REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC APPEAL NO. 18 OF 2019

FREDRICK KAMULA.....APPELLANT

VERSUS

KAMBUA WILFRED MUINDE.....1ST RESPONDENT

MUTUA MUINDE.....2ND RESPONDENT

JUDGEMENT

1. This is an appeal from the judgement of the learned Senior Principal Magistrate in Makindu Civil Case Number 398 of 2009 delivered on 17th May, 2019.

2. The Appellant initially filed his suit against four (4) Defendants at the High Court of Kenya at Machakos vide civil case number 37 of 2009 where he sought the following orders:-

> **a) A declaration that the Plaintiff is the legal and rightful owner of the plots No. 128, 129 and 144 within Wayani Settlement Scheme.**
>
> **b) An order that the Plaintiff be registered as the owner of the suit premises and the name of the Defendant be deleted in the Adjudication Record accordingly.**
>
> **c) In the alternative, an order that if the Plaintiff was not originally entitled, he has acquired ownership and title through adverse possession from 1969 to date.**
>
> **d) A permanent injunction prohibiting the Defendants, his agents and/or servants from interfering with the Plaintiff's ownership of the suit premises in any manner whatsoever.**
>
> **e) General damages.**
>
> **f) Exemplary and aggravated damages.**
>
> **g) Special damages (costs of engaging in unnecessary disputes over the ownership of the suit premises instigated by the Defendant (to be quantified).**
>
> **h) Costs of the suit.**
>
> **i) Interest on items (e), (f), (g), and (h) of the prayers as the court may deem fit and justified.**
>
> **j) Any other or further relief as this Honourable Court may deem fit and just to grant.**

3. The four Defendants filed their joint defence on 5th March, 2009. The same dated on even date. They denied the Appellant's claim.

4. On the 4th March, 2009, the suit against 3rd and 4th Defendants was withdrawn with no orders as to costs. And on 21st October, 2009, the suit was transferred to the Senior Principal Magistrates court at Makindu for hearing and determination.

5. Vide the consent dated 20th September, 2012, the Appellant was allowed to amend his plaint and hence his amended plaint dated 26th September 2011. In the amended plaint, the Appellant sought the following orders against the two Respondents: -

> **a. A declaration that the Plaintiff is the legal and rightful owner of the plots No. 128, 129 and 144 within Wayani Settlement Scheme.**
>
> **b. An order that the Plaintiff be registered as the owner of the suit premises and the name of the Defendant be deleted in the Adjudication Record accordingly.**
>
> **c. In the alternative, an order that if the Plaintiff was not originally entitled, he has acquired ownership and title through adverse possession from 1969 to date.**
>
> **d. A permanent injunction prohibiting the Defendants, his agents and/or servants from interfering with the Plaintiff's ownership of the suit premises in any manner whatsoever.**
>
> **e. General damages.**
>
> **f. Exemplary and aggravated damages.**
>
> **g. Special damages (costs of engaging in unnecessary disputes over the ownership of the suit premises instigated by the Defendant (to be quantified).**
>
> **h. Costs of the suit.**
>
> **i. Interest on items (e), (f), (g), and (h) of the prayers as the court may deem fit and justified.**
>
> **j. Any other or further relief as this Honourable Court may deem fit and just to grant.**

6. The Respondents did not amend their defence. Upon conclusion of the matter at the subordinate court, the learned Senior Principal Magistrate in his judgment found in favour of the Respondents and proceeded to dismiss the Appellant's suit with costs to the Respondents.

7. Aggrieved by the judgement of the learned Senior Principal Magistrate, the Appellant filed this appeal where he raised the following grounds: -

> ***1.*** *The Honourable Magistrate erred in law and fact by failing to find that Plot Numbers 128, 129 and 144 in Nguu Settlement Scheme are exclusively owned by the Appellant having taken possession of them in 1969.*
>
> ***2.*** *The Honourable Magistrate erred in law and fact by failing to find that the Appellant had acquired exclusive ownership of Plot Numbers 128, 129 and 144 in Nguu Settlement Scheme by adverse possession.*
>
> ***3.*** *The Honourable Magistrate erred in law by failing to set aside the letter of the Chief, Mweini Location dated 16th August, 2013 which unlawfully declared that Plot Numbers 128, 129 and 144 in Nguu Settlement Scheme were owned by Wilfred Muinde Mukivu, the 1st Respondent's husband.*
>
> ***4.*** *The Honourable Magistrate erred in law and fact by dismissing the Appellant's suit with costs.*
>
> ***5.*** *The Honourable Magistrate erred in law and fact by failing to recognize that the Appellant's suit was meritorious and it was in the interest of justice that the prayers sought in the Plaint be granted. Further, that, dismissing the Appellant's suit meant driving the Appellant from seat of justice which would occasion great injustice and irreparable prejudice to the Appellant.*

He prays for: -

> ***a)*** *This Honourable Court be pleased to set aside in its entirety, the Judgment of the lower court delivered on 17th May, 2019 dismissing the Appellant's suit with costs.*
>
> ***b)*** *This Honourable Court grants this Appeal and find that the Plot Numbers 128, 129 and 144 in Nguu Settlement Scheme are exclusively owned by the Appellant.*
>
> ***c)*** *The costs of and incidental to this Appeal be provided for.*

8. This being a first appeal, 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 allowance in this respect. (See **Seller –Vs- Associated Motor Board Co. Ltd 1968 [1968] EA 123** at page 126 letter H and **Williamson Diamond Ltd –Vs- Brown [1970] EA 1** at pages 15 and 16 letters (i) to (c)).

9. In his evidence before the trial court, the Appellant who was PW1 told the court that the Respondents snatched his land which he got in

1969. He went on to say that he settled on the suit premises because it was government land and that he had built on it.

10. It was also his evidence that the Respondents do not reside in the suit land. He added that when the area was surveyed in the year 2007, he was given an allotment book (PEX No. 1) with allotment number to show that he had been given plots numbers 128 and 129. He said that plot number 144 was hived off from plot number 129 by the Ministry of Lands Kibwezi. According to him, he did not sell nor did he see the Respondents buy any land.

11. In his evidence in cross examination, the Appellant told the trial court that he could remember the surveyors went to the area in 2007. He said that he filed a case at the committee but the latter gave the land to Mokivo who is the husband of the 1st Respondent. He said that although he had filed an objection after the land was allotted to Mukivo, he did not appear before the board and he instead sought to go to court.

12. The Appellant called Joseph Matoni (PW2) and Benson Mukili (PW3) as his witnesses. Joseph (PW2) in his evidence in chief before the trial court was that he was a resident of Nguu area since 1963. He said that he knew the Appellant who stays in Mayani area and added that he did not know the Respondents. He went on to say that the land belongs to the government and that surveyors gave him and others land and that they were also issued with numbers. He said that he first saw the Appellant in 1969 and up to date the latter resides where he saw him. He said that he and others entered into the land as squatters. It was also his evidence that Malava alleged to have purchased the land.

13. In his evidence in cross examination, Joseph (PW2) told the trial court that the area was declared an adjudication section in 2007.

14. Benson's (PW3) evidence in chief before the trial court was that he too has known the Appellant since 1969. He said that the suit land where the Appellant resides belongs to Nguu Ranch. He said that the Appellant was issued with a number by the surveyors when survey exercise commenced. He said that he did not see Mukivo.

15. His evidence in cross examination was that he did not know Sarah James. He said that he knows Mutua. He said that he only heard that the two took over the Appellant's land but he did not know if they entered into the said land.

16. On the other hand, the 1st Respondent who testified on behalf of herself and that of the 2nd Respondent told the trial court that the land in dispute belongs to her late husband. She said that a dispute between the Appellant and her late husband arose when the latter entered into the land to plough. She said that the dispute involved plots number 128, 129 and 144. According to her, the land officer decided the dispute in favour of her husband and the Appellant was ordered to vacate the suit land and he did so. The 1st Respondent produced proceedings of the land adjudication as DEX No. 1. She went on to say that in 2013, the chief of Nguu visited the disputed land and he wrote a letter saying that the land was hers. It was also her evidence that when her husband died in 2008, the Appellant who had moved out of the suit land went back to claim it.

17. Her evidence on cross examination was that she stays at Kigimeni area. She said that she was not amongst the squatters nor did she have any document to confirm that she was one. She also said that she did not have any document given by the survey and that she further said that even though she was using the land, she had no document. She reiterated that the land belonged to Nguu Ranch and that she acquired it in 1982. She said that she was given an allotment number but had no allotment book.

18. In his judgment, the learned Senior Principal Magistrate held that;

> ***"The court has considered the Plaintiff and defence case, considered documents produced as exhibits and holds that plot No. 128, 129 and 144 are owned by Wilfred Mukivu Muinde. Consequently, the Plaintiff's case be and is hereby dismissed with costs."***

19. In his written submissions before me, the Appellant counsel framed three issues for determination as follows: -

> ***(a) Whether the Appellant is entitled to the suit properties and the relief sought;***
>
> ***(b) Whether the Respondents and their agents/servants should be permanently restrained from trespassing on the suit properties; and***
>
> ***(c) Costs.***

20. The counsel however made submissions in respect of issue number one and three.

21. In his submissions regarding the first issue, the counsel for the Appellant submitted that the Appellant has been in actual possession and occupation of the suits properties since 1969 and that he holds allotments letters. The counsel went on to submit that the Appellant has put up various developments thereon. The counsel further submitted that the Appellant confirmed that the government surveyors demarcated and adjudicated the suit properties and gave him allotment numbers as can be seen in the Appellant's testimony before the trial court on 23rd November, 2018 captured in page 85 of the Record of Appeal.

22. The counsel further submitted that the Appellant's witnesses at the trial court corroborated the Appellant's evidence. The counsel went on to submit that the 1st Respondent confirmed to the trial court that she resides in Kikumini and not in Wayani settlement scheme thus her claim of ownership, use and possession of the suit property must fail.

23. In support of his submissions, the counsel cited the case of Henry **Muthee Kathurima –Vs- Commissioner of Lands and Another**

[2015] eKLR where the Court of Appeal sitting at Meru held that;

> ***"We note that it is not in dispute that the 2nd Respondent has always been in actual and physical occupation of the suit property from 1989 to date. The Appellant must have known of this fact when he applied for the suit property to be allotted to him. In his application for allotment of a commercial plot made by letter dated 21st March 1997, the Appellant identified the suit property and marked it in red in the attachment. The inference to be drawn in that the Appellant identified and knew the specific plot he desired and he knew that the 2nd Respondent was in physical possession; it was the Appellant's clear intention not only to disposes the 2nd Respondent of the suit property but to acquire a public utility land that was in possession of a public entity. The bona fides of the Appellant in applying for the specific suit property knowing that it was in possession and occupation of a public entity is put in issue. In Mwangi –Vs- Mwangi (1989) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights that are binding on the land. It is our view that the 2nd Respondent having been in possession of the suit property since 1989 to date, its rights are binding on the suit property, the 2nd Respondent's possessory rights are overriding."***

24. Arising from the above, the counsel submitted that having been in occupation of the suit property since 1969, the Appellant has an equitable right which is binding on the suit property and cannot be dislodged in the manner applied by the Respondents and Kibwezi District Office. The counsel urged the court to uphold the Applicant's right to the suit property.

25. It was further submitted that the Respondents do not have an allotment letter to rebut the evidence by the Appellant. That during cross examination, the 1st Respondent confirmed that neither her nor her deceased husband has ever been issued with an allotment letter or any document whatsoever to assert ownership of the suit property as can be seen from the proceedings of 23rd November, 2018 which appear in page 87 of the Record of Appeal.

26. Further, the counsel submitted that once the suit properties were allotted to the Appellant, they ceased to be unalienated land available to another person. The counsel was of the view that neither Kibwezi District Land's office nor the Chief Mwani Location, have any mandate whatsoever to allegedly transfer ownership of the suit property from the Appellant to the 1st Respondent's husband. In support of his submissions, the counsel cited the case of **Nelson Kazungu Chai & 9 Others –Vs- Pwani University College [2017] eKLR** where the Court of Appeal sitting at Malindi held that: -

> ***".....it is clear that once allotted to the institute, the suit land ceased being unalienated land as defined under Section 2 of the repealed Government Lands Act. Consequently, the Commissioner of Lands could not cause allocation to issue in respect of the same because under Section 3 of the Act only land that could be so allocated was unalienated land. Therefore, under statutory law, the Commissioner of Lands ceased to have the mandate to allocate the land the moment the same was allocated to the institute. Even if the commissioner were to purport to allocate the land, the same would be null and void. As stated by the predecessor of this court in the case of Sid Bin Seif –Vs- Shariff Mohammed Shatry (1940) 19 (1) KLR 9 an action taken by the Commissioner of Lands without legal authority is anullity and such an action, however technically correct, is null and void and is of no effect whether under legitimate expectation, estoppel or otherwise."***

27. It was further submitted on behalf of the Appellant that the Appellant has legitimate expectation that he would be the sole proprietor of the suit properties and that title deeds for the suit properties would be issued to him. In support of his submissions, the Appellant's counsel cited the case of **Nelson Kazungu Chai (Supra)** where the Court of Appeal quoted the decision of House of Lords in **Council of Civil Service Unions & Others –Vs- Minister for the Civil Service [1984] 3 ALL ER 935** in respect of legitimate expectator as follows;

> ***"even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege and if so the courts will protect his expectation by judicial review as a matter of public law. In order to successfully invoke the doctrine it must be shown that the act or decision complained of affected such other person either; (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him some benefit or advantage which he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do."***

28. The Counsel went on to submit that it would be in breach of the Appellant's right to property enshrined under Article 40 of the constitution of Kenya and urged the court to protect the Appellant's right to ownership, occupation, possession and use of the suit properties. The court further cited the **Nelson Kazungu Chai's** case Court of Appeal where they stated thus: -

> ***"An expectation can only be legitimate if it is coached in law and if the promise made by the authority falls within its mandate to fulfil. This position was appreciated by the Supreme Court of India in Jitendra Kumar & Others –Vs- State of Haryana & Another Appeal No. 5803 of 2007, where it was sated that; a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty with the Government's dealings with the public."***

29. The Counsel further the case of **Sirikwa Squatters Group –Vs- Commissioner of Lands & 9 Others [2017] eKLR** among others. The Appellant's counsel further submitted that Section 7(1) of the Land Act recognizes that title to land may be acquired through any manner prescribed by statute. The counsel further cited section 28 of the Land Registration Act which recognizes the right to land acquired by virtue of any written law relating to limitation of actions for other rights acquired by any written law. The counsel went on to submit that by operation of the aforementioned statutes, an adverse possessor gains title to equal protection of the law over his property. The counsel cited the case of **Mtana Lewa –Vs- Kahindi Ngala Mwagandi [2017] eKLR** where Asike Makhandia, JA. he held;

> ***"Limitation of actions mechanisms such as adverse possession plays an important role in the enforcement of one of the***

fundamental legal principles in the judicial system which is that at some point litigation must come to an end. It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce."

30. Arising from the above, the counsel submitted that the Appellant has been in actual and physical possession and occupation of the suit properties since 1969 to date. The counsel further cited the case of **Chevron (K) Ltd –Vs- Harrison Charo wa Shutu [2016] eKLR** where the Court of Appeal referred to the decision in **Adnam –Vs- Earl of Sandwish [1887] 2 QB 485** where it stated that;

"The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the borad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tactic parties."

31. The counsel went on to submit that Section 7 of the Limitation of Actions that provides that a person may not bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person. The counsel added that the 1st Respondent's husband, during proceedings before the Land Adjudication and Settlement Officer on 21st April, 2018 alleged that he came to the suit property in 1980 with an intention to buy it as can be seen in page of 49 of the Record of Appeal. The counsel pointed out that it is a well settled principle in law that he who alleges a fact must prove. The counsel cited Section 107 of the Evidence Act which provides that;

"whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."

32. The Counsel added that the burden lay on the Respondents to prove that they purchased the suit premises and in the absence of such evidence, the allegation by the 1st Respondent must fail.

33. It was further submitted that the Appellant discharged both the legal and evidential burden of proof when he produced the allotment letter confirming that the suit properties were allotted to him. The counsel cited the case of **Raila Amolo Odinga & Another –Vs- IEBC & 2 Others [2017] eKLR** where the Supreme Court in a majority decision aptly illustrated the contradistinction between the legal burden and evidential burden at paragraph 132 as follows;

"Though the legal and evidential burden of establishing facts and contentions which will support a party's case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharged this, the evidential burden shifts and its position at any time is determined by answering the question as to who will lose if no further evidence were introduced."

34. The counsel further submitted that even though the 1st Respondent's husband alleged that the suit properties were sold to him by the committee that was allocating land to people, he did not produce any agreement for the sale. The counsel added that the 1st Respondent's husband has never taken the Appellant to any tribunal or court for a declaration that the suit for parties belong to him. The counsel went on to submit that sued by the Appellant, the Respondents have never had any counter claim against him thus they surely do not have any legitimate interest and rights to assert and preserve to the exclusion of the Appellant.

35. Regarding the issue of costs, the Appellant's counsel cited judicial Hints on Civil Procedure 3rd Edition (Nairobi) Law Africa 2011, page 94 where Kuloba J. (retired) said;

"Costs are awarded at the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise…."

36. The counsel further cited the case of **Cecilia Karuru Ngayu –Vs- Barclays Bank of Kenya & Another [2016] eKLR** where Mativo, J. was of the view that;

"In determining the issue of costs, the court is entitled to look at among other things; the conduct of the parties, the subject of litigation, the circumstances that lead to the institution of the proceedings, the events which eventually led to their termination, the stage at which proceedings were terminated, how they were terminated, the relationship between the parties; and the need to promote reconciliation amongst the disputing parties according to Article 159(2) (c) of the Constitution."

37. Arising from the above, the counsel submitted that since Appellant had discharged the legal and evidential burden of proof in respect of his claim against the Respondents. The court should exercise its discretion in his favour and award him costs at the trial court.

38. On the other hand, the counsel for the Respondents confined his submissions to grounds one, two and three of the memorandum of appeal.

39. Regarding issue number one, the counsel for the Respondents invited the court to **consider** (*emphasis are mine*) the fact that the land in Nguu Wayani was demarcated in 2007 and that before then, all those that lived on the land set aside in the scheme were squatters and the land was in the hands of the government. The counsel went on to submit that the Appellant is wrong on laying a claim of adverse possession against the government.

40. It was further submitted that when demarcation was done, the Appellant had the right to challenge any wrongful allocation, if any, (through Sections 13-29 of the Land Adjudication Act Chapter 284 of the Laws of Kenya if he felt aggrieved. The counsel pointed out that the Appellant presented his case before the committee and when the same was dismissed, he chose to go to court instead of challenging the decision through the laid out procedure.

41. In conclusion, the counsel submitted that the learned trial magistrate was guided by the law and the evidence in arriving at his decision thus the appeal lacks merit and same should be dismissed with costs.

42. Having reconsidered the evidence adduced before the trial court and having evaluated it, these are the conclusions that I have drawn bearing in mind that I neither saw nor heard the witnesses and as such I will make due allowance in this respect. Both the Plaintiff and the Defendant are in agreement that belongs to the government. According to the Appellant, he was allocated parcel numbers 128 and 129 as he had been a squatter since 1969 while the Respondent's evidence was that her deceased's husband bought parcel number 144 from the adjudicating committee.

43. From the evidence that was adduced before the trial court, the Respondent does not have a title document in respect of her parcel number 144. As such, I am in agreement with the counsel for the Respondent that the Appellant cannot claim adverse possession against her. I further agree with the Respondent's counsel that the Appellant also cannot claim for adverse against the government.

44. Both the Appellant and the Respondent are in agreement that they received their respective parcels of land after adjudication process. The Appellant produced an allotment book (PEX No. 1) to show that he had been allocated the two parcels that he claims on the other hand, the Respondent in her evidence before the court was that her deceased husband purchased parcel number 144 from the adjudication committee. She further relied on the adjudication proceedings (DEX No. 1) that were conducted by the Land Adjudication Officer who upheld her claim. The Respondent further relied on the Chief's letter (DEX No. 2) that stated that parcel number 144 was hers.

45. The Respondent in her evidence in cross examination before the trial court admitted that she had no document to confirm that she was a squatter nor did she have any document from the survey to show how she acquired her land in 1982.

46. If Nguu Ranch is a government land as both parties claim, then the government would naturally issue land to deserving buyers under a Settlement Scheme Programme alluded to by the Respondent in her statement dated 22nd November, 2018 and which statement she adopted as her evidence before the trial court. Clearly the Respondent did not produce any letter of offer issued to her deceased husband in 1982. The Appellant and his witnesses told the court that adjudication process in Nguu Ranch commenced in the year 2007 when he was issued with an allotment book (PEX No. 1) after being allocated parcels numbers 128 and 129. That evidence was not controverted before the trial court.

47. The preamble to Land Adjudication Act Chapter 284 of the Laws of Kenya provides the purpose for the said Act as;

> ***"An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto."***

48. Arising from the above, parties herein are in agreement that there was adjudication process that took place in Nguu Ranch. There is nothing in the evidence before the trial court that shows the rights and interests that the deceased husband of the Defendant had in parcel number 144 so as to be allocated the same since in the words of the Respondent, her husband bought it from the adjudicating committee. There was no evidence of the money, if at all it was received by the government, having been receipted.

49. As such, in my view, there was no justification for the adjudication committee to hive off parcel number 144 from parcel number 129 that had already been allocated to the Appellant. The learned trial magistrate therefore erred in law and in fact by failing to appreciate that parcel number 144 Nguu Settlement Scheme was part of parcel number 129 owned by the Appellant and, therefore, could not be allocated unless the allocation to the Appellant was revoked.

50. In the circumstances, I hereby set aside in its entirety the judgement delivered by the trial court on 17th May, 2019 dismissing the Appellants suit with costs. I will therefore allow the appeal and proceed to grant the following orders since the Appellant appears to have abandoned the other prayers in his amended plaint: -

> ***a) That parcels number 128, 129 and 144 are exclusively owned by the Appellant.***
>
> ***b) The costs of and incidental to this appeal to the Appellant. It is so ordered.***

Signed, dated and delivered via email at Makueni this **29th** day of **January, 2021.**

MBOGO C.G.

JUDGE

Court Assistant: Mr. G. Kwemboi.