REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT & LAND APPEAL NO. 6 OF 2014

(BEING AN APPEAL FROM THE DECISION OF BUTALI SENIOR

RESIDENT MAGISTRATE'S COURT CIVIL SUIT NO. 135 OF 2009 DATED 4TH OCTOBER, 2013)

BETWEEN

DAVID WEKESA ---------- APPELLANT

VERSUS

FESTUS NGOVILO ---------- RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the learned Ag. Senior Resident Magistrate, S. N. Abuya, given on 17/11/2011 at Butali. In that Judgment, the learned magistrate allowed Festus Ngovilo's (The Respondent) suit and granted a Permanent Injunction restraining David Wekesa (The Appellant) from entering, cultivating and or farming on the 1½ acres of land parcel No. South Kabras/Shamberere/1340 either by himself or through his agents, assigns and representatives. The Respondent was also awarded costs of the suit.

2. That decision provoked this appeal and the appellant has proferred seven grounds of appeal as follows:-

1. THAT the learned trial magistrate erred in law and fact by holding that one Wanyonyi Kigenyi is the owner of L.R. No. S. Kabras/Shamberere/1340 when evidence showed that the same was legally registered in the name of Bero Ogolla.
2. THAT the learned trial magistrate erred in law and fact by holding that one Wanyonyi Kigenyi acquired L.R. No. S. Kabras/Shamberere/1340 through adverse possession when this was not the issue in and/or prayer in the pleadings.
3. THAT the learned trial magistrate erred in law and fact by holding that there exists a lease known in law between the Respondent and one Paul Wanyonyi Kigenyi over L.R. No. S/Kabras/Shamberere/1340 when there is non that can be legally enforced.
4. THAT the learned trial magistrate erred in law and fact by mis-interpreting the law as it relates to registration of leases.
5. THAT the learned trial magistrate erred in law and fact by holding that the appellant invaded the Respondent's leasehold over LR No. S. Kabras/Shamberere/1340 when no such lease existed.
6. THAT the learned trial magistrate erred in law and fact by totally ignoring the appellant's evidence.
7. THAT the learned trial magistrate erred in law and fact by totally failing to take into account documentary evidence clearly showing that no lease exists and registered in respect of L.R. No. S.

Kabras/Shamberere/1340.

3. Parties agreed to dispose of this appeal by way of written submissions which have been filed and are on record.

4. Counsel for the appellant submitted that the learned magistrate was in error in holding that Paul Wanyonyi Kigenyi was the owner of the land yet the evidence and more so, the search that was produced in court showed that the owner of the land was one Bero Ogolla. Counsel argued that by making such a finding, the learned magistrate ignored crucial evidence of fact.

5. Counsel further faulted the learned magistrate for finding that one Paul Wanyonyi Kigenyi acquired parcel No. S. Kabras/Shamberere/1340 through adverse possession, submitting that this was an erroneous finding because the case in court was not on adverse possession. According to counsel, the learned magistrate dealt with irrelevant issues which were not pleaded, and were therefore not properly before him.

6. Regarding ground 3 of the appeal, counsel submitted that the learned magistrate was in error by misapprehending the legal meaning of a lease. He argued that in law, only the proprietor of a parcel of land can enter into a lease capable of being enforced. According to counsel, Paul Wanyonyi not being the registered proprietor of the suit land, could not enter into a binding lease in terms of Section 40 of the Registered Land Act (Cap. 300 – now repealed).

7. Counsel further submitted, that since the purported lease was for more than 2 years, such a lease required registration and noting on the register in terms of Section 47 of the Act (Cap. 300). Counsel faulted the learned magistrate for finding that there existed a lease despite evidence to the contrary.

8. It was also submitted on behalf of the appellant that although the learned magistrate found as a fact that the lease required registration, it was wrong for her to turn around and hold that non registration was not fatal to the instrument (lease) which was a wrong interpretation of Section 47 of Cap.300.

9. On ground 5 of the appeal, counsel submitted that the learned magistrate was wrong in holding that the appellant invaded the respondent's leasehold over the suit property. Counsel submitted that the respondent did not have a lease over the suit land capable of being invaded because the purported lease was not a lease in accordance with the law as it existed then.

10. Counsel also submitted that the learned magistrate completely ignored the appellant's evidence including the documents tendered by the appellant to show that the land in dispute did not belong to the respondent.

11. Counsel for the respondent on his part supported the learned magistrate's finding that Paul Wanyonyi was the owner of the land, since the registered owner had not taken possession of the land. The respondent was the person in possession for a period of more than twelve years who was thus capable of entering into a binding lease with the respondent.

12. Counsel further submitted that Paul Wanyonyi Kigenyi had acquired an interest over the land by way of adverse possession and therefore the learned magistrate was right in finding so. As Paul Wanyonyi had occupied the land for more than 12 years, counsel was of the view that the learned magistrate was in order to find that the land had been acquired by way of adverse possession, and the learned magistrate was also right in finding that there existed a lease between Paul Wanyonyi Kigenyi and the respondent and that since it was a lease under customary law, it did not require registration.

13. Counsel also supported the learned magistrate's finding that the appellant invaded the respondent's leasehold since he had a valid lease. He argued that the learned magistrate had considered the appellant's evidence and found it unbelievable. According to counsel, the appellant

lacked ***locus standi*** to challenge the lease because he was not the registered owner of the suit land. He asked that the appeal be dismissed with costs.

14. I have considered the rival submissions by learned counsel for the parties and perused the record of appeal. As this is a first appeal, it is my duty to analyse and re-assess the evidence on record and draw my own conclusions in this matter. This position was well captured in the case of ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123*** where the Court of Appeal for Eastern Africa said;

> ***"An appeal from a trial by the High Court is by way of a retrial and the Principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 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 or 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 (Abdul Hamed Saif –vs- Ali Mohamed Sholan [1955] 22 E.A.C.A. 270)"***

15. The evidence on record shows that the respondent Festus Ngovilo, entered into a lease agreement with Paul Wanyonyi on 8/3/2005 for Kshs.64,000/= on parcel No. S/Kabras/ Shamberere/1340. He leased 1.5 acres to grow cane which was to run upto 2014. Later, the appellant asked him to stop working on the land which prompted him to file the suit.

16. Paul Wanyonyi told the court that he was the owner of the suit land and that he leased 1.5 acres to the respondent on 8/3/2005 for cane growing which was to run upto 2014 for Kshs.64,000/=. According to this witness, the appellant had no right to interfere with the respondent's lease. PW3, Zakaria Chinisiu Malovi, testified that he was present when the respondent and Paul Wanyonyi entered into the lease agreement. He was a witness to the lease and he counted the money which was Kshs.64,000/=

17. Another witness, Patrick Indeche Ingumba, was also a witness to the lease entered into on 8/3/2005 between the respondent and Paul Wanyonyi. He told the court that he resides near the leased parcel of land and he witnessed the appellant prevent the respondent from working on the land.

18. Jafred Anziya (PW5), a village elder, also testified that he knew both the respondent and appellant as people from his village, that on 8/3/2005, Paul Wanyonyi leased out 1.5 acres to the respondent at Kshs.94,000/=. Later, the appellant who is Paul Wanyonyi's son, attempted to prevent the respondent from working on the leased portion of land. According to this witness, the suit land belonged to Paul Wanyonyi and the appellant had no right to stop the respondent from working on the land.

19. Nashon Nyongesa Nguvilo (PW6) a witness to the lease agreement testified that he knew the appellant as a neighbour. Paul Wanyonyi and the respondent entered into a lease for ten years but the appellant prevented the respondent from working on the land.

20. At the conclusion of the respondent's case, the appellant testified and told the court that his father, Paul Wanyonyi, had taken a loan from A.F.C. but failed to service it with the result that the land was on 27/12/1979 sold by A.F.C. to one Bero Ogolla, in whose name the land is still registered. This was clear from the P.Exh.1, Search showing the land was still registered in the name of Bero Ogolla. He said that according to the lease agreement, the owner of the land, Bero Ogolla, did not sign it and it did not have the Parcel number. The appellant told the court that he lives on the suit land and that it is in the name of Bero Ogolla and not Paul Wanyonyi. He also faulted the lease agreement saying that it did not have parcel number.

21. The suit before the learned magistrate was for a Permanent Injunction, general damages and costs. But after considering the evidence on record, as reproduced above, the learned magistrate at page 32 of the judgment held as follows;

> ***"I find that the defendant's father (Paul Wanyonyi Kigenyi) is the owner of the said parcel of land No. South Kabras/ Shamberere/ 1340 as the defendant has admitted that he has lived on that land since he was born with his father (PW2) and is now 46 years old and the registered owner (Bero Ogolla) has never interfered with his occupation of the said land since 1979 when he purchased the said land after the defendants' father (PW2) failed to repay a loan he took with AFC and he was registered as the owner in 1980 and as under Section 7 of the Limitation of Actions Act an (sic) may not be brought to recover land after the end of 12 years from the date of which the right to action accrued. Under Section 17 of the same Act of expiry of that 12 years the title of the person who ought to have brought an action to recover land is extinguished as was the case with the said registered owner herein Bero…"***

22. I have perused the plaint filed herein on behalf of the respondent and I have not come across any averment or prayer that sought a declaration or finding by the court that Paul Wanyonyi was the rightful owner of the suit land. The suit was for an injunction and general damages. Moreover, the evidence adduced in court and more particularly the Search, clearly showed that one, Bero Ogolla, was the registered owner of parcel No. South Kabras/Shamberere/ 1340 having been so registered on 27/12/1979 and remains the owner to-date. The finding by the learned magistrate that the land belonged to Paul Wanyonyi Kigenyi was not supported by evidence and was therefore erroneous. The learned magistrate clearly ignored clear evidence of fact and made an erroneous finding which must be interfered with. The first ground of appeal succeeds.

23. The learned magistrate also made a finding that Paul Wanyonyi Kigenyi had acquired parcel No. South Kabras/Shamberere/1340 by way of adverse possession. The learned magistrate was in error in attempting to make a declaration for adverse possession where non had not been sought. As said earlier, the suit before the learned magistrate was for an injunction and general damages. Paul Wanyonyi Kigenyi, the person in whose favour the court made a finding, was also not a party before that court.

24. The declaration for adverse possession was not only made in favour of a non litigant, but also where it had not been sought. Moreover, a suit for a declaration that a person has acquired title to land by operation of the law under Section 38 of the Limitation of Actions Act, can only be brought by way of Originating Summons as required by Civil Procedure Rules. Order 37 rule 7 (1) the Rules provides as follows;

> ***"An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons."***

Making a declaration for adverse Possession in any other suit other than one commenced by way of Originating Summons is unprocedural and therefore unsustainable.

25. I must also point out that under Section 38 of the Limitation of Actions Act (Cap. 22 Laws of Kenya) where a person claims to have acquired title to land by way of adverse possession, such a person may apply to the High Court that he be registered as the proprietor. The jurisdiction to make a declaration for adverse possession can only be exercised by the High Court. It is clear that by making such a declaration, the learned magistrate exercised a jurisdiction she did not have, in favour of a person who was not a party before her and on a relief that was not sought. The learned magistrate was in error and on this the second ground of appeal too, must succeed.

26. The respondent claimed to have entered into a lease with one Paul Wanyonyi Kigenyi over land parcel No. South Kabras/ Shamberere/1340 for a period of ten years from 2005 to 2014. The said Paul Wanyonyi Kigenyi was not the proprietor of the land and could not legally enter into a binding

lease. He had no proprietory interest over the suit land, and had no interest capable of being passed on to the respondent. The lease purportedly entered into between him and the respondents herein was not a lease, and could not bind the parties.

27. Under Section 45 of the Land Registered Act (Cap. 300 – now repealed), it is the proprietor of land who may lease out the land. According to Section 47 of the same Act, a lease for more than two years has to be in a prescribed form and has to be noted on the register of the parcel of land. The purported lease was not in the prescribed form, was made by a party who was not the proprietor of the land and was not noted on the register. The purported lease did not also sufficiently describe the land as well as the leased part as required by Section 45 of the Act. The appellant could not have invaded a lease that did not exist.

28. Although the learned magistrate found as a fact that the lease being for more than two years required registration, she went on to find that lack of registration did not render the instrument fatal but invited penalty. The learned magistrate did not say what penalty she had in mind since Section 47 did not refer to or mention any penalty.

29. Finally, the learned magistrate failed to consider the evidence of the appellant. I have perused the record of Appeal and the judgment but I have not seen where the appellant's evidence was considered. Had the learned magistrate given due consideration to the evidence including the Search which clearly showed that the land belonged to a person other than Paul Wanyonyi, she would have arrived at a different decision, and from that she would also have found that there was no valid lease capable of being invaded by the appellant. What existed between the respondent and Paul Wanyonyi Kigenyi was a local arrangement which did not have any force of law and upon which a proper legal claim could not be founded.

30. For the above reasons, the applicant's appeal is allowed with costs. The learned magistrate's decision of 17/11/2011 is set aside and the Respondent's suit before the Senior Resident Magistrate's Court dismissed with costs.

31. Orders accordingly.

Dated and delivered at Kakamega this 24th day of February, 2015

E. C. MWITA

J U D G E