



REPUBLIC OF KENYA

High Court at Malindi

Civil Appeal 25 of 2012

SETH MICHAEL KASEME.....APPELLANT

VERSUS

SELINA K. ADE.....RESPONDENT

JUDGMENT

1. The Appellant filed his Record of Appeal on 24th May 2012 challenging the Judgment and Orders of the Resident Magistrate, Garsen dated 29th June 2011 in R.M.C.C. No. 66 of 2010.

The Appellant's case

2. The Appellant relied on 10 grounds which are enumerated in the Memorandum of Appeal dated 14th July, 2011 and filed on the same day.

3. In the first ground, the Appellant has averred that the learned trial Magistrate erred in law and fact by holding and making a finding that the Respondent had a good title when the same was not passed to her at the time of the alleged sale in accordance with the law.

4. Mr. Omwancha, counsel for the Appellant, submitted that according to the Sale Agreement between **Maua Benjamin Munkomba** and **Selina Nkandugu Ade**, the Respondent herein, the said Benjamin Maua Munkomba purported to sell to the Respondent the suit property when he did not have a title as at the time of the sale.

5. The Appellant's counsel submitted that if one does not have a title to land, the *nemo dat* principle comes into play. Counsel further submitted that as at the time Benjamin Maua Munkomba sold the suit property to the Respondent, there was a pending dispute between the said Benjamin Munkomba and Ruth Hale, the Appellant's mother. Counsel referred the court to a Ruling of the District Magistrate's court in Miscellaneous Application case number 16 of 1993. In the said matter, counsel submitted, Maua Benjamin Munkomba purported to sue Ruth Hero Wayu, the Appellant's mother over the suit property.

6. According to the Appellant's counsel, the District Magistrate's court at Hola observed that there was a pending case between Maua Benjamin Munkomba and the Appellant's late Mother and restrained the parties from building or erecting any structure on the portion of the plot until the ownership is determined. The court, counsel submitted, allowed the parties to file the suit with the appropriate authority.

7. According to the Appellant's counsel, the dispute between Maua Benjamin Munkomba and the Appellant's Mother, who is now deceased, has never been resolved and consequently, the said Maua Benjamin Munkomba did not have any capacity to enter into a Sale Agreement with the Respondent.

8. The Appellant's counsel referred this court to the letter dated 23rd December, 1998 by the Tana

River District Commissioner, which directed Mr. Maua Munkomba to desist from putting up any structures on the disputed plot.

9. Counsel also referred the court to another letter dated 21st April 1998 by the Galole District Officer addressed to Mr. Maua Munkomba and the Appellant's mother in which the District Officer alluded to the existing dispute between the two.

10. The Appellant's counsel finally submitted that though the two parties were referred to the elders, Mr. Maua Benjamin Munkomba did not appear before the elders but instead went to the District Officer, Galole who wrote the letter dated 21st April 1998.

11. The Appellant's second ground of appeal is that the learned trial Magistrate erred in law and fact by failing to make a visitation of the disputed site having found it necessary to do so which failure greatly prejudiced the Appellant's case.

12. According to counsel, the disputed plot is in two phases, the front and back. Counsel submitted that the Appellant's mother's plot is the one at the front and not at the back. That is the plot that the Respondent is claiming. Counsel submitted that it was important for the trial court to have visited the disputed plot to ascertain whether Benjamin Munkomba's kiosk was at the front or at the back as it had earlier (the court) directed.

13. The Appellant's third ground of appeal is that the learned Magistrate came to the aid of the Respondent's case by importing his own evidence and by considering unsubstantiated and contradicting testimonials by the Respondent's witnesses.

14. The Appellant's counsel submitted that some witnesses stated in court that there was one plot while others informed the court that there were two plots. According to counsel, the learned Magistrate delivered a sweeping Judgment and did not consider the contradicting testimonies by the Respondent's witnesses.

15. Finally, the Appellant's counsel submitted that the learned Magistrate did not determine the issue as to who owned the front and the behind plot; that the Magistrate failed to consider the Appellant's evidence and that the Judgment as a whole did not address the issues in the suit.

The Respondent's case

16. In response, Mr. Mayaka, counsel for the Respondent submitted that the Respondent bought the suit property from Benjamin Maua Munkomba after being satisfied that the said Munkomba had a title or a beneficial interest in the property.

17. The Respondent's counsel referred the court to the letter dated 30th July 1993 by the Tana River County Clerk. In the said letter, the County Clerk's representative states that the plot number **TRCC/HOL/R/331** measuring **50 Ft** by **200 Ft** is registered in the name of Maua B. Munkomba and that the same was given to Mr. Mau by village elders.

18. The Respondent's counsel further referred the court to the receipts showing the rent that Maua Munkomba paid to the County Council of Tana River for the suit property between 1998 and 2008.

19. The Respondent's counsel submitted that the Respondent was not a party to the Miscellaneous Application case number 16 of 1993. She purchased the property on 6th September 1998 after the finalization of the miscellaneous application.

20. According to the Respondent's counsel, the learned Magistrate interpreted correctly the provisions of the Trust Land Act. Counsel submitted that both the Appellant and the Respondent are inhabitants of the Tana River County and the property in question is held by the county council in trust for the people of the county.

21. The Respondent's counsel further submitted that the original property was number **331** before the same was sub divided to create another plot known as Plot number **331 A**. The letter dated 18th October 1999 by a representative of the Tana River County Clerk and addressed to the Respondent alludes to the sub-division of plot number **331**.

22. Counsel submitted that Maua Benjamin Munkomba, who was PW 2, informed the lower court that he was allocated the whole plot in 1985 and he sold half of it to the Respondent herein. According to Benjamin Maua's evidence, he was allocated the plot by Mji Wa Wazee.

23. The Respondent's counsel further submitted that there is no law which provides that the trial court should have visited the site; that there is no evidence which has been place before this court to show that the trial court relied on unsubstantiated evidence while arriving at its decision and that the trial court considered the testimony of the witnesses and the evidence that was presented before it.

24. Counsel finally submitted that the learned Magistrate delivered a well-reasoned Judgment; that the

documents that were produced in evidence by the Respondent did not bear any discrepancy and that the trial court did not deliver a Judgment that was contradictory.

Analysis

25. I have considered the submissions by the two learned counsels, the pleadings, the exhibits and the testimony of the witnesses in the lower court.

26. Though the Memorandum of Appeal has ten grounds of Appeal, the Appellant's advocate compressed them into fewer grounds while submitting. The first ground, in my view, is pertinent to this Appeal. Did Benjamin Maua Munkomba have a good title to pass to the Respondent?

27. To answer this particular question, the lower court analysed the law pertaining to the land tenure in Kenya. At page 10 of the Judgment of the lower court, the learned Magistrate posed and framed the issue of land tenure in Kenya viz-a-viz the dispute before him as follows:-

“To resolve this issue, the court must first establish on the basis of the evidence and law applicable who between the said Maua and Ruth legally acquired the subject land. It is only on the basis of that finding that the court will determine if the Plaintiff acquired a good title from the said Maua”.

28. At page 11 of the Judgment, the learned magistrate held as follows:

“Under the Trust Land Act and Chapter IX of the old constitution (which was in operation) all Trust Land is vested in the County Council within whose area of jurisdiction it is situate and each County Council holds the trust land vested in it for the benefit of the persons ordinarily resident on that land.....”

29. The above exposition of the law by the learned Magistrate is correct. In the case of **Bahola Mkalindi Rhigho -V- Michael Seth Kaseme, Malindi HcccNo. 168 of 2012**, I held as follows:

“The repealed Constitution, at Sections 115 and 116 classified Community land as “Trust Land” and vested such land in the County Council within whose area of jurisdiction it is situated.”

30. Trust land, as defined by the repealed Constitution and the current Constitution can only be dealt with in accordance with the provisions of the Trust Land Act, cap.288.

31. Section 4 of the Trust Land Act provides that the Council shall divide the Trust Land vested in it into such divisions as appear to it to be necessary or expedient for the purpose of the Act, while section 5 provides for the establishment in respect of each division a Divisional Land Board.

32. Section 13 of the same Act mandates a County Council to set apart an area of Trust Land vested in it for use and occupation by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area. The same section provides the procedure that should be followed by the County Council before setting apart Trust land.

33. According to section 13(2) (d) of the Trust Land Act, It is the Divisional Board which makes recommendations to the council to set apart land for the benefit of an individual. The said recommendations are then approved or rejected by the majority of all the members of the council. So what happened in the instant case?

34. According to the evidence of the Plaintiff in the lower court (PW1), now the Respondent, she bought plot number **TRCC/HOL/331A** from Benjamin Maua Munkomba in 1998 for Kshs. 40,000. The Plaintiff produced the Sale Agreement dated 6th September 1998 as PW exhibit 1 and the receipts from the County Council of Tana River showing the payments of the rent as PW exhibits 2, 3, 5, 6, 7, 8 and 9.

35. It was the Plaintiff's evidence that the County Council of Tana River wrote to her a letter dated 18th October 1999 which she produced as PW exhibit 4. In the said letter, the County Council of Tana River acknowledged the application for the sub-division of Plot Number 331 into two. The sub division created plot number **TRCC/HOL/R/331 A**, the suit property.

36. On his part, PW2, Maua Benjamin Munkomba informed the trial Magistrate that he indeed sold part of his land to the Respondent herein; that he was given the Plot in 1985 by elders of Mji wa Wazee village and he paid application fee of Kshs. 200/= on 26th July 1993 and made other subsequent payment. The witness produced in evidence two receipts from County Council of Tana River as PW exhibits 5 and 6.

37. PW 2 acknowledged that there was a dispute in respect of the plot and that he obtained an injunction against the Appellant's late mother in Miscellaneous Application number 16 of 1993 (Hola District Magistrate's Court).
38. PW 2 further testified that he was summoned by Gasa elders but he insisted that the matter should be referred to elders of Mji Wa Wazee. According to him, the Gasa elders proceeded to make a decision as to the ownership of the plot. They decided that the plot in question belonged to the Appellant's mother. PW 2 produced in evidence a letter dated 24th of March, 1999 which, according to him, shows that he is the owner of the land.
39. PW 2 finally testified that he had sold the other portion of his land to a different person and that there is no dispute over the said portion.
40. On the issue of how he acquired the plot, PW 2 testified that the plot was given to him by a village Committee known as Mji Wa Wazee after he requested for it orally.
41. It was PW 2's evidence that he did not agree with the decision of the elders of Gasa and he appealed against the decision to the Chairman of the District allocation Committee. It is on that basis that the District Officer wrote a letter dated 21st April 1998 which was produced as Defence exhibit 5. According to the witness the said letter confirmed that he was the legitimate owner of the plot.
42. The witness acknowledged receipt of another letter dated 23rd December 1998 from the District Commissioner, Hola, informing him that the Dispute between him and the Appellant's mother had not been resolved and advised him not to put up any structures. That letter was produced as Defence exhibit 3.
43. PW 2 confirmed in his testimony that he was aware of a letter dated 15th July 1999, Defence exhibit 4, by the Town Clerk in which the clerk was confirming that the plot belonged to the Appellant's mother and not to him.
44. According to PW 3, an employee of the County Council of Tana River, in cases of disputes over land, the District Liaison Committee usually resolves them. PW 3 informed the trial court that the committee was established in 1996 to deal with such disputes. The witness confirmed that the letter dated 15th July 1999, Defence Exhibit 4 was written by the then County Clerk, DW 4. According to the witness, the Gasa elders only deal with land outside town as opposed to land within town.
45. The Defendant, now the Appellant, called three witnesses. The Defendant informed the trial court that the plot in question belonged to her deceased mother, Ruth. According to the Defendant, his mother was allocated the suit property adjacent to Benjamin Maua's plot.
46. The Defendant further stated that it was Maua who invaded her late mother's plot by putting up a pit latrine. The Appellant's mother referred the dispute to the area Chief. Upon arbitration by the panel of elders, the dispute was resolved in favour of his late mother.
47. It was after the arbitration by the panel of elders that Benjamin Maua sued the Appellant's mother in the District Magistrate Court, Hola, in Miscellaneous Civil case No. 16 of 1993. The Defendant further informed the trial Magistrate that when he received a letter dated 21st April 1998, defence exhibit 5, from the District Officer, he wrote to the District Commissioner vide his letter dated 9th June, 1998, defence exhibit 6, who countered the District Officers letter dated 21st April 1998 by writing a letter dated 23rd December, 1998, defence exhibit 3. The District Commissioner wrote another letter to the District Magistrate dated 29th December 1998. The said letter was produced as defence exhibit 7.
48. Armed with the minutes of the village elders dated 12th November 1995, defence exhibit 8, the Appellant informed the trial court that he went to the County Council offices, whereafter the Clerk to Council wrote to the Appellant's mother and Mr. Maua a letter dated 15th July 1999, defence exhibit 4. When the witness was asked about the payments of the rent that Benjamin Maua had been making to the Council, he stated that the payments were in respect to Benjamin's plot which was at the back.
49. The Appellant called DW 2 a retired Chief of Sabaki location as his witness. DW 2 informed the court that when he was the chief in 1993, the Appellant's mother reported the encroachment on her land by Benjamin Maua. He summoned the said Benjamin Maua Munkomba and after listening to the two in the presence of the Assistant Chief, he decided that the plot in question belonged to Ruth since 1981. According to the Chief, the practice had been that plots used to be allocated to individuals by a panel of elders.

