Ngumbao v Kenga & another (Environment and Land Appeal 63 of 2021) [2023] KEELC 20975 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20975 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 63 OF 2021

NA MATHEKA, J

OCTOBER 25, 2023

BETWEEN

IRENE BENDERA NGUMBAO ..... APPELLANT

AND

BENJAMIN KARISA KENGA ..... 1ST RESPONDENT

TIMOTHY KAINGU BARKA ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant herein, being aggrieved and dissatisfied by the entire judgment of the Learned Hon. M.L Nabibya (PM) delivered at Mombasa on September, 2021 in Civil (MCELC) No. 1950 of 2014 appeals to this Honourable Court against the whole of the said Judgment on the following gounds;

    1. That the Learned Hon. Magistrate erred in law and in fact by failing to appreciate that the jurisdiction of the Court is not limited to land registered under the statutes but also to unregistered land and that the parties having subjected themselves to the court, a determination should have been made as to who owns the suit land, being Plot No. 243, measuring 32ft by 48ft situate at Kadzandani within Mombasa County.

    2. That the Learned Hon. Magistrate erred in law and in fact by making a finding that the suit land in dispute could not be ascertained, yet by her own observations, she stated that there was a general feeling that the parties were litigating over the same property.

    3. That the Learned Hon. Magistrate erred in law and in fact by making a finding that squatters are not recognized under the statutes and specifically under Section 26 of the *Land Registration Act*, yet the said statute provides for easements which are rights enjoyed by squatters and/or lawful trespassers under the doctrine of Adverse possession.

4. That the Learned Hon. Magistrate erred in law and in fact by failing to appreciate the famous maxim of there being no wrong without a remedy by not determining the matter in any one's favour yet the Law required her to make a finding that would be conclusive in the matter regarding the proprietary interest of the parties.

5. That the Learned Hon. Magistrate erred in law and in fact by making a determination that permanent injunctive orders cannot be issued against a party who was constructing on the suit land and who was only stopped through a temporary injunctive order of the Court, yet the construction of the structure(s) was not complete at the time judgment was delivered due to the existence of the said temporary injunctive order.

6. That the Learned Hon. Magistrate erred in law and in fact by dismissing the Appellant 's suit, yet the evidence tendered by both parties therein was in favor the Appellant 's case.

2. The Appellant therefore seeks for the following Orders: -

1. That the Appeal be allowed, by setting aside the judgment of the Learned Hon. M.L. Nabibya (PM) delivered at Mombasa on September, 2021 in Civil (MCELC) No. 1950 of 2014) and substituting the same with an order, allowing the said suit with costs.

2. That costs of this appeal be borne by the Respondents.

3. This court has considered the appeal and the submissions therein. The Appellant dissatisfied with the judgement, filed a Memorandum of Appeal dated 26th November 2021 seeking to set aside the judgement and allow the suit as prayed. 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 *Mbogo and another v Shah* (1968) EA 93 where it was 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."

4. In the plaint dated 6th October 2022 the Appellant averred that she was the lawful/beneficial owner of suit land, being Plot No. 243, measuring 32ft by 48ft situate at Kadzandani within Mombasa County. That on or around 15th March 2002 the Plaintiff purchased the land from Lazima Charo Kombe at the sum of Kshs. 20,000/=. That on 11th August 2014 the Defendants invaded and trespassed on her land. The Appellant produced two sale agreement documents dated 15th March 2002 and 10th August 2008 to prove ownership to the suit land.PW1 produced two sale agreements dated 15th March 2002 and 10th August 2008. PW1 testified that she bought the land from Lazima Charo Kombe. PW2 testified that she was a witness to the said agreement and that PW1 bought the land from Sidi Charo. However, her name does not appear on the document. PW3 the village elder testified that both Lazima Charo Kombe and Sidi Charo sold the plot to the Appellant. It also came out in evidence that the 1st Defendant was the Plaintiffs ex husband. On the 218th May 2021 the Plaintiff was recalled and on cross examination she stated that she purchased the land from both Lazima Charo Kombe and Sidi Charo. That one of the witnesses was their grand child and was a child going tto Bamburi Primary School. Secondly. The agreement of 10th August 2008 is not signed by the witnesses. DW3 Lazima Charo Kombe, testified

that he never signed the said agreements neither did he sell the land to the Plaintiff, that he sold it to the 2nd Defendant and received the purchase price.

5. The Learned Magistrate did not err by finding that the Appellant did not produce any valid document to prove of ownership. It is trite law that that possession is not title and it is not proof of ownership. The burden of proof laid with the Appellant to prove she was the lawful and/or beneficial owner of Plot No. 243, measuring 32ft by 48ft situate at Kadzandani within Mombasa County. In *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

> It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:
>
> > Whosever 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.
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> Also, further, Section 108 of the *Act* states thus:
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> > 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.
>
> Again Section 109 of *Act* refers to the burden of proof of a particular fact. It states that:
>
> > 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.

6. I find that the said agreements did not meet the threshold set out in Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act* which required any land transaction dealings must be reduced into writing, executed by the respective parties and signed by witnesses. The agreements were never signed by the witnesses and the witness who signed was a minor. The agreements did not indicate the parcel number or the size which amounted to an ambiguous agreement that could not pass title.

7. It was upon the Appellant as the Plaintiff therein to prove her case and not demonstrate how weak the Respondent's case was. At no point did the evidential burden shift from the Appellant to the Respondent in terms of proving ownership of the suit premises. The burden was cast upon the Appellant who had the burden of proving the fact that she was the legal or beneficial owner of the suit premises, since she was the one who desired for the court to believe the existence of that fact. The well-known mantra "he who asserts must prove" was well pointed out by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* (2013) eKLR as follows;

> We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the Appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

8. I find and hold that the Learned Magistrate did not err in finding that the Appellant did not make a case for a grant of the prayers sought and in dismissing the suit with costs to the Respondent. In the totality of my re-evaluation of the evidence and applicable law herein, I agree with the Learned Magistrate and find that the Appellant failed to prove her case on a balance of probabilities. Accordingly, the appeal herein is devoid of merit and is dismissed with costs to the Respondent.

9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE