

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 4 OF 2010

JONATHAN MACHASIO.....APPELLANT

VERSUS

MARSELA NAFULA NANJALA alias MALLISSELA NAFULA

NANDASABA.....RESPONDENT

(Being appeal arising from the judgment & decree of the Hon F. Kyambia RM. In Bungoma CMCC no 259 of 2009)

JUDGMENT

1. The Appellant was sued by the respondent as the defendant in Bungoma CMCC case no. 259 of 2009. The learned trial magistrate found for the respondent and gave an order for the appellant to vacate the land parcel no. Bokoli/Bokoli/1693 (hereinafter referred to as the suitland). The appellant who was not satisfied with that decision filed this appeal raising three grounds in his memorandum of appeal as follows;

1. THAT the learned trial magistrate erred both in law and in fact when he failed to take into account and consider the evidence of the defendant (appellant) and his witnesses.

2. THAT the learned trial magistrate erred both in law and in fact when he failed to appreciate the fact that the respondent (plaintiff) had totally failed to prove her case against defendant (appellant) on a balance of probability.

3. The learned trial magistrate erred both in law and fact by failing to appreciate the fact that the plaintiff (respondent) had totally failed to avail any witness to corroborate her case.

2. The appeal was admitted to hearing on 19th September 2011 pending preparation of the record. The record of appeal was prepared and filed on 8th December 2011 and thereafter the appeal set down for hearing. The appellant tried to extend a hand to negotiate this matter but which the respondent declined to consider. Parties agreed to argue the appeal by way of filing written submissions and a mention date given for confirmation if the submissions were filed. The respondent's counsel did file their submissions while the appellant's counsel did not within the timelines set.

3. This is a first appeal and this court is aware of its duty to re-evaluate the evidence and reach its own conclusions (**Ephantus Mwangi vs. Duncan Mwangi (1984) KLR 453**) while being alive of not having the advantage of seeing and hearing the witnesses (**Peters Vs. Sunday Post Ltd (1958) E.A 424**). The brief summary of the case presented to the learned trial magistrate is narrated as follows. The respondent vides her plaint dated 20th April 2009 asked the court for eviction orders to issue against the appellant plus costs of the suit. She proceeded to adduce oral evidence stating that she purchased the suit land from Jamin Wanakuta and finished paying for it in 1990. She appeared before the respective Land Control Board and the land was surveyed. She obtained title documents for her land on 4th June 1997. She was taken ill and went for treatment but on return found somebody (the appellant) had built a house on her plot. The appellant sued her before the tribunal who awarded him the land. She concluded her evidence by asking for orders to evict the appellant.

4. The appellant on his part also testified and called two other witnesses. He said that he bought the suit land on 7th March 1990 from Jamin Wanakuta measuring 25ft by 100ft and produced a sale agreement (Dex 1). He started working on the land in 1992 and even built a home on it. He did not obtain title for the land as the person who sold it to him died in 1997. The chief wrote to the children of the deceased to process for him title for his land (Dex 2). The respondent (plaintiff) failed to attend hearing of the case before the tribunal which tribunal awarded him the land. On cross-examination, he said he bought land from the parcel no 1444.

5. DW2, Daudi Juma Sudi said he knew the appellant bought the land on 7th March 1990 as he counted Kshs. 8,500/= which was the purchase price and gave it to DW3 who also counted and handed it over to Jamin Wanakuta. On cross-examination, he said he did not know whether the respondent knew the land given to the appellant. DW3, Pius Wanyonyi reiterated the evidence of DW2. He was a witness to the sale transaction. DW4 was the widow to Jamin Wanakuta – deceased. She was aware her husband sold land to the appellant and the appellant built on it in 1994. In cross-examination, DW4 admitted the respondent also bought a piece of land from her husband. The appellant closed his case.

6. The learned trial magistrate analyzed this evidence and was satisfied that the respondent was the registered owner of L.R. no. Bokoli/Bokoli/1693. He found for the respondent and entered judgment as prayed in the plaint. From the evidence on record, it is not in dispute that both the appellant and the respondent bought portions of land from Jamin Wanakuta. The respondent already undertook the process of obtaining title in her name as demonstrated by the copy of title deed and mutation forms produced. Neither the appellant nor DW4 questioned the manner in which she acquired title into her name. This title was obtained after sub-division of the original number. The appellant did say he bought a portion measuring 25ft by 100ft from parcel no. 1444 but did not endeavor to prove that this is the portion comprised in the respondent's title. I am aware the burden of proof lied on the respondent to prove her case but that burden shifted to the appellant the moment the respondent produced title to her portion of the land.

7. In ground no. 3 of the appeal, the appellant said the learned magistrate failed to appreciate that the respondent failed to call any witness to corroborate her case. I do not see any fault on the part of the magistrate in this instance. This because taking into consideration that the respondent brought documents to support her case and it is not mandatory for parties to call witnesses to prove a case. The ground no. 2 of the appeal is also not supported by any reason. The trial magistrate was satisfied that the respondent followed due process in acquiring her title deed hence she proved her case. The process in which the respondent acquired the title was also not questioned by the appellant or the widow of Jamin Wanakuta-deceased. There is no doubt the appellant purchased some land from Jamin Wambuta- deceased (Dex. 1). In appreciating this fact, the chief of Bokoli location wrote a letter to the Land Registrar Bungoma to include him in the list of the children of Jamin Wanakuta Amutalla – deceased to enable him benefit from title no. Bokoli/Bokoli/1444. As rightly submitted by Mr. Sichangi for the respondent, I find that the appellant's claim lie against the estate of Jamin Wanakuta-deceased and not against the respondent.

8. Consequently, I find this appeal as lacking in merit. The decision of the learned trial magistrate in Bungoma CMCC no. 259 of 2009 be and is hereby upheld with an order that the appellant is given three months from the date of this judgment to give vacant possession of the land L.R. No. Bokoli/Bokoli/1693 to the respondent. In default, eviction to issue. Each party shall bear their respective costs in this appeal but the costs awarded to the respondent in the lower court is not disturbed.

DATED and DELIVERED this 22nd day of October 2014.

A. OMOLLO

JUDGE.