Mayamei & another v Tauta & 4 others (Environment and Land Appeal 9 of 2021) [2022] KEELC 14975 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14975 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 9 OF 2021

MN GICHERU, J

NOVEMBER 22, 2022

BETWEEN

NTIISHO OLE MAYAMEI ..... 1ST PLAINTIFF

PARMITO POLONG MUMEITA ..... 2ND PLAINTIFF

AND

NTIBABA SENJA TAUTA ..... 1ST DEFENDANT

LONGOIJO TUTA SENJA ..... 2ND DEFENDANT

PARSITAU SENJA ..... 3RD DEFENDANT

NENGOTOK KILELU ..... 4TH DEFENDANT

TINALAI TUTA SENJA ..... 5TH DEFENDANT

JUDGMENT

1. Ntisho Mayiamei and Parmito Polong, the appellants, filed this appeal on June 29, 2020 challenging the decision in Kajiado Chief Magistrates ELC Case Number 442 of 2014.

   In the said decision, the learned trial Magistrate dismissed the appellants' suit against Ntipapa Tuta Sencha, Longoijo Tuta Sencha, Nengotok Kilelu and Tinalau Tuta Sencha, the respondents.

2. In the suit in the lower court, the appellants had sought an eviction order against the respondents from LR Kajiado/Dalalekutuk/947 and 1663. They also sought a permanent injunction restraining the respondents from harvesting sand, trees or burning charcoal from the appellants' land.

   The appellants' case was that the respondents, though in occupation of part of the suit land, were mere licencees of the appellants. They occupied part of the suit land only because they were waiting for allocation of their own land which was eventually allocated as Kajiado/Dalalekutuk/1093.

3. In dismissing the appellants' case in the Lower Court, the learned trial Magistrate relied heavily on a consent entered between the parties in District Land Disputes Tribunal Case No TC 211/9/2002 where the first appellant agreed to surrender to the first respondent the portion of land in dispute.

   It was also consented that the District Land Registrar would visit the disputed land and establish the beacons. Thereafter, the land records would be amended accordingly.

4. In the appeal, the appellants raised six grounds of appeal as here below. That the honourable Magistrate erred in law and fact by;

   a. deciding on issues not raised by the parties.

   b. by entering the issue of adverse possession without jurisdiction.

   c. by relaying on illegal and void documents.

   d. by failing to consider the evidence on record.

   e. by failing to hold that the appellants had proved their case on a balance of probabilities and

   f. by failing to evaluate the evidence given by the parties.

5. Counsel for the respondent filed written submissions on 10/5/2022. Even though the appellants' counsel said on 3/2/2022 that he filed written submissions in this case, the only ones filed by that counsel are dated 6/10/2020 and they relate to notice of motion dated 30/6/2020 seeking stay of execution of the decree of the lower court pending the hearing and determination of this appeal.

   In the submissions by the respondents' counsel, it is urged that the second ground of appeal relating to adverse possession is not the only one that the court relied on in dismissing the appellants' suit. Other factors such as the consent formed the core of the lower court's decision.

   In the absence of the appellants' submissions, I will treat their grounds of appeal as their issues for determination.

6. I have carefully considered the entire appeal including the grounds, the submissions by the respondents and the entire record from the lower court.

   It is trite law that this being the first appellate tribunal, I should reconsider the evidence adduced before the trial court, re-evaluate it and draw my own conclusions and satisfy myself that the conclusions reached by the trial court are consistent with the evidence but give allowance that the trial court had the advantage of seeing the witnesses first hand. See *Ngui versus Republic* (1984) KLR 729.

   I make the following findings.

   Firstly, I find that it is true that though the trial Magistrate may not have had jurisdiction to deal with the issue of adverse possession in view of section 38 of the *Limitation of Actions Act* which ousts such jurisdiction, the issue of the consent between the parties was more central to the conclusion that the trial Magistrate reached.

   On the issue of relying on an issue not raised by the parties, I find that the issue of consent before the tribunal is in the witness statements by the respondents at pages 64, 65, 66, 67 and 68 of the record of appeal. Each of the statements raises that issue at paragraph 2. The appellants cannot therefore be heard to say that the issue was never raised.

   As stated above, it is correct to say that the trial Magistrate was wrong to refer to the ground of adverse possession owing to lack of jurisdiction.

On reliance on illegal and void documents, such documents have not been mentioned by the appellants let alone proved to be illegal and void.

I find that the trial Magistrate considered the evidence on record and that evidence included the evidence of the consent. I do not agree that the appellants had proved their case on a balance of probabilities because, I find that the consent was binding.

On the final ground, I find that the Magistrate evaluated the evidence given by the parties and relied on the strong point of the consent entered into between the parties in the presence of many elders.

Finally, I find that the respondents enjoyed on overriding interest in terms of section 28 (b) of the *Land Registration Act* because of their occupation of the suit land. Such interest is superior to the title held by the appellants.

For the above stated reasons, I find no merit in the appeal and i dismiss it with costs to the respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22ND DAY OF NOVEMBER, 2022.

M.N. GICHERU

JUDGE