Case Number:	Environment and Land Case Appeal 17 of 2021 (Formerly Nyeri ELC Appeal 26 of 2020)
Date Delivered:	10 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Nanyuki
Case Action:	Judgment
Judge:	Antonina Kossy Bor
Citation:	Laikipia County Government v Tirus Kinyua Thumbi [2022] eKLR
Advocates:	Mr. Wang'ombe Wambugu for the Appellant Mr. John Abwuor for the Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Laikipia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NANYUKI

ELC APPEAL NO. 17 OF 2021

(FORMERLY NYERI ELC APPEAL NO. 26 OF 2020)

LAIKIPIA COUNTY GOVERNMENT...APPELLANT

VERSUS

TIRUS KINYUA THUMBI...RESPONDENT

JUDGMENT

1. By a memorandum of appeal dated 24/08/2020 which was filed in court on 09/04/2021, the Appellant, who was the Defendant in Nanyuki Chief Magistrates Court Environment and Land Case No. 169 of 2018 appealed against the entire judgment vide which Honourable Lucy Mutai, Chief Magistrate, found on 12/08/2020 that the land known as Nanyuki Municipality Block/258 within Laikipia Municipality belonged to the Plaintiff and that he acquired it regularly and procedurally. The Learned Chief Magistrate awarded the Respondent damages in the sum of Kshs. 20,000,000/= being the value of the property which the Appellant demolished and put up stalls which it assigned to traders. Additionally, the court found that the Appellant trespassed onto the Defendant's property and destroyed his development.

2. The court granted those orders based on the plaint in which the Respondent sought a permanent injunction to restrain the Appellant from dealing with the land known as Nanyuki Municipality Block/258 within Laikipia County ("the Suit Property"). In that suit, the Respondent sought to be declared the legitimate owner of the Suit Property.

3. In the defence and counterclaim that it filed in court, the Appellant denied the Respondent's claim and averred that the Suit Property constituted public land comprising the Nanyuki Old Market and sought revocation of the title held by the Plaintiff. It also sought to have the Respondent restrained from dealing with that land.

4. Being dissatisfied with the decision of the Learned Magistrate, the Appellant filed **ELC Appeal No. 26 of 2020** at Nyeri, which was transferred to this court in August 2021. The Appellant seeks to have the judgment of the Learned Magistrate set aside and for the orders sought in the counterclaim to be granted. The Appellant set out several grounds of appeal including that the Learned Magistrate erred by failing to make a determination that the Suit Property was in fact public land under the Nanyuki Old Market and thus the Respondent could not acquire any recognisable rights or interests over the land in law; and that as such, the land could not be alienated, transferred or used in any other way than for the purpose for which it was set aside.

5. The Appellant also faulted the Learned Magistrate for not finding that the Respondent never acquired a clean and indefeasible title to the Suit Property with rights capable of any legal protection. The Appellant contended that the Learned Magistrate failed to consider the evidence of the defence witnesses on the aspect of the suit land being public land set aside for the open market coupled with its assertion that there was no access road to this land. The Appellant faulted the Learned Magistrate for dismissing its counterclaim and for failing to make a finding that the Appellant was within its rights to enter the Suit Property and reclaim it for purposes of putting it into use for the intended purpose. The Appellant highlighted discrepancies and anomalies in the manner in which the Respondent's title over the Suit Property was issued.

6. The appeal was canvassed through written submissions. The Appellant submitted that the process through which the Suit Property was acquired was fraudulent thereby invalidating any title document obtained from it. The Appellant pointed out the discrepancies in the Defendant's evidence before the trial court, specifically the commencement date of the lease being twenty years prior to the

date in the allotment letter. It argued that the Respondent did not prove that he paid the allotment fees within 30 days as required by Section 16 of the Government Lands Act. Further, it contended that the sanctity of title protected under Articles 40(1) and 40(6) of the Constitution and Section 26 of the Land Registration Act which the Respondent relied on does not extend to titles obtained fraudulently. The Appellant relied on the decision in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** on this point.

7. The Appellant maintained that the Suit Property was alienated government land designated as part of the open air market and was therefore not available for allocation by the Commissioner of Lands to a private entity. It urged that this fact was borne out by the evidence which the National Land Commission (NLC) Coordinator for Laikipia County gave at the trial as well as the part development plans (pdp) which were produced in court. The Appellant pointed out that at the time the Suit Property was the only parcel of land without an access road and the Respondent had to trespass through other public parcels of land to access it. Counsel relied on the case of **Flemish Investments Limited v Town Council of Mariakani, Civil Appeal No. 30 of 2015, 2016 [eKLR]** where the court noted thus:

"By dint of Section 117(2) of the former Constitution, once plot no. 34 was set apart for public purposes, all the rights that the Katetei family or any other person had over that plot were immediately extinguished by operation of the Constitution. The effect thereafter was that neither the Katetei family nor any other person, could sell and transfer any rights over plot no. 34 to Ndambuki.

