



**Karuru v Matara (Environment and Land Appeal 28 of 2019)
[2023] KEELC 764 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 28 OF 2019
JO OLOLA, J
FEBRUARY 16, 2023
(FORMERLY NYERI HCCA NO. 36 OF 2018)**

BETWEEN

GABRIEL WAHOME KARURU APPELLANT

AND

JOSEPH MUKABURU MATARA RESPONDENT

JUDGMENT

1. This is an Appeal arising from the decision of the Honourable W. Kagendo, Chief Magistrate delivered on 29th June, 2018 in Nyeri CMCC No. 274 of 2014; Gabriel Wahome Karuru v Joseph Mukaburu Matara.
2. By his Complaint dated 12th August 2014, Gabriel Wahome Karuru (the Appellant) had sought orders against Joseph Mukaburu Matara (the Respondent) for:
 - (a) Delivery of vacant possession to the Plaintiff of Plot No. 7 Wamagana;
 - (b) General damages for trespass;
 - (c) Costs of the suit;
 - (d) Interest on (b) and (c) above at court rates; and
 - (e) Any other or better relief which the Court may deem fit to grant.
3. Those prayers arose from the Appellant's contention that he was the legal representative of the estate of one Thumbi Moru who was the registered owner of the said Plot No. 7 Wamagana. The Appellant accused the Respondent of trespassing into the said plot and remaining thereon without any colour of right and thereby denying the Appellant his proprietary rights.



4. But in his Statement of Defence dated 26th August 2014, the Respondent denied the Appellant's claim asserting that the Appellant had no locus standi to bring the suit as he had not been issued with any letters of administration for the estate of the deceased.
5. The Respondent further asserted that he was the bonafide owner of Plot No. 16 Wamagana Trading Centre where he had lived for more than 35 years and that he was not aware of the whereabouts of the Plot No. 7 claimed by the Appellant. The Respondent further asserted that the late Thumbi Maru who was known to him had never during his life time sought to claim Plot No. 16 from himself and that it was strange for the Appellant to seek to have the same after Thumbi Maru's death.
6. Having heard the Parties and their witnesses, and in her Judgment delivered on 29th June 2018, the Honourable W. Kagendo, Chief Magistrate determined that the Appellant had not satisfactorily discharged the burden of proof and proceeded to dismiss the suit with costs to the Respondent.
7. Aggrieved and dissatisfied with the said determination, the Appellant lodged a Memorandum of Appeal herein dated 23rd July, 2010 seeking to have the Judgment and decree set aside on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact by ignoring the evidence of the Appellant;
 2. The Learned Trial Magistrate erred in law and (in) fact by failing to establish the true owner of the suit Plot No. 7 Wamagana Market and Plot No. 16 Wamagana Market which is what was basically in contention; and
 3. The Learned Trial Magistrate erred in law and (in) fact by misdirecting herself on points of law particularly in awarding the Defendant the costs of the suit.
8. This being the first appellate Court, this Court has a duty to re-evaluate the evidence tendered before the trial Court and to make its own conclusions thereon bearing in mind that it did not have the opportunity to hear the testimonies of the witnesses first hand [See *Selle v Associated Motor Boat Company Limited* [1968] EA 123].
9. I have accordingly carefully perused and considered the evidence adduced at the trial Court as well as the written submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
10. By his Complaint dated 12th August, 2014 as filed in the trial Court, the Appellant accused the Defendant of trespassing onto Plot No. 7 Wamagana Market and remaining thereon without any colour of right. It is the Appellant's case that the said Plot No. 7 belonged to his grandfather the late Thumbi Maru and that he had brought the suit as the Legal Representative of his estate.
11. On his part, the Respondent contended that he was not occupying Plot No. 7 Wamagana Market. To the contrary, the Respondent asserted that he was occupying Plot No. 16 at the Market and that he had bought and built his house thereon in the 1980s and had always been in occupation of the same.
12. From the material placed before the Court, it was interesting to note that the Appellant did not state when the Respondent allegedly encroached upon the land and/or when he erected the house which was said to be on the land. When the Court visited the locus in quo in 2016 some two years after the suit was filed, the Court noted that the buildings on the land were old and did not appear to have been constructed recently.



13. In support of his case, the Appellant produced a Limited Grant of Letters of Administration Ad Litem issued to him on 6th August, 2014 in Nyeri High Court Succession Cause No. 656 of 2014. That was some six (6) days before he instituted the suit. A perusal of the Grant as well as the Certificate of Death produced by the Appellant reveals that the said Thumbi Maru passed away on 1st May 1976, some 38 years before the suit was filed.
14. In his Statement of Defence, the Respondent told the Court that he had occupied the suit land since the 1980s when he bought the same. In support of that contention he produced a Sale Agreement confirming that he had bought Plot No. 16 Wamagana Trading Centre on 13th August, 1981 from one Titus Maingi. In addition, the Respondent produced various receipts showing that the said Titus Maingi had acquired the Plot from one John Wang'ombe and that the then County Council of Nyeri had received the sum of Kshs.200/- as transfer fees for the said Plot No. 16 Wamagana. There are also produced in evidence receipts showing that Titus Maingi paid annual rent to the defunct County Council and that from 1982, the Respondent herein took over the payments.
15. In support of his case, the Respondent called as his witness John Wangombe (DW2) who had initially acquired the land in 1969. It was DW2's case that he was allocated the land measuring 100 x 50 by the County Council in 1969 and that he was shown the beacons before fencing it off. DW2 further told the Court that he sold the plot undeveloped to Titus Maingi in 1975 before Titus later sold it to the Respondent.
16. On his part, the Appellant produced an official search from the County Government of Nyeri (the successor to the defunct Council) indicating that Plot No. 7 was registered in the name of his late grandfather. In faulting the decision of the Learned Trial Magistrate, the Appellant relies heavily on the evidence of the County Government's Land Surveyor one Oduor Kioko Makinyera (PW2).
17. I have looked at the evidence of the said Surveyor who testified three times before the trial Court. It was apparent from his testimony that the County Government did not have a proper record of the sequence of the Plots of land and who owns which parcel of land at Magana Market. To enable him arrive at the conclusion that Plot No. 7 was on the same spot which the Respondent was claiming to be Plot No. 16, PW 2 had to go to the Market, carry out inquiries with the residents before coming to the conclusion that the subject parcel of land is Plot No. 7.
18. As the Learned Trial Magistrate rightfully concluded, PW2's evidence did not conclusively point to the Plot as being the one that was claimed by the Appellant. Indeed, PW2 admitted that there was a possibility that Plot No. 16 could be where the Respondent said it was. He did not interview the Respondent and only interviewed persons apparently introduced to him by the Appellant.
19. As rightfully pointed by the Learned Trial Magistrate the Respondent had tabled evidence of his acquisition of the land and the fact that he had been in occupation thereof since the 1980s without any claim from the Appellant and/or his relatives.
20. Arising from the foregoing, I did not find any basis to disturb the trial Court's findings and determination including on the award of costs to the Respondent. Accordingly this Appeal is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 16TH DAY OF FEBRUARY, 2023.

In the presence of:

Mr. Gathiga Mwangi for the Appellant



Ms. King'ori holding brief for Wa Gathoni for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

