Mwangi v Kagunyi (Environment and Land Appeal 23 of 2021)
[2023] KEELC 16317 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16317 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 23 OF 2021

FM NJOROGE, J

MARCH 21, 2023

BETWEEN

MWATHI MWANGI ..... APPELLANT

AND

CYRUS WAWERU KAGUNYI ..... RESPONDENT

(An appeal against the entire judgment of Honourable Principal Magistrate Y. I. Khatambi in Nakuru CMCC 1323 of 2015 delivered on 7/9/2021)

JUDGMENT

1. The appellant herein appeals against the entire judgment of Honourable Principal Magistrate YI Khatambi in Nakuru CMCC 1323 of 2015 delivered on September 7, 2021. The background to the present appeal is that the respondent commenced a suit in the lower court vide a plaint dated 17th November 2015 in which he stated as follows: that he owned Nakuru Municipality Block 29/1476 while the respondent owned Nakuru Municipality Block 29/1477; (for brevity these lands may also be just referred to as "Plot No 1476" and "Plot No 1477" in this judgment); that the appellant's developments on the latter plot have encroached onto the respondent's plot; that the said developments were erected in the year 2010. He sought orders that the said developments be demolished in so far as they had encroached on his land as well as costs of the suit.

2. The suit was opposed by the appellant who filed a defence dated 4/12/2015 in which he stated as follows: that the claim that the respondent owned parcel number 1476 was denied in so far as there was a pending suit Nakuru ELC No 164 of 2015 in which the ownership of the said parcel was in dispute, but he still admitted the jurisdiction of the court; that the respondent's suit was for that reason res judicata; on his part, he admitted he owns plot number 1477.

3. The appellant filed a reply to defence dated 11/1/2016 stating that the suit referred to by the respondent did not concern the parties or the subject matter herein and that the doctrine of res judicata did not therefore apply.

4. The suit was heard on October 6, 2020 when the respondent testified; on December 1, 2020 PW2 testified; on February 9, 2021 the appellant and DW2 testified and on March 30, 2021 the appellant's last witness testified. Thereafter judgment was delivered on September 7, 2021.

5. In the judgment the learned trial magistrate listed the issues for determination as follows: whether the plaintiff is the bona fide owner of plot no 1476; whether the appellant had encroached on plot no 1476; and whether the respondent is entitled to the orders sought. She referred to and set out verbatim the provisions of Sections 25 and 26 of the *Land Registration Act* regarding indefeasibility of title; she then analyzed the evidence of the parties and arrived at the finding that the respondent had proved ownership of plot no 1476 and that the appellant's claim is that the appellant's defence principally lay in the claim that the respondent's title had been fraudulently obtained; that however, citing the cases of *Moses Parantai & Peris Wanjiku Mukuru Suing as the Legal Representative of the Estate of Sospeter Mukuru Mbeere (Deceased) V Stephen Njoroge Macharia* 2020 eKLR, she had noted that the appellant had neither pleaded nor proved fraud by way of evidence at the hearing and had not led evidence to demonstrate the nexus between the several plot numbers that he had mentioned. She also noted that the appellant's evidence was that some members of Kalenjin Enterprises Ltd had filed the mentioned suit claiming that they were not satisfied with the area map, but further observed that the appellant was not a party in those cases and that the suit land herein was not the subject matter of those suits. The learned trial magistrate finally found that the appellant's structures had encroached on the respondent's plot and that the respondent had proved his case on a balance of probabilities and entered judgment in his favour against the appellant. The orders that she granted were that the appellant should demolish the structures he had erected on plot no 1476 within the following 90 days and in default the respondent was at liberty to demolish the same. She also awarded the respondent costs of the suit. It is those findings and orders that triggered off the present appeal.

6. The appellant herein appeals against the entire judgment of the trial court delivered on September 7, 2021 on the following grounds:

    1. That the Learned Magistrate erred in law and facts by finding that the appellant had failed to prove that the respondent had fraudulently obtained title in respect of parcel known as Nakuru/municipality Block 29/1476.

    2. That the Learned Magistrate erred in fact and law by failing to carefully examine the evidence tendered by the Appellant thus arriving at erroneous finding.

    3. That the Learned Magistrate erred in law and facts by failing to consider that the area map does not reflect and/or tally with position the ground.

    4. That the Learned Magistrate erred in law and facts by failing to consider the Surveyor's testimony and report that the area map did not reflect and/or tally with the ground.

    5. That the Learned Magistrate erred in law and facts by failing to rely on defendant's witness No 3 who was a director of Kalenjin Enterprise (sic) who testified that plots starting with Nakuru municipality block 29/1435 – 1542 were illegally subdivided.

6. That the Learned Magistrate erred in law and facts by failing to consider that Nakuru/municipality Block 29/1476 does not exist on the ground

7. From the memorandum of appeal, the present appeal raises six grounds that can be congealed into three main issues which are as to whether the learned trial magistrate erred in law and in fact in failing to carefully examine the appellant's evidence including that of the director of Kalenjin Enterprises Ltd. and also the surveyor and consequently:

   i. Found that the appellant had failed to prove that the respondent's title had been obtained fraudulently;

   ii. Failed to consider that the area map does not tally with the position on the ground;

   iii. Failed to find that plot no 1476 does not exist on the ground.

8. It is upon the foregoing grounds that the appellant has in the present appeal asked this court to issue the following orders:

   a. that this court is hereby pleased to allow this appeal.

   b. that the orders of subordinate court issued on September 7, 2021 in Nakuru CMCC 1323 of 2015 Cyrus Waweru Kagunyi v Mwathi Mwangi be vacated and/or set aside and be substituted with an order of this Honourable Court.

   c. that the costs before this Honourable Court and trial court be awarded to the appellant herein.

9. Regarding the first issue which is as to whether appellant had failed to prove that the respondent's title had been obtained fraudulently, it is proper to note that the rule is that fraud must not only be particularly pleaded but it must be proved. Fraud can not be inferred. It is by evidence that the statements in pleadings are proved. *Stephen Gachau Githiaga & Anor v AG* (2015) eKLR the Court stated as follows:

> " Where a party does not appear and defend the suit and or substantiate on its pleadings, they remain mere allegations and therefore the balance of probability should tilt in favour of the Plaintiff or the party who has appeared and substantiated on his or her pleadings."

10. In the case of *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others* [2013] eKLR, the Court of Appeal held as follows:

> " In R. G. Patel v. Lalji Makani (1957) E.A. 314, the predecessor of this Court at pg 317 held:
>
> "Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga v Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact."

11. In view of the holding by the Court of Appeal in the decision in Gladys Wanjiru Ngacha (supra,) strong evidence demonstrating that the respondent in the present appeal had obtained his title by fraudulent means, however relevant or not that issue was to the issue of the trespass before the trial court, was therefore necessary if the defence of the appellant in the lower court case was to succeed. Without production of evidence proving fraud on the part of the respondent, even the strongest statements in the defence would not have aided the appellant.

12. What therefore was the evidence of fraud that the appellant tendered before the trial court? His evidence was to the effect that in 2015 the respondent laid claim to a part of his land whereupon the appellant lodged a complaint with Kalenjin Enterprises Ltd. who had allocated the land. He stated that the two plots belonging to the two parties herein were then allocated new numbers which are those currently being referred to in the present appeal. He stated that the current map does not reflect the actual situation on the ground. He admitted that he accepted the title for plot number 1477 only to protect himself and that the map does not reflect the original number of his land. His further evidence was that there was a complaint that he and others had lodged before the National Land Commission and a suit, ELC No 164 of 2015 which he and others had lodged challenging the new map. He produced the pleadings in that case as P. Exh 5. He alleged that a one eighth acre plot had been taken away from his land in that map. In cross-examination he alleged that the respondent has no share certificate and that the suit referred to a challenged title; in re-examination he stated that there used to be another map which Kalenjin Enterprises Ltd. had failed to release, and that the County Surveyor had used the faulty, more recent map to prepare his report in the matter.

13. The evidence of DW2 was that the map used by the County Surveyor was not the map that was in use during purchase of land by the appellant and that the map is not reflective of the situation on the ground. The current map, he states, displaces the members and reduces their acreage.