Similarly, Ndambuki had no rights over plot no. 34 to sell and transfer to the Appellant. Although Section 23 of the Registration of Titles Act declared that the certificate of title was conclusive evidence of proprietorship, that by itself could not have conferred on Ndambuki and the Appellant title to plot no. 34, simply because the Constitution, a higher legal norm than the Registration of Titles Act, had extinguished title to plot no. 34 before it could be transferred to Ndambuki or the Appellant. As the evidence on record, in the form of postal search dated 28th April 2010 shows, plot no. 34 is still registered in the name of County Council of Kilifi and reserved as a community cattle dip. The purported transfer and incorporation of plot no. 34 into the suit property was simply void ab initio. We come to the conclusion therefore that this appeal has no merit and is dismissed in its entirety, with costs to the Respondent. It is so ordered."

8. On the aspect of whether the Learned Magistrate erred by finding that the Suit Property was private land and that the Appellant did not have any right to enter the property and reclaim it, counsel relied on the case of **Chemey Investment Limited v Attorney General & 2 Others [2018] eKLR** in which the Respondents repossessed illegally acquired public land in an equally illegal manner, without a court order and the court held as follows:

"*This Court cannot give a seal of approval to self-help, high-handed tactics, or violation of the law in order to right what is perceived to be a wrong. However, in this case we are confronted by two wrongdoers, one having fraudulently acquired land set aside for public use and the other having restored the land back to public use without following the prescribed procedure. The Suit Property is now used as a public health facility in the form of Uasin Gishu District Hospital. Both the Appellant and the Respondents would be entitled to invoke public interest in aid of their respective cases. To the Respondents, it is in public interest to ensure that property set apart for public use that is fraudulently transferred to a private individual is restored back to public use. To the Appellant, it is in public interest to ensure that the law is strictly followed to address any grievance the Respondents may have; otherwise the result will be the law of the jungle and utter chaos. The learned judge below preferred to err on the side of public interest that would resort in restoration of the Suit Property to public use. In the peculiar circumstances of this appeal, we are not persuaded that there is any basis for us to interfere with his decision, even though we do not approve of the self-help tactics adopted by the Respondents."*

9. The Appellant submitted that the suit land was already in use as an open air market, which is the purpose it was set aside for and added that it had gone to great lengths and costs to rehabilitate the land for public benefit. It contended that the Respondent was invited to various stakeholder meetings prior to the building which he had erected on the Suit Property being demolished and before the enforcement notice was issued. In the Appellant's view, the main issue in contention was the question of service of the enforcement notice and it argued that even if the notice were not duly served, it could not invalidate its claim because being public land the Suit Property should never have been alienated and allocated to the Respondent in the first place. The Appellant implored the court to err on the side of public interest and rule in its favour.

10. The Respondent filed his submissions on 23/11/2021 and contended that the appeal was incompetent for failure to comply with Order 42 Rule 4 (f) of the Civil Procedure Rules and Section 79 G of the Civil Procedure Act. The gravamen of his argument is that the decree was not included in the Appellant's record of appeal. Further, that the Memorandum of Appeal dated 24/8/2020 which

the Appellant filed in court on 31/8/2020 was not in the record of appeal but instead there was another one dated 24/8/2020 which was filed on 9/4/2021. This mean that the appeal was filed a year and three months after the date of the judgement without the leave of the court. He also contended that no certificate of delay was filed to explain the reason for the delay as envisaged by Section 79 G of the Civil Procedure Act.

11. The Respondent was emphatic that these omissions by the Appellant could neither be cured by Article 159(2) (d) of the Constitution nor by the inherent power and jurisdiction of the court. He relied on the finding of the Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & others (2014) eKLR** stated that:

"*Indeed this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that 'justice shall be administered without undue regard to procedural technicalities'. It is plain to us that Article 159 (2) (d) is applicable on a case by case basis* ***Raila Odinga & 5 others vs IEBC and 3 Others, Petition No. 5 of 2013 eKLR***".

12. The Respondent maintained that the Suit Property was lawfully allocated to him vide the letter of allotment dated 3/12/1991 which he claimed had a valid pdp attached to it in accordance with Section 9 of the Government Lands Act (GLA). In his view, that created a leasehold interest for a period of 99 years in accordance with Section 10 of that Act. He submitted that a valid certificate of lease was issued to him and that the land ceased to be public and became private land in accordance with Article 62(1) (d) and Article 64 of the Constitution. The Respondent relied on the case of **Dana Management Limited v County Government of Mombasa & 5 others (2021) eKLR** on the creation of leases of town plots.

13. The Respondent also referred the court to his own evidence at the trial where he tendered a letter of allotment dated 3/12/1991 together with the pdp attached to it and the certificate of lease showing that the lease was for 99 years from 1/11/1991. He also adverted to the evidence in the record of appeal showing that the Plot Allocation Committee duly allocated the Suit Property to him. Further, he referred to the evidence of the Appellant's witness who filed a report to the effect that the Suit Property was public land lawfully alienated to a private individual by the Commissioner of Lands and who also clarified that in the past allocation could be done first and a pdp prepared later.

14. Regarding registration, the Respondent quoted Section 26 of the Land Registration Act and asserted that the Appellant had not proved fraud or misrepresentation on his part as required by Section 107 of the Evidence Act. He relied on the cases of **Joel Kipkosgei Sigei v Peter Maina Macharia & another (2019) eKLR; Evans Kidero v Speaker of Nairobi County Assembly & another (2018) eKLR** and **Elizabeth O. Odhiambo v South Nyanza Sugar Co. Limited (2019) eKLR** where it was held that parties are bound by their pleadings and that unless these were amended the evidence adduced should not deviate from the pleadings.

15. Finally, the Respondent submitted that the Appellant failed to plead fraud or conspiracy to defraud as required by law and that it failed to plead and prove specifically that he acquired the suit land illegally through fraud or a corrupt scheme. He relied on the decisions in **Peris Wanjiku Mukuru suing as the legal representative of the Estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia (2020) eKLR** and **Margaret Njeri Wachira v Eliud Waweru Njenga (2018) eKLR.**

16. The Respondent urged the court to dismiss the appeal and award him the costs for the appeal and those of the case before the Magistrates Court.

17. This being a first appeal, this court has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions while bearing in mind that unlike the trial court, it did not see the witnesses testifying and should therefore give due allowance for that.

18. The Respondent took up two issues which in the view of this court ought to have been taken up as preliminary issues at the point when the court gave directions on the hearing of the appeal. The issues speak to the competence of the appeal. On the first issue regarding the time for filing the appeal, the court agrees with the Respondent that the memorandum of appeal should have been filed within 30 days of the date of the decree, which unfortunately was not included in the record of appeal. There is no evidence that the decree was ever extracted. The impugned judgement was delivered on 12/08/2020 yet the Memorandum of Appeal which the Appellant put in its record is dated 24/8/2020 but bears a stamp showing that it was received at the Nyeri Environment and Land Court on 09/4/2021. Certainly that is outside the prescribed time.

19. The second issue taken up by the Respondent relates to the failure by the Appellant to include the decree in the record of appeal. The Respondent addressed this issue at length but the Appellant did not make any submissions on this matter. In **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** Judge J. Ngaah reviewed Section 79 G of the Civil Procedure Act and Order 42 Rules 2 and 13 of the Civil Procedure Rules and held that a decree was an inextricable part of any appeal filed in the High Court against a decision of the Magistrates Court. The Judge found that the failure to file a decree was fatal to the appeal and proceeded to strike it out.

20. This court gave directions on the hearing of the appeal on 19/10/2021 when the Respondent's counsel confirmed to the court that he was happy with the record of appeal. The Appellant's advocate agreed that the appeal could be disposed of through written submissions. The court gave timelines for the filing of written submissions. In terms of the duty of the court to efficiently dispose of its business and ensure the timely disposal of proceedings contemplated by Section 1B of the Civil Procedure Rules, the Respondent ought to have pointed out the anomalies or discrepancies with the appeal at the earliest opportunity rather than wait until the hearing of the appeal.

21. The appeal was on the face of it incompetent. The court will nevertheless deal with the appeal on its merits.

22. Looking at the record of appeal and the parties' rival submissions, there are three main issues which fall for determination in this appeal. These are whether the Learned Chief Magistrate erred in making the order dated 12/08/2020; whether the appeal is merited and who should bear the costs of the appeal and of the suit before the trial court. In determining the appeal, this court will have to review the evidence to determine whether the findings which the Learned Magistrate made should be left to stand. The court must consider whether there is evidence to support a particular conclusion, or to show that the Learned Magistrate failed to appreciate the weight of facts which were proved or that she was plainly wrong.

