Wangui & 2 others v Wangui & another (Environment and Land Appeal 3 of 2021) [2022] KEELC 3755 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3755 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 3 OF 2021

EK WABWOTO, J

JUNE 29, 2022

BETWEEN

RAPHAEL WANGUI ..... 1ST APPELLANT

MICHAEL ITAGU ..... 2ND APPELLANT

SILAS MWAURA ..... 3RD APPELLANT

AND

JOSEPHINE WANGUI ..... 1ST RESPONDENT

DAVID MUTIE ..... 2ND RESPONDENT

(Being an appeal against the judgment of the Chief Magistrates Court at Nairobi (Hon E Wanjala (Miss) delivered on May 23, 2019 in Civil Case No 2854 of 2013)

JUDGMENT

Introduction

1. The suit that gave birth to this appeal was initiated by a plaint dated May 20, 2013 in which the plaintiffs Josephine Wangui and David Mutie Sought for an order of injunction to stop the defendants from demolishing their structures and further to stop the defendants from interfering with the quiet enjoyment of their property located in Maili Saba Dandora.

2. On May 23, 2019, the trial court delivered its judgment in favour of the plaintiff and restrained the defendants, their agents and/or anyone claiming from the including the Great Salvation Gospel Church from interfering with the plaintiffs quite occupation and enjoyment of the suit V plot situated at Maili Saba Dandora.

3. The appellants herein who were the defendants in the trial court being aggrieved by the said decision filed a Memorandum of Appeal dated June 20, 2019 against the judgment of Hon E Wanjala (miss)

Senior Resident Magistrate delivered on May 23, 2019 in Nairobi CMCC no 2854 of 2013. The Memorandum of Appeal set out five grounds of appeal: -

1. The learned trial magistrate erred in law and in fact in failing to recognize the fact that the respondents herein had encroached on the suit V Plot.
2. The learned trial magistrate erred in law and in fact in not finding in the face of overwhelming evidence that the respondents had no ownership documents to prove their claim of ownership to the suit property.
3. The learned magistrate erred in law and in fact in finding that the respondents had proved their case as to ownership of the V plot by virtue of being in possession of the suit property.
4. The learned magistrate erred in law and in fact in finding that the beacon certificate for the V plot was irrelevant in the proceedings therein.
5. The learned magistrate erred in law and in fact in failing to consider the sale agreement dated June 24, 2010 between the Church and Bernard Kilonzo was sufficient evidence of the Church having purchased the suit V plot.

4. On that account, the appellants sought the following orders: -
   a. The appeal be allowed.
   b. The judgment delivered on May 23, 2019 be set aside.
   c. The decree subsequent to the judgment of May 23, 2019 and all consequential orders be set aside.
   d. he respondents to pay the appellants the costs of this appeal.
5. The appeal was canvassed by written submissions and both parties filed their written submissions.

The appellants submissions

6. The appellants written submissions dated April 4, 2022 were filed by M/s J M Njengo & Co Advocates. Counsel submitted on several thematic areas. It was submitted that the parties are bound by their pleadings and a court of law can only pronounce judgment arising from pleadings. Counsel referred to the court of Appeal cases of Galaxy Paints Co Ltd vs Falcon Guards EALR (2002) 2 EA 383 and *Independent Electoral and Boundaries Commissions and Another vs Stephen Mutinda Mule & 3 others* (2014) eKLR in support of the said position.
7. It was also submitted that the trial court did not fully address its mind on the issues whether of who is the rightful owner of the V- shaped plot in question hence necessitating the appeal.
8. It was also submitted that there was sufficient evidence adduced by the appellants during trial before the subordinate court that they had purchased the suit parcel and merited being given the beacon certificate.
9. Counsel further submitted that section 26 of the *Land Registration Act* stipulates that a certificate of title issued is *prima facie* evidence of absolute and indefeasible right to ownership and article 40 of the *Constitution* protects the right to own property and prohibits arbitrary and unlawful deprivation of this right. Reference was made to the case of *Henry Muthee Kathurima vs Commissioner of Lands & Another* (2015) eKLR in support of the said position.

10. It was also argued that the trial court erred in finding that the appellants beacon certificate and sale agreement were irrelevant in the proceedings thereon. The appellants concluded their submissions by submitting that the Appeal be allowed.

