



**Mwandwa & another v Mwandawa (Environment and Land Appeal E003 of 2024)
[2024] KEELC 5979 (KLR) (Environment and Land) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E003 OF 2024
EK WABWOTO, J
SEPTEMBER 19, 2024**

BETWEEN

ALEX MWAWANA MWANDWA 1ST APPELLANT

KELVIN ROBERT MAKEO KACHILI 2ND APPELLANT

AND

CECILIA MSHAI MWANDAWA RESPONDENT

*(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM) delivered
on 31st day of January, 2024 at Voi Law Courts ELC Case No. E019 of 2020)*

JUDGMENT

1. This is an appeal against the judgement and decree of the Chief Magistrates Court at Voi dated and delivered on 31st January 2024 by Hon. C. K. Kithinji (PM) in Voi CM ELC No. E019 of 2020 delivered on 24th August 2022. Vide an amended plaint dated 9th February 2021, the plaintiff sought the following orders; -
 - a. A permanent injunction be issued against the defendants together with their agents and/or workers from entering, erecting, fence doing constructions, disposing off by way of sale or interfering in any manner with the suit property measuring approximately 2 acres within Kishamba B Group Ranch.
 - b. An order of relief that this court may deem fit to grant.
2. The Respondent opined that she was the owner of the 2acres of land situated at Kishamba B Group Ranch being the suit property. She had an interest of disposing off a portion of the suit property



- sometimes in 2017 but the sale was never completed and the 1st Appellant was actually a witness to the buyer.
3. The Respondent argued that the 1st Appellant has now secretly sold portions of the suit property to the 2nd and 3rd Defendants which actions are totally unlawful.
 4. The Appellants on the other hand filed a statement of defence and counterclaim dated 31st May 2021. The Appellants case before the trial court was that their late father Neverson Mwandawa, had before his demise shared out all his property and that he and the Plaintiff together with another sister of theirs were given parcels of land within the same area which border each other.
 5. The 1st Appellant argued that he sold to the 2nd and 3rd Defendants as well as other third parties' portions of his entire parcel of land inherited from his father which portions he had wholly sold out by the end of the year 2018 when his father was still alive. The 1st and 2nd Appellant also argued that the parcel of land sold by the Respondent to Caroline Wandwa is still available and vacant.
 6. In their counter claim before the trial court, the Appellants argued that the Plaintiff has her own separate portion measuring approximately 2acres as given by her late father which portion is distinct from the suit property herein and hence the Appellant has no right over the same. They also argued that the plaintiff had encroached onto the property despite lacking any rights over the same.
 7. The Appellants sought for the following reliefs in their counter claim before the trial court; -
 - i. A permanent injunction barring the plaintiff whether by herself, agents, relatives, and or assigns from trespassing and or entering into, remaining on and or cultivating, selling, transferring and or constructing or in any manner dealing and interfering with the parcel measuring approximately 3acres near the junction of the Voi town road and Mombasa – Nairobi highway.
 - ii. General damages for unlawful encroachment and or trespass and for pain and suffering occasioned to the 1st and 2nd Defendants.
 - iii. Cost of the counter claim.
 8. The trial court upon considering the respective parties' cases, delivered its judgment on 31st January 2024. It found that the Plaintiff (Now Respondent) had proved her case on a balance of probabilities and dismissed the Appellants counterclaim. The trial court granted an order of permanent injunction against the Defendant, an order requiring the Defendant to give vacant possession of the suit property within 45 days from the date of the said judgment and the costs of the suit.
 9. The Appellants being dissatisfied with the trial court judgement filed this appeal vide the memorandum of appeal dated 1st February 2024. The Appeal has 4 grounds enumerated as follows; -
 - i. THAT the trial Magistrate erred in both Law and Fact in finding that the Respondent had proved her case to the required standard against the weight of the evidence on record.
 - ii. THAT the trial Magistrate erred both in Law and Fact in failing to take into consideration that both the 1st Appellant and Respondent were beneficiaries of the estate of the deceased Neverson Mwandwa with equal rights over the property.
 - iii. THAT the trial Magistrate erred both in Law and Fact disregarding the evidence of ownership of the land by the Appellants.
 - iv. THAT the trial Magistrate erred both in Law and Fact by taking into account extraneous matters in arriving at her decision.



10. The Appellants have sought for the following prayers; -
 - i. That the judgement delivered on 31st January 2024 by HON C.K. Kithinji (PM) be set aside and or be varied.
 - ii. That the costs of this appeal be borne by the Respondents
11. The Appeal was canvassed by way of written submissions. The Appellants filed written submissions dated 6th August 2024 while the Respondent filed written submissions dated 20th August 2024.
12. Counsel for the Appellant submitted on the following two issues; -
 1. Whether the Honourable trial Magistrate erred in both Law and Fact in finding that the Respondent had proved her case to the required standard against the weight of the evidence on record.
 2. Who is to bear costs of the Appeal.
13. It was submitted that the suit land falls within a former Group Ranch now a community Land. Proof of ownership of such land must be as per the provisions of the Community Land Act and the ascertainable share of each member. Reliance was placed in the case of *Caroline Awinja Ochieng & Another -vs- Jane Ann Mbithe Gitau & 2 others* (2015) e KLR and *Mwaja & 5 others -vs- National Land Commission & Another (Environment & Land Case 100 of 2021)*(2023) KEELC 16458 (KLR) (27 March 2023) Judgment.
14. Counsel submitted that the documentary evidence presented before the trial court by the Respondent in form of letters purportedly addressed to the Appellant did not prove ownership of the suit property and that the observations made by the trial court during the visits casts doubts to the Respondent's evidence of ownership of the suit property.
15. It was also submitted that it is not disputed that the 1st Appellant and the Respondent herein are siblings and that they derive their ownership interests from their late father Neverson Mwandwa. Furthermore, that both the 1st Appellant and the Respondent were given land by their late father Neverson Mwandwa who was the only person who knew to what extent and which land had been given to who.
16. The Respondent in her evidence confirmed that when the 2nd Appellant purchased the portion now developed, her father the late Neverson Mwandwa was alive. That she did not raise any objection to the purchase and even the development of the said portion of land. She also confirmed that she could not object to his brother's allocation of the land by her father.
17. It was further submitted that PW-2 confirmed that when the transaction between the 1st Appellant and the 2nd Appellant was being conducted, their father was as well alive. She as well gave evidence that when the construction of the house owned by the 2nd Appellant was happening, the father was as well alive and would go round his land checking since he had a house nearby.
18. Counsel submitted that the testimony of DW-4, DW-5, DW-6 resonated with that of the Appellants herein. They testified that they had met the deceased Neverson Mwandwa when DW-4 was purchasing from the 1st Appellant who confirmed to them that the portion being sold, belonged to the 1st Appellant.
19. It was further submitted that the Respondent failed to provide evidence proving her ownership of the disputed portion and that contrary to the findings of the court, her father had divided the land in the year 2013, meaning in 2017, he knew who was where and owned which parcel of land. Importantly,



the evidence presented by the Respondent did not prove ownership of the disputed portion given that she had already sold of a parcel measuring 1 acre when the 2nd Appellant purchased the already sold of a parcel measuring 1 acre when the 2nd Appellant purchased the land. The only evidence on record indicates that Neverson Mwandawa was the sole authority on land allocation, and he confirmed the land belonged to the 1st Appellant. The Respondent did not produce any documents tracing the root of her title as required.

20. Counsel further submitted that proof of ownership of land is found in documentary evidence which lead to the proof of the title. There must be an unbroken chain of documents showing the true owner. Once proof of ownership is tendered, then the holder of the documents is entitled to protection under the law. There is no doubt that such proof will be on balance of probabilities, but the court must be left in doubt that the holder of the documents proved is the one entitled to the property. The Respondent did not present an unbroken chain of ownership of the disputed portion of land. The evidence on record shows that the Respondent was not the owner of the suit property given the confirmations by her father to the contrary.
21. It was argued that the trial court erred in purporting to make a finding that the respondent could not have gotten half a share than her sister PW-2 when in the first place, no evidence was led as to the size of the land given to each beneficiary for comparison purposes. Notably there was no evidence led by the Respondent that she ever before the death of her father used and/or possessed the suit property. At the time of her father's death, the suit property had already been in the possession of the 1st Appellant who then transferred it to the 2nd Appellant and DW-4 amongst others.
22. Notably, DEXH-2 an agreement dated 29/08/2016 was produced by the 1st Appellant to confirm that he had as well sold a portion to one DAMARIS MUKITI. That agreement was witnessed by the deceased as the initial owner of the said land confirming the 1st Appellants root of title. No evidence was presented that the said portion was not within the seven (7) portions sold by the 1st Appellant as observed by the court at the site visit. The courts findings that the Respondent was the owner of the suit property was without the backing of the evidence but presumptions which the Honourable court drew form non-existent facts and hence the suit by the Respondent was not proved at all.
23. The Appellants faulted the trial court on its decision and for failing to pay due regard to the fact that the Respondent admitted to having disposed off a parcel measuring 1 acre to DW-2 without the authority of her father and /or justification. The court was urged to find merit in the appeal and allow the same with costs.
24. The Respondent submitted on the following issues; -
 - i. The Honourable Magistrate erred in both Law and Fact in finding that the Respondent had proved her case to the required standard against the weight of the evidence on record.
 - ii. Whether the Honourable Magistrate erred in both Law and Fact in failing to take into consideration that both the 1st Appellate and the Respondent were beneficiaries of the estate of the deceased Neverson Mwandwa with equal rights over the property.
 - iii. That the Honourable Magistrate erred both in Law and Fact by taking into account extraneous matters in arriving at her decision.
 - iv. The Honourable Magistrate erred in both Law and Fact in disregarding the evidence of ownership of the land by the Appellate.
 - v. Who is to bear the costs of the Appeal.



25. On the first issue, counsel submitted that the Respondent satisfactorily proved on the required standard that she is the owner of the suit property. The court visited the suit property and confirmed the testimony of the witnesses. The Appellant has not demonstrated how the evidence that was adduced by the Respondent fell short of the required standard.
26. On her second issue, it was submitted that the trial court was cognisant with the fact that the 1st Appellant and the Respondent were siblings and that they were both beneficiaries of the estate of the late Neverson Mwandawa. The Respondent was given her share which borders her elder sisters land and on the left it borders the community ward and on the right side, it borders her elder sisters land. At no single point did the 1st Appellant land bordered the Respondents land. The 1st Appellant was once engaged by the Respondent while the Respondent wanted to sell the suit property. Later the 1st Appellant started lodging claims on the suit property.
27. Counsel for the Respondent also submitted that the trial court appreciated the fact that both the 1st Appellant and the Respondent were beneficiaries of the estate of the deceased Neverson Mwandawa and the beneficiaries were at liberty to dispose of their property in their own ways. The 1st Appellant decided to sell his share and squandered his money and decided to sell the Respondent's rightful ownership of property and enjoyment of the share by virtue of inheritance from her father. According to the Respondent, the trial court could not entertain any violation of rights of ownership and enjoyment of property by the 1st Appellant simply because they are beneficiaries of the estate of their late father.
28. On whether the Honourable Magistrate erred both in law and fact by considering extraneous matters in arriving at her decision, Counsel submitted that the Appellants were not present when the trial court conducted the site visit neither did they give any reasons for their absence. The site visit was conducted on 13th October 2023 and considered there were no extraneous matters taken by the trial court as it observed Article 47 and 48 of *the Constitution* of Kenya.
29. On whether the Magistrate erred in both law and fact in disregarding the evidence of ownership of the land by the Appellants, Counsel submitted that the Appellants did not tender any evidence to prove that the suit property belongs to them. It was argued that the learned Magistrate noted that the spouse and the mother of the 1st Defendant were not called as witnesses. The Learned Magistrate also noted that the 3rd Defendant was honest enough to acknowledge the position that the 1st Defendant proceeded to deal with land allocated to the plaintiff without her consent. It was argued that the trial court at paragraph 30 of its judgment noted from the site visit that the 1st Defendant had subdivided the one acre into six portions and confirmed having disposed of four portions of his parcel and was also ready to dispose the remaining two acres in case an interested buyer showed up.
30. It was further argued that it could not be verified that the 1st Appellant and Respondent's father gave approval towards the sale of the said parcels and hence the trial court corrected and evaluated the accessed the evidence placed before it in arriving at its decision.
31. Counsel concluded the Respondents submissions by making reference to the maxim of equity that he who comes to equity must come with clean hands. The court was urged to dismiss the appeal with costs to the Respondent.
32. The court has read and considered the entire record of appeal and the respective parties' submissions together with the grounds of the appeal. Taking into account the grounds of appeal and the submissions that were tendered. The following are the key issues that fall for determination in this appeal; -
 - i. Whether the Respondent proved her claim before the trial court to the required standard.



