



Mtaji v Wambua (Suing as legal administrator of the Estate of Alice Wanzala) & another (Environment and Land Appeal 10 of 2017) [2023] KEELC 18299 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18299 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 10 OF 2017
NA MATHEKA, J
JUNE 20, 2023

BETWEEN

MWANZIA MTAJI APPELLANT

AND

CHRISTINE NDHOKI WAMBUA (SUING AS LEGAL ADMINISTRATOR OF THE ESTATE OF ALICE WANZALA) 1ST RESPONDENT

HARUN NGOLANYE 2ND RESPONDENT

JUDGMENT

1. This is an Appeal against the Judgment of the Honourable L.K. Gatheru, Resident Magistrate, Mariakani Law Courts, delivered on 5th April, 2017 in SPMCC no 153 Of 2 013 based on the following grounds;
 1. That the learned Magistrate erred fact and in law in awarding the 1st Respondent prayer (b) of the counter claim after making a finding that the suit ought to have proceeded as a succession cause.
 2. That the Learned Magistrate erred in fact and in law in failing to consider that the court was no longer vested with jurisdiction to make a determination after finding that the suit ought to have proceeded as a succession cause.
 3. That the Learned Magistrate erred in law and in fact in applying the wrong principles of law in awarding the 1st Respondent herein a permanent injunction restraining the Appellant, his assigns, agents and employees from interfering with Plot no Hse/Miki/Njoro/ Takatifu / 243, which is a parcel of land that the Honourable Learned Magistrate classified as private land owned by one Mbau Muthiani (deceased) without taking into consideration that the deceased's estate has not been administered.



4. That the Learned Magistrate erred in law and in fact in failing to determine that unregistered and unadjudicated land is community land.
 5. That the Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions that Plot no Hse/Mki Njoro/Takatifu / 243 was another plot and not the property the subject matter of SPMCC no 153 of 2013.
 6. That the Learned Magistrate erred in law and in fact in applying wrong principles of law in finding that the Letter of Allotment dated 29th July, 2004 bearing the name of the 1st Respondent herein was sufficient proof of ownership of Plot no Hse / Mki/ Njoro / Takatifu/ 243.
2. In view of the foregoing, the Appellant prays that this Honourable Court;
 - a. Allows this Appeal and sets aside the Judgment of the Honourable Court in Mariakani SPMCC no 153 Of 2013, delivered on the 5th of April, 2017 in its entirety;
 - b. Orders the Parties herein to institute a Succession Cause for purposes of distribution of the estate of Mbau Muthiani (deceased) within fortyfive (45) days from the delivery of the Judgment of this Appeal;
 - c. Orders that costs of this Appeal and costs of the Subordinate Court be borne by the Respondents.
 3. This court has considered the appeal and the submissions therein. This is an appeal from a judgement delivered on 5th April 2017 by L.K Gatheru Resident Magistrate in Mariakani PMCC 153 of 2017 *Mwanzia Mtaji v Alice Wanzala and Harun Ngolanye*. The learned magistrate dismissed the Appellant's case and granted prayer (b) of the 1st Respondent's counterclaim. The Appellant being dissatisfied with the judgement, filed a Memorandum of Appeal dated 5th May 2017 seeking to set aside the judgement and for an order that the parties file a succession case. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in [*Kenya Ports Authority v Kuston \(Kenya\) Limited* \(2009\) 2 EA 212](#) where the court stated that;

“on a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
 4. While in *Mbogo and Another v Shah* (1968) EA 93 the Court of Appeal the court held held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
 5. This court has perused the entire plaint, the Appellant claimed to be the owner and hence entitled to possess an unadjudicated plot measuring 60ft by 68ft. He prayed for the demolition and eviction



of the 1st Respondent from the suit property on account of trespass. Whereas the Respondents in their defence and counterclaim claimed that Plot no Hse/Mki/Njoro/Takatifu/243, the suit property was an inheritance from the 1st Respondent's late mother, who had also inherited the same from her late father Mbau Mudhiani who was also the Appellant's grandfather. The Respondents also prayed for damages for trespass and for a permanent injunction against the Appellant's dealing with the suit property.

6. Looking at the memorandum of appeal, the Appellant has raised the question of jurisdiction and averred that the Magistrate erred by failing to consider that he had no jurisdiction to hear and determine the matter and the suit ought to have proceeded as a succession cause. However, nowhere in his plaint does the Appellant claim the suit property as a beneficiary to the estate of the owner of the suit property but as a beneficial owner. Therefore, the question that was before the trial court for determination, was not one on distribution of the estate of the parties' grandfather or parents, but rather a question of ownership and trespass. I am of the view that the said question for determination, is within the jurisdiction of this court and that of the trial court. The parties did not approach the court as beneficiaries who were seeking to enforce their rights as beneficiaries, if they did the court would have advised them to file their case as succession causes. Instead, the Appellant was seeking to enforce his rights as a beneficial interest in the land, while the 1st Respondent was seeking to ascertain her registered interest in the land. In *Joseph Koori Ngugi & another v Stephen Ndichu J. Mukima* (2017) eKLR, the court held that: -

“The real question for consideration here is whether a claim for an equitable interest in the form of a trust in land is the kind of dispute that the framers of the Constitution and the Legislature intended that should be handled exclusively by the ELC or whether that question is the kind that should be handled by a Probate Court. To my mind, a person claiming to be a beneficiary of a trust in land, in essence makes a claim to the land in question. That claim, though equitable, may turn out to be a better claim than the legal title holder. There is no escaping that a claim for an equitable trust in land is a claim against the legal title holder which, at its root, is a claim against the legal holder of the title and hence, about the title to the land.”

7. The court further held,

“To attempt to resolve such issues of contested ownership in the context of a probate case could obfuscate the real issues and lead a Court to reach wrong or compromised conclusions. This is in part because probate proceedings are not designed for parties to be able to effectively litigate complex issues of ownership. In a separate suit, parties are better able to plead their case, go through discovery process and a fully-fledged hearing where evidence can be properly presented, contested, examined and veracity tested.”

8. Having determined, the trial court had jurisdiction to hear and determine, the issue I turn to the next issue of between the Plaintiff and the Defendants who had a right to the suit property. From the Appellant's pleading, it is clear that his cause of action is on ownership of the unsurveyed and unregistered plot measuring 60ft by 68 feet within Njoro area of Mariakani. The Appellant did not produce any document to support his claim of ownership over the suit property, he however relied on the minutes of a meeting held by members of the Amuti clan on 17th August 2012 to claim ownership. This court has perused the minutes which the Appellant sought to rely upon and I do note that they are neither signed nor dated by the Chairman or the Secretary to the said meeting. During cross examination, the Appellant admitted that his evidence was not based on any document but rather



on what he had to say. Further PW2, Antony Mteke Ndachi, who attended the clan meeting as the Secretary, testified that in the said meeting they agreed that it was the Plaintiff who owned the suit property since the 2nd Respondent failed to attend the meeting. He further stated that they gave the plot to the Plaintiff since it same belonged to the Appellant's father. I find that the trial court, therefore, did not err by finding that the Appellant did not hold any title to the suit property as he relied on the minutes of the Amuti clan meeting to claim ownership; since the said minutes do not in any way confer ownership of the said suit property to the Appellant.

9. The 1st Defendant, on the other hand, produced an allotment letter to Plot no Hse/Mki/Njoro/Takatifu/243, the suit property issued by the Town Council of Mariakani on 29th July 2004. The said allotment was issued subject to payment of ksh 1,100 which was registration fees and annual rent. The 1st Defendant demonstrated that she made a payment of ksh 300 on the same date and further payments on 9th October 2006 of ksh 1,500. The 1st Defendant's letter of allotment established her beneficial interest in the suit property that was formalized by the fees paid to the Town Council of Mariakani. Even though a letter of allotment is not a title, a title deed or a certificate of title usually comes into existence after the issuance of a letter of allotment, meeting the conditions stated in the letter and the actual issuance of title documents. Therefore, the trial court did not err by finding that the 1st Respondent's letter of allotment was a legal step towards ownership of the suit property. Once the suit property was allocated to the 1st Defendant, it became unavailable for reallocation or ownership by another person including the Appellant, unless the first allocation is validly and lawfully cancelled. Warsame, J (as he then was) held in *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another* Kisumu HCCA no 9 of 2004 stated that;

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

10. The Appellant has not sought the cancellation of the 1st Respondent's letter of allotment nor has he presented evidence the allotment was acquired through any fraudulent means. The Appellant did not prove that the 1st Respondent acquired the suit property illegally. The court is satisfied that the 1st Respondent has a beneficial interest in the suit property and only awaits the issuance of title documents. She is therefore entitled to protect her suit property and was therefore entitled to the injunction sought. In conclusion, I do find the Appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

