Sitonik v Ntimama (Environment and Land Appeal E010 of 2021)
[2023] KEELC 18404 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18404 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E010 OF 2021

CG MBOGO, J

JUNE 29, 2023

BETWEEN

QUEEN SIMAT SITONIK ..... APPELLANT

AND

NAMITI NTIMAMA ..... RESPONDENT

(Being an appeal from the judgment and orders of the Honourable magistrate G.N. Wakahiu (CM) signed and delivered on the 28th July, 2021 in the Chief Magistrate Court at Narok, in Narok Civil Case No. 101 of 2014)

JUDGMENT

1. The appellant herein being aggrieved by the judgment and orders of Hon G.N. Wakahiu, Chief Magistrate Narok delivered on July 28, 2021 in Narok CMCC No. 101 of 2014 appealed to this court vide a memorandum of appeal dated November 23, 2021 against the whole judgment on the following grounds: -

    1. That the learned trial magistrate erred in fact and in law by disregarding the appellant's evidence and erroneously finding that she is not entitled to own plot no. 74 Block 8 while she had met the threshold beyond reasonable doubt.

    2. That the learned trial magistrate erred in fact and in law by failing to consider the opinion by Honourable T Gesora in page 35 of the proceedings who stated that "the paper work argument may not get us answers we need" and further directed the town Administrator to conduct a scene visit to identify the ground for each of the members he has on valuation roll and file a report. The same report was filed.

    3. That the learned trial magistrate erred in fact and in law by erroneously recording in page 17 of his judgment that the plaintiff was claiming ownership of plot 74 Block 8 and in her pleadings and witness statement it's clear she is laying claims over plot 89 Block 8, he ought to have

aligned his judgment with Order 2 Rule 1 of the *Civil Procedure rules 2010* which its effect is that cases must be decided on issues pleaded. In the case of *Stephen Onyango Achola & Another v Edward Hongo Sule & Another* [2004] eKLR where the honourable court held that it is trite law that cases must be decided on issues pleaded.

4. That the learned trial magistrate erred in fact and in law by failing to consider the appellant's evidence and legal argument having fully participated in the trial process she has legitimate expectation that her evidence will be considered hence it is upon the trial court to deduce the importance of such evidence and make a finding not only on one party case.

5. That the learned trial magistrate erred in fact and in law by failing to take into consideration documentary evidence by not acknowledging the fact that parties had allotment letters, had been paying rates to the Narok county council and that both parties are at par in their claims on the suit property hence the need to interrogate the claims further in his judgment to determine who on a balance of probability own or should own which plot.

6. That the learned trial magistrate erred in fact and in law by failing to take into consideration the documentary evidence and testimony by PW2 and DW2 being the Narok Town administrator and Narok Physical planner respectively and being the representatives of the defunct Narok County Council who clearly demonstrated the existence of three separate and distinct plots both on valuation roll and on the ground where the respondent currently own plot no. 96, the appellant owns no. 74 while Parsimanoi Ole Sadera own plot no. 89.

7. The honourable magistrate erred in law and in fact by failing to appreciate that the documents that have been filed under oath in a court of law are binding and can be relied upon as evidence in a court of law as required by law and in practice and are admissible for all purposes in making judgments.

8. That the learned trial magistrate erred in fact and in law by contravening the law more particularly the provisions of Article 50 of the *Constitution* of Kenya 2010 on fair hearing and Section 1B of the *Civil Procedure Act* on the duty of the court to ensure just determination of the proceedings.

9. That the learned trial magistrate erred in fact and in law by relying on the case quoted by the plaintiff on the case of *Wreck Motors Enterprises v The Commissioner of Lands and Others* Civil Appeal No. 71 of 1997 on the issue of first title in times prevail as the appellant and respondent have separate allotment letters to different plots, that the registration of plot no. 74 Block 8 in the appellant names conferred upon her absolute ownership rights and privileges in terms of Section 24 and 25 of the *Land Act* 2016 (sic) and that this rights are indefeasible unless it is proved that the registration of the titles was obtained through fraud and misrepresentation or if the allotment letter was acquired illegally, unprocedurally or through a corrupt scheme within the meaning of Section 26 (1) (a) and (b) of the *Land Registration Act*, 2012.

10. That honourable magistrate erred in law and in fact by failing to consider the documentary evidence by PW2 and DW2 on the current valuation roll and arriving at an erroneous decision by declaring that plot 89 block 8 belong to her while the registered owner is Parsimanoi Ole Sadera and not in the appellant's name making the orders uncertain and imprecision.

11. That the honourable learned magistrate erred in law by delivering a judgment with ambiguous orders incapable of being executed since order (a) of the judgment declares "her" to be the owner of the plot rather than stating "the plaintiff or defendant" on grounds that both parties are female.

12. That honourable learned magistrate erred in law and in fact by failing to incorporate a segment of the applicable law and case law on his judgment while applying the same to the facts of the case but instead indolently used the plaintiff's submissions and arguments to arrive to his decision as required in the Article on Judgment Writing in Kenya and Common Law World Volume 11 2008-2010 eKLR by Gerald Lebouits that; the reason for judgment is for judges and magistrates to put reasons on paper on their decisions and not only for litigants and their attorneys.

13. That the honourable magistrate erred in law and in fact by failing to discuss the main issue of the ownership of the three plots and that he did not give any legal reasoning on the issue of changing of the numbers of the plots on the valuation roll and on the fact that the disputed plot is not owned by the appellant at the time of making and delivering of the judgment, the learned trial magistrate ought to have complied with Order 21 Rule 4 of the *Civil Procedure rules* that provides that judgment in defended suits shall contain points for determination, the decision thereon and the reason for each decision.

14. That the learned trial magistrate erred in fact and in law in failing to give a properly articulated reason through analysis of evidence by both parties in light of the law he relied on arriving on his decision (sic), he failed to earn respect and confidence of the appellant by failing to display a full mastery of the facts in issue in the case and analysis pleading of both parties as provided in an article by Honourable Justice Lee G. Muthoga on 'Guidelines for judgment drafting' dated 18th October, 2012 eKLR.

15. That the honourable magistrate erred in law and in fact by failing to take into account appellant's submissions and authorities as well as the factual grounds adduced thereof and relied upon by the appellants.

2. The appellant prays for orders as follows: -

   a. That the appeal be allowed.

   b. That the judgment dated 28th day of July, 2021 and the consequent order be set aside in its entirety.

   c. That judgment be entered against the respondent as prayed for in the appellant's defence before the magistrate court Narok.

   d. That this honourable court do issue its own orders in respect of the evidence on trial court records.

   e. That the costs of this appeal be borne by the respondents.

3. On 21st March, 2023, this court gave directions that the memorandum of appeal be canvassed by way of written submissions. The appellant filed written submissions dated 8th June, 2023 and raised six issues for determination as listed below: -

   1. Ownership and registration of parcel number 89 block 8.

   2. Ambiguity of the orders of the trial court.

   3. Unenforceability of the orders of the trial court.

   4. Failure to analyse evidence as to the existence of plot number 89 block 8 and whether any prayers can be sought from the pleadings as filed.

5. Failure to appreciate the ownership and distinctiveness of plot 74 and 96 and failure to consider material evidence.

6. Misalignment of pleadings to judgment.

4. On the first issue, the appellant submitted that it is imperative to make key foundational observations of the letter of allotment which the appellant complied with and which the respondent made an important omission of not complying with the terms of offer. That the letter of offer, being a typical contract offer letter, lapsed by dint of effluxion of time.The appellant cited the case of *Bubaki Investment Company Limited v National Land Commission & 2 Other* [2015] eKLR.

5. On the second issue, the appellant submitted that the trial court erred in delivering a judgment with ambiguous order incapable of being executed by referring to 'her'. The appellant relied on the case of *Gatharia K Mutitika v Baharini Farm Limited* [1982-88] 1KAR 863.

6. On the third issue, the appellant submitted that the orders of the trial court were incapable of enforcement and that it is trite law that a letter of allotment does not give rise to a proprietary interest in land to the allotment. Reliance was placed in the cases of *Wreck Motors Enterprises v The Commissioner of Lands & 3 Others* Nairobi Civil Appeal No. 71 of 1997, *Joseph Arap Ng'ok v Justice Moijo Ole Keiwua* Nairobi Civil Application No. 60 of 1997 and *John Mukora Wachichi & Others v Minister of Lands & Others* High Court Petition No. 82 of 2010.

7. On the fourth issue, the appellant submitted that the respondent did not provide evidence of payment of survey fees and considering the length of time from the year 1992 to the year 2014, it is possible that the respondent could not identify the exact boundaries of the plot. The appellant further submitted that the evidence of the town administrator is sufficiently clear that plot number 89 block 8 that is claimed by the respondent no longer exists. Also, that the respondent never filed an objection to the roll and the said changes in plot numbers were sanctioned by statute as was explained by PW2.

8. On the fifth issue, the appellant submitted that the respondent did not adduce evidence to show that the two plots are one and the same on the ground. Also, that the respondent did not indicate that she had purchased or acquired plot number 96 separately otherwise other than through the allotment of 1992 and neither has she laid claim to plot number 74. The appellant submitted that the testimony of DW2 was not considered at all by the trial court in its judgment and this was an error so grave that it tipped the scale of justice as against the appellant. The appellant relied on the cases of *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) and *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR.

9. On the sixth issue, the appellant submitted that the trial court mixed up the plot numbers in its judgment which the respondent never made such claims in her pleadings nor her testimony. That the mix up depicted lack of understanding or recollection of the subject matter leading to subjective conclusions. The appellant submitted that the trial court ought to have aligned its judgment with Order 2 Rule 1 of the Civil Procedure Rules which effect is that cases must be decided on issues pleaded as was held in the case of *Stephen Onyango Achola & Another v Edward Hongo Sule & Another* [2004] eKLR.

10. The respondent filed written submissions dated 21st June 2023. On grounds 1,2 and 3 of the memorandum of appeal, the respondent submitted that the trial court was right in finding that the rightful owner of plot number 89 block 8 was the respondent who had provided her letter of allotment issued by the defunct County Council of Narok. Further, that the respondent complied with all procedures and was able to pay land rates and was issued with receipts which were produced as evidence.

Further, that the appellant was unable to explain why she had not paid the previous land rates and was also unable to show why she started paying rates in the year 2003. The respondent further submitted that the land which has already been allocated cannot be allocated twice as an allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land as was held in the case of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others* [2015] eKLR.

11. The respondents urged this court to be guided by Order 2 Rule 4 (2) of the *Civil Procedure Rules* and Order 2 Rule 2 (2) and (3) of the *Civil Procedure Rules*. Reliance was placed in the case of *Samuel Mbugua Gachuhi v City Council of Nairobi & 2 Others* [2008] eKLR.

12. On grounds 4 and 9 of the memorandum of appeal, the respondent submitted that the trial court having found that the appellant's produced a letter of allotment at the hearing dated 14th August 1992 and, the respondent producing an allotment letter dated 18th February 1992 and, both being approved by the same minutes raises eyebrows as one of the letters of allotment may have been fraudulently acquired. The respondent urged this court to be guided by the maxims of equity in which when two equities are equal, the first in time prevails. The respondent relied on the case of *Kamau James Njendu v Serah Wanjiru & Another* [2018] eKLR.

13. On grounds 5 and 6 of the memorandum of appeal, the respondent submitted that the fact that both parties having paid rates, the said payments should be looked as from who began paying rates in the first instance. Further that the county government did not produce a proper register of the said valuation roll showing that they had revised the old plots and given the plots new numbers so that the name of the appellant can be identified and the root of her title can be identified also.

14. On ground seven, the respondent submitted that both parties presented their evidence that was listed in their list of documents and the court did not in any way object to the documentary evidence that was presented by both parties. The respondent urged this court to be guided in the decision of *Stephen Onyango Achola & Another v Edward Hongo Sule & Another* [2004] eKLR.

15. On ground eight, the respondent submitted that there was no judgment that was entered without the parties being heard. Further that the memorandum of appeal presents a different scenario which was not pleaded in the lower court as her issues would clearly be directed to the county government of Narok that allotted her the respondent's property.

16. On grounds 10 and 11, the respondent submitted that the issue of wording in the judgment is not really an issue as it was clear that the respondent was the only one who was female and 'her' in the English context being a pronoun connoted a singular pronoun which when used in the same sentence differentiated the parties herein.

17. On grounds 12,13,14 and 15, the respondent submitted that the trial court in arriving at the final decision, tackled all the issues, made an analysis and in his analysis applied the law and supported his analysis with the determination of a precedent that is locus standi. The respondent submitted that both parties relied on their evidences and the claim by the appellant that the trial court did not take into account the appellant's submission is a total sham and lack of trust in the judicial process.

18. In conclusion, the respondent submitted that the appellant failed to discharge her burden of proof to establish that they deserve any of the remedies sought in the trial court.

19. This is a first appeal, the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was

held in *Mwanasokoni v Kenya Bus Service Ltd* [1982 – 88]I KAR 278. In addition, this court must also take into account the fact that it did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – *Selle & Another v Associated Motor Boat Co. & Others* [1968] EA 424.

20. The respondent herein filed a plaint dated 4th June, 2014 seeking the following orders: -

    a) A declaration that the plaintiff is the owner Plot No. 89 Block 8 Narok township situated in Narok County and that the defendants are jointly by themselves, their servants and or agents be restrained from dealing with the same.

    b) An order of this honourable court for temporary and permanent structures built by the defendant I plot number Plot No. 89 Block 8 Narok Township situated in Narok County be removed from site.

    c) Cost of the suit plus interest at court rates.

    d) Any other relief the honourable court may deem fit to grant and just to grant.

21. The appellant filed a defence dated 7th July, 2014. In her defence, the appellant denied the contents of the plaint and pleaded that she has not encroached upon the suit land but that she is in rightful occupation being the registered owner of plot no. 89 Block 8 (old number) and now plot no. 74 block 8 Narok Town. She also denied barring the respondent from utilising her plot and averred that she never parted possession from the year 2003 after completing construction to date.

22. The respondent in paragraph 7 of the defence stated that the trial court had no jurisdiction and in paragraph 8, termed the suit as defective, misconceived, embarrassing and an abuse of the court process and that she would at the earliest opportunity raise a preliminary objection to strike off the suit with costs.

23. This matter proceeded for trial and subsequently judgment was delivered on 28th July, 2021. At the trial court, the appellant was represented by the firm of S. Mogere & Co. Advocates whereas the respondent was represented by the firm of Masikonde & Co. Advocates who are also presently on record in this appeal.

24. The instant memorandum of appeal has been filed by the firm of Tuya Kariuki & Co. Advocates. On perusal of the record herein, this court noted that the firm of Tuya Kariuki & Company is not properly on record for the appellant.

25. Order 9, Rule 9 of the Civil Procedure Rules provides that "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—(a)upon an application with notice to all the parties; or(b)upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

26. The Civil Procedure Rules governs the conduct of proceedings in this court. The courts have also not been hesitant to uphold Order 9 rule 9 of the Civil Procedure Rules.

27. In the case of *Jackline Wakesho v Aroma Cafe* [2014] eKLR the court held as follows; "Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the *Civil Procedure Act* and entertain the Motion. The Court will not however do that.

The reason for the foregoing is twofold. Firstly, there are several judicial pronouncement cited by the claimant which show that Court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9…" (emphasis)

28. While I place reliance on the above cited authority, this court, therefore, cannot proceed to determine the merits or otherwise of the appeal as the law firm said to be on record for the appellant has not complied with Order 9 rule 9 of the *Civil Procedure Rules*.

29. This court, therefore, of its own motion, hereby strikes out the memorandum of appeal dated 23rd November, 2023.The orders issued by this court on 16th November, 2021 are vacated. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 29TH day of JUNE, 2023.

HON. MBOGO C.G.

JUDGE

29/6/2023.

In the presence of:-

CA:Chuma