23. The Appellant argued at the trial that it was incumbent upon the Respondent to demonstrate the procedure followed in getting the Suit Property registered in his name and to show that the law was strictly followed in the alienation of the land and its subsequent registration in his name. The court notes from the record of appeal that the Respondent produced a copy of the letter of allotment dated 3/12/1991, the lease over the suit land registered on 27/12/2017 and the certificate of lease.

24. On the other hand, the Appellant mainly relied on the minutes of its meetings held on 23/4/2018, 22/5/20184/6/2018 and 28/8/2018 where the petition to demolish structures on grabbed land within the old market in Thingithu Ward was deliberated and certain resolutions made. The logical conclusion which one can draw from the documents which the Appellant tendered in evidence before the Learned Magistrate is that it demolished the Respondent's structure on the Suit Property at the behest of the traders who claimed that the Suit Property which was intended for use as a market had been grabbed.

25. The Appellant contended that the Suit Property was irregularly excised from public land reserved for a market and elaborated that it was the only land that did not have an access road. No evidence was led to support this contention. The Appellant ought to have placed evidence before the trial court to show that the Suit Property was public land. The Appellant could have produced survey plans and records as well as the amended Registry Index Map to show how the plot was created and its actual location to demonstrate that the land had no access road. It is evident that the Respondent had developed the suit land and erected a single storey commercial building on it, which is what the Appellant admits it demolished. The land must have been somehow accessible for the Respondent to have developed it.

26. The witness from the NLC whom the Appellant called to testify stated that the Plot Allocation Committee allocated 32 commercial plots to different individuals at the meeting convened on 29//5/1991, which presumably is what the Appellant contends was public land reserved for use as a market. The witness produced a list of the allottees. It is not clear whether the Appellant repossessed all the 32 plots as public land and whether those allottees received any compensation. The minutes of the Appellant's meeting held on 4/6/2018 show that the documents of those allocated plots in the market were to be verified and it was resolved at that meeting that once verified, the genuine allottees would be allocated other spaces within the market.

27. What is deducible from the evidence of the Appellant is that it resolved at its meeting held on 28//8/2018 that those who had encroached on the market land would be given 14 days' notice to vacate the land. It is also evident that the Appellant conducted an exercise to establish the genuine market allottees and arrived at a list of 135 genuine allottees. Perhaps if the Respondent had been made aware of that verification exercise he would also have presented his own documents to the market committee.

28. It was the Appellant's evidence that it issued an enforcement notice dated 6/9/2018 to the Respondent. The Respondent denied receiving any notice of the intention to demolish his building. The enforcement notice which the Appellant put in the record of appeal is illegible. The Appellant's witness confirmed in his evidence that the demolition was carried out on 17/9/2018. This confirms the fact that the demolition was carried out before the lapse of the 14 day notice.

29. In **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** the Court of Appeal stated that it could not give a seal of approval to self-help, high-handed tactics, or violation of the law in order to right what was perceived to be a wrong. The court observed that it was confronted by two wrongdoers, one who had fraudulently acquired land set aside for public use and the second who had restored the land back to public use without following the prescribed procedure. The suit land was by then being used as a public health facility.

30. The facts of this case are somewhat similar to the ones in the *Chemey Investment case*. The Appellant went ahead to demolish the Respondent's building on land it claimed was public land set apart for use as a market and thereafter allocated the land to traders for use as a market. The Appellant took it upon itself to repossess the Suit Property without following due process. The court cannot give its seal of approval for violations of the law in order to remedy a wrong.

31. It may well be that the suit land constituted public land. The witness from NLC could not tell with certainty whether the Suit Property was public or private land. His opinion was that the proper procedure for the allocation of plots was followed when the Suit Property was allocated to the Respondent. He recommended that a review of the process through which the land was alienated should be undertaken. He pointed out, correctly so, that the Appellant ought to have requested NLC to review the grant over the Suit Property before NLC"s mandate to do so ended. In this court's view the Appellant did not have the legal mandate to establish the propriety of the alienation of the suit land to the Respondent. That was the mandate of NLC until May 2017 and thereafter it is the courts to make determinations regarding ownership of land. Due process should have been followed in the recovery of the Suit Property from the Respondent.

32. This court finds it difficult to fault the Learned Magistrate for arriving at the decision that she did. The court finds no merit in this appeal and dismisses it. The costs of the appeal are awarded to the Respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 10TH DAY OF FEBRUARY 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Wang'ombe Wambugu for the Appellant

Mr. John Abwuor for the Respondent

Ms. S. Gakii- Court Assistant

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