REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 721 of 2003

KAMILA SANKOR.....APPLICANT

VERSUS

SUBAN ABDULAHI.....RESPONDENT

JUDGMENT

The Respondent to the appeal moved to the lower court and filed civil suit 37 of 2002 averring that she became the owner of the suit plot GARISSA MUNICIPALITY BLOCK 3/57. The plot had been allocated to her husband one Mohamed Dahir who had given her a power of Attorney to pursue the recovery of the plot while away on medical treatment in the USA. The power of Attorney was produced in evidence as exhibit 1. The letter of allotment was produced as exhibit 3 and acceptance of allotment exhibit 4. The plot was allegedly surveyed as per the beacon certificate exhibits 5. A certificates lease was issued exhibit 6. The cause of action arose because the defendants had encroached on the said plot. On the basis of the foregoing averments the plaintiff sought a declaration order of the court that the plaintiff is the legal owner of the plot from 7.9.2002. An order of a permanent injunction restraining the defendant/respondent agent/servants from interfering, wasting, damaging and or building or erecting any construction or selling the said plot **GARISSA MUNICIPALITY/BLOCK 3/457** and interfering with the plaintiffs' right of ownership and enjoyment, costs to be borne by the defendant and any other relief the court may deem fit to grant.

When cross examined the Plaintiff agreed that the allotment letter did not indicate clearly the plot number. She added that she is not able to identity her plot on the PDP Plan. She had not indicated the size of the plot in paragraph 2 of the plaint but she knows the same is four (4) acres. Further agreed that the letter of allocation indicated that the plot is situated beyond auction and towards SANKIRI. But the plots were moved due to food problems but she had no minutes showing change of site. She denied encroaching on the defendants plots but was only defending her plot.

The Respondent who was the defendant in her defence stated that she has been in occupation of the suit property since l983 having been duly allotted the same by Garissa Municipal Council, denied that the plaintiffs plot had been surveyed and denied being a trespasser and prayed for the suit to be dismissed with costs. In her evidence P.W.1 stated that she has been residing on this plot since 1963. It is at Iftin and a place called Sabdui are far off but did not know much details on documentation. D.W.2 stated that their late father applied for the plot on which they reside and the same was allocated to their late father as per their minutes exhibit D1 and the same was approved by the Council exhibit D2. Their plot is No. 218B and it is the plot on which they live and it is the same plot which the court had viewed on that date. Commenting on the documents of the plaintiff, he said the documents show that the plaintiff was allocated four acres at a place beyond auction yard towards Sankori which is near Kenya power and

lighting North of Garissa town. They maintained that Bulla Iftini is not Sankuri. They have no plot in Auction yard. Further that Sabdul cultural village is near power.

In cross-examination he denied forging the documents in support of their case. D.W.3 area Chief confirmed that the defence have lived on the plot in question for long and that the plot is located in Iftin but the Auction yard is near Power and Lighting which is far off.

Against the foregoing background the learned lower court magistrate made observations that he had moved to the ground and shown boundaries or demarcation of the plots by the defendant and the plaintiff. That the defendant showed her house and compound which to the learned trial magistrate were clearly outside the boundaries of the plaintiff. The newly built house is built outside the perimeter of the Plaintiffs plot. On that account the learned magistrate made findings that on the basis of the evidence of the record the plaintiff has proved sufficiently on a balance of probabilities that in 1973 she was allocated a plot to be located at auction yard near Sankuri. Later it was moved to its current site by order of physical planning Director Ericca Mann. That the Plaintiff had beacon Certificate indicating that the same was beaconed in l992. She had a certificate of lease for 9 years from 1992. That Mohamed Dahir is the owner of plot No. Municipality Block 3/457 and has given power to Attorney to his wife therefore empowering her to file the case. That since the defence alleges to have moved on the plaintiffs plot in 1992, the same cannot be accepted as an adverse possession defence to the plaintiffs claim. Further that the plot the defendant was claiming was outside the perimeters of the plot shown by the plaintiff that the defence put up a house on the plaintiffs, land with a view to laying claim to the plaintiffs plot. That this is an encroachment. That the municipality could not allocate the plaintiffs plot to the defence as the same was not available for allocation and by 1992 Mohamed Dahir had already become an owner of the plot. Further that the plaintiff has a better title which is indefeasible title and ownership over the subject plot. On that account gave judgment in favour of the plaintiff in terms of prayer (a) (b) and (c). Further gave either party 60 days from the date of the judgment to move the District Land Surveyor and the Land Registrar to re-establish the beacons on the plaintiffs plot and show the defendant the perimeter of her plot. The OCS Machakos to supervise the exercise to ensure security and upon which both plaintiffs and defendant may fence their respective plots to avoid mix up in future. That the defendants house recently constructed on the plaintiffs plot was to be forthwith demolished upon the beacons being established and upon the clear marking of the party's respective plots as above ordered not later than 60 days from the date of the judgment.

The appellant became dissatisfied with that decision and has appealed to this court citing 7 grounds of appeal. These are that the learned trial magistrate erred in law and in fact:-

(1) In holding that the Respondents plot No. Garissa Municipality block 3/457 had been moved from its original site to an alternative site when there was no evidence adduced in support thereof.

(2) By arriving at and concluding that no plot was available for allotment to the Appellant in l984 when there was sufficient evidence supporting otherwise.

(3) In holding that the appellant started staying on her plot in l992 when there was evidence that she had been on her plot No. 218 B since 1963.

