REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 43 OF 2018

JEREMIAH GAKURU NG'ANG'A.....APPELLANT

-VERSUS-

BROWN INZIANI SHAGWIRA.....1ST RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED.....2ND RESPONDENT

(Appeal against the Judgment and Decree of the Chief Magistrate's Court at Milimani delivered and signed at Nairobi on 27th July 2018 by Hon. D W Mburu Principal Magistrate in Civil Suit No. 465 of 2011)

JUDGMENT

INTRODUCTION

1. Vide Memorandum of Appeal dated the **20th August 2018,** the Appellant herein has raised the following Grounds of Appeal:

a. The Learned Trial Magistrate erred in both Law and in fact when he found that the Suit Property is Plot No. P6571 and not Plot No. A.335 contrary to evidence adduced by the 2nd Respondent, the allotting authority. On account of that erroneous finding, the Appellant was illegally deprived of Plot No. A.335.

b. The Learned Trial Magistrate erred in both Law and in fact when he found that the Suit Property belongs to the 1st Respondent merely on account of the 2nd Respondent's evidence that Plot No. P6571 exists on their records instead of making a determination of to whom the plot that the 1st Respondent was in occupation of belongs to.

c. The Learned Trial Magistrate erred in both law and in fact in making a finding of ownership based on assumed long and uninterrupted possession yet the 1st Respondent's claim was neither based on Adverse Possession nor was such a prayer sought in his Pleadings.

d. The Learned Trial Magistrate erred in both law and in fact in totally mis- constructing the evidence adduced and failed to appreciate sufficiently and/or at all the Appellant's submissions hence arriving at an erroneous Decision.

e. The Learned Trial Magistrate erred in both law and in fact in totally failing to consider the Application of the Doctrine of "first in time" in relation to the Ownership Documents held by the Parties vis-à-vis the actual Plot in dispute hence arriving at an Erroneous determination.

f. The Learned Trial Magistrate erred in both law and in fact in Dismissing the Appellant's Counter-claim contrary to the Evidence adduced and applicable law.

BACKGROUND:

2. The 1st Respondent herein filed and/or lodged the suit in the lower court vide Plaint dated the 9th March 2011, whereby same sought various orders *inter-alia;*

a. Declaration that the Plaintiff is the legal owner of Plot No. P6571 and an order directing the 2nd Defendant to issue the Plaintiff with a certificate of title.

b. Costs of the suit.

c. Interests.

d. Any other Relief.

3. Following the filing and service of the Plaint and summons to enter appearance, the 1st and 2nd Defendants herein duly entered appearance and thereafter filed a Statement of Defense whereby same denied the Plaintiff's claim. For clarity, the Appellant herein, who was the 1st Defendant also filed a Counter claim.

4. Subsequently, the matter in the Lower court proceeded to hearing whereupon the Plaintiff in the lower court (the 1st Respondent herein) tendered evidence and called two other witnesses, including the widow of the vendor.

5. On the other hand, the Appellant herein, (*who was the 1st Defendant*) testified and called one witness, namely Mr. Wilfred Ng'ang'a Gakuru, who was effectively alleged owner of the Plot as A.335.

6. Other than the Appellant herein, the 2nd Respondent, who was the 2nd Defendant also summoned and called one witness namely Mr. Jack kamau Wachira, who testified and produced documents for and on behalf of the 2nd Respondent.

7. Suffice it to note, that after the close of the Defendants case, the Parties herein agreed to file and exchange written submissions, which were indeed filed and exchanged and thereafter the matter was reserved for Judgment.

8. For coherence, the Judgment in respect of the subject matter herein was rendered by the trial court on the 27th July 2018, whereby the trial court entered Judgment for and in favor of the Plaintiff now the 1st Respondent herein on various terms including a Declaration that the 1st Respondent herein, (*who was the Plaintiff in the lower court*) is the legal owner of Plot No. P.6571.

9. It is the said Judgment which has provoked the subject Appeal and in respect of which the Appellant has proffered the various grounds of Appeal which have been itemized at the onset of this Judgment.

SUBMISSIONS:

10. The Appeal herein came up for directions on the 23rd November 2021, on which date it was confirmed that the Appellant had dully prepared and compiled a complete Record of Appeal and thereafter directions were given on the disposal of the Appeal.

11. For clarity, the Parties herein agreed to have the Appeal heard and disposed of by way of written submissions and in this regard, timelines for the filing and exchange of the written submissions were thereafter set and or scheduled.

12. Pursuant to the directions, the Appellant proceeded to and filed his written submissions on the 16th September 2021, whereas the 1st Respondent filed his written submissions on the 20th January 2022. On her part, the 2nd Respondent filed her written submissions on the 27th January 2022.

13. Suffice it to note, the three set of written submissions are on record and same have been duly considered and taken into account.

ANALYSIS AND DETERMINATION:

14. Having evaluated the Pleadings that were filed before the subordinate court, the Oral Evidence tendered and the Judgment of the trial Magistrate and having similarly Considered the submissions filed by and/or behalf of the Parties in support and in opposition of the subject appeal, I proposed to deal with the Appeal as hereunder;

a. Ground 1, Singularly.

b. Ground 2 and 3, Consolidated.

c. Grounds 4 and 6, Consolidated.

d. Grounds 5, Singularly.

GROUND 1 OF THE APPEAL

15. Before venturing to deal with the crux of the Issue raised and/ or captured in the first Ground of Appeal herein, it is important to observe and note that this being a First Appeal, this Honourable Court is vested with the Jurisdiction to re- evaluate the Evidence that was tendered before the Lower Court and to subject same to fresh and exhaustive scrutiny to ascertain whether the Lower arrived the correct factual findings.

16. Besides, it is paramount to note that this Court is also mandated to depart from the conclusions and findings of the Lower Court, if the

findings, were not supported by the Evidence on record, or same were contrary to or otherwise at variance with the obtaining position of the Law.

17. For clarity, the circumstances under which the Appellate Court can interfere with findings of the Lower Court were discussed and underscored in the Decision in the case of **Selle & Another versus Associated Motor Board Company Ltd and others [1968] 1 EA 123,** where the Eastern Africa Court Of Appeal held as hereunder;

> ***"An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally."***

18. Having made the foregoing observations, which are the guiding light in the determination of the subject matter, it is now appropriate to revert to and analyze the Evidence and how the Trial Court dealt with same.

19. Be that as it may, after reproducing the evidence tendered by the respective Parties in the lower court, the learned trial magistrate itemized three issues for determination and the first issue which was itemized for determination was; whether the subject property of the suit herein is Plot No. P6571 or A335, Embakasi Ranching Company Ltd.

20. Having itemized the said issue for determination, the Learned trial magistrate thereafter proceeded to and held as hereunder;

> ***Para 19:***
>
> ***This court has taken the efforts to study all the Documents produced in evidence by the Parties herein. Plaintiff exhibit 1, is the original handwritten sale agreement and the Plaintiff herein. It is accompanied by non-membership certificate of plot ownership, which was issued to John Gitau, deceased. I have contrasted those specific documents with the Defense exhibits. [Verbatim]***
>
> ***Para 20:***
>
> ***Although none of the Parties, holds a certificate of title over the suit property all the evidence produced during the trial left no doubt that the suit property is P6571 and not A335"***

21. It is worthy to note that the two sets of documents which were produced by the Plaintiff/1st Respondent before the court and which the learned trial magistrate seems to have taken into account are the sale agreement and the non-member certificate, the latter which was in the name of John Gitau Wangunyu, relating to Plot No. P6572 and not P6571. For clarity, it is important to point out that the 1st Respondent/Plaintiff filed a Supplementary Bundle of Documents dated the 6th October 2011 and Document number 3 therein related to the Non-member certificate of Plot No. P6572.

22. Nevertheless, the issue as to ownership of plot no. P6571 or otherwise, shall be addressed in respect of Ground number 2 and 3, which shall form the basis of the discourse hereinafter. For now, the important point to address is the ground location and/or delineation of Plot number P6571 versus A.335.

