Bombo & 3 others v Mwasambu & another (Environment and Land Appeal 32 of 2019) [2022] KEELC 3674 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3674 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 32 OF 2019

NA MATHEKA, J

JULY 26, 2022

BETWEEN

CHIZI BOMBO ..... 1ST APPELLANT

MRISA KAMBI ..... 2ND APPELLANT

CHEKUSHA BEMDIGO ..... 3RD APPELLANT

MRISA KAMBI ..... 4TH APPELLANT

AND

ZIOR LEWA MWASAMBU ..... 1ST RESPONDENT

RAMA JOHARA MWASAMBU ..... 2ND RESPONDENT

JUDGMENT

1. Bombo & 3 others which judgment was delivered on the May 29, 2019. The 2nd, 3rd and 4th appellants herein being dissatisfied with the judgment of the Learned Trial Magistrate Hon. D. Nyambu(Miss), CM, in Land case No. 2 of 2013 (Kwale) delivered on May 29, 2019 appeal against the whole of the said judgment on the following grounds;-

    1. The learned Trial Magistrate erred in law and fact by contradicting herself as to how theplaintiffs' alleged claim to plot number Kwale/Mwanguda/694 came about as a result of which contradiction she arrived at a wrong decision.

    2. The Learned Trial magistrate erred in law and in fact in holding that the purported agreement dated June 17, 1995 between Zuma Bekombo and Johari Mwasambu which was manifestly doctored had anything to do with plot number Kwale/Mwanguda/694.

    3. The learned Trial Magistrate erred in law and in fact by holding that Zuma Bekombo purchased plot number Kwale/Mwanguda/694 from the 2nd and 4th appellants' father.

4. That the learned Trail Magistrate erred in law and in fact in holding that the Appellants were in breach of contract.

5. The learned Trial Magistrate erred in law and in fact by holding that plot number Kwale/ Mwanguda/694 forms part of the estate of Johari Mwasambu(deceased).

6. That the learned Trial Magistrate erred in law and in fact in holding that the claim to plot number Kwale/Mwanguda/694 by the Respondents which claim was premised on the agreement dated June 17, 1995, was not time barred.

7. The Learned Trial Magistrate erred in fact and in law by failing to appreciate the 2nd, 3rd and 4th appellants' case and thereby rejecting it.

8. The Learned Trial Magistrate erred in law and in fact by holding that the respondents had proved their case against the 2nd , 3rd and 4th appellants.

9. The learned Trial Magistrate erred in law and in fact by delivering a judgment in total contravention of the law.

10. That the learned Trial Magistrate erred in law and in fact by delivering judgment against Chizi Bombo, sued as the 1st Defendant in the primary suit because the suit against her had abated by the time judgment in the primary was delivered.

11. The learned Trail Magistrate erred in law and in fact by delivering judgment in a suit in which she was lacking in jurisdiction.

The appellants pray that;

1. The Appeal be allowed and the judgment in the suit and all consequential orders of the court in Principal Magistrate's Court Land Case No. 2 of 2013 (Kwale) be set aside and substituted with one dismissing the said suit with costs.

2. Therespondents be ordered to pay the costs for this appeal.

2. This court has carefully considered the appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the Court of Appeal held that;

> This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

3. I have perused the proceedings of the lower court and find that the 1st plaintiff and the 4th defendant both gave evidence on the May 9, 2018. PW1 testified that his father Johari Mwasambu now deceased purchased the suit land plot No. 694 from one Zuma Bekombo who is now deceased for the sum of KSHS 37,500/= in 1995 and his family had been utilising the same upto 2012 when the defendants came and claimed the same. He produced the limited grant and sale agreements dated June 17, 1995 and April 17, 1995. The 4th defendant testified that his late father did not sell the suit land but used

the plot as security for a loan of kshs 20,000/- and that the matter went to the Chief and they were to refund the money but the plaintiffs have refused to accept the same. That his father called them and told them he owed Zuma money and they should look for the money and refund. Their father died and when they got the money they attempted to refund but the sons of Mzee Zuma refused to accept the money. In the sale agreement the name of the 2nd Appellant appears as a witness. Section 107 of the *Evidence Act* cap 80 of the laws of Kenya states that;

> 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".

4. There is no documentary evidence to prove that the money was a loan and not to purchase the suit land. Indeed, the evidence of DW1 is that his father told him so. There is no forgery that has been proved by the defendants of the said documents. I find that the plaintiffs' father did purchase the said suit land and took possession in 1995 until 2012 when the defendants came back and started claiming the same only after their father has passed away. On the issue that the 1st defandant/appellant had based away by the time the judgement was delivered, I find that the plaintiffs' advocate had indicated that he was to file a notice to withdraw on 9th May 2018. If this was not done then the suit would have abated as against het and that would not nullify the entire judgement which still stands as against the other defendants.

In *Mbogo & another v Shah* (1968) EA 93, the court, (Sir Newbold, P.) stated at page 96:

> A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

5. In the case of *Nkube v Nyamiro* (1983) KLR 403, the same court stated that;

> A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

6. I agree with the trial magistrate that from the evidence on record the plaintiffs have proved their case on a balance of probabilities. For these reasons I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE