Mayeku v Aden (Environment and Land Appeal 18 of 2019) [2023] KEELC 22367 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22367 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 18 OF 2019

MN GICHERU, J

DECEMBER 14, 2023

BETWEEN

SARAH NANDACHA MAYEKU .... APPELLANT

AND

ADEN NOOR ADEN .... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court delivered on 15th August 2019 by the Hon. Chief Magistrate A.K. Ithuku in Civil Case No. 219 "A" of 2018, Ngong)

JUDGMENT

1. This judgment is on the appeal by Sarah Nandacha Mayeku, the appellant, against the judgment of the learned Chief Magistrate Ngong in Civil Case No 219A of 2018.
2. In the judgment dated 15/8/2019 the learned trial Magistrate found in favour of the respondent who was the plaintiff. The effect of the judgment and the decree was that the appellant who was the defendant be evicted from the suit land which is Plot No Ngong Township/Block 2/376.
3. Dissatisfied with the judgment, the appellant filed this appeal seeking the following orders.
    a. That this appeal be allowed with costs.
    b. That the judgment of the Chief Magistrate's Court delivered on 15/8/2019 be set aside and be substituted with an order dismissing the respondent's suit with costs.
    c. That in the alternative the judgment of the Chief Magistrate's dated 15/8/2019 be substituted with an order remitting the case back to the Chief Magistrate's Court to be heard *de novo* before any other magistrate other than Honourable A.K. Ithuku.
    d. That the court does grant such further orders as it deems necessary for the ends of justice.

4. The memorandum of appeal has thirteen grounds which read as follows. The learned Chief Magistrate erred and misdirected himself in law,

   i. By considering the provisions of the *Land Registration Act*, 2012, instead of the *Registered Land Act* (repealed) which was the law applicable to the dispute.

   ii. By disregarding the letter or record from the Deputy Land Registrar of Kajiado, Mr. D.M. Mulili to the Commissioner of Lands dated 28/8/2012 confirming that there were two certificates of lease issued with regard to the suit land.

   iii. By making a finding on the validity of title on a claim of trespass pleaded by the respondent and without any evidence being tendered.

   iv. By upholding the respondent's claim that the appellant's title deed was forged without an examination of records held at the Kajiado Land Registry.

   v. By failing to exercise his mandate and summon the Kajiado Land Registrar to attend court and produce all the documents pertaining to the suit property and be cross-examined on the same.

   vi. By disregarding the Court of Appeal decision in the case of *Benja Properties Limited v H.H. Dr. Mohamed Sahed and 4 others* (2015) eKLR that set out the test to be applied when two titles deeds are issued with regard to one parcel of land and the evidence tendered that, the appellant's certificate of lease over the suit land was issued first in time before that of the respondent and therefore the appellant's title had to prevail over that of the respondent.

   vii. By failing to consider that the appellant enjoyed quiet possession of the suit land for a period of nine (9) years and that pursuant to Section 4(2) of the *Limitation of Actions Act*, a suit for trespass and eviction was statute barred.

   viii. By disregarding Section 27 of the *Registered Land Act* with respect to the absolute ownership of land granted to a proprietor upon registration.

   ix. By disregarding Section 28 of the *Registered Land Act* with regard to the rights held by a proprietor over a parcel of land.

   x. By disregarding the principles governing the Torrens System of Title in which the government as a keeper of records guarantees indefeasibility of title against the entire world and the respondent was only entitled to compensation from the government and was non suited against the appellant.

   xi. By making an order that there were only temporary structures on the suit property without visiting the property and confirming the same or without an evaluation report or expert report being tendered and disregarding the appellant's evidence that she had developed the property.

   xii. By disregarding the evidence tendered and the principles of law applicable to the dispute and as a result made an erroneous decision.

   xiii. By acting without jurisdiction in declaring the appellant's title as defective without any fraud having been pleaded or proved as required by law.

5. The indisputed fact of the case are as follows. The appellant is the one in occupation of the suit land. The appellant has a lease over the suit land which is dated 12/5/2004. The respondent too has a lease over the same land dated 29/9/2005.

6. Counsel for the parties filed written submissions dated 17/8/2023 and 23/1/2023 respectively. The appellant's counsel identified the following grounds for determination in this appeal.

    i. Whether the trial magistrate had any reason to declare the appellant's title as invalid.

    ii. Which of the two leases prevails over the other.

    iii. Whether the land was available to the respondent after it was registered in the name of the appellant.

    iv. Whether the lower court had jurisdiction to entertain the suit in view of Section 4 of the *Limitation of Actions Act*.

    v. Which law was applicable between the *Land Registration Act* and the *Registered Land Act* (CAP 300).

    vi. Whether it was proper to make a finding on what infrastructure exists on the land without a visit to the locus in quo.

7. On the other hand, the respondent's counsel identified four issues. He agreed with appellant's counsel that jurisdiction of the lower court to determine the dispute is one of the issue to be determined in this appeal. He identified three other issues as follows.

    i. Whether the respondent is the owner and registered proprietor of the suit land.

    ii. Whether the appellant has trespassed on the suit land.

    iii. Who should bear the costs of this appeal.

8. This being a first appeal, 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 witness and it should make due allowance in this respect". See *Selle v Associated Motor Boat Company Limited* (1968) EA 123.

9. I have carefully considered the entire appeal including the memorandum, the record, the submissions, the issues and the law raised therein. I have also borne in mind the principle in the case of *Selle* (*supra*). I make the following findings in the issues raised by the learned counsel for the parties.

10. Firstly, on whether the lower court had jurisdiction to entertain the suit in view of Section 4 of the *Limitation of Actions Act*, I find that the court had the requisite jurisdiction. The respondent was not simply saying that the appellant was a trespasser to the suit land but rather that he is the owner and that the appellant who was in occupation, was not the owner.

    In trespass, we have an owner against a non-owner but in this case, we had each of the two parties claiming ownership. Ownership rather than trespass was the crux of the matter in the dispute.

11. Secondly, on the applicable law between the *Registered Land Act*, (Chapter 300) now repealed and the *Land Registration Act* (Act No 3 of 2012), I find that it is the former and not the latter. The reason for saying so is that the newer Act has 2/5/2012 as the commencement date and the two competing leases exhibited by the parties were issued before the commencement of the new Act. That notwithstanding, I find that reference by the trial magistrate to Section 25 of the *Land Registration Act* instead of the Registered Land Act is immaterial because Section 25(1) of the newer Act is identical to Section 28(1) of the older Act, verbatim. The words being the same, the meaning of those words is also the same.

12. On whether it was proper to make a finding on what infrastructure exists on the land in quo, I find that it was proper. Under Section 3 of the *Evidence Act*, evidence includes statements made by the parties. Again, under Section 143 of the same Act, even the evidence of one witness is sufficient to prove any fact. In her witness statement dated 14/7/2015, the appellant did not state what infrastructure she has put up on the suit land. The same applies to her testimony in court on 9/5/2019. It is only at paragraph 3 of the written statement of defence dated 5/6/2014 where the appellant has averred thus, "…and planted a fence along the perimeter thereof, trees, constructed a permanent bathroom and a semi permanent building which is occupied by the workers I have employed". Among the documents filed by the appellant to accompany the defence, there were no photographs of the developments on the land, no approved plans or bills of qualities of the materials used to build on the land. There was no request for the trial court to visit the locus in quo. The trial magistrate cannot therefore be faulted for finding that only temporary structures exist on the suit land. This finding was supported by appellant's and the respondent's evidence adduced at the trial.

13. On whether the trial magistrate was right in declaring the appellant's title as invalid, I find that he was not. The appellant having been in possession of the suit land since 1998, and that possession being well explained though purchase from Samson Mankuleyio Kapaito, the Magistrate erred in invaliding that uncontroverted evidence. Section 116 of the *Evidence Act* provides as follows.

    > " When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".

    In this case, the burden was on the respondent to prove that the appellant was not the owner since as we have seen earlier, she was in undisputed possession. This burden was never discharged because the respondent could not explain how he was allocated land which was already owned by Samson Mankuleyio Kapaito since 25/5/1992.

    Secondly, the respondent in his witness statement dated 24/3/2014 and in his testimony in court on 9/5/2019 offers very scanty evidence on his acquisition of the land. The totality of his evidence does not go to the root of the title as does that of the appellant.

14. Fourthly, on which of the two competing leases prevails over the other, I find that it is that of appellant that does. I am convinced that the law in Kenya is that where there are two leases issued by mistake by the issuing authority, the earlier in time prevails over the one issued later. This is the ratio decidendi in the case in the case of *Benja Properties Limited v H.H. Dr. Syedna Mohamed Burhannudin Sahed & others*, Civil Appeal No 79 of 2007 (eKLR 2015). Since the appellant's lease was issued on 12/5/2004, no other valid lease could lawfully be issued over the suit land without first revoking the one already issued. Since there was no revocation of the appellant's lease, then the respondent's lease is defeated by the one issued earlier to the appellant. It is noteworthy that the Land Registrar who purported that the respondent's lease prevailed over the appellant's did not appear in court to testify.

    It was upon the respondent to avail him in court to prove his allegations. This did not happen. This finding covers the final issue raised by the appellant as to whether the suit land was available to the respondent after it was registered in the name of the appellant. I find that it was not for the reasons already given.

15. Fifthly on whether the respondent is the owner of suit land, I find that he is not for the reasons given in paragraphs 13 and 14 above.

16. Sixthly, on whether the appellant has trespassed on the suit land, I find that she has not because I have already found that she is the lawful owner of the land in dispute.

17. Finally on costs, I find they should follow the event and because the appellant is the successful party in this appeal, she gets the costs as required by Section 27 of the *Civil Procedure Act*.

18. For the foregoing reasons, I make the following orders.

    a. The appellant's appeal is allowed.

    b. The judgment of the Chief Magistrate Ngong in Case No 219 "A" of 2018 and dated 15/8/2019 is set aside and substituted with and order dismissing the respondent's suit with costs. Costs in the lower court and of this appeal to the appellant.

    It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF DECEMBER, 2023.

M.N. GICHERU

JUDGE