23. From the Judgment of the learned Trial magistrate it is apparent that after contrasting the two set of Documents produced by the Plaintiff/1st Respondent as against the ones produced by the Defendants (*read the appellant and the 2nd Respondent*), same was left with no doubt that the disputed ground, which comprises of the suit property was/is Plot No. P6571 and not A.335

24. I must point out that the Plaintiff, now the 1st Respondent herein admittedly did not produced a copy of the Registry index map, Part Development Plan and/or Beacon Certificate, to authenticate and/or show the Ground location and/or delineation of the Plot which same was claiming to be P6571.

25. On the other hand, it is also worthy to note that though the Plaintiff, now 1st Respondent had alleged in his evidence that the suit plot, namely P6571 was pointed out to him by a Surveyor working for the 2nd Respondent herein, same however, did not found it fit to call and/or to summon the Surveyor to come and testify concerning the ground position and/or delineation of the land, if any, that he identified and/or pointed out to the 1st Respondent.

26. It is also worthy to note that though the 1st Respondent herein had in his List of witnesses indicated that same would be calling a Director of the 2nd Respondent, as well as Mr. Mahinda, the Surveyor, who allegedly identified and/or pointed out the suit Property to the 1st Respondent, but it appears that there was a change of mind midstream, which change of mind was never explained.

27. Be that as it may, it is imperative to note that it is Mr. Mahinda, who is said to be the surveyor who pointed out and/or identified the ground position over and in respect of the suit property to the Plaintiff, (*now the 1st respondent*) herein. Consequently, the failure to call the said witness, must be taken that his evidence would have been adverse to the 1st Respondent's case.

28. In support of the foregoing observation, I adopt and restate the position of the law as enumerated in the case of **Peter Gichuki King'ara v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR,** where the court observed as hereunder;

The law that appears to me to be the most relevant to this situation is Section 119 of the Evidence Act, Chapter 80 Laws of Kenya. It provides as follows:-

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

This provision in our Evidence Act embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. (See Woodroffe's Law of Evidence, 9th Edition at Page 811-816).

29. Notwithstanding the foregoing, the determination of whether ground location, which was in dispute constituted Plot No. P.6571 or A.335, could certainly not be arrived at by contrasting documents on the table, in the manner that the trial magistrate purports to have done and thereafter come to the conclusion that the disputed portion of land formed Plot No. P6571 and not otherwise.

30. Finally, even if the comparison and contrasting of documents presented by both the 1st Respondent and the Appellant and the 2nd Respondent, was objectively undertaken, alongside the evidence tendered by the Parties, it would be difficult to see how the Learned trial magistrate came to the conclusion anchored on the basis of Paragraph 20 of his Judgment.

31. With humility, it is worthy to take cognizance of what DW2 (*but who essentially would have been DW3*), witness on behalf of the 2nd Respondent herein stated during cross examination by the 1st Respondents counsel. For clarity, he stated as hereunder;

> *"**The Plaintiff has constructed on plot No. A335.** Plot No. P6571 does not appear in our allocation records. It is not yet allocated, I am aware of double allocation on the 2nd Defendants land. I am not aware of wrong identification of plots.*

32. From the foregoing evidence, it is still apparent that had the Learned trial magistrate taken into account and/or considered the piece of evidence that was given by the only surveyor, who testified before the Court, same would not have arrived at the determination that the disputed property was (sic) no doubt Plot No. P.6571.

33. In my humble view, the Learned trial magistrate arrived at a slanted and Erroneous conclusion.

GROUND NUMBER 2 & 3:

34. The learned trial magistrate proceeded to and held that the 1st Respondent herein was the lawful and legal owner of the suit property, namely Plot No. P.6571. For clarity, the finding of the learned trial magistrate was premised and/or predicated on three factors, namely;

a. A sale agreement entered into between the 1st Respondent and John Gitau Wangunyu dated the 5th August 1999.

b. Copy of the non-member certificate in respect of Plot No. P.6571.

c. Occupation and Uninterrupted possession of the suit property.

35. However, it is important to note that during the testimony of the 1st Respondent herein, the 1st Respondent admitted that same did not have any letter of allotment which had been handed over unto him by the vendor, namely John Gitau Wangunyu, now deceased.

36. On the other hand, the 1st Respondent further admitted that same did not have any letter of allotment which had been issued unto him by the 2nd Respondent to confirm allotment and/or allocation of plot number P6571 or any other plot whatsoever. For clarity, it must be noted that a letter of allotment is the precursor to acquisition of title over and in respect of the subject plots.

37. Similarly, the 1st Respondent also conceded that same did not have a beacon certificate to show that the plot which same claimed to be his, was indeed surveyed and the boundaries thereof were demarcated. In this regard, it is important to underscore the centrality of a beacon certificate in the establishment and ascertainment of the ground position and/or location of a particular landed property.

38. Notwithstanding the foregoing, it is also imperative to note that the plot in question which is claimed by the 1st Respondent, is deemed to have been allocated to the 1st Respondent's predecessor by the 2nd Respondent and in this regard, the 2nd Respondent is therefore deemed to be the custodian of authentic records concerning ownership and ground position of the various Plots under her jurisdiction.

39. Suffice it to point out, that where a dispute does arise, concerning ownership of plots which are said to have been allocated by the 2nd Respondent, it would have been incumbent upon the 1st Respondent to endeavor to procure a witness from the 2nd Respondent and/or better still, to move the court to obtain summons to witness to compel a designated officer to attend court produce designated records.

40. Nevertheless, the 1st Respondent herein did not do so and same was content to rest his case on the basis of the three Documents which were tendered before the court. Sadly though, none of those Documents showed that plot number P6571 was registered in his name.

41. I must point out, that it is incumbent upon the Plaintiff, now the 1st Respondent and/or such other Party who makes an assertion, to prove

the assertion and/or the fact, before the court can grant the relief sought. Simply put, the burden of proof lies on the person, who wishes the court to make a favorable finding in his/her favor.

42. In this regard, it is imperative to take note and/or cognizance of the provisions of Sections 107 and 108 of the Evidence Act, which provides as hereunder;

> ***107. Burden of proof***
>
> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***108. Incidence of burden***
>
> ***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

43. Other than the foregoing, it is also important to take note of the Decision in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR,** where the honourable court observed as hereunder;

> ***.Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:***
>
> ***"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."***
>
> ***That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.***
>
> ***It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.***

44. Notwithstanding the foregoing, the learned trial magistrate also made a perplexing finding that because the 1st Respondent was in exclusive possession of the property in question as opposed to the Appellant herein and given the length of time that same had been in occupation thereof, there was a connotation of ownership.

45. In my humble view, the reasoning of the learned trial magistrate is not sound in law. For clarity, if the position taken by the learned trial magistrate was to hold sway, then it means a trespasser who has entered upon and constructed on a piece of land, irrespective of title, can stand up against the registered owner thereof, merely on the basis of occupation.

46. Be that as it may, I must also point out, that the suit before the subordinate court was not one for adverse possession so that the issue of the length and duration of possession and occupation, would become material in determining ownership of the suit property, either in the manner the learned magistrate attempted to do or at all.

47. But, it is also worthy to point out that a claim founded on adverse possession would still not lie for determination before the subordinate court or at all. For clarity, such a claim falls squarely within the jurisdiction of the Environment and Land Court by dint of Section38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, which provides as hereunder;

> ***38. Registration of title to land or easement acquired under Act***
>
> ***(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***
>
> ***(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.***
>
> ***(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.***

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

GROUNDS 4 & 6:

48. As pertains to Grounds 4 and 6 of the Memorandum of appeal, the Appellant herein has complained that the learned trial magistrate ignored, disregarded and or otherwise failed to appreciate the import of the evidence (both oral and documentary) that was tendered before the court and thereby arrived at erroneous conclusion.

49. Before venturing to analyze the complaint mounted by the Appellant, it is worthy to take note of the nature of the documents which were produced and tendered in evidence by the appellants. For clarity, same are contained at the foot of the list of documents dated the 19th August 2011, which are at pages 25 to 36 of the Record of Appeal.

50. It is also important to take note of the Documentary Exhibits which were produced and tendered to the court for and/or on behalf of the 2ND Respondent, which are at the foot of the list bundle of Documents which is dated 7th April 2012, and the are at pages 77 to 87 of the Record of Appeal.

51. Suffice it to point out, at page 30 of the Record of Appeal is a letter of allotment which was issued to and in favor of one Mr. Wilfred Ng'ang'a Gakuru, on whose behalf the Counter-claim was mounted and who donated a power of attorney in favor of the current Appellant.

