



**Marira & another v Shongo & 2 others (Environment and Land Appeal
1 of 2020) [2023] KEELC 15663 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 1 OF 2020
MN GICHERU, J
FEBRUARY 21, 2023**

BETWEEN

PETERSON NDUNG’U MARIRA 1ST APPELLANT

SAMUEL IRURA NDERITU 2ND APPELLANT

AND

RESERIATO ENE SHONGO 1ST RESPONDENT

PHILIP SAYIA SHONGO 2ND RESPONDENT

GEORGE MAIKAN SHONGO 3RD RESPONDENT

JUDGMENT

1. This appeal is against the Judgment and decree in Kajiado SRMCC No 412 of 2007. In a judgment dated October 9, 2015 but delivered on November 9, 2015, the lower court dismissed the Appellant’s suit with costs to the Respondents.
2. In the suit before the lower court the Appellants who were the Plaintiffs had sought for eviction of the Respondents who were the Defendants from LR Kajiado/Kaputiei-North/2233. They also sought a permanent injunction to restrain the Respondents from occupying the suit land.
3. In its decision, the lower court found that though the Appellants had the title deed for the suit land, they were unable to prove that the transfer of the suit land from David Kereka Joseph Lasei to themselves had been consented to by the relevant land control board. Secondly, it was found that the suit parcel vis-à-vis parcel No Kajiado/Kaputiei-North/2235 has been displaced on the ground.
4. Dissatisfied with the judgement of the lower court, the Appellants filed his appeal and cited the following grounds. The trial Magistrate erred in law and in fact by –



- i. Delaying judgment for over two years and subsequently delivering judgment without giving notice to the Appellants' counsel.
 - ii. Failing to appreciate that after hearing was completed and written submissions timeously filed in court, a two year lacuna before delivery of judgment occasioned a miscarriage of justice.
 - iii. By consciously disregarding and not applying the overriding objectives of the law which are meant to ensure that justice is not only heard to be done, but that it is actually done to all.
 - iv. By failing to confirm that both parties written submissions were filed timeously thus occasioning a miscarriage of justice.
 - v. In dismissing the suit without appreciating or considering either the evidence adduced in court and or the timeously filed written submissions.
 - vi. By failing to consider evidence adduced in court or balance the law relating to land ownership rights and contractual claims while delivering his judgment.
 - vii. By failing to consider the overwhelming prejudice occasioned upon the Appellants by relocating to two different stations with the said court file, and much later sending the court case file back to the initial court, having dismissed the suit.
 - viii. By making erroneous findings of fact and of law, contrary to the evidence adduced, and delivering questionable and unbalanced judgment, with manifest significant errors apparent on the face of it, and whose modum of delivery itself reeks of a travesty of justice.
 - ix. When he at the time of delivering the judgment failed to notify counsel for the Appellants.
 - x. In failing to appreciate that the Appellants had purchased the subject property legally and had presented ownership documents in court.
 - xi. In failing to appreciate that the Appellants are the registered owners of the subject suit property exclusively.
5. There are no submissions on record from either the Appellants' or the Respondents' counsel. I will treat the grounds of appeal as the issues for determination. I find that the grounds of appeal can be classified into two categories. The first category is the one that addresses the issue of delay in delivery of judgment by the lower court. They include grounds 1, 2, 3, 4 and 7. The second category is the one that addresses issues of law. They include grounds 5, 6, 8, 9, 10 and 11.
6. I have carefully considered the entire appeal including the grounds, the record and the issues raised by the Appellants. This being a first appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded. In *Selle and another v Associated Motor Board Co Ltd and others* (1968), E.A. 123, this principle was enunciated thus;

“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 bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

I make the following findings. As regards grounds 1, 2, 2, 4 and 7, I find that they would apply when one is seeking leave to appeal out of time. Since the appeal was admitted, there is no need to make any findings on the above grounds.



7. I find as regards the fifth ground that the trial Magistrate appreciated and considered all the relevant evidence adduced. That relevant evidence was whether or not the Land Control Board consent was issued prior to the transfer of the suit land to the Appellants. He also considered the other relevant issue of the location of the suit parcel and parcel No 2235
8. I do not agree that the trial Magistrate made erroneous findings and the judgment was unbalanced and with errors. The findings on the absence of the consent of the Land Control Board were based on evidence. The first Appellant, Peterson Ndungu Marira, is on record at page 21 of the record of appeal at line 5 saying the following.

“...I don’t have evidence to show that we got a consent from the Land Board. I don’t have a copy of transfer. We did everything through Stephen Kinyua Gathua...”

The finding that there was no consent was based on what the first Appellant himself admitted on oath. The other finding on the location of the suit parcel as well as parcel No 2235 is based on evidence of a surveyor. The survey was ordered by the court itself.

9. Ground number nine would fit in the first category and what I said about the grounds in that category is true of this particular ground.
10. I would partly agree with the Appellants’ counsel regarding ground number 10. Partly because while it is true that the Appellants paid for the land, it was incumbent upon them to prove that all the legal procedures were complied with. They failed to prove that there was consent of the Land Control Board. Having found that the transfer of land to the Plaintiffs was null and void under Section 6 of the [Land Control Act](#), the trial Magistrate ought to have complied with Section 7 of the same [Act](#) and order for a refund of the purchase price.
11. I find that paragraph (10) above covers the eleventh ground and I need not say more than I already have in that paragraph.
12. For the above stated reasons, I find that there is no merit in the appeal except as regards the refund of the purchase price. I therefore dismiss the appeal and make two orders as follows.
 - a. Joseph Lasei Kisaju or his successors to refund the purchase price to the Appellants with interest at court rates from the date the installments were paid until the date of refund.
 - b. Cost to the Appellants.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF FEBRUARY, 2023.

M.N. GICHERU

JUDGE

JUSTICE M.N. GICHERU

