Achieng v Odongo & 2 others (Environment and Land Appeal E019 of 2022) [2023] KEELC 20983 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20983 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E019 OF 2022

AY KOROSS, J

OCTOBER 26, 2023

BETWEEN

YUNIA .A. ACHIENG .... APPELLANT

AND

MICHAEL NDEDA ODONGO .... 1ST RESPONDENT

MUSA AJUMA .... 2ND RESPONDENT

DORIS OKORE OWUOR .... 3RD RESPONDENT

(Being an appeal from the judgment of PM Magistrate Hon. J. P. Nandi given on 09/06/2022 in Bondo PM ELC Case No. E36 of 2021)

JUDGMENT

Background

1. In the trial court, the appellant was the plaintiff and the respondents were defendants. The appellant who was the registered proprietor of land parcel no. North Sakwa/Nyawita/1662 ('suit property') pleaded the respondents had trespassed onto the suit property while the respondents counterclaimed they were not trespassers but adverse possessors.

2. In a plaint dated 9/07/2021, the appellant contended she bought the suit property from the previous registered proprietor James Aila Tara ('Tara') and she was registered as the current owner on 2/06/1995. However, the respondents had trespassed onto it and caused wanton destruction to her detriment.

3. She particularized loss and damage, sought orders that it be declared the respondents, their servants and agents were in wrongful occupation and that she be entitled to exclusive and unimpeded right to the suit property, an order of eviction, permanent injunction, enforcement of court orders, costs of the suit and interests. She testified and her evidence was led by 2 witnesses who were Tara's children.

4. The respondents stringently opposed the appellant's claim and filed a defence and counterclaim dated 07/09/2021. It was their stand that though it was not in dispute the appellant was the registered owner, they were not trespassers but adverse possessors having occupied the suit property continuously, peacefully, openly and uninterrupted from 1965.

5. At the time of transfer to the appellant, Tara did not have title capable of transmission since he held the suit property in trust for them. At the date of transfer, the appellant was privy of their occupancy.

6. They sought several reliefs which included the appellant's suit be dismissed, declaration they be deemed to be entitled to the suit property by adverse possession, they be registered as owners, permanent injunction, costs and interests. The 1st and 2nd respondents testified and their evidence was led by the area assistant chief.

7. The appellant filed a reply to defence and defence to counterclaim dated 30/11/2021 in which she reiterated the averments in her claim, denied the averments made in the counterclaim and put the respondents to strict proof.

8. The claim and counterclaim were heard, suit closed and judgment rendered by the trial court on 9/06/2022. The trial court identified 3 issues for determination which were as follows; (i) who the registered owner was (ii)when the cause of action accrued and (iii) whether the appellant's suit was time barred.

9. On the 1st issue, it found the appellant was the 1st owner, on the 2nd issue, it reasoned because the appellant did not know when the respondents entered the suit property, she had never been in occupation since 1995 and the respondents had been in occupation for over 12 years, it was apparent the appellant did not disclose when her cause of action accrued.

10. On the 3rd issue, it found the counterclaim was competent and the respondents had met the ingredients of adverse possession since the respondents had been in occupation for 25 years. It found the appellant had not proved her case while the respondent's had proved theirs. It entered judgment for the respondents and amongst other orders, ordered the land registrar Bondo, to register the suit property in the respondents' names.

11. The appellant was dissatisfied with the decision of the trial court and preferred an appeal to this court. The appeal filed by the appellant's counsel Messrs. Mulinge & Ochieng Co. Advocates raised 24 grounds. By consolidation and abandonment of some grounds, they abridged these numerous grounds into 13 in number. The grounds are repetitive and can aptly be summarized into the following 4 grounds: -

    a. The trial court erred in law and fact in relying on the respondents' uncorroborated evidence and finding the respondents proved their case and the appellant did not.

    b. The trial court erred in misapprehending the law.

    c. The trial court was biased.

    d. The trial court erred in issuing orders not sought by the parties.

12. The appellant prayed for the appeal to be allowed, impugned judgment be set aside and costs of the suit before the trial court and of the appeal.

13. The appeal was disposed of by written submissions. The appellant's counsel filed theirs on 8/03/2023 while the respondents who were acting in person filed theirs on 21/06/2023.

Appellant's submissions

14. The appellant's counsel submitted on the 13 grounds which this court had earlier in this judgment, summarised into 4.

15. On the 1st ground, counsel submitted Section 107 (1) and 108 of the *Evidence Act* provided that he who alleges proves. It was counsel's submissions the respondents' evidence that they had lived on the suit property since 1965 and had buried their kin on the suit property was uncorroborated by documentary evidence to prove the existence of those facts whilst the appellant's evidence was corroborated. Further, the respondents had failed to discharge prove why they had not registered the suit property in their names during adjudication process.