50. DW2 further informed the trial court that he had agreed with the two to visit the plot in question the following day but before he could do so, he was served with the court document in Miscellaneous Civil Application number 16 of 1993.

51. After the court in Miscellaneous Civil Application number 16 of 1993 declined to hear the dispute, DW2 stated that a meeting was convened on 4th November 1995 and the elders visited the site and a decision was taken by the elders in favour of the Appellant's mother. During cross-examination, DW 2 stated that the suit property was not within township in 1995. He finalised his testimony by stating that before 1996, the Provincial Administrators were the ones who used to allocate plots. However, the sole responsibility to allocate plots was given to the Council in 1996.

52. The Appellant's third witness in the lower court was one Stephen Jahera Malo, a retired sub-chief in whose jurisdiction the land is situated. He had been a sub-chief for 29 years before he retired. He informed the court that the plot in question was allocated to the Appellant's mother in 1981 by the council of elders. According to him, the Appellant's mother's plot is the one next to the road, while the plot for Maua Munkomba is behind.

53. The Appellant's last witness (D W 4) was Joseph Kalume Ngali, the Tana River County Clerk between February 1999 and April 2001.

54. According to the witness, when the dispute was brought up at the council, he went through the council's file and established that the area in dispute was outside the trading centre, and therefore outside the council's jurisdiction. According to him, arbitrations in those areas were being handled by council of elders. The witness testified that he wrote a letter dated 15th July 1999, DW exhibit 4 confirming that the plot in dispute belonged to the Appellant's mother.

55. After analysing the parties' evidence, the learned Magistrate, at page 12 of his Judgment held that according to Defence Exhibit 8, which were the minutes of the council of elders dated 4th November, 1995, a decision had been made to the effect that the plot belonged to the Defendant's (Appellant's) mother. According to the learned Magistrate, the council of elders remarked that the matter was to be handed over to the County Council for further investigations.

56. According to the learned Magistrate, the minutes of 4th November 1995 by the elders referred to plot number TRCC/HOL/R.183 and not the plot in dispute. The learned Magistrate concluded his observation about the minutes of 14th November 1995 as follows:

“Nowhere have the elders deliberated on plot number TRCC/HOL/R. 331 and I therefore make a finding that the plot that belonged to the defendant's deceased mother was plot number TRCC/HOL/R/183.”

57. This inference by the learned Magistrate that the plot that the Gasa elders deliberated upon was TRCC/HOL/R/183 and not plot TRCC/HOL/R/331 did not arise in evidence. Indeed Benjamin Maua Munkomba, PW 2, was categorical that he did not agree with the decision of the Gasa elders when they decreed that the plot in dispute belonged to the Appellant's mother and not to him. Consequently, he appealed against the decision of the elders to the chairman of the District Allocation Committee. It was therefore clear to the Gasa elders and to Benjamin Maua that the decision that the elders had arrived at was in respect to TRCC/HOL/R/331 and more specifically to the plot in the front vis a vis the plot behind.

58. I have looked at the Minutes of the 4th November 1995 by the “Wazee Wa Gasa” and specifically at their decision. The decision of the elders was that they had believed the Chief's evidence to the effect that Maua's plot is behind while the Appellant's mother's plot was the one fronting the road. The decision did not make reference to plot number TRCC/HOL/R/183 as held by the learned Magistrate. At no particular moment did any of the witnesses allude to plot number TRCC/HOL/R/183 as stated by he learned Magistrate.

59. At page 12 of the Judgment, the learned Magistrate, relying on the erroneous conclusion that the Gasa council of elders deliberated over TRCC/HOL/R/183 and not TRCC/HOL/R/331 held that the letter dated 15th July, 1999 by the County Clerk, DW exhibit 4, was erroneous as it referred to a dispute that was not subject of the arbitration by the Gasa elders.

60. I have already found and held that the Gasa council of

elders vide their minutes of 4th November 1995 arbitrated

over the only plot that was in dispute between the Appellant's mother and Benjamin Maua Munkomba, which, as correctly observed by the learned Magistrate, had been in existence since 1993, and that is TRCC/HOL/R/331. Consequently, the Magistrate erred in fact when he held that the letter dated 15th July 1999 by the County Clerk, was erroneous as it referred to a dispute that was not subject of the arbitration on 4th November, 1995.

61. The letter of 15th July, 1999, by the then County Clerk, which was produced as defence exhibit 4, stated as follows:

“The Gasu elders deliberated the matter on 4th November 1995 and witnesses from both parties summoned. The verdict of the Gasu elders as contained in the minutes of their sitting indicate clearly that the disputed plot belongs to Ruth Paula. The Gasu elders however gave room for appeal by any aggrieved party. My comments regarding this dispute centres on the verdict of the Elders since each of the parties in dispute claim to have been given the right of ownership of the plot by the elders. Since no appeal has been made by either party since the elders verdict date (14.11.95) then it can only be rightfully assumed that the verdict was acceptable to both parties. In this regard therefore the ownership of the plot in dispute goes to Ruth Paulo.”

62. PW 2, Benjamin Maua Munkomba informed the trial court that he appealed against the decision of the Gasu elders. However, no evidence was produced in the lower court to show that the District Allocation Committee ever met and deliberated over the said appeal and the outcome thereof.

63. The witness relied on the letter dated 21st April 1998, by the Galole District Officer to show that his appeal against the decision of the Gasu elders had succeeded.

64. In the said letter, the District Officer refers to the meeting between the two protagonists on one part and himself, some local leaders whom he does not name and the Clerk to County Council on the other part. The penultimate paragraph of the letter states that the plot belongs to Mr. Maua. The letter does not state whether the District Officer and the elders, who are not named, were sitting as an appellant body or they were hearing the dispute afresh between Benjamin Maua and the Appellant's mother. The letter does not mention the minutes of the Gasu elders of 4th November, 1995. In the circumstances, the letter of 21st April, 1998 cannot be termed as the outcome of an appeal against the decision of the Gasu elders.

65. According to the learned Magistrate, the true position as regards to the ownership of the plot is as captured in Plaintiff exhibit 10 (letter dated 30th July 1993), Plaintiff exhibit 11 (letter dated 24th March, 1999) and Defence exhibit 5 (the District Officer's letter dated 21st April 1998).

66. I have already found and held that Defence exhibit number 5, being the letter by the District Office dated 21st April 1998 has no basis because the then District Officer does not state in the letter in which capacity he was arbitrating the dispute between Appellant's Mother and Benjamin Maua Munkomba.

67. Defence Exhibit number 5 is further discredited by the District Commissioner's letter dated 23rd December 1998 which was produced as Defence exhibit 6. The District Commissioner wrote the letter of 23rd December, 2009 after receiving the Appellant's letter dated 9th June, 1998. This was after the Appellant (who was acting on behalf of his mother throughout) received the District Officer's letter dated 21st April, 2009 which I have alluded to above.

68. (a) What is interesting is that the District Commissioner's letter dated 23rd December, 1998, defence exhibit 6, was addressed to Maua Munkomba, through the Galole District Officer, who had authored the letter dated 21st April 1998 purporting to confer the property to Benjamin Maua Munkomba.

69. In the letter dated 23rd December 1998, the District Commissioner advised the parties to desist from putting up any structure pending the hearing of the dispute of ownership of TRCC/HOL/R/331. The District Commissioner followed up the issue with another letter dated 29th December, 1998 to the District Magistrate's court in which the Commissioner informed the court that the parties have been unable to agree on "authority" that should arbitrate over their dispute. It is therefore clear from the District Commissioner's letters that the decision by the Gasu council of elders was never appealed against as argued by PW 2. That position was confirmed by the County Clerk's testimony and his letter dated 15th July, 1999 (Defence exhibit 4).

70. Plaintiff's exhibit number 10 is a letter dated 30th July 1993 authored by PW 3, an employee of the County Council of Tana River. This letter is not addressed to any particular person. The letter states that TRCC/HOL/R/331 is registered under the name "Maua B. Munkomba".

71. This letter does not show the genesis of ownership of the plot by Benjamin Maua Munkomba. The letter is written a few months before the Miscellaneous Civil Application was filed in the District Court by Mr. Maua. The Ruling in Miscellaneous Application No. 16 of 1993 reproduced the affidavit of Maua Benjamin Munkomba, who was the Applicant.

72. The Ruling did not make any reference to the letter of 30th July, 1993 or the council records. In the circumstances, I find and hold that the letter dated 30th July, 1993 did not confer to Mr. Maua the suit property, at least not the portion fronting the road. If that was the position, it would not have been necessary to refer the matter to the panel of elders in 1995 who made a decision as to the ownership of the disputed parcel of land and forwarded it to the Council.

73. It may be true that TRCC/HOL/R/331 was sub divided to create sub-division number TRCC/HOL/R/331A and that Maua Benjamin paid the necessary fees. However, and as I have observed above, the said Maua Benjamin was making payments for his plot which was part and parcel of the bigger parcel of land number TRCC/HOL/R/331, and which, according to the Gasa elders was “behind” and not “in front.”

74. The learned Magistrate, at page 14 of the Judgment found that the council had issued to the Respondent an allotment letter as early as 1993 thus creating the presumption that the council had validated the existing rights on the ground.

75. That is not correct. A letter of allotment was never produced in evidence. The letter dated 30th July, 1993 addressed “to whoever it may concern” cannot amount to a letter of allotment.

76. A letter of allotment is an offer that must be accepted within a specific period by an allottee. It must be accompanied by an approved part development plan. Once a party accepts the terms of the offer by payment of the stand premium, it is only then that such a party would lay a claim over the property. That did not, and has not happened in this particular use.

77. From the above analysis of the evidence that was tendered in the lower court, I find and hold that the learned Magistrate erred when he found and held that the disputed plot belonged to Maua Benjamin Munkomba when it is clear that the decision of the Gasa elders allocating the front part of the disputed parcel of land to the Appellant’s mother was never appealed against. That decision was up held by the clerk to the council after going through the council’s records.

78. I further find and hold that the learned Magistrate erred when he found and held that Benjamin Maua Munkomba was issued with a letter of allotment by the Council. No such letter or any other document conferring interests in the parcel of land in dispute was issued to Benjamin Maua Munkomba by the County Council of Tana River.

79. Consequently, I find and hold that Benjamin Maua Munkomba was not the owner of the disputed parcel of land fronting the road and therefore could not pass a good title to the Respondent. Having found so, I will not address the other grounds of appeal.

80. For the reasons I have given above, I allow the appeal and set aside the Judgment of 30th June, 2011 by the learned Magistrate and substitute it with the order dismissing the Complaint dated 26th November, 2009.

81. The Respondent shall pay the costs of the suit in the lower court and the costs of this appeal.

Dated and Delivered at Malindi this 16th day of May, 2013.

O. A. Angote

Judge