14. The evidence of DW3 was that he was a former director of the company that sold the land to Kalenjin Enterprises Ltd; that the land was subdivided between 1983-1984 into 1200 parcels of different sizes; that there was no subsequent subdivision. He further testified that there was a dispute with the Municipal Council regarding 50 acres and as far as he was concerned the land between the two parties in the present appeal falls within the ambit of the suit challenging the current Registry Index Map. He further testified that there was an order issued by the High Court barring any further action on the land after the first subdivision. He stated that the appellant's property lies on land reference No Nakuru Municipality Block 29/925 and the respondent's on Nakuru Municipality Block 29/925.

15. The question that arises is whether the defence evidence outlined above can lead to the conclusion that fraud had been proved against the respondent. The answer is an emphatic No The main evidence of the defence appears to blame the company that sold the plots for being responsible for the mess the appellant claims exist. The company misdeeds can not be visited upon an innocent title holder who had nothing do after purchasing land but to await issuance of title in his name in respect of the parcel that he purchased. If the faults in the map that generated the titles actually occurred, it can not be attributed to the respondent unless he was in charge of the preparation thereof which he was not. Consequently, it is this court's finding that the learned trial magistrate did not err in law or in fact in arriving at the conclusion that on the basis of the evidence adduced by the appellant the respondent could not be blamed for fraud.

16. As to the ground raised by the appellant to the effect that the magistrate erred by failing to consider that the area map does not tally with the position on the ground, it is clear from the evidence of the three defence witnesses that there is a dispute that arises from the creation of a new map other than the original map. That dispute was said to be still pending before court. However, it was upon the

respondent to establish that the second map that gave rise to the new plots was inconsistent with the original map. It is evident that the respondent relies on the recent map as it is while the appellant craves for the use of the old map in determining who owns what on the ground. The predominant theme in the defence evidence was that the current map does not reflect the proper boundaries as recognized by the earlier map. The evidence of the surveyor sent to the site the court was to the effect that the appellant had indeed encroached on the respondent's land, and that conclusion was based on the current Registry Index Map.

17. I have examined the sketch drawn by the surveyor and presented to court. In this court's view, the map and the surveyor's sketch both depict plots Nos 1476, 1477 and 1478 as being of the same shape and, I believe, from a cursory glance, size.

18. In this court's view, the surveyor who prepared that report is the only expert whose evidence was called and the appellant never called any other expert witness to counter his evidence. No other map was produced save the one he relied on whose extract is available in the record of appeal. That other map alleged by the appellant to exist remained a myth. The surveyor's evidence therefore stands uncontroverted. The trial court below therefore had no basis upon which to find that the area map does not tally with the position on the ground. I too therefore find that the learned trial magistrate never erred on the determination of the issue at hand.

19. Regarding the ground that the learned trial magistrate erred when she failed to find that plot No 1476 does not exist on the ground, this court refers to the very same map that it considered in dealing with the previous issue. It notes that if the appellant and the respondent are both on the ground and that their plots neighbour one another, and that their plots are numbered 1476 and 1477, then there is no probability that the plot indicated on the map as No 1476 is not indeed plot no 1476. All that remained is for the boundaries of the plots Nos 1476 and 1477 to be adjusted and established so as to confine each party to the plot bearing the number on his title, and that is what the litigation before the trial court sought to do. The Surveyor who went to the site and prepared a report found that there was encroachment by the appellant and the physical boundaries had to be adjusted for parties to live within their proper plots as defined by the Registry Index Map. I find no error in the trial magistrate's failure to find that plot No 1476 does not exist on the ground.

20. I have also perused the original court file for Nakuru ELC 164 of 2015 and found that the only plots concerned in that suit were Nos Block 29/1455 and 1456. The plots of the appellant and the respondent respectively never featured in that litigation. Nakuru ELC 164 of 2015 is also not litigation regarding the whole of the subdivision scheme relating to single mother title previously held by Kalenjin Enterprises Ltd. Finally, that suit was also marked as withdrawn pursuant to a notice signed by Munene Chege & Co, Advocates for the plaintiff therein dated July 3, 2015 and the withdrawal order was recorded by the Hon Munyao J in the proceedings of October 12, 2015. Clearly, the appellant's defence in the trial court below was full of misconceptions.

21. The upshot of the foregoing is that the appeal before me lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF MARCH, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU