



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC APPEAL NO. 13 OF 2013

(Being an Appeal from the Judgment of the Honourable Chief Magistrate-Lucy Gitari delivered on 27th January 2013 in Malindi CMCC NO. 97 of 2006)

1. YUSUF ABDULLAHI

2. SAID SALADO ABDI.....APPELLANTS

=VERSUS=

SAID SALIM MBARAK.....RESPONDENT

J U D G M E N T

Introduction:

1. This is an appeal from the Judgment of Honourable Lucy Gitari dated 27th February 2013.
2. In the said Judgment, the learned Magistrate confirmed her Judgment of 21st April 2010 in which she dismissed the Plaintiffs' (Appellants') suit.

The Appellants' case:

3. In the Memorandum of Appeal, the Appellants has raised seven grounds which can be summarised as follows: that the learned Magistrate erred by preferring the evidence of a layman as compared with that of the expert witness; that the learned Magistrate erred when she stated that she could not change her Judgment although she agreed with the evidence of PW6 and that the learned Magistrate erred when she failed to note that she had set aside her Judgment and there was no Judgment to refer to.
4. The Appellants' prayer is that the Judgment of the learned Magistrate should be set aside and the Appellants' suit be allowed.
5. The parties agreed to dispose of the appeal by way of written submissions.

The Appellants' submissions:

6. The Appellants' counsel submitted that at the time the trial court made the initial Judgment, the court was convinced that plot number 84, 39 and 40 was one and the same plot until the time when an application for review was filed.

7. Counsel submitted that even after the court allowed the surveyor to testify after she set aside her Judgment, the trial Magistrate still insisted that she believed the evidence of the Town Clerk as compared with that of the surveyor, PW6.
8. The Appellants' counsel submitted that it was wrong for the Magistrate to refuse to depart from her earlier findings having set aside the Judgment and proceeded to allow further evidence to be adduced; that the learned Magistrate retained her original jurisdiction once she set aside her Judgment and that the Magistrate was not dealing with an Application for review when she delivered the Judgment.

The Respondent's submissions

9. The Respondent's counsel submitted that after re-opening the case, the trial court analysed the new evidence and rightly found that the Plaintiff had failed to prove his case.
10. Counsel submitted that the evidence of PW6 was an opinion which was not binding on the court.
11. The Respondent's counsel submitted that PW6 confirmed that the Respondent was developing plot number 84 and not plot number 39 and 40.
12. The Respondent's counsel submitted that the evidence of the District Surveyor, DW2, corroborated with the evidence of PW4, the Town Clerk and on that account, the court was entitled to reject the evidence of PW6.
13. The Respondent's counsel finally submitted that although the court had set aside its earlier Judgment, the evidence on record did not alter at all. According to counsel, the evidence on record was still in favour of the Respondent. Counsel submitted that the evidence on record shows that the Respondent has not encroached on plot numbers 39 and 40 as claimed by the Appellant.

Analysis and findings:

14. As I have already stated, the trial court dismissed the Plaintiffs' case even after re-opening the case and recalling more witnesses.
15. This being a first appeal, this court is required to analyse the evidence on record and arrive at its own conclusion.
16. According to the Amended Plaint filed in the lower court, the Appellants averred that they were the owners of commercial plots numbers TRCC/MINIJILA/C/39 and TRCC/MINIJILA/C/40 and that they were duly registered as owners by the County Council of Tana River. However, in the year 2007, the Respondent encroached on the two plots and commenced developments thereon.
17. In the amended Defence, the Defendant/Respondent averred that the plot he was developing was plot number 84 and not plot numbers 39 and 40 as alleged by the Plaintiffs.
18. According to the evidence of the 1st Plaintiff, PW1, he bought plot number 39 from Esther Kabute Ezekiel. After purchasing the plot, PW1 informed the court that he filled a prescribed form which he took to the county Council for the purposes of effecting the changes. The said changes were effected by the Council. PW1 produced in evidence the form that he filled and the Minutes of the Council.
19. PW1 stated that he had no claim over plot number 84.
20. The 2nd Plaintiff, PW2, stated that he bought plot number 40 from Omar Said Awadh.
21. It was his evidence that the Council effected the changes vide Minutes number 9 of 7th August 2008.
22. According to the evidence of the then Clerk of Tana River County Council, PW4, Ester Ezekiel sold to the 1st Plaintiff, PW1, plot number 39 and the said changes were minuted by the Council on 7th August 2008. It was his evidence that indeed the 2nd Plaintiff purchased plot number 40.
23. However, it was the evidence of the Clerk PW4, that he never signed the transfer forms.
24. According to PW4, the records of the County Council still showed that plot number 39 was in the name of Esther Ezekiel.
25. On the issue of plot number 40, it was the evidence of the Clerk, PW4, that the issue of the transfer of the plot to the 2nd Plaintiff was never discussed by the Council because the plot had a dispute.
26. It was the evidence of the Clerk that plot numbers 39 and 40 were consolidated to become plot

