Ikiugu v Ikiugu (Environment and Land Appeal 4 of 2022)
[2022] KEELC 15598 (KLR) (5 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15598 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT AND LAND APPEAL 4 OF 2022

AK BOR, J

DECEMBER 5, 2022

BETWEEN

JOHN MUTWIRI IKIUGU ..... APPELLANT

AND

LAWRENCE MWONGERA IKIUGU ..... DEFENDANT

JUDGMENT

1. This dispute revolves around ownership of the land known as plot number 1077C Nturukama ("the suit property") which both the appellant and the respondent lay claim to. The appellant is the nephew of the respondent. The appellant lodged this appeal against the decision of the Honourable Mr B Mararo, Principal Magistrate, delivered in Nanyuki Chief Magistrate Environment and Land Court Case No 66 of 2020 delivered on 22/2/2022, *vide* which the learned magistrate declared the respondent the owner of the suit property and directed the appellant to vacate the land and pay the respondent general damages of Kshs 100,000/= for trespass and encroachment on the respondent's land.

2. The grounds of appeal were set out in the memorandum of appeal. The main grounds were that: the trial court disregarded the documentary and oral evidence which the appellant tendered during the hearing; the court disregarded the explanation given regarding the sale agreement dated October 12, 2002: and the court erred when it awarded the respondent general damages of Kshs 100,000/=.

3. The appeal was canvassed through written submissions which the court has read and considered. The appellant submitted that he bought the suit property from Daniel Nkoroi for Kshs 140,000/= and that he paid him Kshs 130,000/= leaving a balance of Kshs 10,000/= which was to be paid on transfer of the land. His position was that, initially, the respondent was buying the land with his aunt but that they allowed him to buy the land *vide* the handwritten sale agreement dated October 12, 2002. He claimed that he left the plot in the custody of the respondent and his aunt who later died. He claimed that he gave the respondent notice to vacate the suit property but he declined to do so following which he forcibly entered the suit land as its owner.

4. There were attempts made to resolve the dispute which did not yield any results culminating in the filing of Nanyuki Chief Magistrate Environment and Land Court Case No 66 of 2020. The appellant was aggrieved by the judgment rendered in that suit and argued that the trial court failed to consider the statement he made to the police investigators regarding the history of the land and the admission of the respondent in the letter he wrote to him in which he admitted that the appellant bought the land from the original owner. He added that there was an agreement that there would be no need to draw up another agreement. He also drew the court's attention to the claim which the respondent made before the chief that he bought the suit land from him at Kshs 450,000/= and not the original owner and that there was no written agreement for that sale.

5. The appellant relied on the sale agreement and faulted the trial court for finding that the sale agreement was between the respondent and the original owner and that the appellant signed the agreement as a witness. He went to great lengths to reproduce the answers which the respondent gave during cross examination regarding his claim of ownership of the land. Further, he took issue with the learned magistrate's finding that the respondent did not have money at the time to buy the suit property and that it was he who paid for the land and despite this, concluding that the respondent was the owner of the land. He also faulted the trial court for relying on the respondent's statement that he refunded money to the appellant.

6. The appellant also contended that the trial court applied section 3(3) of the *Law of Contract Act* but failed to consider section 3(3)(b) on the requirement for each signature to be attested. He faulted the court for considering the top part of the agreement and ignoring the bottom which showed he was the buyer. He contended that the court erred in concluding that there was a transfer in favour of the respondent without evidence of a transfer being tendered. He emphasised the contradictions in the respondent's evidence that he bought the land from the original owner at Kshs 140,000/= and the claim that he bought the land from the appellant for Kshs 450,000/=. He urged that the agreement was written in favour of the respondent but was to be implemented in his favour. He challenged the award of general damages of Kshs 100,000/= to the respondent and urged the court to allow the appeal.

7. The respondent submitted that the appeal was incompetent for failure to attach the decree. He relied on section 3(3) of the *Law of Contract Act* on the bar for courts to entertain suits based on contracts for land unless the agreement was in writing, executed by the parties and attested. He submitted that section 3(7) of the *Law of Contract Act* excludes the application of section 3(3) to contracts made before the commencement of the subsection and that section 3(3) came into force on 1/6/2003.

8. Further, that prior to the amendment of section 3(3) of the *Law of Contract* in 2003, the subsection in force then stipulated that no suit would be brought upon a contract for disposition of an interest in land unless the agreement or note or memorandum was in writing and was signed by the party or a person he had authorised. The proviso added that such a suit would not be prevented by the absence of writing where an intending purchaser had in part performance of the contract taken possession of the land, or being already in possession, continued the possession in part performance of the contract and did some other act in furtherance of the contract.

9. The respondent maintained that the appellant executed the sale agreement merely as a witness and not as a buyer. He contended that it was not in dispute that he had been in occupation of the suit property since 2002. He added that he had enjoyed possession of the land for over 20 years peacefully, openly and uninterrupted until the appellant went to the suit land in 2020. He urged the court to dismiss the appeal and award him the costs of the appeal and of the trial.

10. The court notes that contrary to the respondent's contention, there is a copy of the decree at page 54 of the record of appeal.

11. What is at the heart of this case is the sale agreement dated October 12, 2002. It is helpful to reproduce it here.

    October 12, 2002

    Agreement between Danil Nkoroi

    And Lawrence Mwongera M Ikiara

    I have agreed to sell plot No 1077, C to Lawrence Mwongera M Ikiara at 140,000/=

    The transfer will be shared among to two each Ksh 3,800/=.

    I have received 130,000/= leaving a balance of Kshs 6,200/= to be paid after transfer.

    Seller: Daniel Nkoroi: signed

    Buyer: John Mutwiri Ikiugu: signed and dated 12/10/02.

12. Looking at that sale agreement, it is not drafted in the best legal terms. It states that the agreement is between Daniel Nkoroi and Lawrence Mwongera M Ikiara but at the bottom indicates the buyer signing it as John Mutwiri Ikiugu. Daniel Nkoroi acknowledges receipt of Kshs 130,000/= without indicating from whom he received that sum of money. The balance of Kshs 6200/= was to be paid after transfer. It is not clear whether the plot was ever surveyed for purposes of registration but what is certain is that the land was never transferred to the buyer.

13. The court notes that the investigations by the police were conducted in September 2020 following allegations of malicious damage to property which the respondent made against the appellant. The appellant produced a letter dated 11/8/2020 addressed to whom it may concern regarding this dispute. It is difficult to tell who authored that letter because the part bearing the signature was cut off while being photocopied. It would seem from the witness statement of the appellant that that letter was written by the chief of Nturukuma.

14. No explanation was given as to why the appellant did not pursue Daniel Nkoroi to transfer the suit property to him during his lifetime if at all the agreement for sale was to be implemented in his favour as he contended on appeal. No plausible explanation was given as to why the appellant did not take possession of the land upon purchasing it or why he did not complete the sale transaction with Daniel Nkoroi and have the land transferred to him. If at all he had an enforceable claim to the suit property, the appellant should have taken steps to assert and enforce his rights over the plot. He waited until 2020 then attempted to occupy the land which prompted the respondent to sue him for trespass and he only defended the claim.

15. It is not in dispute that the respondent was in occupation of the suit property since 2002. The appellant claimed that in 2014 he allowed the respondent to use the suit land. That would be 12 years after he claimed to have bought the land. From 2002 until 2020 when he attempted to take possession of the suit property, the appellant was indolent in enforcing whatever rights or interests he may have had over the suit land.

16. The appeal lacks merit and is dismissed. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 5TH DAY OF DECEMBER, 2022.

KOSSY BOR

JUDGE

In the presence of:

Mr. J. Okemwa holding brief for Mr. J. Abwuor for the Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the Appellant