- ii. Whether the Appellants proved their counter claim before the trial court to the required standard.
 - iii. What are the appropriate reliefs to grant herein.
33. Before I analyse and dispose the issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
34. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
35. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
36. The gist of the Respondent’s claim was that the suit property belongs to her after she was given the same by her late father one Neverson Mwandawa. Her case was that the land borders her elder sister’s land. On the left side it borders the country road and on the right side it borders her elder sisters land, one Jane Mkangemi Mwandawa.
37. It was her case that the 1st Defendant sold his share then also sold her portion and that the 1st Defendant has no claim or interest over her land. It was also her case that the 3rd Defendant has no stake or claim over her land which the 1st Defendant sold to her.
38. The Respondent also argued that the actions of the Appellants prompted her to institute the suit before the trial court seeking a permanent injunction and eviction order.
39. On their part, the Appellants through their defence and counter claim contended that the Respondent has her own separate portion of land measuring approximately 2 acres as given by her late father which portion is distinct from the suit property herein and hence she has no right over the suit property. It was also their case that the Respondent while fully aware of this fact, went ahead and unlawfully without any justification encroached and/or trespassed into the portion owned by the 1st Appellant. The Appellant accused the Respondent of illegally and maliciously disposing the Appellant of his rightful property and evicting the third parties from respective portions without justifiable cause. It was also their case that they have been denied peaceful use and quiet enjoyment of the property. They equally sought a permanent injunction and general damages before the trial court.
40. It subsequently emerged during trial and site visit that was conducted by the trial Magistrate that the 1st Defendant (now 1st Appellant) had sub divided one acre of the suit property into six portions and disposed of four portions including the one to the 2nd and 3rd Defendant and only 2 were vacant owing to earlier orders issued by the court. It also emerged that the 1st Appellant did not have the authority to dispose of the suit property.



41. From the evidence that was tendered during trial before the lower court, it was also evident that the 2nd Defendant had never lived on the suit land and as was confirmed during the site visit. It was also evident that the 1st Defendant had occupied the Respondent's land without any authority or consent and further he had no justification at all to dispose off the said property without the authority and/or consent of the Respondent.
42. The Respondent tendered evidence how she acquired the suit property and how the 1st Appellant without her consent had sold off the same. The site visit undertaken by the trial court on 13/10/2023 also confirmed the testimony tendered by the Respondent and as such it is the finding of this court that the Respondents were able to prove their case to the required standard before the trial court
43. In respect to the Appellants case and counterclaim. The evidence tendered herein and the site visit that was conducted established that they had no any lawful or legitimate interest to the suit property. The 1st Appellant never obtained any consent or authorization for the sale of the disputed portion. The evidence tendered confirmed that the 1st Appellant and Respondent's late father never gave any consent and or authorization for the sale of the same. The 1st Appellant has no claim over any land portion as he sold the land portion he had inherited.
44. In view of the foregoing, it is the finding of this court having evaluated and considered the totality of the weight of the evidence tendered before the trial court, it is evident that the Appellants counter claim was not proved and the same was unmerited.
45. As to whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs sought, it is evident and as earlier stated in this judgement that the weight of the evidence tendered could only have led to the conclusion being that the Respondent had proved his case to the required standard.
46. In view of the foregoing, it is the finding of this court that the trial Magistrate did not err in both law and fact when arriving at her decision. I am satisfied that the Learned Magistrate addressed himself properly on the law and considered all relevant factors in arriving at her decision. It is therefore not open for this court to interfere with the same.
47. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the trial Magistrate. Consequently, the appeal fails and is hereby dismissed.
48. On the issue of costs, costs are at the discretion of the court and in any event to a party who is successful. However, in this case, this court notes that the dispute involves some members of the same family and in the circumstances this court directs each party to bear own cost of the appeal.

Final Orders

49. In conclusion, the appeal is hereby determined as follows; -
 - a. The appeal is devoid of merit and is dismissed,
 - b. Each party to bear own costs of appeal.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF SEPTEMBER, 2024.

E. K. WABWOTO



JUDGE

In the presence of:-

Ms. Wambura for Appellants.

Mr. Mwazighe for Respondent.

Court Assistant: Mary Ngoira and Norah Chao.