- number 84 and that the said plot was registered in the name of Omar Said Awadh.
27. The evidence of PW4 was that there were two Part Development Plans (PDP) dated 29th October 1997 and 10th November 2008 which shows the existence of plot number 84.
 28. In cross examination, PW4 stated that he did not have records to show that plot number 39 and 40 were consolidated. It was his evidence that indeed the Council approved the transfer of plot number 39 from Esther Ezekiel to the 1st Plaintiff.
 29. Omar Saidi Awadh, PW3 and PW5 informed the court that they sold plot numbers 39 and 40 to the 1st and 2nd Plaintiffs respectively.
 30. DW1, Jamal Barak, gave evidence on behalf of his deceased brother, Said Salim Mbarak, the Respondent herein.
 31. According to DW1, he did not know anything about plot numbers 39 and 40. It was his evidence that the Defendant was developing plot number 84.
 32. The witness produced communication from the Council to show that plot number 84 belongs to his late brother.
 33. In her Judgment of 21st April 2010, the learned Magistrate was of the view that the Plaintiffs had not proved their cases because their names did not appear in the register of the County Council.
 34. However, when the Plaintiffs/Appellants applied for review of the Judgment, the learned Magistrate allowed the Plaintiffs' to adduce further evidence.
 35. The evidence of Walter Okoth Mbogo, who is a surveyor (PW6) was that indeed plot numbers 39, 40 and 84 do exist in Garsen.
 36. It was the evidence of PW6 that he visited and identified the three plots in August 2010 and prepared a report which he produced in evidence.
 37. It was the evidence of PW6 that in preparing his report, he relied on part development plan numbers TRB/355/2004/03 and TRD/355/2007/01 which he annexed on the report.
 38. It was his evidence that the part development plan for plot number 84 shows that the plot was allocated to Salim Nassir and sons and that he was able to identify plot numbers 39, 40 and 84 on the ground. It was his evidence that plot number 84 is represented on TPD/1355/2007/01, while plot numbers 39 and 40 are represented by PDP reference number 1355/2004/03.
 39. According to the witness, as one approaches Garsen from Malindi, plot numbers 39 and 40 are on the left side of the road while plot number 84 is on the opposite side.
 40. To rebut the evidence of PW6, the Defence called Mr. Ruben Makero Kidadia, a government surveyor (DW2).
 41. His evidence was that when he prepared his report, plot number 84 was under construction. According to the witness, plot number 93 was allocated to Garsen Petrol Station via PDP P1 TRD 1355/199841 while PDP TRD 1355/2001/01 is in respect to plot numbers 84; that plot number 93 is not plot number 84 and that the report by PW6 was not professionally done.
 42. After hearing the evidence of the two surveyors, the learned Magistrate still dismissed the Plaintiffs' case as follows:

“While PW6 has shown that there is another plot number 84, I find that the matter raised by the Plaintiff would need a Judgment that will change my earlier findings of fact. It would amount to sitting on my own appeal. There were many issues in the Judgment where I made findings of fact to arrive at the Judgment which are still intact and I cannot change the findings at this stage.”

43. Having re-opened the case, the trial court was entitled to arrive at a different decision if the evidence adduced by the two witnesses supported such a decision. The learned Magistrate erred when she found that she would be sitting on her own appeal if she arrived at a different decision after re-opening the case.
44. In view of the evidence of PW6 and DW2, the learned Magistrate was supposed to evaluate the whole evidence afresh and arrive at a decision which was independent of the earlier decision.
45. Having said so, I am supposed to determine, based on the evidence that was produced in the lower court the person entitled to the suit property.
46. The evidence of PW4 and PW6 are at variance. According to the Town Clerk, PW4, plot numbers 39 and 40 were consolidated to create plot number 84. However, according to the evidence of PW6, the three plots exist on the ground. The report by the District Surveyor, DW2 did not assist

- matters. It was a convoluted report that was of no assistance.
47. The Town Clerk did acknowledge in his evidence that according to the records, plot number 39 was initially owned by Esther Ezekiel, PW3. His evidence collaborated with the evidence of Esther, PW3.
 48. The Clerk, PW4, further stated that the Council, through its Minutes, approved the transfer of plot no. 39 from Esther to the 1st Plaintiff. He produced the Minutes dated 26th October 2005 as PEXB 3. The receipts showing the payments that were made by Esther and the Transfer form showing the transfer of the land from Esther to the 1st Plaintiff were produced as PEXB 1 and 2 respectively. The Minutes shows the approval of the transfer of plot no. 39 from Esther to the 1st Plaintiff.
 49. I have perused the Minutes of the Town Planning Committee dated 7th August 2008 in which the County Clerk was present.
 50. According to Min 9/07/8/2008, the Committee was referred to a list of 76 cases for transfer. The members noted that some of the plots that were to be transferred to new owners had disputes. All the applications for transfers were approved by the Committee except six which had disputes.
 51. According to the Minutes of 7th August 2008, the transfer of plot number TRCC/MJL/C/40 from Omar Said Awadh to Ali Salado Abi was approved. The plot was indicated to be in Minijila and was for commercial purposes.
 52. The 2nd Plaintiff also produced in evidence the receipts showing the payments that he made to the Council on 13th March, 2008 when plot number 40 was transferred to him. The said receipts were produced as PEXB 8a-c. The receipts issued to the 1st Plaintiff by the Council in respect of plot number 39 and dated 28th December, 2003 were produced as PEXB 4b.
 53. The totality of the evidence produced in the lower Court shows that indeed plot numbers 39 and 40 existed in an area called Minijila. The evidence further shows that both the initial owners of plot number 39 and 40 paid the requisite fees to the Council. The Minutes dated 26th October 2008 and 7th August 2008 further shows that the Council approved the transfer of the two plots from the initial owners to the 1st and 2nd Plaintiffs respectively. Those Minutes were signed by the Town Clerk.
 54. The problem over the two plots mentioned about appears to have commenced when the Defendant sought for land to put up a petrol station. According to the letter of the then District Commissioner dated 7th January 2008, his office had asked Mr. Salim Nassir and Sons (the Defendant) to quickly and urgently go ahead and construct a petrol station in Minijila area to take care of the needs and requirements of the operations of this new District.
 55. The letter by the District Commissioner in support of the construction of a petrol station in Minijila area is precedent by a letter dated 28th July 1988 by the Clerk to Council. In the said letter, the then Clerk approved the construction of a petrol station in Minijila immediately the place is allocated. The said letter was produced as DEXB 5.
 56. However, the actual allocation of the land to the Defendant to put up a petrol station did not begin until sometimes in the year 2008. According to the letter dated 9th July 2008 by the Clerk (PW4), the Clerk informed the District Physical Planning Officer that he had no objection to the approval of plan number TRD/1355/2007/01-existing petrol service station for Salim Nassor and Sons. The said plan has been annexed on the Report of the District Surveyor, DEXB6 and the Report of PW6. The plot number indicated is 84 and the owner is shown as Salim Nassor & Sons.
 57. On 9th May, 2008, the Clerk (PW4) had informed the Defendant vide a letter that plot numbers 39 and 40 did not belong to M/s Yusuf Abdullahi and Ali Salado Abdi, the Plaintiffs.
 58. The letter by PW4 dated 9th May 2008 in which he claims that the Plaintiff did not own plot numbers 39 and 40 has an annexure of the register certified as a true copy by the Council. The said register shows that the two plots are owned by Esther Karito Ezekiel and Omar Said Awadh.
 59. As I have already stated, evidence was produced to show that Esther and Omar transferred the two plots to the 1st and 2nd Plaintiffs respectively, an act that was approved by the Council. Indeed, the records indicate that the said transfers were in possession of PW4 as at the time he did the letter dated 9th May 2008 denying that the Plaintiffs did not own plot numbers 39 and 40, or any plot within Minijila.