16. On the 2nd ground, counsel submitted Section 24(a) of the *Land Registration Act* upheld sanctity of title while Section 26 (a) and (b) thereof affirmed title to land could only be challenged on grounds of fraud, misrepresentation, illegality or if it was acquired unprocedurally or through a corrupt scheme. According to counsel, the appellant adduced evidence she took possession when she purchased the suit property in 1995 yet the trial court cancelled her title. Counsel placed reliance on the case of Esther Ndegi Njiru & Another v. Leonard Gatei (2014) eKLR where it was stated: -

> " ...Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible..... Article 40(6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. ..."

17. On the 3rd issue, counsel submitted, the trial court disregarded the appellant's submissions and authorities relied upon. Despite the appellant proving her case that the respondents were trespassers, she had legally acquired title to the suit property and her evidence was watertight, the trial court entered into the arena of litigation, failed to analyze the appellant's case and found in favour of the respondents.

18. On the 4th issue, counsel submitted the trial court issued orders not sought by the parties.

Respondents' submissions

19. The respondents' submissions identified 6 issues for determination. Considering the condensed grounds of appeal, the issues can be compacted into the 4 grounds of appeal.

20. On the 1st ground of appeal, they submitted by Section 107 (1) of the *Evidence Act*, their evidence was corroborated by DW3 who was a witness who did not have interest in the suit and was conversant with the suit property. Further, they had proved their claim of adverse possession.

21. On the 2nd and 4th grounds, they submitted the order of cancellation of the suit property's title document was done within the apparatus of law after it was found the respondents had acquired rights over it by adverse possession and the appellant was untruthful that she took possession over the suit property in 1995.

Analysis and determination

22. This court will not interfere with the exercise of discretion by the trial court unless it is satisfied the impugned decision was clearly wrong because of some misdirection or because of failure to take into consideration relevant matters or because the trial court considered irrelevant matters and as a result arrived at a wrong conclusion or where there was clear abuse by the trial court of its discretion.

23. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon demonstrating a clear abuse of discretion. See the Court of Appeal decision in Mwanasokoni v Kenya Bus Services Limited [1985] eKLR where the court expressed itself thus;

> " Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal."

24. I have carefully perused the record including the lower court pleadings and impugned judgment. I have also carefully considered the grounds of appeal and the parties' respective rival submissions, applicable provisions of law, case law and common law principles. In my considered view, the crux of the issues for determination are the 4 consolidated grounds of appeal.

25. However, before I proceed, the appellant has alluded in her submissions that she bought the suit property in 1995 and took possession of it. I have scrutinised the record and at no time did she adduce evidence that she took possession. It is obvious she intended to mislead this court and this court will not entertain such conduct since it will lead to a miscarriage of justice. This line of her submissions will be disregarded. I will now turn to the issues for determination which shall be dealt with sequentially.

a. The trial court erred in law and fact in relying on the respondents' uncorroborated evidence and finding the respondents proved their case and appellant did not.

26. Sections 107, 108, 109 and 110 of the *Evidence Act* set down the settled principle that the burden of proof lies with the person who alleges. These provisions of law provide as follows: -

> " 107
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 110 The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

27. In the case of Hellen Wangari Wangechi v Carumera Muthoni Gathua [2015] eKLR, Mativo J cited with approval the case of Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd {2007} 4 SLR (R} 855 at 59 which stated: -

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

28. This decision went further and quoted with approval the decision of Miller vs Minister of Pensions {1947} 2ALL ER 372 where Lord Denning stated: -

> "The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."

Mativo J then concluded: -

> "The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist."

29. In an adversarial system as ours, trials are conducted in a competitive process by the parties so that parties lay bare the truth of certain facts and the court on application of the law and evidence, renders a determination. In the circumstances of this case, the standard of prove was on a balance of probabilities.

30. On application of the provisions of law and settled principle, both the appellant and respondents were called upon to prove their respective cases and the trial court as an independent arbiter determined the case based on the facts proved and found the respondents' case was probable.

31. Since the appellant has questioned the trial court's findings, this court has been called upon to interrogate and investigate the evidence on record and establish which party proved her/their case.

32. The appellant contended she was the registered proprietor of the suit property and the respondents had occupied it without her permission. The respondents did not rebut this but put forth the common law defence of adverse possession which is founded in Sections 7, 13 and 38 of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.

33. The respondents having stated they had been in open, peaceful, continuous, undisputed and uninterrupted occupation of the suit property for over 55 years, it was necessary for the appellant to adduce evidence to refute the respondents' allegations.

34. This could have been such as demonstrating when the respondents entered the suit property, producing evidence on previous court proceedings to show the respondents occupancy was not peaceful or that time had stopped to run or that in the past 12 years prior to filing suit, she had occupied the suit property and could even have produced photographs to show such occupancy or even tendered income statements from activities she conducted on the suit property. All such evidence would have helped her case.

35. No evidence was tendered by the appellant to rebut the respondents' allegations of her dispossession and discontinued possession. By her own testimony she had never occupied the suit property since 1995 which was when it was 1st registered in her name.

36. The trial court calculated time for purposes of adverse possession from the year 1995 which was the year the suit property's title was 1st registered. This was in consonance with settled law. See Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] eKLR.

37. In affirming the probability of their case, the respondents' testimony was corroborated by DW3 who was the area chief who confirmed that since she was born in 1973, the respondents and their family had always occupied the suit property. DW2 produced a bundle photographs which showed they had constructed houses on the suit property and on it, they had planted trees which were mature. These obviously corroborated the respondents' testimonies.

38. The trial court had the benefit of seeing and hearing the parties' testimonies, had an opportunity to assess witnesses' abilities to recall events accurately, verify the truthfulness of their testimonies and test if they were consistent, biased, hostile or had a motive to lie or otherwise. I have been unable to fault the trial court in the findings it arrived at. This ground fails.

b. The trial court erred in misapprehending the law.

39. In applying Section 7 of the *Limitation of Actions Act*, the trial court found the respondents had acquired title by adverse possession.

40. The appellant's counsel contended title could only be defeated on grounds set down in Sections 26 (a) and (b) of the *Land Registration Act* which affirmed title to land could only be challenged on grounds of fraud, misrepresentation, illegality or if it was acquired unprocedurally or through a corrupt scheme.

41. The question that suffices is whether the trial court misapprehend the law. My answer to this is in the negative. The respondents did not challenge the respondents' title under Section 26 (a) and (b) of the *Land Registration Act* but had moved the court under Section 38 of the *Limitation of Actions Act* which permitted them to apply to the trial court for orders that they be registered as the proprietors of the suit property.

42. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land. The doctrine of adverse possession is well settled and is recognised by Sections 7, 13 (1) and (2), 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*. I need not say more. This ground fails.

c. The trial court was biased.

43. As earlier stated in this judgement, the trial court could not be faulted in arriving at its findings on which party proved their case. Therefore, the basis that the trial court was biased because it did not consider the appellant's evidence falls on all fours.

44. The appellant's counsel contended the trial court descended into the arena of litigation. Put another way, the trial court had examined or put leading questions to the respondents and their witnesses during hearing in order to support the respondents' case. The appellant did not elucidate on these allegations.

45. DW3 who was a government official and did not file a witness statement, produced a document which emanated from her office. The respondents who were acting in person did not file witness statements but the request for them to proceed in the manner they did emanated from the appellant's counsel, Mr. Ochieng who stated before the trial court on 5/04/2022 as follows 'We can proceed with the case despite no statement by the defendants.' Thereafter, the court proceeded with the respondents' case. The appellant's counsel was given an opportunity to cross examine the respondents and their witnesses. Obviously, the trial court could not be faulted.

46. In converse, after PW1 and PW2 had concluded with their testimonies, the trial court sought clarification from them which it was so empowered by Section 173 (1) of the *Evidence Act*.

47. As to the issue of submissions and authorities cited, Black's Law Dictionary, 11th Edn, p. 1724 which quoted P.G. Pagone, "Written advocacy; Writing with Effect and Persuasion," in Essays in Advocacy 119,127 (Tom Gray et al.eds., 2012) described the intent of submissions as mere tools of persuasion.

48. This position was succinctly captured by the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where the court stated thus;

> " Submissions cannot take the place of evidence… Such a course only militates against the law…Submissions are generally parties' "marketing language""

49. The trial court merely stated the appellant's counsel filed written submissions. Notwithstanding the court may not have applied the appellant's submissions in its determination, this was not fatal.

50. Bearing in mind that submissions are merely persuasive and not substantive, it is my considered view that this did not prejudice the appellant for two reasons; one, the trial court evaluated the evidence that had been tendered before it and applied the relevant provisions of law and precedents and two, the parties have had a chance before this court to put forth their submissions.

51. I have scrutinized the proceedings and I am satisfied the trial court was not inclined or prejudiced in any way. It is my finding the trial court was not biased and this ground of appeal fails.

d. The trial court erred in issuing orders not sought by the parties.

52. The appellant's counsel did not substantiate on this. It is trite law parties are bound by their pleadings. After arriving at its findings, dismissing the appellant's case and upholding the respondents' counterclaim, the trial court issued orders that had been sought in the counterclaim. None of the orders granted by the trial court were plucked from the air but rather emanated from pleadings. This ground of appeal equally fails.

53. Utmost and for the reasons stated above, I conclude and find this appeal lacks merit. It is dismissed with costs to the respondents.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

26/10/2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Mulinge h/b for Mr. Ochieng for the appellant

1st and 2nd respondents

N/A for 3rd respondent

Court assistant: Ishmael Orwa