(4) In holding that the appellant's witness had conceded that the Respondent had been offered an alternative plot next to the appellants when there was evidence to the contrary.

(5) In holding that the appellant had encroached on the respondents plot where there was no evidence in support thereof.

(6) In failing to critically address his mind on the Respondents exhibits which appeared contradictory to the oral evidence in support and therefore arriving at a wrong conclusion that the respondent had validity acquired the suit land.

(7) In failing to appreciate the over all evidence adduced by the appellant and documents in support and

thereby arriving at a wrong conclusion that no plot was available to the appellant by 1984. On account of the above the appellant urged the court to set aside the lowers' court judgment and allow the appeal in it's entirety with costs both on appeal and the lower court.

In oral submissions in court counsel for the appellant reiterated the grounds of appeal and then stressed the following points.

(1) There is no evidence to show that this plot had been moved from its original allocated place to an alternative site and so this finding was an error.

(2) The documentation and evidence show that the appellant started staying on the said plot in 1963 and she was allocated the same in l984 and it is not known how the trial court found that she had been on the plot since l992.

(3) It was an error for the trial court to making a finding that the appellant/respondent had encroached and then go ahead to order the establishment of the boundary marks thereafter. The boundary marks should have been established before making findings on encroachment.

(4) In finding for the respondent the appellant went against the weight of the evidence on the record as the courts evidence adduced by the appellant and her witnesses was ignored and this was an error. For this reasons a basis has been established for the appeal to be allowed.

On the other hand Counsel for the Respondent opposed the appeal on the following grounds:-

(1) That the Respondent produced all the documentation to show that she had been allocated the suit plot, she had made all the necessary statutory payments and produced receipts to that effect.

(2) There was no evidence to show how long the defendant had been residing on the said plot and the lower court was right in finding her a trespasser.

(3) The learned magistrate visited the said suit plot but the appellant could not point out the boundaries of her plot and that is why a resurvey was ordered. On this basis this court should not interfere with that finding unless it can be shown that the learned magistrate grossly misdirected himself which has not been demonstrated.

(4) The appellant has not demonstrated ownership of the suit land.

(5) That the balance of probability favoured the Respondent.

On the Court's assessment of the facts herein it is clear that there was a dispute as to whether the plaintiff's plot extended to where the defendants alleged her plot was. The learned trial magistrate visited the scene and had each party point out where each thought the boundaries of their plots were and then from that pointing she concluded the plaintiff had proved her case on a balance of probability and on account of the exhibition of an indefeasible title ruled in the plaintiffs favour but then went ahead to rule that the boundaries should be marked and fixed by a Surveyor. As submitted by the appellants counsel the appellant also exhibited documents of ownership but the learned trial magistrate never said anything about those documents.

The powers of this court in the exercise of its appellate jurisdiction are well set out in Section 78 Civil Procedure Act and these are:-

(1) To determine a case finally.

(2) To remand a case

(3) To frame issues and refer them for trial

(4) To take additional evidence or to require the evidence to be taken.

(5) To order a new trial.

Considering these powers in the light of the evidence adduced herein the court makes findings that the exact location of the plaintiff's plot and the ground was a crucial issue in the matter. It is on record both from the documentation on allocation and plaintiffs own evidence in cross examination that indeed the plaintiffs plot was allocated near the auction and power and lighting which was far off from where the defendant resides and where the plaintiff alleged that the plot had been transferred to a new location because of flooding in the area where she had initially been allocated. It was further added that the transfer was ordered by the physical planner and approved by the municipality. It is however, on record that this evidence was not availed to the court. It was necessary to receive evidence of approval of transfer of the plaintiffs plot to a new site both by the physical planner and the county council. In the absence of that the learned trial magistrate should not have ignored the contents of the allocation papers before him.

As for the appellants evidence, it was wrong to ignore them without actually calling evidence from the country council to confirm that they are fake. The year when the defendant put up a structure on the site where she resides was not crucial. What was crucial was whether the defendant had been allocated that site or not. In the absence of evidence of transfer and relocation of the plaintiffs plot to where the defendant was residing there was no justification for raising issues of attempting to acquire the plaintiffs plot thro ugh adverse possession.

The upshot of the foregoing short assessment is that this is a proper case to remand to the lower court for a new retrial before another magistrate of competent jurisdiction with framed issues for determination. The stand taken by this court draws strength from the fact that the final judgment by the lower court is not conclusive as it ordered for survey work to be undertaken which means the ownership of the plot by the plaintiff was not conclusive. As submitted by the appellants counsel, survey should have been ordered first, before judgment, so that the court rules on the basis of the evidence before it and not on the anticipated evidence. It was wrong for the learned trial magistrate to anticipate that the Surveying evidence would favour the decision reached. It may well have turned out to be contrary to the decision and this would have put the parities in an embarrassing position not withstanding availability of review as possible ultimate remedy should such a situation arise.

The final orders are:-

(1) The appeal has merit and it is allowed in its entirety with costs both on appeal and the lower court.

(2) The case is remanded to the lower court for the trial to start afresh or de novo before another magistrate of competent jurisdiction other than the one who made the orders giving rise to the appeal. The new court and the parties are directed to call for the following documents and adduce them in evidence.

(i) Area maps showing the current location of the two plots namely Garissa Municipality Block 3/457 and plot No.218 B on the ground.

(ii) Survey and establish beacons and other survey marks for each plot.

(iii) Thereafter the court and the parties to proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2007.

R. NAMBUYE

JUDGE