



Ciaruri (As the Legal Representative of the Estate of John Maina Ciaruri - Dcd) v Muriuki & another (Environment and Land Appeal 3 of 2019) [2023] KEELC 22317 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 3 OF 2019
JO OLOLA, J
DECEMBER 15, 2023**

BETWEEN

MARTHA WANJIKU CIARURI (AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN MAINA CIARURI - DCD) APPELLANT

AND

ISAAC MURIMI KIGOTHO 1ST RESPONDENT

JOHN WACHIRA MURIUKI 2ND RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable W. Kagendo, CM delivered on 6th July 2018 in Nyeri CMCC No. 326 of 1994.
2. By a plaint dated 20th June 1994, the two Respondents herein – Isaac Murimi Kagotho and John Wachira Muriuki had sought orders against John Maina Ciaruri (now deceased) as follows:-
 - a). A declaration that the Plaintiffs are the rightful owners of Plot No. 11 Bellevue Trading Centre;
 - b). A permanent injunction restraining the Defendant, his servants or agents or any other person claiming under him from carrying on business or occupying Plot. No. 11 Bellevue Trading Centre;
 - c). General Damages for illegal occupation of Plot No. 11 Bellevue Trading Centre;
 - d). Eviction of the Defendant from Plot No. 11 Bellevue Trading Centre;
 - e). Costs of this suit with interest at court rates; and
 - f). Any other relief this Honourable Court deems fit to grant.



3. Those prayers arise from the Respondents contention that they were sold the said parcel of land together with all developments thereon by the person who was originally allotted the same by the Nyeri County Council. The Respondents asserted that the deceased Defendant had only been instructed to supervise the said plot by the owner, one Eliud Muturi before he sold the same to the Respondents.
4. The Respondents asserted that they had paid the full purchase price to the said Eliud Muturi and that they had also paid outstanding rent from 1984 to 1994 upon which the plot was legally transferred to them by the Kiambu West County Council Division. It was further their case that the deceased Defendant was attempting to illegally occupy the said premises to prevent the Respondents from carrying on their licensed business.
5. In his written Statement of Defence dated 16th September 1994, John Maina Ciaruri denied that the said Eliud Muturi had sold Plot No. 11 Bellevue Market to the Respondents. He further denied that he had only been instructed to supervise the said plot.
6. It was the deceased Defendant's case that indeed the said Eliud Muturi had sold Plot No. 11 Bellevue Market to himself in 1977. He asserted that by the time the Respondents purported to acquire the plot from Eliud, Eliud had no property to pass to them. It was further the Defendant's case that he had been in occupation of the said plot No. 11 Bellevue since 1977 as the owner and had developed the same.
7. In the course of the trial, the Defendant passed on and was substituted by his first wife (the Appellant herein).
8. Having heard the dispute and in her judgment tendered on 6th July 2018, the Learned Trial Magistrate found in favour of the Respondents and allowed prayers a, b, d and e of their plaint dated 20th June 1994 with costs.
9. Aggrieved by the said determination, the Appellant lodged herein in person a Memorandum of Appeal dated 25th July 2018 urging the court to set aside the said judgment and to instead make an order dismissing the Respondents claim on the grounds that:-
 1. The Learned Trial Magistrate erred in law and facts in delivering a judgment that was against the weight of evidence;
 2. The Learned Trial Magistrate erred in law and facts in sustaining the Respondents' evidence on purchase of the suit property without credit or evidence in respect thereof;
 3. The Learned Trial Magistrate erred in law and in facts in imputing ownership of the suit property in favour of the Respondents contrary to the applicable laws and processes to support such ownership; and
 4. The Learned Trial Magistrate erred in law and facts in dismissing the Appellant's defence whereas the same fully controverted the Respondents claim.
10. As the first appellate court, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand { See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123}.



11. I have accordingly, carefully perused and considered the Record of Appeal as well as the judgment which is in the subject of this Appeal. I have equally considered the submissions and authorities placed before me by the respective parties.
12. By their suit filed in the Lower Court in June 1994, the two Respondents had sought a declaration that they are the rightful owners of Plot No. 11 Bellevue Trading Centre. They had also sought a permanent injunction restraining the Appellant's husband or anyone claiming under him from carrying on business on or occupying the said plot of land. In addition, the Respondents sought for general damages for trespass as well as eviction orders to issue.
13. Those prayers were the result of the Respondents contention that they had purchased the land from the previous owner one Eliud Muturi Gatuma and that they had proceeded to clear all the outstanding rents due to the Kiambu West County Council upon which the Council had duly transferred the land to their name. The Respondents asserted that the Appellant's husband had only been instructed by the seller to "supervise" the plot and that there was no basis for his refusal to vacate the land once the Respondents had purchased the same.
14. On his part, the Appellant's husband who passed away in the course of the proceedings denied being a mere supervisor of the plot on behalf of the said Eliud Muturi. It was instead his position that he had purchased the said plot No. 11 from the said Eliud Muturi in 1977 and that he had subsequently developed the same. It was the deceased position that if indeed the Respondents had been sold the land, the alleged seller had no property to pass to the Respondents as the deceased was at all times material the rightful owner thereof.
15. Having considered the testimonies of the witness and the evidence adduced before a number of Magistrates who dealt with the matter over the considerable period of time that the matter has been in court, the Learned Trial Magistrate concluded as follows at pages 10 to 12 of the impugned judgment:

“Ownership”

The Plaintiff produced all the ownership documents as outlined above. They were; the sale agreement Pext 1, receipts for the rates Pext 2, transfer receipt Pext 3, rent clearance receipt Pext 4 and 5, search certificate Pext 7 and receipt Pext 8 and transfer Pext 9. The defendant challenged PW1's evidence that the plot was sold to the father, Eliud and not George. PW1 was very clear that indeed Eliud Muturi bought the plot then directed that it be transferred to George Irungu (his son). The area chief confirmed that the agreement Pext 1 was drawn by him and there was another witness.

On the part of the defendants, we note that he only had the photocopy of the agreement and were not told where the original went. This document was highly questionable in as much as it was admitted. The court notes that the record reflects that the defendants had another documents with other names which he withheld and he never came back to court again.

Further, the defendant produced a copy of a letter Dext 2 which kind of implies that the plot in issue was allocated to him. Now which is which? Did the County Council allocate to him the plot on 31/7/1997 or did he purchase it from Eliud? That remains a mystery.

The two documents that is, the sale agreement and the alluded allotment that the defendant produced were contradicting each other. They were photocopies and they did not support each other. The file that PW5 said was in respect of this plot was in court and it did not have even the file copy of the alleged notice of allotment or the transfer to the defendant. Therefore the defendant did not manage even remotely to prove to court of his claim on



the plot. He had no receipt, no proof of payment of rates and even DW1 who said he did some construction did not say it was this defendant who had instructed him. If he was in occupation, then he was in occupation. (sic), then he was likely a licensed business owner.”

16. It was on that basis that the Trial Court proceeded to allow the Respondents' claim as sought in their plaint save for the prayer on general damages which according to the court, the Respondents had failed to prove.
17. As it were, the dispute herein concerns the parcel of land described as plot No. 11 situated at Bellevue Trading Centre within Nyeri County. It is common ground that then County Council of Nyeri had originally allotted the land to one Allan Murage who is now deceased. It was also common ground that sometimes in the year 1975 or thereabouts, the said Allan Murage transferred ownership of the land to one Eliud Muturi.
18. While the Appellant contended that Eliud Muturi had sold to them the land in 1977, it was the Respondents' case that the Appellant's husband was a caretaker of the property for Eliud Muturi and that the said Eliud Muturi later on sold the land to them after the Appellant's husband failed to purchase the same.
19. At the trial herein, however, the Respondents appeared to make a slight departure from what they pleaded at paragraph 3 of the plaint. In support of their claim, the Respondents told the court that it was not Eliud Muturi who had sold the land to them but Eliud's son by the name George Irungu Muturi.
20. In support of that position, the Respondents called one Susan Murage (PW1) who was said to be the wife to the original allottee - Allan Murage. It was PW1's testimony in chief that they sold the land to Eliud Muturi and that Eliud advised them to transfer the land to Eliud's son George and that they did so.
21. A perusal of PW1's testimony at pages 112 to 113 of the record however reveals a witness who was quite unsure about her testimony. In cross examination, she was completely unsure how the alleged transfer was done stating that it was many years and that she could not recollect well what had transpired. It was her testimony that her husband died many years ago and that she was not one of the people who had transferred the land to George. She also had no idea who resides on the land.
22. From the documents produced by the Respondents, it was apparent that the alleged transfer to George's name was done in May 1994, some one (1) month before this case was filed. As it turned out neither the said Eliud Muturi nor his said son George Irungu were called to testify at the trial and no explanation was given as to how George acquired his alleged title to the land nor why he was not called to testify.
23. The Respondents' second witness was a former Gatarakwa Area Chief. He produced a sale agreement (Pext 1) showing that George Irungu was the vendor and that he sold the land to the Respondents about a month before this suit was filed. While this claim is based on the fact that the Appellant's husband had refused to vacate the suit land, the Area Chief claimed that the vendor handed over the keys to the premises to the Respondents. That contradicted even the Respondents own position that the Appellant's husband had been taking care of the premises since the 1970s and was carrying on a hotel and butchery business thereon.
24. As it were, it is a cardinal principle of law that the parties are bound by their pleadings and that they should bring evidence to support and prove what is in their pleadings. Thus, having insisted that they bought the suit premises from on Eliud Muturi who had asked the Appellant's husband to “supervise”



- the premises, they could not, without amending those pleadings purport to bring evidence that they had bought the same from a different party, the basis of whose title was not demonstrated by any evidence.
25. From the material placed before the Trial Court, it was apparent that sometimes on 17th March 1977, the said Eliud Muturi and the Appellant's husband entered into a Sale Agreement wherein Eliud sold the premises to the Appellant's husband at a consideration. While the Learned Trial Magistrate described the Agreement produced as Dexh 1 as questionable, it was not clear what was questionable about the same save for the fact that it was a photocopy and not the original document.
 26. From a perusal of the record, it was apparent that the same had been admitted as evidence after the Appellant demonstrated that the original could not be found and the court was duly satisfied with the explanation. The document was executed by both Eliud and the Appellant's husband as by law required. And again while the court stated that the Appellant's husband left the court with other documents and never came back to court again, it was apparent that the witness fell ill thereafter as a result of which he later died. He could not therefore be blamed for failing to return to court to testify.
 27. The Appellant also called an employee of the County Government of Nyeri (DW4) who produced a letter dated 31st March 1977 advising her husband that the said plot No. 11 Bellevue had been allocated to him. While the Trial Court found the letter contradictory to the position taken by the Appellant that they had purchased the land, I was again, with respect, unable to see what was contradictory about the same. In my considered view, the letter could only be seen as an acknowledgement by the then County Council of Nyeri that the ownership of the plot had changed and that the Appellant's husband had duly been recognized by the Council as the new owner thereof.
 28. That being the case, the subsequent transaction conducted over 24 years later between George Irungu and the Respondents herein was grossly irregular if not fraudulent. The basis of his title was not explained to the trial court. There was no basis therefore upon which the court could find that the Respondents had proved their ownership of the said plot No. 11 Bellevue Trading Centre.
 29. It follows that I am persuaded that the Learned Trial Magistrate erred in law and in fact in delivering a judgment that was clearly against the weight of evidence that was before the court.
 30. Accordingly I hereby set aside the judgment dated and delivered on 6th July 2018 and hereby substitute the same with an order dismissing the Respondents' suit with costs to the Appellant.
 31. The Appellant shall equally have the costs of this Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2023.

In the presence of:

Mr. Muhoho Gichimu for the Appellant.

Mr. Gathiga Mwangi for the Respondent.

Court Assistant: Millicent

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J.O. OLOLA

JUDGE

