmanet/Siron Block 1/81 (Subuku)
  - b) An order to vacate is hereby issued to the defendant within 30 days in default an eviction to issue.
  - c) A permanent injunction is issued restraining the defendant, herself, agents or any other person claiming through her from cultivating, entering, fencing or in any other way dealing with the plaintiff's land.
  - d) The plaintiff to have costs of the suit and interest.
5. Aggrieved by the aforesaid decision, the defendant, now the appellant filed her memorandum of appeal raising 10 (Ten) grounds of appeal summarised as follows;
  - i. That the learned magistrate erred in law and fact in failing to advise the appellants on the tenets of a fair trial including legal representation and the right to be heard thus the matter proceeded in the style of a formal proof.
  - ii. The learned magistrate erred in law and fact in failing to confirm the registration status of the respondent which is defunct.
  - iii. That the trial magistrate erred in law and fact in failing to determine that the claim of the respondent was time barred by the statute of limitation
  - iv. That the trial magistrate erred in law and fact in failing to determine the counterclaim of the appellant.
  - v. That the trial magistrate erred in failing to determine that the suit was res judicata to the case Nyahururu SRM Case No. 79 of 1991



- vi. That the trial magistrate erred in law and fact in failing to call for reports from surveyor and Land Registrar to determine the ground status including the acreages relating to the suit property.
6. The appellant therefore prays for judgment in the following terms;
  - a. The appeal be allowed
  - b. The proceedings and judgment of the trial court be declared a mistrial and an order be made for the same to be heard afresh or de novo before a different magistrate.
  - c. Costs of the appeal be ordered payable by the Respondent.
7. This court directed the parties to canvass the appeal through written submissions, of which both parties have duly complied. The appellant's submissions are dated 14.8.2024 where she has reiterated the grounds raised in her memorandum of appeal adding that the trial court proceedings did not amount to a fair trial in terms of the provisions of Article 25 (c) as well as 50 (1) of the Constitution
8. The case of *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd ( 2000) eKLR* was proffered to buttress the point that "It is settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect", and in the case at hand, the plaintiff had been disbanded.
9. Further, the case of *Silantoi Ene Santa Nkoipiyia & Another v Natasha Ene Santa Ngopia ( 2021) eKLR* was relied upon to emphasize that the respondents did not state when the act of trespass occurred.
10. The submissions of the respondent are dated 23.9.2024, where it is argued that the appellant religiously attended court after filing a statement of defence as well as her witness statement, and also chose to act in person, and that the court cannot direct a party on how to proceed with their case.
11. It was further submitted that the appellant did not prove her allegations as required by the provisions of Sections 109 and 112 of the Evidence Act, thus the allegations of fraud were not proved. To this end, the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR* was cited amongst other cases.
12. It was further argued that the principle of sanctity of title was upheld by the trial court as set out at Section 24 and 25 of the Land Registration Act. To this end, the case of *Joyce Musyawa Kilungu v Evastus Kilungu ( 2019) eKLR* was relied upon amongst other cases.

### **Determination**

13. This being a first appeal, the court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of; *Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123, Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR*.
14. The proceedings relating to the hearing before the trial court were brief for both parties. PW1 testified for the respondent and he simply adopted his witness statement as his evidence. He also produced 10 documents in his list as exhibits. In his witness statement, he stated that the respondent's company is duly registered, and was also the registered owner of the suit property, having bought the land for its members, of which the appellant is not one of them. That the appellant had trespassed on the suit land but was told to leave. She did not comply, that is why they wrote a demand letter to her.



15. In cross-examination, Pw1 stated that their plot is number 81 and the one claimed by the appellant is 1/155. He denied that parcel 1/81 was carved out of 155, adding that plot 81 is a distant plot of which they have a title deed.
16. For the appellant, she testified as Dw1 contending that she is aware of the dispute in which the respondents were claiming parcel 81. She stated that her mother's plot was no 155, and she had a case in land settlement with the respondent's society. She stated that there is a road between the two plots and that her crops were damaged by the chairman, one Samson Ndegwa.
17. On cross-examination, the appellant stated that the land belongs to her mother who is deceased and it measures 9.5 acres, but she has no title. She also stated that there was a dam owned by the respondent.
18. I have looked at the evidence tendered before the trial court, the submissions proffered thereof as well as the ensuing judgment. The questions falling for determination is whether the judgment delivered by the trial court can be faulted on account of the grounds set out in the memorandum of appeal.
19. On the question of a fair trial and the right to be heard, I find that indeed the appellant was not represented, She also did not produce her documents and witness statement. However, the records indicate that the appellant fully participated in the trial. To this end, she took part in the prosecution of the application dated 24.5.2021 culminating in a ruling delivered on 25.11.2021. She also filed a well articulated statement of defence and a counterclaim.
20. Further, I find that notwithstanding the none production of her documents in court, the trial court went ahead to consider her case based on her witness statement (page 3 of the judgment) as well as her documents (page 6 of the judgment).
21. It is also noted that the pretrial process commenced way back on 25.11.2021 upto 24.4.2022 when the hearing date (4.8.2022) was fixed in the presence of the parties.
22. This far, I find that the trial process was fair and there is no tangible evidence to indicate that appellant's right to be heard was violated.
23. On the rest of the other issues; Trespass, time bared, adverse possession, status of the respondent, reports from the Land Registrar and Surveyor, I make reference to the Text book by Bullen and Leake and Jacob's 12 th Edition page 8 cited in Samson Emuru v Ol Suswa Farm LTD [2006] eKLR ( Martha Koome J as she then was), where it was stated that;

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made”.
24. Further in Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR the court held as follows;

“That the issues for determination in a suit generally flowed from the pleadings, and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination”.
25. A perusal of the appellants pleadings reveal that her claim was that the title of the respondent was fraudulent, and in case it was not, then she ought to have been declared as the owner of the land via adverse possession. Her evidence does not in any way support those averments. Similarly, no tangible evidence was adduced to support the claim of res judicata. There is nothing to indicate that a



determination was made in the case Nyahururu no.79 of 1991. It follows that the trial magistrate did not err in failing to allow the appellants counter claim.

26. On limitation, or when the trespass occurred as well as the issue of the status of the respondent (that it is a defunct entity), the said issues were not pleaded and were therefore not made a subject of contest at the trial. It is noted that in the current submissions of the appellant, the said appellant has in essence set out to give evidence at length on the aforementioned issues. However, submissions cannot in any way substitute evidence, and thus the practice of adducing evidence in the platform of submissions is untenable and unacceptable. Again I find that the trial cannot be faulted in failing to determine issues which were not properly made a subject of contest before the said court.
27. On the claim that the trial court failed to call for reports from the land registrar, again I reiterate that cases belong to the parties, and he who alleges is the one who bears the burden of proof in terms of the provisions of Section 107 of the *Evidence Act*. See- Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR. Thus the appellant had a statutory duty to proof her case and not to shift the said burden to anyone else.
28. In the end, I find that this appeal is unmerited, the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 27<sup>TH</sup> DAY OF MARCH 2025 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:

Sigilai Joel for Appellant

