



**Kipserem & another v Kandie (Environment and Land Appeal
E005 of 2022) [2023] KEELC 17098 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

L WAITHAKA, J

APRIL 24, 2023

BETWEEN

LUKA KIPSEREM 1ST APPELLANT

PAUL KIPTOO 2ND APPELLANT

AND

JULIUS KIPKORIR KANDIE RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated March 25, 2021 and filed on March 31, 2021, the plaintiff/respondent herein instituted a suit in the lower court to wit Iten PMCC ELC Case No 14 of 2021 seeking judgment against the defendants/appellants for a declaration that he is the absolute and indefeasible owner of the parcel of land known as Moiben/Kimnai/258 measuring approximately 8.6 ha (hereinafter referred to as the suit property); an order for eviction of the defendants/appellants from the suit property; an order of permanent injunction to restrain the defendants/appellants by themselves, their servants, employees, agents or any other person acting under their instructions or their interests from entering, interfering with his entry, occupation and possession or otherwise dealing, entering, remaining, trespassing or in any other manner interfering with the suit property; general damages for trespass; costs of the suit and interest.
2. The plaintiff's case was premised on the ground that he is the registered proprietor of the suit property. The plaintiff accused the defendants, who are his relatives, of having unlawfully taken possession of the suit property and constructed a semi permanent building thereon as well as cultivating it in a manner prejudicial to his interest in the suit property.
3. The defendants filed a defence and counterclaim denying the allegations levelled against them and contending that they were in occupation of the suit property as beneficial owners thereof. The



defendants accused the plaintiff of having irregularly and fraudulently acquired title to the suit property. The particulars of fraud and irregularities are particularized in paragraph 22 of the statement of defence and counterclaim thus:-

- a. Irregularly obtaining land documents without due process;
 - b. Registering the suit property wholly in his name against the wishes of the original owner as shown by the restriction filed on August 14, 1997;
 - c. Transferring the suit property to himself without sanction of the original owner;
 - d. Acquiring title documents through dubious, illegal, fraudulent and unorthodox means thereby depriving the defendants of their ancestral land;
 - e. Misrepresenting or colluding with officials at Elgeyo Marakwet Land registry Iten to issue him with title documents in respect of the suit property in 1995;
 - f. Acting in an unfair, unjust, immoral and questionable manner in breach or violation of the [Constitution of Kenya](#) to the detriment and prejudice of the defendants.
4. Maintaining that the plaintiff obtained title documents in respect of the suit property fraudulently, illegally and surreptitiously, the defendants contended that the plaintiff does not have a valid title to the suit property.
 5. Terming the plaintiff's impugned actions tantamount to land grabbing, the defendants contended that any transaction done or steps taken by the plaintiff, his agents or servants in dealing with the suit property are incapable of conferring any legal interest over the suit property.
 6. For the foregoing reasons, the defendants sought judgment against the plaintiff for a declaration that all steps taken and the title documents held by the plaintiff in respect of the suit property are null and void and incapable of conferring any legal interest and/or right to the plaintiff over the suit property; an order of cancellation of the title documents held by the plaintiff and rectification of the land register to reflect the plaintiff and them as the registered owners thereof.
 7. When the case came up for hearing, the plaintiff/respondent who testified as PW1 relied on his statement dated March 25, 2021, after it was adopted as his evidence in chief. The statement is to the effect that he is the registered owner of the suit property; that he was issued with a title deed in respect of the suit property on August 20, 1995; that he has been in occupation of the suit property for over 20 years; that sometime in 2012, the defendants began illegally laying claim to a portion of the suit land; that the defendants have illegally erected semi-permanent structures on the suit property and that the size and boundaries of his land are well established. Terming the defendants strangers to his land, the plaintiff states that he has suffered all that time and prayed for judgment to be entered against the defendants as sought in the plaint.
 8. The plaintiff produced the documents in his list of documents dated March 25, 2021, after they were adopted as his exhibits-Pexbt 1-4 respectively. These are:- copy of official search for the suit property; copy of official search for Moiben/Kimnai/256; copy of title deed for the suit property and copy of demand letter dated March 10, 2021.
 9. In cross examination, the plaintiff stated that there was no restriction on the land; that the house on the land was constructed long time ago and that he tried to chase the defendants away. He acknowledged that the defendants are his relatives, his nephews.



10. DW1, Kipserem Kiyeng, relied on his statement dated April 6, 2021 after it was adopted as his evidence in chief. He produced the documents contained in their list of documents filed on April 6, 2021 after they were admitted in evidence as Dexbt 2-5 respectively. These are:- copy of green card in respect of the suit property; photographs of the defendant's house; chief's letter dated February 10, 2021 and notification document from lands dated March 11, 2021.
11. DW2, Paul Kiptoo, relied on his statement dated April 6, 2021 after it was adopted as his evidence in chief. He also relied on their list of documents, Dexbt 1-5.
12. In cross examination, he stated that his grandfather, Kandie Kiptuisang, did not give the land to the plaintiff.
13. On the basis of the foregoing pleadings, evidence and the submissions by the parties, the Learned Trial Magistrate (TM) entered judgment in favour of the plaintiff. In so doing he stated:-

“I have considered the evidence on record and submissions filed by both parties. The issue for determination is whether the plaintiff is the lawful owner of the suit land and lastly whether the defendants should be evicted.....

In the instant case, although the defendants' evidence was based on allegation that the plaintiff had transferred the suit land without their consent, they have not strictly speaking challenged the authenticity of the title held by the plaintiff. The green card that was produced in court shows the land was transferred to the plaintiff on August 20, 1995 when his late father was alive. The restrictions alluded to by the defendants were placed on the land way after the transfer had been effected by the land registrar.

The defendants also alleged that the suit property was ancestral land and therefore the plaintiff was holding it in trust for them.....

The burden of proof fell upon the defendants to prove the existence of customary trust. Going through the pleadings and evidence there are many conflicting statements as to how the plaintiff came to own the property. On the one hand the defendants' claim that they inherited the land and on the other they allege that he illegally acquired it. The history of registration of the suit shows that it was originally in the name of Kandie Kiptuisang and later transferred to the plaintiff. The averment by the defendants that plaintiff has not availed any evidence to show that he legally acquired the land does not hold since the burden of proof still lies on the defendant....

It was not enough for the defendants to claim that the suit land was ancestral land. They needed to avail tangible evidence to show that the suit land was actually ancestral land.

I do therefore find that the plaintiff has proved his case on a balance of probabilities. I do allow his claim in terms of paragraph 12(a)(b)(c) and (e) of the plaint. The defendants are given sixty (60) days to move from the suit land. I do also dismiss the defendants counterclaim with costs to the plaintiff.”

14. Dissatisfied with the decision of the TM, the defendants appealed to this court on 10 grounds that can be summarized into one broad ground to wit the TM erred by allowing the plaintiff's case and dismissing their defence and counterclaim.



Analysis and Determination

15. Pursuant to directions given on October 13, 2022 that the appeal be disposed of by way of written submissions, parties to the appeal filed submission, which I have read and considered.
16. The main issue arising from the appeal and the submissions is whether the TM erred by allowing the plaintiff/respondent's case and dismissing the defendants/appellant's defence and counterclaim.
17. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make its own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See the case of *Selle & Another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where the Court of Appeal stated:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
18. As pointed herein above, the plaintiff instituted the suit that forms the subject matter of this appeal seeking to be declared the absolute owner of the parcel of land known as Moiben/Kimnai/258 (the suit property).
19. It is not in dispute that the plaintiff/respondent is the registered proprietor of the suit property having been registered on August 20, 1995. It is also not in dispute that before the plaintiff/respondent got registered as the proprietor of the suit property, the suit property was registered in the name of Kandie Kiptuisang (deceased).
20. The deceased was registered as the proprietor of the suit property on March 27, 1974 and a title deed issued to him on April 5, 1974.
21. From the evidence adduced in the lower court, it is not clear how the plaintiff/respondent obtained the suit property as the lands office was unable to avail any documents regarding the transfer of the suit property to the plaintiff/respondent.
22. The green card issued in respect of the suit property, Dexbt 1, shows that a restriction was registered on August 14, 1997 restricting dealings with the suit property until the land was subdivided and shared with the other two brothers of the plaintiff/respondent.
23. According to the defendants/appellants, the restriction was placed by the deceased. The plaintiff/respondent did not controvert the evidence of the defendants/appellants to the effect that the restriction was put by the deceased to restrict dealings with the suit property after he discovered that the defendants/appellants had accused the plaintiff/respondent of fraudulent dealings with the suit property.



24. Despite there being evidence that a restriction was indeed filed by the original owner to restrict dealing with the suit property, the plaintiff/respondent in cross examination, merely denied the existence of that restriction.
25. The mere denial by the plaintiff/respondent of existence of that restriction cannot take away the fact that a restriction was filed by the original owner to restrict dealings with the suit property. That fact is laid bare by the green card produced in evidence by defendants/respondents as Dextb 1.
26. The defendants/appellants gave the reason for putting of the restriction as fraud in registration of the suit property by the plaintiff/respondent. They also led evidence to the effect that there are no documents capable of showing how the plaintiff/respondent got himself registered as the proprietor of the suit property.
27. Whereas ordinarily, the burden of proof is on the one who desires judgment in that which he/she asserts (Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya), there are certain situations in which that burden shifts to the person with special knowledge of the facts. In the circumstances of this case where there is evidence that the plaintiff/respondent obtained title to the suit property but there are no documents capable of showing how he obtained title and that a restriction was placed by the person who would ordinarily have transferred the land to him, the burden of proof shifted to him (plaintiff/respondent) to prove that he lawfully obtained the title. In that regard see Section 112 of the *Evidence Act*, Cap 80 of the Laws of Kenya, which provides as follows:-

“ In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
28. The fact that the original owner placed a restriction to restrict the plaintiff/respondent until the suit property was subdivided and shared with his brothers, negates a finding that the original owner, if he transferred the suit property in favour of the plaintiff/respondent, had the intention of transferring it to him as the absolute proprietor thereof. If this was the case, he would not have filed a restriction to restrict his dealing with the suit property.
29. The evidence adduced in the lower court further shows that the defendants are in use and occupation of portions of the suit property. There being evidence that the suit property is family land that was transferred to the plaintiff/respondent in circumstances that the plaintiff/respondent was unable to satisfactorily explain, I find and hold that the defendants/appellants’ use and occupation of the suit property is an overriding interest to the title held by the plaintiff/respondent. That being the case, the plaintiff/respondent may not evict the defendants/appellants from the suit property unless it is demonstrated that they have no interest or legal stake in the suit property. In the circumstances of this case, I am of the considered view that the plaintiff/respondent did not demonstrate that the defendants/respondent had no interest in the suit property to warrant issuance of a declaration that he is the absolute proprietor of the suit property and issuance of eviction orders against the defendants/appellants.
30. The upshot of the foregoing is that the appeal herein has merit and is allowed as prayed.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 24TH DAY OF APRIL, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-



Mr. Chanzu for the appellants

N/A for the respondent

Court Asst.: Thomas

