



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCA CASE NO. 30 OF 2021

JOSHUA MAKIYA ARONI.....APPELLANT

VERSUS

1. LIKONI MAINLAND TAXI SERVICE GROUP

2. KHAMISI M. NGUMI GUGU

3. HASSAN SWALEHE M. NGUMI

4. AMANI MOHAMED.....RESPONDENTS

JUDGEMENT

This is the appeal from the Judgment of Senior Principle Magistrate Court Honourable F. Kyambia at Mombasa delivered on 5th April 2019 in the Senior Resident Magistrate's Court Civil Suit No. 655 of 2011 Joshua Makiya Aroni -vs- Likoni Mainland Taxi Services Group & 3 others. Joshua Makiya Aroni the above named Appellant being aggrieved and dissatisfied by the judgment of and order of the learned Senior Principal Magistrates Court in Mombasa Civil Suit No. 655 of 2011 delivered on 5th April 2019 appeals against the said judgment and order on the following grounds;

1. The Honourable Senior Principal Magistrate erred in law and in fact by failing to find that the Plaintiff/Appellant herein had proved his case on a balance of probability as required by law to enter judgment against the Defendants/Respondents herein.
2. The Learned Magistrate erred in Law and in fact in failing to find that the Defendants/Respondents had invaded the plaintiff/appellant's frontage to his suit land being MSA/BLOCK/MS/1680.
3. The Learned Magistrate erred in law and in fact by failing to take into account the evidence of the Appellant/Plaintiff that Defendants/Respondents had obstructed the appellant's free access to the Appellant's suit land and that the Appellant is entitled free ingress and egress to the suit land.
4. The Learned Magistrate erred in law and in fact to come to finding that the Defendants/Respondent's occupation of the Plaintiff/Appellant's frontage is not an obstruction to the Appellant's suit property.
5. The Learned Magistrate erred in Law and in fact in concluding that the Appellant colluded with the County Government Officers to revoke a temporary License issued to the Respondents when there was no iota of evidence to proof the said contention.
6. The Learned Magistrate erred in law and in fact for arriving at a conclusion that the Respondents had a right of occupations of the road reserve, being the frontage of the Appellant's property.
7. The Learned Magistrate erred in law and in fact by failing to note that the Defendants parking of taxis was not a designated or gazetted parking area as required by law.
8. The Learned Magistrate erred both in law and in fact by failing to consider the evidence of DW4 to the effect that the Appellant's frontage and access to the road was completely obscured to the extent that in event of an emergency or development to the property there is no possible access or way leave.
9. The Learned Magistrate erred in fact and law by failing to appreciate the facts laid down before him by the Appellant and the Respondent but instead descended into the arena of the trial and proceeded to restate his own version of facts in complete departure from the pleadings before him.

10. The Learned Magistrate failed in fact and in law to consider the authorities laid before the court by counsel for Plaintiff/Appellant herein in support of the plaintiff/applicant's case.

11. The Learned Magistrate erred in law and in fact in failing to consider and appreciate the submissions of the Plaintiff/Appellant's Counsel.

12. The Learned Magistrate erred in both fact and law when he handed down a judgment propelled by whimsical and capricious reasoning whose sum effect tantamount to an assault to the cherished principles of the process and the adversarial system.

The Appellant prays that;

i) The appeal be allowed.

ii) The judgment by the court on 5th April 2019 be set aside and the said judgment be substituted with another order of allowing the Plaintiff/Applicant's suit with costs to the Defendant/Respondents.

The Appellant submitted that he is the absolute owner of the suit property. That the Respondents approached him and asked if they could use the frontage of the said land to put up a temporary structure and he agreed subject to the Respondents accepting to vacate upon request. They state that the Respondent has encroached and obstructed access onto the suit property. That there is no evidence that the frontage of the Appellant's suit property is a designated parking. That from the evidence of DW4 his frontage and access road has been completely obscured by the Respondents.

The Respondent submitted that the Appellant's property and portion of the Respondent's operation on the road reserve is separated by a high boundary wall, which the Appellants admits it was there at the time when he purchased the property, and also a cliff/quarry, making it impossible for them there to ever have been an access to the Appellant's property. Secondly, the evidence on record clearly shows that the Appellant has two (2) entrances to his property, one being the main entrance leading to the parking and the other one a foot path. They submit that the Respondents have never obstructed the Appellant's access to his property. That, from the record, the Appellant admitted that he has been using other portions of the road reserve herein for his purposes, to wit, the kiosks and chemist shop. The desire to get the Respondents from the road reserve herein, which is public land, is a ploy to expand the said business. In any event, the Appellant has no exclusive right to the road reserve and thus cannot mislead this Honourable Court to grant him what he has no right to. That all the exhibits produced by the Respondents have apparently not been included as part of the Record of Appeal.

That the Learned Magistrate cannot be faulted for the decision he arrived at in this matter, to wit, dismissing the Appellant's case. There is no evidence to support the Appellant's case, whether by himself nor the opposing evidence by the Respondent's Witnesses. That the Appellant has no case against the Respondents and thus not entitled to the prayers sought in the Plaint they thus urge the court to dismiss the Appeal herein same to all the prayers sought herein. This court has considered the Appeal and submissions herein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

Section 26 (1) of the Land Registration Act states as follows:

"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

"-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."

It is not in dispute that the Appellant is the proprietor of parcel of land known as MSA/BLOCK/MS/1680. The Appellant states that the Respondents have encroached and obstructed access onto the suit property. That there is no evidence that the frontage of the Appellant's suit property is a designated parking. That from the evidence of DW4 his frontage and access road has been completely obscured by the

Respondents. I have perused the proceedings of the lower court and I find that the averment that the access road is blocked is not factual. DW4 a Land Surveyor stated that the frontage of the suit land is the parking lot for the taxes. That there is no encroachment by the Respondents and the Defendants' land is accessible. That the taxi operators are on the road reserve which belongs to the government. The Appellant has no proprietary rights over the road reserve. I find that the Respondents have not encroached onto the Appellant's land nor have they blocked the access road. In *Mwanasokoni vs. Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the judgment as it was based on cogent evidence. This appeal is dismissed for lack of merit with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE