Ngara v Mungai & another (Environment and Land Appeal E007 of 2021)
[2023] KEELC 20022 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20022 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E007 OF 2021

LC KOMINGOI, J

SEPTEMBER 21, 2023

BETWEEN

JOSEPH NGARA ..... APPELLANT

AND

FRANCIS D MUNGAI ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO ..... 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. S.M. Shitubi, Chief Magistrate, Kajiado Law Courts delivered on 4th February 2021 in Chief Magistrate's Court Civil Suit No. 325 of 2010)

JUDGMENT

1. The Appellant filed a memorandum of appeal dated 3rd March,2021 on 4th March, 2021 against the judgment of hon S.M. Shitubi (CM) delivered on 4th February,2021 in CMCC no 325 of 2010 where he sought for the following order;
    a. The Appeal be allowed with costs and the Plaintiff's suit in the lower court be dismissed with costs as against the Appellants herein.
    b. That the 1st Defendants counterclaim in the lower court be allowed as prayer
    c. That the cost of this Appeal be awarded to the Appellant.
2. The Appeal is premised on grounds that the learned magistrate erred in law and fact;
    a. In relying on the surveyor's report which had not been produced as exhibit neither was it adopted by the court or the parties as evidence.
    b. In failing to consider the evidence of the Appellant at the trial.

c. Failing to consider the Appellants submissions and entirely relied on that of the 1st Respondent making a wrong judgment.

d. By failing to address her mind to the submission and authorities cited by the Appellant.

e. Holding that the Plaintiff had proved his case on a balance of probability when there was no evidence to support her findings.

f. Dismissing the Appellant counterclaim claim unfairly and without considering the evidence tendered by the Appellant and his witness,

g. Holding that the Plaintiff suffered damages when there was no evidence to support such findings.

3. The Appeal originates from a dispute over existence of plot 16 and 51/Business-Kerarapon Trading Market. The 1st Respondent claimed that plot 16 was allocated to him by the 2nd Respondent in 1990 when he obtained its possession. He constructed rental rooms as a source of income. In April, 2020, the Appellant trespassed and attempted to fence the plot. He therefore filed a suit seeking general damages for trespass, costs and interest of the suit and that a permanent injunction be issued restraining the Appellant from interfering with his plot boundaries, fence, wall or any building. He also sought that be declared the rightful owner of Plot 16 which he occupied and built his house in 1990. The Appellant denied ever trespassing on plot 16 and stated that plot 51 was legally allocated to him on 12th January, 2006 by the 2nd Respondent. Given the two were different, the Appellant sought that the 1st Respondent be evicted from the plot, general damages for trespass, costs of the suit and damages for loss of income. This is because he had lost ksh20,000 per month ever since the Plaintiff obtained possession of the property.

4. On 30th November 2018, the 2nd Respondent's Surveyor and Planner conducted a site visit in presence of all the parties in order to establish their respective plots. The visit was pursuant to consent order adopted by the trial court on 25/10/2018.The order also provided that the 2nd Respondent Surveyor and Planner were supposed to point out to the Appellant and 1st Respondent plot 51 and 16 respectively.

5. After analyzing the evidence, supporting documents and the site visit report, the trial court found that the 1st Respondent was the rightful owner and was granted the orders sought. He was also awarded damages of ksh20,000 with costs were to be paid by the 2nd Respondent. The Appellant's counterclaim was also dismissed with cost to the 2nd Respondent for being unmerited.

6. On 19th October 2022, the court directed that the Appeal be disposed of through written submission. In compliance with this directive, submissions dated 2nd December 2022 and 13th March 2023 were filed on 5th December 2022 and 21st March 2023 by the Appellant and 1st Respondent counsel respectively.

The Appellants Submissions.

7. The Appellant counsel put forward the Court of Appeal decision of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* (2015)eKLR to submit as follows with respect to ground 1,2 and 3 of the Appeal; The trial court is faulted for relying on the 2nd Respondent site's visit report dated 4/12/2018 in making its finding yet it was not adopted as evidence in court. It's production was also objected to unless the maker was called. These issues were never addressed by the trial court when it made its findings.

8. With regard to ground 2, 3 and 4, it is contended that the Appellant produced documentary evidence showing that plot 16/business-Kerarapon Trading Market was different from 51/Business Kerarapon

Trading Centre and that the issue was effectively adjudicated by the 2nd Respondent. If re-planning and re-survey was property done, the two plots would be accommodated on the ground. Further, the survey could not pinpoint plot 51 and 16 unless the physical planner prepared a proper development or part development plan. According to counsel, this evidence was never considered in making the determination. The trial court is faulted for failing to make reference to the Appellants exhibits especially the 2nd Respondent's letter allocating the two plot yet it had never been revoked.

9. On ground 5 and 7 reliance is placed on *Kuria Kiarie & 2 Other v Sammy Magera* (2018)eKLR and *Stanley Maira Kaguonyo v Isaac Kibiru Kahutwa* (2022) eKLR to argue that the 1st Respondent did not prove the alleged fraud on a balance of probabilities. He never produced any material evidence showing that the two plots never existed on the ground. His evidence was that he never knew his plot's acreage neither did the surveyor visit the scene to take measurements. Had the 2nd Respondent undertaken the ground measurement and confirmed its acreage, then the trial court could have addressed the issue whether the two plots existed on the ground. The absence of such evidence therefore made the court to arrive at a wrong finding.

10. The trial court is further faulted for erroneously awarding the 1st Respondent ksh20,000/= as general damages yet there was no evidence that he suffered or was likely to suffer irreparable damage. Likewise, there were no returns from Kenya Revenue Authority on rental houses to conforming payment of tax on rental income that was collected from the houses. According to the Appellant's counsel, if the trial court considered the cited authorities on trespass, then it would have arrived at a different decision when awarding the damages.

11. The counsel's contention is that the trial court misdirected itself when it held the view that the 1st Respondent's claim was supported by the 2nd Respondent. That is, the Appellant's plot was superimposed over his. This court is therefore invited to re-look at the 2nd Respondent's statement of defence denying all allegations given they never called any evidence.

12. As related to ground 5, counsel reiterates the above arguments and asks the court to allow the Appeal with cost to the Appellants and also dismiss the 1st Respondent case before the trial with costs.

The Respondent Submissions.

13. Counsel for the Respondent commenced his submission by urging this court to examine and re-evaluate the evidence on record, assess it and make its conclusion as was held in *Selle & Another v Associated Motor Boat co ltd & Other* (1968) EA 123 given that this is a first appeal. It is further argued that the trial court never disregarded the Appellants evidence. This is because it rightfully found that the 2nd Respondent issued the Appellant with an allotment letter on 2006 and received his rents as shown by the produced receipts. The 2nd Respondent's surveyor and physical planner also testified that the land allocated to the Appellant did not exist on the ground. Although the trial court noted the Appellant's surveyor arguments that the site visit was done unprocedurally, it held the view that plot 51 which the Appellant laid claim on and wanted to develop did not exists the ground even though he had been issued with an allotment letter.

14. Section 107 and 108 of the *Evidence Act* is put forward to advance the argument that the burden of proof does not shift to the Defendant neither can the Plaintiff claim be allowed as prayed where the evidence is unconverted. The 1st Respondent plot had not been re-allocated nor were his documents controverted by the 2nd Respondent as was held in *Republic v City Council of Nairobi & 3 Other* (2014)eKLR and *Ashmi Investments Limited v Riakina Limited and National Land Commission* ELC no 646 of 2014 Nairobi. This therefore implies that once land has been validity allocated and the allotee pays the requisite fees and obtains possession, then such land is unavailable for re-allocation to

another person. The 1st Respondent counsel concludes by urging this court to dismiss the Appeal and uphold the lower court judgment.

15. The 2nd Respondent never participated in this Appeal.

Analysis and Determination

16. In *Selle v Associated Motor Boat Company* (1968) EA, 123 the Court of Appeal stated as follows;

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are , that this court must reconsider the evidence evaluate itself, and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances on 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".

