Tasur v Naisi (Environment and Land Appeal 14 of 2021)
[2023] KEELC 16687 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16687 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT AND LAND APPEAL 14 OF 2021

MN KULLOW, J

MARCH 22, 2023

BETWEEN

SOLOMON OLOIBALA TASUR ..... APPELLANT

AND

WILSON NKODEDIA NAISI ..... RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment and decree of Hon R.M Oanda delivered on October 24, 2019 in Kilgoris Principal Magistrate's Court MELC Case No 95 of 2018, in which the respondent's claim was allowed as prayed. The grounds in the memorandum of appeal are that: -

    i. The learned trial magistrate erred in law and fact by not taking cognizance of the fact that the appellant's title No Transmara/ Shartuka/ 1042 still exists legally.

    ii. The learned trial magistrate failed to exhaustively consider the appellant's evidence that he legally owns the land he occupies together with his family members.

    iii. The learned trial magistrate erred in law and fact by failing to exhaustively consider the sections of *Land Registration Act*, 2012 quoted in his submissions.

    iv. The learned trial magistrate erred in law and fact by not following precedents set by the Honourable Justice S. Okongo in similar cases whose judgments were supplied to him.

    v. The learned trial magistrate erred in law and fact by not taking cognizance of the fact that the appellant acquired his title deed No Transmara/ Shartuka/ 1042 legally and procedurally through allocation in terms of section 7 of the *Land Act*, 2012.

    vi. The learned trial magistrate generally failed to consider and/or analyse critically, the evidence advanced by the appellant through his testimony.

vii. The learned trial magistrate erred in law and fact by not upholding the sanctity of the appellant's title deed.

viii. The learned trial magistrate erred in law and fact by believing the respondent's erroneous assertion that the appellant's title deed never existed and had been cancelled.

ix. In the circumstances, the learned trial magistrate gravely caused a miscarriage of justice and misdirected himself on the laws governing ownership of land.

2. Consequently, the appellant sought the following orders: -

a. The appeal herein be allowed and judgment and orders of the trial magistrate delivered on October 24, 2019 in Kilgoris MLC & E No 95 of 2018 be set aside and/or quashed wholly.

b. The honourable court be pleased to substitute therefore an order dismissing the respondent's suit No MLC & E No 95 of 2018 in its entirety and with costs.

c. Costs of this appeal be paid by the respondent.

3. A brief background to bring this appeal into perspective is that; *vide* a plaint dated September 1, 2016 the plaintiff/respondent instituted a suit against the defendant/appellant; seeking an order of eviction, mesne profits, permanent injunction restraining the defendant from trespassing and interfering with the suit property, a declaration that he is the absolute and exclusive owner of the suit parcel and costs of the suit. It was the plaintiff's contention that sometimes in the year 2003; the defendant without permission or consent constructed a house on his land. That despite several demands for him to vacate the suit land, the defendant refused to vacate the land indicating that he had title to the suit land and produced title documents relating to LR No Transmara/ Shartuka/ 1042 owned by him.

4. The plaintiff maintained that the suit parcel in dispute was confirmed to be LR No Transmara/ Shartuka/180, belonging to him and the defendant therefore had no rights or interest over the said land.

5. The defendant on the other hand stated that he legally and rightfully owns LR No Transmara/ Shartuka/ 1042, where he has been residing and working for gain since 1992. That the same was allocated to him as a member of the Shartuka group and thus he did not require any license or permission to utilize his land or vacate the same.

6. The appeal was canvassed by way of written submissions, both parties filed their rival submissions which I have read, considered and summarized as hereunder;

Appellant's Submissions

7. The appellant submitted on the grounds of appeal separately; on grounds 1,2,3,5,7 and 8, it was his submission that the onus was on the respondent to prove his allegations that his title deed had indeed been cancelled, which he failed to do. He relied on the decision of Okong'o J. in the case of *John Kiine Musharu v Ole Tasur Koonti* (consolidated with ELC Case No 28 of 2009)

8. On ground 4 of the appeal, he submitted that the decisions of the higher courts are to be maintained as precedents and that the foundation laid by such courts must be sustained. It is his contention that the trial court had no latitude for departure from the existing precedents and he relied on the decision in Rai Case.