The respondents submissions.

11. The respondents who were acting in person filed written submission dated May 23, 2022. In their submissions, the respondents outlined four issues for consideration by this court: -

    1. Whether the Respondents are the bona fide owners of the suit property.

    2. Whether the appellants have any legitimate claim over the said suit plot.

    3. The evidence(sic)

    4. Whether the Respondents proved their case to warrant the judgment in their favour.

12. On whether the Respondents are the bona fide owners of the suit V Plot, it was submitted that the respondents had bought the suit property in 1989 when it was yet to be surveyed nor occupied. Later in the year 2011, the chief called the respondents to his office on resolving an issue that they had encroached into a plot belonging to the local church and were asked to vacate within 21 days upon which they demolished the encroached structures.

13. It was further submitted that later on September 8, 2011, the 2nd respondent and one Benard Kilonzo also appeared before the assistant chief to settle the issue of ownership of the said plot and the assistant chief made a finding that the property belonged to one Bernard Kilonzo the decision which prompted the respondent to file the suit before the lower court.

14. The respondents maintained that the appellants had purportedly forged the contract of sale and even the beacon certificate that formed part of the documents they relied on. Since the sale agreement did not describe the V plot neither did it describe the vendor and the purchaser, neither did it state whether payments were done immediately upon execution of the agreement and that the same was void. Reference was made to section 3 of the *Law of Contract Act* cap 23 of the Laws of Kenya.

15. The respondents also added that they had been in the suit property for over 20 years and notwithstanding the sale agreement that was produced by the appellants during trial, they are entitled to ownership of the same by way of adverse possession.

16. On the issue of the appellants having any legitimate claim over the suit plot, it was submitted that appellants claimed to have bought the V plot from Bernard Kilonzo yet they never called the said Benard Kilonzo to testify on whether he had sold the same to the appellant's or not and as such it was outrageous for them to lay claim over the suit property.

17. On the evidence that was adduced during trial, the respondents witness gave contradicting evidence. The 3rd appellant Cyrus Mwaura had testified that the property had been bought by the church while Patrick Waweru who had testified as the appellant's witness testified that the plot was given to the church. While in cross-examination, he stated that he did not know how the land was acquired by the church since he did not participate in the negotiations of acquiring the V plot by the church.

18. The respondents further submitted that their testimony during trial was consistent to the effect that they bought the property from one "Tukuru" not his real name in 1989 when the same was unsurveyed and unregistered. Later the property was surveyed by a surveyor known as Carol.

19. On whether the appellant's have proved their case to the required standard as required by law, it was submitted that the appellants had not proved their case to warrant the prayers sought in the appeal. The respondents urged this court to dismiss the appeal with costs.

Analysis and determination.

Analysis and determination

20. Although the appellants raised 5 grounds of appeal in their Memorandum of Appeal dated June 20, 2019, this court is of the opinion that the appeal may be conclusively be determined on the following three (3) grounds: -

    1. Whether the learned magistrate erred in law and fact in not finding in the face of overwhelming evidence that the respondents had no ownership documents to prove their claim of ownership to the suit property.

    2. Whether the learned trial magistrate erred in law and in fact in finding that the respondents had proved their case as to ownership of the V Plot by virtue of being in possession of the suit property.

    3. Whether the learned magistrate erred in law and in fact in failing to consider the sale agreement dated June 29, 2010 between the church and Bernard Kilonzo was sufficient evidence of the church having purchased the V plot.

21. After hearing the evidence of both the appellants and respondents, the learned magistrate in her judgment found that the beacon certificate relied upon by the appellants was not relevant to the proceeding before her since it did not state the plot number.

22. Counsel for the appellants submitted that the beacon certificate was issued to them after execution of the sale agreement and further that the respondents had failed to produce any evidence to the contrary.

23. The law on unregistered land unlike on registered land is slightly unclear. Proof of ownership is found in documentary evidence which lead to the root of title. There must be shown on unbroken chain of documents showing the true owner. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property. The appellants claim to the V plot is that they purchased the same from one Benard Kilonzo and they produced a Sale agreement dated June 24, 2010 and a beacon certificate in an endeavor to proof ownership of the V plot.

24. I have perused the record of appeal and noticed that at page 30 of the same, the beacon certificate that was produced by the appellants during trial was listed as being for plot No 7970 pursuant to the survey done by Caroline Mbiti on June 30, 2001. The said beacon certificate was also in respect to Maili – Saba Siranga Mwengenye Resettlement scheme. On this issue having reviewed the evidence that was adduced by the parties, it is the finding of this court that the trial magistrate erred when she held that the beacon certificate was not relevant to the proceedings yet all the defendants witnesses were consistent in their testimony that all the plots at Maili Saba Siranga Mwengenye Resettlement Scheme had been issued with Beacon Certificate and had plot numbers. As such it was incumbent upon the trial court to consider the same vis a vis the Respondent testimony that had been adduced since the suit property was initially unregistered and un surveyed.

25. While it is the finding of this court that the learned magistrate erred in not considering the beacon certificate that were tendered during trial, the same did not automatically confer ownership to the appellants since there was sufficient evidence that was adduced during trial confirming that the

respondents had been in occupation and possession of the suit plot since 1989 a fact which had not been controverted by any of the appellants witness during trial.

26. The beacon certificate was in any event acquired when the respondents were in possession of the V plot.

27. The next issue for determination is whether the learned magistrate erred in law and in fact in finding that the respondents had proved their case as to ownership of the V plot by virtue of being in possession of the suit property. The appellants submitted that the respondents merely laid a claim to the suit parcel but under the provisions of section 112 of the *Evidence Act*, it was incumbent upon them to demonstrate with sufficient evidence how they acquired the suit property which they failed to do so. The respondents on the other hand submitted that they had been in the suit property for over 20 years since 1989 and thus they had proved ownership to the V plot by virtue of being in possession since then.

28. In determining this issue, I am guided by the maxim of equity that; "when two equities are equal, the first in time prevails". The respondent were the first in time to be in possession of the suit property when the same was unregistered and unsurveyed way before the appellants purchased the same from one Benard Kilonzo and were issued with beacons. The evidence adduced by the respondents having been cognate and not displaced by the appellants. Balancing the two competing interests, it is in my view that the respondents had proved their ownership to the suit property. From the evidence that was adduced, the respondent became the owner in 1989 way before the appellants. Hence therefore the said suit could not be available for allocation to any other person. In view of the foregoing, it is the finding of this court that indeed the respondents had satisfactory established their root to the ownership of the suit property The court is also guided by the cited authority of *Augustine Thuo v James Maina Thuita & Another* [2020] eKLR where the court stated as follows:

> " The property was not available for allocation as it had already been allocated to the plaintiff. The allocation of the property to the 1st defendant was in the circumstances null and void. An illegal allocation of the suit property by the 2nd defendant to the 1st defendant could not confer upon the 1st defendant any lawful interest in the suit property".

29. The final issue for determination is whether the learned magistrate erred in law and in fact in failing to consider the sale agreement dated June 24, 2010 between the church and Benard Kilonzo was sufficient evidence of the church having purchased the suit V plot. Counsel for the appellant submitted that the sale agreement was sufficient to prove that indeed the appellants purchased the V shaped plot for valuable consideration. On the same issue, the respondents submitted that the sale agreement did not describe the V plot neither did it describe the purchaser or even whether the payments were done immediately upon execution of the agreement and that the same was void.

30. A perusal of the said sale agreement which appears at page 32 of the record of appeal shows that it was dated June 24, 2010 and was witnessed by Godfrey Mwangi, Cyrus Chomba, Raphael Nguru and Michael Itau. The same also clearly described what was being sold was plot V. However, sale agreement parse is not conclusive proof of ownership. At the time of the execution of the said sale agreement, the respondent was already in occupation of the suit property having been there since 1989. There was no evidence tendered that the respondents had relinquished possession of the same to Benard Kilonzo and or the church. The appellants did not also call the said Benard Kilonzo to testify in the suit. As it is the finding of this court that the suit property was not available for sale to another party since doing so would be depriving the respondents of their possession to the same.

31. Consequently, I find that the appeal is devoid of merit and the same is dismissed with an order that each party to bear their own costs of the appeal.

32. Judgment accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2022

E K WABWOTO

JUDGE

In the Presence of: -

Mr Ngure holding brief for Mr Jengo for the appellants

N/A for the respondents.

E K WABWOTO

JUDGE