60. It would appear, from the evidence produced in the lower court, that the Clerk (PW4) was determined to allocate the Defendant plot number 39 and 40. Whether those are the plots that are represented in PDP no. 1355/2007 as plot number 84 will emerge shortly.

61. In his letter dated 21st January 2008 which was produced as DEXB3, the Clerk states as follows:

“This is to confirm that the above plot (plot No. 84-PDP No. TRD/1355/2007/01) belongs to Said Salim and measures 0.27 Ha. This correspondence supersedes the other previous ones and is in conformity with an earlier Council and District Commissioners commitment of 1988 and 1990”

62. It would appear that the Defendant, having realised that the said plot number 84 which the Council was allocating to him was previously plot numbers 39 and 40 made further inquiries. That explains why the Clerk (PW4) had to do the letter of 9th May 2008 to the Defendant informing him that plot numbers 39 and 40 did not belong to the Plaintiffs but to Esther and Omar Said Awadh. The Clerk was aware that what he was telling the Defendant was not true because the records held by the Council, including the Minutes showed the contrary. Indeed, the Minutes of the Council were produced by the Clerk, PW4.

63. In his evidence, the Clerk, PW4 stated as follows;

“Minute No. 9 is talking of approval of plot number 40. Minute number 6 had excluded the plot as the dispute was in court. There was a petrol station to be built on plot no. 84. Minute 6 and 9 are contradictory. Plot number 39 and 40 were consolidated to come to plot number 84. Plot no. 39 and 40 were a previous allocation. According to County Council Register Omar Said is the registered owner. The plot has not been transferred to any other person”.

64. It is clear from the above testimony by PW4 that he was very economical with the truth. At one point he states that plot number 39 and 40 had been allocated and then states that the two had been consolidated.

65. PW4 does not state how the Council consolidated two plots belonging to two different individuals without informing them. PW4 did not produce any evidence to show the process that was followed before the previous allottees of plot numbers 39 and 40 were dispossessed of their plots and then consolidated to create plot number 84.

66. The bottom line of the evidence of the Clerk, (PW4), however, is that plot number 84 is a creation of plot numbers 39 and 40, the ownership of plot number 39 and 40 notwithstanding.

67. I have arrived at the above conclusion on the basis of the letter by PW4 and his own evidence. In fact, PW4 alluded to the fact that the initial allottees of plot numbers 39 and 40 were disposed of the plots when they failed to develop them. However, PW4 admitted that the initial allottees were not issued with any notice before the said dispossession although they were entitled to the notices.

68. The evidence of DW1 was that the property that the Defendant is claiming is plot number 84 and not plot numbers 39 and 40. It was his evidence that his brother was building a petrol station on plot number 84 having applied for it in 1988.

69. As I have already stated, although the District Commissioner alluded to the issue of putting up a petrol station in Minjila area in 1988, the allocation of the plot to the Defendant commenced sometimes in the year 2008. Indeed, by May 2008, the PDP number TRD/1355/2007/01 in respect to the land that was meant for the construction for a petrol station had not been approved.

70. In view of the evidence of PW4 and the Minutes that were produced in evidence, plot numbers 39 and 40 which the Council purported to allocate to the Defendant had already been allocated to Esther and Omar who sold them to the Plaintiffs.

71. The Council could not amalgamate the two plots to create plot number 84 and allocate it to the Defendants without following due process. Indeed, no register was produced by the Clerk to show the existence of plot number 84 or how plot numbers 39 and 40 were consolidated to create plot number 84.

72. Two surveyors, PW6 and DW2 were called to testify of the existence of plot numbers 39, 40 and 84.

73. PW6 informed the Court that the three plots exist on the ground.

74. According to the report of PW6, he relied on the existing Part Development Plans and the beacon certificate dated 13th December 2004 to determine the existence of plot numbers 39 and 40.
75. It was his evidence that while on the ground, he identified the beacons of plot numbers 47, 46, 45, and 44 measuring 0.045 Ha each; that the plots had been surveyed and had beacons; that from the beacons of plot number 44 which borders plot no. 43 he took measurements to locate and identify the beacons for plots nos. 43, 42, 41, 40, 39, 38, 37, 36 and 35.
76. It was his evidence that a petrol station and a boundary wall had been built on an area reserved for commercial cum residential plot numbers 43, 42, 42, 40, 39, 38, 37, 36, 35 and part of the area reserved for the bus park on PDP number TRD/1355/2004/03.
77. It was the evidence of PW6 that he also identified the location of plot no. 84 as represented on PDP No. TRAD/1355/2007/01. PW6 annexed the said PDP on his report. According to him, plot number 84 represented in PDP No. TRAD/1355/2007/01 is located to the right side of Malindi-Garsen road as you face Garsen. There is another petrol station which is coming up on that plot. That is the plot that was allocated to Said Salim vide the letter dated 21st January 2008.
78. On the other hand DW2 identified the location of plot number 84 based on PDP NO. TRD/1355/2007/01 (the same PDP relied on by PW6) dated 29th October 2007 and TRD/1355/2009/02.
79. According to DW2, the 2009 PDP separated plan number TRD/1355/06/1.
80. It was the evidence of DW2 that the whereabouts of plot numbers 39 and 40 could not be immediately established in the location. However, after placing the part development plan on the township development plan, he confirmed the position of plot nos. 39 and 40. DW2 does not state in his report what had happened to plot numbers 39 and 40 after identifying that they had existed in the locality. He decided to be very economical with the truth.
81. In his conclusion, DW2 remarked that the numbering system of the plots was the preserve of the Council.
82. The only conclusion I can arrive at is that the Defendant's surveyor, DW2, conveniently ignored to look at what had happened to plot numbers 39 and 40 after the PDP that was prepared in the year 2009 superseded the other PDP's. It is only him and PW4 who knew of what happened to plot numbers 39 and 40.
83. According to the letter that was relied on by DW2 dated 24th March, 2009 and authored by County Clerk, Minjila informal settlement had been re-planned afresh and there were a few variations between the new and the old development plan. The Clerk further stated as follows:

“You are therefore advised to take note of all the changes and prepare new part development plans to cater for any displacements in the old allocations. By copy of this letter, the District Surveyor is advised to refer all cases to committee plots in the new development plan to this office for relocations.”

84. It is this re-planning and relocation by the Clerk that, in my view, led to the purported allocation of plot numbers 39 and 40, amongst others, to the Defendant as confirmed in the letters that I have already alluded to. This consolidation of plot numbers 39 and 40 was done despite the Defendant having been allocated plot number 84 which is across the road and where another petrol station is coming up.
85. PW6 traced the existence of plot numbers 39 and 40 by using the old plots that had beacons. The ingenious reallocation of plot numbers 39 and 40 was confirmed by PW4. DW2, who is an employee of the Council tried to compound the problem by failing to produce in evidence all the records held by the Council.
86. The Plaintiffs knew the plots that they had purchased from the previous owners. The Defendant came to the scene much later and had no idea that plot numbers 39 and 40 had already been allocated and sought to be allocated the same plots even after being allocated Plot No. 84.
87. In conclusion, I agree with the findings of PW6 that plot numbers 39 and 40 on which a petrol station was being constructed belong to the Appellants. The Respondent's plot is the one on the right side of Malindi-Garsen road and where another petrol station is being constructed and not the plots on the left side of Malindi-Garsen Road. The Respondent wants to put up a petrol station on both sides of the road whereas he was allocated only one plot, the one on the right side of Malindi-Garsen Road. That is unacceptable.

88. For those reasons, I set aside the Judgment of the lower court in CMCC No. 97 of 2008 and allow the Plaintiffs' Plaint dated 18th April 2008 with costs. The Respondent shall also pay the costs of this Appeal.

Dated and delivered in Malindi this **20th** day of **February**, 2015.

O. A. Angote

Judge