9. His submission on ground 6 of the appeal was that the trial magistrate did not take cognizance of the fact that the respondent had not pleaded and proved that there existed any fraud, mistake or omission on his title deed No Transmara/ Shartuka/1042.

10. He further submitted that the trial court judgment did not comply with the mandatory provisions on the contents of a judgment as provided under order 21 rule 4 and 5 of the *Civil Procedure Rules*. That the judgment had no points for determination, reasons for the decision as well as the reasons for the finding.

11. On ground 9 of the appeal, it was his submission that the trial magistrate failed to take cognizance of the fact that the respondent did not commence his suit to recover land within 12 years from the date on which the right of action accrued to him as per section 7 of the *Limitations of Actions Act*. In conclusion, he maintained that it was incumbent upon the trial magistrate to critically consider the provisions of sections 24,25, 26, 79 & 80 of the *Land Registration Act*,2012.

Respondent's Submissions

12. The respondent on the other hand jointly submitted on the grounds of appeal under two main issues; on grounds 1,2,3 and 5; it was his submission that he produced a letter from the Land Registrar that stated that the appellant's title deed was a bad title that had been revoked. He produced court orders issued *vide* miscellaneous application No 52 of 2009 and Kisii High Court Case No 103 of 2003, which orders cancelled the appellant's title.

13. It was therefore his contention that the letter from the Land Registrar stated that the appellant's title deed was cancelled by a court order upon following the due process. He maintained that the appellant's title was acquired unprocedurally and is non-existent.

14. On grounds 6,7,8 and 9, it was his submission that he produced a copy of a title deed as Pexh 1 and the area map, which clearly showed the land parcels in the area and the boundaries thereto. He maintained that the appellant's land No Transmara/ Shartuka/ 1042 does not exist anywhere on the area map. He thus submitted that the appellant resides on his land in the pretence that it is his land and further holds a title that is only in paper but the land does not exist on the ground.

15. In conclusion, he maintained that his title is not disputed and he is the legal owner of the suit land entitled to all the rights and privileges as provided under section 24 and 25 of the *Land Registration Act*. He thus urged the court to dismiss the appeal with costs and uphold the judgment of the trial court.

16. I have considered the memorandum of appeal, the proceedings and evidence tendered before the trial court and the rival submissions herein in totality. It is my considered view that the sole issue arising for determination is whether this court should interfere with the exercise of discretion by the trial court and set aside its judgment and decree delivered on October 24, 2019 and I will analyse the same on account of the grounds of appeal put forward by the appellant.

17. This court's duty as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The Court of Appeal's decision in *Selle v Associated Motor Boat Co* [1968] EA 123) held as follows: -

> " this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or

of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. The dispute between the parties herein is centered on ownership of the suit parcel LR No Transmara/ Shartuka/ 180 and No 1042. It is the appellant's contention that he legally owns parcel No 1042, holds a valid title thereto and has been occupying the same since the year 1992. It is his further claim that the said parcel is separate and distinct from the suit land No 180 and thus maintained that he has no interests nor claim over the plaintiff land No 180.

19. The respondent on the other hand maintained that he is the lawful and absolute owner of the suit land No 180 and is therefore entitled to all the rights and privileges appurtenant thereto as the registered owner. It is his claim that the appellant without his consent nor permission, put up structures on his land and has refused to vacate the land to date. He contends that the alleged parcel No 1042 claimed by the appellant does not exist on the ground and further that the title deed issued to that effect in respect of the said parcel had since been cancelled/ revoked. He thus maintained that he is the owner of the suit parcel.

20. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

> " Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

21. In support of his case and to prove his ownership claims of the suit land; the respondent produced a copy of the title deed as Pexh 1 together with an area map, a copy of a letter from the Land Registrar Transmara District as Pexh 5 in support of his averments that parcel No 1042 does not exist. I have critically looked at the said letter dated November 20, 2013 from the Land Registrar and the same clearly indicates that parcel No 1042 is not in his records, the same was cancelled by a court order and that the title deed issued to that effect should be investigated to prove the origin of issuance. He also produced various Gazette Notices as Pexh 4 which touched on various orders issued by various courts touching on the Shartuka Group Ranch parcels of land.

22. The appellant on the other hand produced a copy of the title deed in respect to parcel No 1042 as Dexh 1, and maintained that the same was procedurally acquired and has never been cancelled. It is his claim that he was allocated the said parcel as a member of the Shartuka Group Ranch. He also produced various demand notices as Dexh 2-6 in support of his claim.

23. Section 26 of the *Land Registration Act* on the certificate of title provides as follows: -

> "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

24. Evidently, both parties are laying ownership claims in respect to parcel No's 180 and 1042 and both hold title deeds thereof to prove the said ownership. This court is therefore tasked to determine who between the parties is the absolute proprietor of the suit land, the existence of parcel No 1042 and/or whether the two parcels are separate and distinct.

25. The respondent produced Pexh 5, which is a letter from the Land Registrar, whose contents points to the non-existence of the appellant's alleged land parcel No. 1042 and further questions the legality of the title deed held by the appellant to that effect. This evidence was not rebutted by the appellant nor did he produce any contrary evidence. This court therefore finds that the said evidence being unchallenged is a reflection of the actual position and status on the existence of the said parcel No 1042.

26. Further, it is the appellant's claim that the land was allocated to him by virtue of being a member of the Shartuka Group Ranch. It is important to note that he neither adduced any copy of the Group Ranch register to support his membership claims nor called any witness to buttress the said averments. Moreover, the appellant did not further demonstrate to the court how and when he became the registered owner of the alleged parcel No 1042.

27. From a look at the Gazette Notice No 501 produced by the respondent as pexh 4, it is clear that there were two registers for members of the Shartuka Group Ranch and pursuant to the Court of Appeal order dated September 15, 1998, the second register of new members of Shartuka Group Ranch was declared fraudulent and void. This court is therefore unable to ascertain the membership of the appellant as part of the Group Ranch and consequently the legality of the alleged title which he claims to have been allocated to him by the Group Ranch by virtue of being a member.

28. It is also the appellant's case that his land parcel No 1042 is separate and distinct from the suit land No 180. He maintained that he had no interest whatsoever on the suit land and that he has been occupying his rightful land. The respondent on the other hand contends that said land No 1042 does not actually exist on the ground. From a perusal of the trial court record and in particular the Area map included as part of the defendant list of documents; I do note that the suit land No 180 which is owned by the respondent is within the alleged No 1042 which is allegedly owned by the appellant, the two parcels therefore overlap each other. No evidence was adduced by the appellant that the two parcels of land and distinct and separate as alleged and this court is therefore unable to ascertain the correctness of such averments. In the absence of any proof, I find that the assertions made by the appellant that he owns parcel No 1042 which is different and separate from the suit land are unsubstantiated.

29. From a re-evaluation of the evidence adduced in support of each party's claim; this court finds that the appellant did not adduce satisfactory evidence to prove his claims and support his averments to the required standard. It is not enough to merely lay claim on the existence of a fact without adducing evidence in support of such claims. Without any proof, the said averments do not hold any probative value.

30. In view of the foregoing, I find that the analysis and subsequent decision of the trial court was based upon examination of the facts of the case and the cogent evidence adduced in court. This court therefore finds that the decision of the trial court was arrived at judiciously and I will not interfere with the same.

Conclusion

31. In conclusion, I accordingly find that the appeal dated November 12, 2019 is not merited and is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22ND DAY OF MARCH, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellant

Nonappearance for the Respondent

Court Assistant - Tom Maurice/Victor