17. The above position was restated by Mrima J in the case of *South Nyanza Sugar Company ltd v Leonard O. Arera* (2020) eKLR where he stated that,

> " As the first Appellate Court it is now well settled that the role of this court is to revisit the evidence, evaluate it and reach its conclusion in the matter"

18. I have considered the Memorandum of Appeal, the grounds, the record of Appeal, the written submissions and the authorities cited. In my view the following issues arise for determination:

    i. Whether the 1st Respondent proved his case on a balance of probabilities.

    ii. Whether the Learned trial magistrate erred in relying on the Surveyor's Report.

    iii. Whether the Learned Trial Magistrate erred in dismissing the Appellant's counter claim.

    iv. Who should bear costs of this Appeal?

19. According to the evidence tendered before the trial court, the Appellant was issued with an allotment letter for plot 51 by the 2nd Respondent on 12th January ,2006. Plot 16 was transferred to the 1st Respondent on 15th November, 1990 from Elizabeth S. Gakure. Although the 2nd Respondent attempted to resolve the dispute with regard to the ownership of the plot as evidenced in the record of appeal, no amicable solution was found. The site visit reports notes that the Appellant was allocated plot 51 from a sketch that never depicted the actual situation on the ground. The two plans from which ownership of plot 51 is claimed were contradicting and inconsistent. The report also noted that given plot 51 never existed, the Appellant would have colluded with the 2nd Respondent's officials to illegally hive plot 26 and other neighboring plots. This is because he never had any evidence to prove ownership of the alleged plot 51.According to the report, the Appellant and the 1st Respondent were present together with their respective surveyors' when the site visit was conducted.

20. The record of appeal also shows that certificate of official search establishing that plot 16 and 51 belonging to the Appellant and 1st Respondent respectively were issued by the 2nd Respondent. They also paid rates as evidenced by the receipts issued and clearance certificate. The 2nd Respondent even granted approvals to the Appellant to undertake development in plot 51.

In making its finding, the trial court stated as follows, which I hereby reproduce below;

> " County land belongs to the county government. The county surveyor confirms that the plot on the ground was properly allotted to the Plaintiff. The Plaintiff's documents have not been controverted if the county government purported to allocate the same physical ground to the 1st Defendant years later then that was wrong. It is not to say that the 1st Defendant has no recourse to the law. He is entitled to compensation from the allotting authority, the 2nd Defendant for the misdeeds of its agents.
>
> The Plaintiff having demonstrated entitlement even before the 1st Defendant came to the picture, he cannot just be wished away. In granting orders of injunction, the court is guided by the principles set out in *Giella v Cassman Brown*.
>
> That is prima facie case is made out. The plaintiff stands to suffer irreparable damage that cannot be compensated for by way of damages were the orders to be denied and lastly that the balance of convince tilts in favor of the plaintiff.
>
> All these principles have been demonstrated in the evidence adduced by the Plaintiff. He has demonstrated prior allocation. The county government supports his claim that the 1st Defendants plot is superimposed over his. There was no plot for allocation. He developed some structures from which he earns rental money."

21. The 2nd Respondent based on the findings of the site visit report which indicated that plot 51 did not exist on the ground. When this exercise was being undertaken, the Appellant's surveyor despite being present never objected to such findings. He also never complained that the Appellant was accused of acquiring plot 51 allotment letter in collusion with the 2nd Respondent's officers. Instead, the Appellant filed his own separate report which he produced in support of his evidence. Taking this into consideration, this court holds the view that the Appellant was under obligation to prove on a balance of probability how he acquired plot 51. This would have assisted the trial court understand the inconsistence and incurrences associated with his allotment letter and the two maps he sought to rely on to claim ownership.

22. One of the terms of the consent order adopted on 25/10/2018 was that the 2nd Respondent's Surveyor/ Planner was supposed to file the site visit report in court. The Appellant cannot then turn around and claim that the court ought not to have relied on the report in making its findings.

23. In conclusion, I find that the Learned trial magistrate did not err in finding that the 1st Respondent had proved his case on a balance of probabilities neither did she err in dismissing the Appellant's counter claim.

24. I find that the learned trial magistrate rightly relied on the Surveyor's Report following a site visit on 25th October 2018.

25. I find no reason to interfere with the judgement and decree issued on 4th February 2021.

26. The upshot of the matter is that I find no merit in this Appeal and the same is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21STDAY OF SEPTEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Ndirangu for the Appellant.

Ms. Odera for Mr. Chege for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant - Mutisya