52. Other than the foregoing, there is a letter which was produced as exhibit D11 at page 36 of the Record, whose contents and import is explicit. However, it does not appear that the learned trail magistrate captured the contents and/or import of these Documents in his reproduction of the evidence or even in his analysis whatsoever.

53. I must also point out, that despite the contents of the various Documents which were produced by the Appellants and which documents were corroborated by DW3, being the witness called on behalf of the 2nd Respondent, the learned trial magistrate, did not deem it fit and/or appropriate to evaluate the said evidence and/or consider same, in any manner whatsoever.

54. In the premises, the Appellant's complaints that the learned trial magistrate failed to consider and/or appreciate sufficiently or at all the evidence adduced and/or tendered before the court is well grounded.

55. In my humble view, the learned trial magistrate was obliged to evaluate the totality of the evidence that was tendered by the Parties and thereafter to distill issues for determination therefrom in an objective manner, that would allow the court render itself on the macro issues ventilated by the parties and not otherwise.

56. Be that as it may, I must say that Grounds 4 and 6 must also succeed.

GROUND 5:

57. A question arose as to whether the dispute before the court is premised and/or based on Double allocation. In this regard, what then would be important to ascertain is which of the two allocations, if any, preceded the other.

58. According to Pw1, the Non Member certificate which was handed over unto him by the vendor showed that the Plot P6571, was allocated on the 24th September 1993.

59. On the other hand, the Appellant herein tendered in evidence a copy of his provisional letter of allotment and same showed that it was allocated on the 28th November 1982. In this regard, if the suit properties, were sharing the same ground position and a determination were to be made on whose allotment would take precedence, then the Doctrine of first in time would become relevant and applicable.

60. In this regard, I would hasten to invoke and rely in the Decision in the case of **African Inland Church – Kenya (Registered Trustees) v Catherine Nduku & 12 others [2017] eKLR,** where the court observed as hereunder;

"……like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity"

61. Be that as it may, I have pointed out elsewhere herein before that the 1st Respondent did not place before the court any Evidence of allotment of Plot No. P6571 and hence the issue of Double allocation does not arise.

62. Premised on the foregoing, the Doctrine of first in time is therefore not applicable in respect of the subject matter. Consequently, Ground 5 of the Memorandum of Appeal fails.

FINAL DISPOSITION:

63. Having reviewed all the Grounds of Appeal, I come to the conclusion that the Appeal herein is Meritorious and same is therefore allowed.

64. In the premises, I therefore Make the following Orders;

a. The 1st Respondent suit vide plaint dated the 9th March 2011 be and is hereby Dismissed.

b. The Appellants counterclaim dated the 23rd September 2011, be and is hereby allowed on the following term;

i. Declaration be and is hereby made that the disputed ground is Plot No. A.335 and not P.6571 and that same belongs to one Wilfred Ng'ang'a Gakuru, the donor of the power of attorney in favor of the Appellant.

ii. The 1st Respondent be and is hereby ordered to vacate and deliver vacant possession of the suit property namely Plot No. A335, within 180 days from the date of this judgment.

iii. In default to vacate and hand over vacant possession of the suit property to and in favor of the Appellant within the said 180 days the appellant shall be at liberty to evict the 1st Respondent from the suit property and the costs of such eviction shall be recovered as part of the cost of the suit.

iv. Permanent injunction be and is hereby issued to restrain the 1st Respondent, either by himself, agents, employees and or any person claiming under the 1st Respondent from entering upon, retaining possession, remaining on, developing, interfering with the property whatsoever and howsoever.

v. The claim mense profit was neither specifically pleaded nor proven. Consequently, same is hereby dismissed

c. Costs of the suit and the counterclaim be and are hereby awarded to the counter claimer/ 1ST Defendant.

65. To the extent that the Appeal has succeeded, the Appellant herein be and is hereby awarded costs of the Appeal.

66. It hereby ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Orenge h/ b for Mr. Mbugua Nganga for the Appellant.

Mr. Jumba for the 1ST Respondent.

N/A for the 2ND Respondent.