Okondo & another v Kasyima & another (Environment and Land Appeal 222 of 2014) [2023] KEELC 16319 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16319 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 222 OF 2014

CA OCHIENG, J

MARCH 21, 2023

BETWEEN

GABRIEL ONSONGO OKONDO ..... 1ST APPELLANT

JANE NYAKIO ONSONGO ..... 2ND APPELLANT

AND

OLIVE K. KASYIMA ..... 1ST RESPONDENT

MAVOKO LAND DEVELOPMENT COMPANY LIMITED .... 2ND RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Case No. 408 of 2011 delivered on 25th September, 2014 by Hon. P. N. Gesora, Snr. Principal Magistrate)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the October 24, 2014, the Appellants appealed against the whole Judgment delivered by Hon P N Gesora (SPM). The genesis of this Appeal is the Judgment of the Senior Principal Magistrate Hon P N Gesora in Machakos CMCC No 408 of 2011 Gabriel Onsongo Okondo and Jane Nyakio Onsongo v Olive K Kasyima & Mavoko Land Development Company Ltd, delivered on September 25, 2014 where the trial court proceeded to dismiss the Plaintiffs' suit with costs.

2. The Appellants being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the October 24, 2014.

3. The Memorandum of Appeal contains the following grounds: -

    1. The learned trial Magistrate erred in Law and Fact in failing to find that the plot, the subject matter of the suit is the property of the Appellants.

2. The learned trial Magistrate erred in Law and Fact by failing to appreciate that the Appellants availed documents in evidence which proved on a balance of probabilities that they are the owner of the property.

3. The learned trial Magistrate erred in Law and Fact in failing to consider the evidence and submissions of the Appellants.

4. The learned Magistrate erred in Law and Fact by failing to find and hold that the 1st Respondent had not proved her ownership of the plot.

5. The learned Magistrate erred in Law and Fact in by failing to grant the prayers sought by the Appellants.

It is intended to pray for orders:

i. That Judgment and Decree thereof in the Chief Magistrate's Court be set aside and/or varied in such terms as this Honourable Court may deem necessary.

ii. That this Honourable Court be pleased to make an order on the costs of this Appeal.

iii. Such further or other consequential orders as this Honourable Court deems fit and just.

4. The Appeal was canvassed by way of written submissions.

Submissions

Appellants' Submissions

4. The Appellants in their submissions insist that the 2nd Respondent was the key player in this matter and should therefore be ordered to reinstate the Plaintiffs as the owners of Plot No 1466 or replace it with another. They insist that there was evidence that Plot No 795 was transferred to them on December 6, 2010 by Transfer of Plot Form. Further, that Plot No 297 was changed to Plot No 1466 on July 12, 2011. They contend that there are documents on record to prove that Plot No 795 existed and was initially owned by Edwin Ochieng Obiero who transferred it to them, and they continued paying rates to the 2nd Respondent. They reiterate that they proved ownership of Plot No 1466 but the 1st Respondent failed to do so. To support their averments, they relied on the following decisions: *Danson Kimani Gacina v Embakasi Ranching Co Ltd (2014) eKLR* which was cited in approval in *Sarah Leitich v Joshua Rutto & 2 others (2021) eKLR*.

1st Respondent's Submissions

5. The 1st Respondent in her submissions contends that the learned Magistrate properly proceeded in law and fact and the Appeal must fail. She argues that during the hearing it emerged that she bought Plot No 297 Phase III and has remained its legal including beneficial owner. Further, that although new surveying gave rise to new numbers (1466) the plot remains the same on the ground. She insists that she never transferred an interest in Plot No 297 *(new 1466)* to the Appellants or anybody else and hence there was no basis to cancel or replace her name with the Appellants' names. She reiterates that by the time the Appellants were issued with Certificate of Ownership, she was already the owner of the suit plot. Further, no evidence was presented to confirm what happened to Plot No 795. She states that the 2nd Respondent clearly demonstrated during cross examination that Plot No 795 never existed in their books and neither did they engage with the Appellants who purportedly bought it from one Edwin Ochieng Obiero. She provided the history of Plot No 297 of phase III and claims she paid Kshs

18, 500 in July 2002 and was issued with Letters of Allotment by the 2nd Respondent. She reiterates that the Appellants have failed to produce evidence to prove ownership of Plot No 1466. To support her arguments, she relied on the following decisions: CA No 36 of 1997: *Abdulrehman v Almaery*; CA No 236 of 2008: *Barclays Bank of Kenya v Evans Ondusa Onzere* and CA No 109 0f 2015: *Robric Ltd & Another v Kobil Petroleum Limited*.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the only issue for determination is who is the proprietor of Plot No 1466 and if the Appeal is merited.

7. The Appellants as Plaintiffs in the lower court claimed ownership of Plot No 1466 which the 1st Respondent also claims. The learned Magistrate after considering the evidence as presented by the parties proceeded to dismiss the Plaintiffs' suit with costs and noted that Plot No 1466 actually belonged to the 1st Respondent and this forms the fulcrum of the Appeal herein. Before I make a determination of the Appeal herein, I will proceed to analyse the evidence as presented in the lower court appreciating that this court never saw the witnesses testify.

8. The Appellants explain that they initially purchased Plot No 795 Phase I, from one Edwin Ochieng Obiero but later the 2nd Respondent who was the allocating authority transferred them to Plot No 1466 Phase III. They contended that they had continued to pay land rates and rent to Mavoko Municipality. They insist that Plot No 795 was transferred to them on December 6, 2010 by Transfer of Plot Form but the said number was changed to No 1466 on July 12, 2011. They contend that there are documents on record to prove that Plot No 795 existed and was initially owned by Edwin Ochieng Obiero who transferred it to them, and they continued paying rates to Mavoko Municipality. In the lower court they produced the Sale Agreement and various receipts to prove their claim. PW1 during his examination in chief stated that he approached the 2nd Respondent who was the original owner of the land and managing the scheme and they transferred Plot No 795 to Phase III and gave No 14. Further, they were given a Certificate of Ownership. During cross-examination PW1 confirmed he never got a receipt when he paid for Transfer of Plot. Further, that he was shown Plot No 795 on the ground but the 2nd Respondent told him the plot could not fit and they were transferred and given No 1466 Phase III. He admitted that it is the 2nd Defendant who created confusion over the plots. I note during cross examination PW1 who is the 1st Appellant herein actually admitted that he saw his name on the 2nd Respondent's records including that of the 1st Respondent, however he was the first one to be given a Certificate of Ownership. PW2 Edwin Ochieng Obiero in the lower court confirmed he sold the plot which was in Phase I to the Appellants but he was later told Plot No 795 was transferred to Phase III Mlolongo.

9. The 1st Respondent as DW1 confirmed she purchased Plot No 297 in Phase III Mlolongo on July 15, 2002 and was issued with a Letter of Allotment, dated the July 16, 2002 after making payments. She produced various receipts and Letter of Allotment to support her claim. She explained that there was a change of numbering in the plots and her plot was given No 1466. Further, when she did a search with the 2nd Respondent, her name was in their Black Book. She however had not received her ownership documents despite paying Kshs 7,500 to the 2nd Respondent. She clarified that she never sold her plot to anybody but noted in the Black Book that her name had been cancelled on February 28, 2011 and replaced by two names. Further, that her plot was never repossessed nor any complaint lodged against her by the 2nd Respondent.

10. I have had a chance to peruse the exhibits provided and I note that Edwin Ochieng Obiero was issued with a Letter of Allotment for Plot No 795 Phase I on March 5, 2002. Further, he transferred Plot No

795 to the Appellants *vide* Transfer of Plot Form dated the January 16, 2006. Further, I note the said plot was at Phase I, as per the Plot Rent Form dated the January 23, 2006. As per an extract from the 2nd Respondent's records, it is very clear that the initial owner of Plot No 1466 was the 1st Respondent but her name had been cancelled on February 28, 2011 and replaced with the Appellants' names. Further, the 1st Respondent was issued with a Letter of Allotment dated the July 16, 2002 for Plot No 297 Phase III and new number 1466. There are several receipts confirming the 1st Respondent was indeed paying for Plot No 1466 Phase III. I further note the 2nd Respondent furnished the Appellants with Land Ownership Certificate No 2372 dated the December 6, 2010 for Plot No 1466 Phase III, yet by that time the plot was still in the 1st Respondent's name as per their records.

11. From the evidence I have analysed above, it is not clear how the Appellants were issued with a Certificate of Ownership of land which belonged to the 1st Respondent, yet they purchased a separate plot in Phase I and not Phase III. The 1st Respondent was emphatic she never sold her Plot No 1466. The 2nd Respondent never offered any explanation in court as to how Plot No 1466 was transferred from the 1st Respondent to the Appellants yet the 1st Respondent already had actual possession of the said plot.

12. In the case *Stephen Mburu & 4 Others v Comat Merchants Ltd & Anor [2012] eKLR* Kimondo J held that:

> ... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property."

See decision of *Republic v City Council of Nairobi & 3 Others (2014) eKLR*.

13. Since there was no evidence offered to the contrary to confirm that the 1st Respondent's Letter of Allotment was cancelled by the 2nd Respondent while associating myself with the decisions cited above, I find that she indeed had the right to take Plot No 1466 as her Letter of Allotment remained valid.

14. In the circumstances, I do not find that the learned trial Magistrate erred in Law and Fact in finding that the subject plot indeed belonged to the 1st Respondent. I find that the learned Magistrate was correct when he analyzed the evidence as presented by the parties and held that the Appellants did not own Plot No 1466 and they needed to pursue the 2nd Respondent for their Plot No 795. From the evidence that was tendered by the 1st Respondent, I find that the learned Magistrate was right in finding that she had proved ownership of the Plot No 1466.

15. In the foregoing, I find the Appeal unmerited and do not see any reason to set aside the Lower Court's Judgment.

16. The upshot is that this Appeal is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE