Mburu v Wandimbe (duly appointed by Margaret Wangechi Karicho) (Environment and Land Appeal 10 of 2022) [2023] KEELC 20086 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20086 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 10 OF 2022

JO OLOLA, J

SEPTEMBER 28, 2023

BETWEEN

PAUL MAINA MBURU ..... APPELLANT

AND

JOSEPH MAINA WANDIMBE ..... RESPONDENT

DULY APPOINTED BY MARGARET WANGECHI KARICHO

(An Appeal arising from the Judgment of the Honourable F. Muguongo, Senior Resident Magistrate delivered on 9th June, 2021 in Nyeri CME & LC Case No. 7 of 2020)

JUDGMENT

1. This is an appeal arising from the judgment of the Honourable F. Muguongo, Senior Resident Magistrate delivered on June 9, 2021 in Nyeri CME & LC case No 7 of 2020.

2. By a plaint dated February 13, 2020, Joseph Maina Wandimbe acting on behalf of his sister Margaret Wangechi Karicho (the respondent) had sought orders against the appellant herein as follows:

   (a) A permanent injunction do issue restraining the defendant by himself, through his agents, servants or employees from encroaching into the plaintiffs parcel of land registration number Naromoru/Block 2/Muriru/1171;

   (b) An order directing the land registrar Nyeri and the County surveyor Nyeri (to) jointly mark out the access road that separates the 2 parcels of land;

   (c) An order evicting the defendant from the plaintiff's parcel of land registration number Naromoru/Block 2 Muriru/1171; and

   (d) Costs.

3. Those prayers arose from the respondent's contention that the said parcel of land borders another parcel of land owned by the appellant. It was the respondent's case that sometime in the year 2019, he visited the lands office at Nyeri and upon perusal of the Registered Index Map (RIM), he realized that there existed an access road that was not captured on the ground at the time he had purchased his parcel of land in the year 1990.

4. The respondent asserted that it is then he realized that the appellant had encroached a large portion of his land. Despite his efforts to resolve the matter amicably, the appellant had refused to resolve the matter and hence the suit filed by the respondent.

5. But in his statement of defence dated March 9, 2020, Paul Maina Mburu (the appellant) asserted that he was the registered proprietor of all that parcel of land known as Naromoru/Block II/Muriru/1172 which property he had inherited from his mother one Nduta Mburu Kuniara (deceased)

6. The appellant asserted further that the respondent Margaret Wangechi Karicho agreed to buy from the deceased a triangular shaped portion of land which as at the date of execution of the sale agreement on February 1, 1990 had not been surveyed and excised from the original title No Naromoru/Block II(Muriru)650.

7. The appellant averred that the actual acreage of the portion of land purchased by the respondent from the deceased was 0.207 Ha. being the area of the portion of land occupied on the ground from the date of sale to date. The appellant stated further that on April 4, 1990, his deceased mother and the respondent did an agreement in writing covenanting that the respondent was only entitled to ownership and possession of the aforesaid triangular shaped land parcel and that at no time would the respondent's portion traverse the access road on the ground, demarcating the respondent's and the deceased's parcels of land.

8. The appellant denied encroaching on the respondent's portion of land and asserted that the suit was an afterthought and that the respondent was estopped from laying any claim to the portion of land the appellant had occupied and used since the year 1990.

9. The appellant further asserted that the respondent's suit was time barred by virtue of provisions of the *Limitation of Actions Act* and stated that he would raise a preliminary objection with a view of having the suit struck out.

10. By an amended statement of defence and counter-claim dated October 27, 2020, the appellant introduced a prayer seeking a resurvey of the two properties by the Nyeri County Surveyor as well as an order directing the Land Registrar to rectify the registers thereof to reflect the acreages consequent upon the re-survey exercise.

11. The dispute was placed before the Honourable F. Muguongo, Senior Resident Magistrate who upon hearing the parties and in her judgment rendered on June 9, 2021 dismissed the appellant's counter-claim and allowed the respondent's suit with costs.

12. Aggrieved by the said determination the appellant, with the leave of this court, lodged a memorandum of appeal herein dated April 1, 2022 urging the court to set aside the entire judgment and decree of the trial court and instead allow his counterclaim on the grounds:

    1. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff's claim for the marking out of an access road captured on the registry index map as separating the suit properties, Naromoru/Block 2/Muriru/1171 and Naromoru/Block 2/Muriru/1172 would result in the plaintiff recovering a portion of Naromoru/Block 2/Muriru/1171 already in occupation of the defendant and which portion measures 0.586 hectares;

2. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff was seeking to recover the said portion of Naromoru/Block 2/Muriru/1171 measuring 0.586 hectares outside the period of twelve (12) years prescribed under the *Limitation of Actions Act*;

3. That the learned trial magistrate erred in law and fact by disregarding the evidence on record by both parties supporting the defendant's claim for adverse possession on the said portion of Naromoru/Block 2/Muriru/1171 measuring 0.586 hectares and the necessity of a resurvey of the suit properties to reflect the reality on the ground; and

4. That the learned trial magistrate erred in its assessment of costs as is apparent in the certificate of stated costs by failing to appreciate and apply the provisions of the Advocates Remuneration Order as respects the items "instruction fees" and "attendances" and awarding "other disbursements" which were not approved.

13. This being the first appeal, the mandate of the court is as was set out in *Selle & another v Associated Motor Boat Company Limited & others* (1968) EA 123 where it was held that:

> " ... 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 ..."

14. Accordingly, I have carefully perused and considered the record or appeal, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein.

15. By his plaint dated February 13, 2020, the respondent herein acting on a power of attorney donated by his sister Margaret Wangechi Karicho had urged the court to grant a permanent order of injunction restraining the defendant from encroaching upon the respondent's land parcel No Naromoru/Block 2/Muriru/1171. His second prayer was for an order directing the County Land Registrar and surveyor to jointly mark out an access road said to separate his parcel of land from that of the appellant. Finally the respondent sought for an order to issue evicting the appellant from his said parcel of land.

16. Those prayers arose from the respondent's contention that his parcel of land borders that of the defendant and that sometime in 2019 he perused the registry index map for the two parcels of land whereupon he not only discovered that the appellant had encroached on his parcel of land but that there was in existence an access road that was not captured on the ground when he had purchased the land in 1990.

17. On his part, the appellant asserted that he was indeed the registered proprietor of the adjacent land parcel No Naromoru/Block 2/Muriru/1172 having inherited the same from his mother – one Nduta Mburu Kaniara who had since passed away in the year 2005. He told the court it was his deceased mother who had in February, 1990 sold the land to Margaret Wangechi Karicho after sub-dividing her original land parcel No Naromoru/Block II (Muriru) 650.

18. The appellant averred that the actual acreage of the portion of land purchased by the respondent from the deceased was 0.207 Ha. being the portion of land actually occupied by the respondent on the ground. It was further his case that on April 4, 1991, his mother and the respondent did another agreement wherein it was agreed that the respondent was only entitled to ownership and possession of a triangular shaped parcel of land that did not traverse the access road on the ground.

19. The appellant denied encroaching on the respondent's portion of land stating that he remained in occupation and were using the same portion of land since 1990. In addition, the appellant asserted that the suit as filed by the respondent was not only an afterthought but that the same was time-barred by virtue of the *Limitation of Actions Act*, cap 22 of the Laws of Kenya.

20. Having heard the dispute and considered the issues before her, the learned trial magistrate concluded on the measurement of the portion of land purchased by the respondent as follows:

> " What is as clear as black is from white, is the measurement of the portion of land purchased by Margaret Wangechi Karicho – that is 0.793 Ha. Whether that portion of land measuring was in triangular shape, or circular shape, its immaterial, as long as it measured 0.793 Ha. If the shape of that parcel of land was so pertinent to the seller or to the purchaser, then nothing stopped the parties from capturing the shape in the sale agreement of February 1, 1990 or in the subsequent agreement of April 4, 1991. The submissions by the defendant that the agreement of April 4, 1991 was curing a mistake that the land purchased by the plaintiff was a triangular portion measuring 0.207 Ha cannot be true.
>
> If that was the case why did the resultant survey of parcel 650 done in the presence of the defendant's mother still excise plaintiff's portion still measuring 0.793? Why did Nduta Mburu not seek to correct the alleged mistake during her lifetime?
>
> The answer is simple. The alleged mistake was no mistake and is just a creation of the defendant."

21. Regarding the appellant's contention that they had been occupying the same portion of land said to be belonging to the respondent since 1990 and that they had acquired the same by adverse possession, the learned trial magistrate found as follows:

> " In the same breath, the defendant claims adverse possession over a portion of land forming part of parcel No 1171.
>
> By claiming adverse possession, the defendant indirectly concedes that this portion of land belong(s) to the plaintiff, which fact the plaintiff has successfully proved.
>
> The defendant has not proved that he has been in the exclusive occupation of any portion of land belonging to the plaintiff for over 12 years to constitute dispossession and denying the plaintiff enjoyment of the portion of the land.
>
> The defendant produced as evidence a copy of (a) title deed under his name whose date of registration was January 17, 2017.
>
> My finding is that he has not proved (the) claim for adverse possession."

22. It was on the basis of those conclusions that the court went on to dismiss the appellant's counter-claim and to allow the prayers made by the plaintiff. From my perusal of the pleadings and the testimonies of the witnesses, it was apparent to me that there were two main issues being raised by the respondent in his claim. One was that the appellant had encroached upon his suit property while the other was that he had discovered the existence of an access road which he sought to have created on the boundary of the two parcels of land.

23. The first limb of the respondent's claim is to be found at paragraphs 9 to 11 of the plaint where the respondent asserts as follows after his stated visit to the lands office and checking of the RIM:

> " 9. It is upon this confirmation by the plaintiff where the access road ought to be, that the plaintiff realized that the defendant had encroached a large portion of the plaintiff's subject parcel;
>
> 10. The plaintiff thereafter approached the defendant and clearly informed him of the status but the defendant has persistently insisted on encroaching into the plaintiff's subject parcel of land; and
>
> 11. The disputed portion is currently being illegally utilized by the defendant to the detriment of the plaintiff."

24. Those are the matters that indeed led to the prayer for injunction against the appellant as well as a prayer for his eviction from the respondents' parcel No Naromoru/Block 2/Muriru/1171. The said portion of land said to be occupied by the appellant but belonging to the respondent was clearly identifiable and existent. At the invitation of the respondent, the Land Registrar had visited the disputed parcel in 2018. His report at page 50 and 51 of the record of appeal identifies the portion as measuring 0.586 Ha. That portion as it were was part of the land registered in the name of the respondent but had been in the appellant's occupation ever since the sale agreement was executed in 1990.

25. As it were, the respondent conceded that he only realized in 2019 that the appellant had encroached on that portion of land. The respondent indeed told the court in cross-examination (page 109 of the record) that he had fenced off the portion of land he occupies and that he did the fencing in 1989. That fenced portion according to the land registrar's report dated August 27, 2018 aforesaid measures 0.207 Ha. That figure was thereof not merely a creation of the appellant as was stated by the learned trial magistrate.

26. In his recorded statement which he adopted as his evidence-in-chief, the respondent conceded that if the access road on the RIM was to be marked out on the ground so that the footpath on the ground was no longer used, he would recover the disputed portion of land. As it were the agreement executed on April 4, 1991 which the respondent acknowledges as genuine, had acknowledged that it is the footpath on the then unsurveyed land that separated the two parcels of land and not the access road which was certainly created after the survey.

27. Arising from the foregoing, it was evident that the respondent's suit was one for the recovery of land. As early as 1989, the respondent knew or should have known that the appellant and his deceased mother were in occupation of a portion of land that is part of their LR No Naromoru/Block 2/Muriru/1171. Rather than take steps to recover the portion, the respondent instead fenced off the portion he was using. His suit filed in the year 2020 had arrived some 31 years after he fenced off what he considered to be his rightful parcel thereof.

28. In matters for recovery of land, section 7 of the *Limitation of Actions Act* required that such suit be instituted within 12 years. That being the case, it was evident to me that the respondent's suit was stale and time-barred as at the time it was instituted.

29. It follows that I am persuaded that the learned trial magistrate had misdirected herself in matters of law and fact and had hence arrived at the wrong conclusion that the respondent had proved his case.

30. In the result, the judgment dated June 9, 2021 is hereby set aside in its entirety with the result that the respondent's suit before the trial court is dismissed with costs. In its place, judgment is hereby entered

in favour of the appellant as prayed in the amended defence and counter-claim dated October 27, 2020 as further amended in open court on March 17, 2021.

31. I make no order as to costs in regard to this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 28TH DAY OF SEPTEMBER, 2023.

In the presence of:

No appearance for the Appellant

Mr. Ombongi for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE