



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC APPEAL NO. 009 OF 2021

WILKISTER ACHIENG' MAMBOLEO.....APPELLANT

- VERSUS -

JOHNSTONE ODUORY.....RESPONDENT

(An appeal from the judgement and decree made in Busia Chief Magistrate's Court

by Hon. Lucy Ambasi CM delivered on 29th June 2021 in Busia

CM ELC Case No. 58 of 2019)

J U D G E M E N T

1. This appeal is against the judgement/order made by Hon. Lucy Ambasi CM delivered on 29th June 2021 in Busia CM ELC Case No. 58 of 2019. The Appellant raised the following grounds in her Memorandum of Appeal dated 16th July 2021;

1. The Learned Magistrate erred both in law and in fact by holding that the Appellant had failed to prove her case on a balance of probability 2) That the Learned Magistrate erred both in law and in fact by failing to write down the evidence that the Appellant tendered during trial; 3) That the Learned Magistrate erred both in law and in fact by failing to consider the documentary evidence tendered by the Appellant during the hearing of the suit and hence arrived at a wrong finding;

4. That the Learned Magistrate erred both in law and in fact in analysing the evidence tendered by the Appellant and hence arrived at the wrong finding;

5. That the Learned Magistrate erred both in law and in fact by considering the Respondent yet the Respondent did not tender any evidence to challenge the Appellant's claim.

2. The Appellant urged the court to find merit in her appeal and the same be allowed with costs in this Court and the trial Magistrate's decision be set aside.

3. The record of appeal was filed on the 28th of September, 2018 and the appeal was admitted to hearing on the 25th of October, 2021. The Court issued directions on the 23rd of November, 2021 when the Appellant chose to rely on the record of appeal while the Respondent requested for a month to file his written submissions. By the time of writing this judgement, the Respondent had not filed his submissions. This Court shall therefore rely on the record of appeal for the determination of this matter.

4. From the pleadings and submissions before this Court I frame two issues for determination:

a. Whether the trial magistrate misdirected herself in finding that the Appellant's case was not proved; and

b. Whether the appeal has merit.

5. This is a first appeal in which the law permits this court to consider both the facts and the applicable law while determining the appeal. From the pleadings on record, the Appellant's claim was for an eviction order of the Defendant from her suit parcel number L.R

BUKHAYO/KISOKO/3111 and a rectification of the mutation form. She also prayed for the costs of the suit.

6. The Appellant has stated in her grounds of appeal that the trial magistrate failed to take into account the evidence she adduced during trial as well as the documents produced which documents proved that her land parcel had been encroached by the Defendant. The Appellant testified on the 27th of February, 2020 during which she produced the documents in her list of documents, certificate of official search for Bukhayo/Kisoko?3111 & 3112 as PEx1 and 2, copy of title Kisoko/3111 as PEx 3.

7. The Respondent filed a defence on 28th March 2019 denying the claim. He also filed a list of documents which included a mutation for Bukhayo/Kisoko/2077 which created the two suit parcels, and a report by the Land Registrar dated 24th January, 2019. The Respondent and gave her testimony on 27th February 2020 as well as filed closing submissions. In his submissions he stated that the Court had no jurisdiction to handle the matter as the same ought to have been handled by the Land Registrar first.

8. The Appellant was seeking eviction orders from the portion of her land which according to her, the Respondent had encroached onto. The burden of proof rested upon the Appellant to establish the extent of the encroachment before the orders could be issued to her. The Appellant had filed a witness statement that was made up in four sentences. She stated that she is the registered owner of L.R 3111. That the Respondent has forcefully entered on a portion of this land and has refused to leave.

9. One of the grounds of appeal was that the trial Magistrate did not record what she stated in her oral evidence. The Appellant did not file any submissions in support of this ground therefore it is impossible for me to ascertain what she said that according to her was not recorded. This is a court of record thus guided by what is recorded or documents filed which forms part of the record.

10. This court will analyze the documents produced in evidence to determine if the appeal is merited. The certificate of searches produced show that the Appellant's land is approx. 0.59ha in size while the Respondent's land L.R. 3112 is 0.1ha in size. The Appellant's copy of title also reads 0.59ha and the Respondent's title is also reading 0.59ha. The original number L.R. 2077 measured approx. 0.69ha. It appears there is a problem with one of the titles as both cannot be 0.59ha.

11. On the face of the documents produced, there is need for rectification of the register to have the sizes of the titles reflect the correct size. The Respondent produced an incomplete mutation form which showed that L.R. 3111 was measuring 0.1ha while L.R. 3112 measured 0.59ha. The land Registrar ought to have been called to explain the variance in the sizes appearing on the titles, searches and the mutation. The documents presented by the appellant is sufficient proof that there was a need to rectify the mutation and or the records.

12. However, this court will not make an order for rectification without supporting documents explaining ground positions as well as parcel file for the original number 2077. This is also account that the Respondent stated that he bought 1 ½ acres of land from the Appellant's mother. The Appellant admitted her mother sold to the Respondent land but that it was ¼ or ½ acre. If what was sold was ½ acre then it contradicts the size of ¼ as shown in the search for parcel 3112. The Respondent produced a letter from the County Land Surveyor, Busia dated 24th January, 2019 addressed to the Land Registrar which said a correction had been made on page one of the mutation to conform with page two. The letter proceeded to indicate that L.R. 3111 should read 0.10ha while 3112 to read 0.10ha.

13. The Appellant was aware of this letter which was served upon her before the hearing of the case. The letter essentially stated that she is only entitled to ¼ acre portion and not 0.59ha as indicated on her title. She did not lead any evidence to contradict the contents of the said letter. Consequently, on the basis of the evidence before court, I find her claim for eviction as premature and not proved.

14. The trial court in its analysis held that:

The Plaintiff however failed to furnish the Court with evidence of encroachment. As submitted by the defence, boundary disputes and questions of encroachment are proven by a surveyor's report.

In the case of Samuel Wangau Vs. AG & 2 others (2009) eKLR it was held that:

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■■■.Indeed, both PW1 and DW 2 were agreeable that for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include hedges, fences and roads. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.’**

15. I find no fault on the part of the honourable chief magistrate in declining to make an order for the eviction of the Respondent where She availed no expert reports or opinions to ascertain that the indeed the Respondent had exceeded his intended boundary. In the absence of the Land Registrar's and the Land Surveyor's reports it would be difficult to arrive at a suitable conclusion on the issue of encroachment.

16. In light of the analysis given above I find that this Appeal has no merit and the same is dismissed. The Appellant shall surrender her title to the Land Registrar for rectification to read 0.10ha to conform with records. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 30TH DAY OF MARCH, 2022

A. OMOLLO

JUDGE