



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 53 OF 2018

GUFU JILLO.....APPELLANT

VERSUS

KULE GOLICHA DAMBI (Suing as the legal representative of

GOLICHA DAMBI).....RESPONDENT

(Being an appeal from judgment and orders of the honourable B.M Obwewa delivered on 5th November 2018 in Marsabit Civil Case no. 24 of 2016)

JUDGMENT

1. The respondent instituted this suit before the principal magistrate's court in Marsabit vide a plaint dated 30.3.2016 seeking an order of eviction against the appellant/defendant from plot no. 433 situated in Sagante Adjudication section.
2. The appellant/defendant filed a statement of defence and counter claim dated 23.2.2018 claiming compensation to the tune of Ksh.111,137.50 on account of destroyed crops.
3. The respondents case was that the suit plot was at all material times registered in the name of her deceased husband one Golicha Dambi. She contends that she was paying rates in respect of the suit plot. She added that the appellant invaded the land. In support of her case, she had availed the grant which enabled her to sue for the estate of her husband. She also availed receipts S/N 0135898 and 0136106 as her exhibits 2a & b. She further availed a clearance certificate also as an exhibit.
4. PW 2 Godana Arabo testified that he knows the suit land belonged to Golicha Dambi who was his neighbor before PW 2 relocated to another area.
5. The appellant who testified as DW 1 stated that he has been farming the suit land for the last 33 years until year 2015 when the son of the respondent came and destroyed his crops. He reported the matter to the police. He also engaged the services of an agricultural officer who carried out a crop damage assessment. Thereafter the elders committee held a meeting and reaffirmed his ownership of the suit land.
6. He contends that parcel Marsabit/Sagante/443 doesn't exist as adjudication has not taken place. He produced his list of documents as exhibits.
7. Dw 2 is one Roba Gaibo who introduced himself as an elder in the sub-location of sagante. He contends that the land in the area has not been adjudicated or surveyed and hence none of the parcels in the area has a number. He contends that he is the secretary of the land committee in the area and vide their meeting of 1.11.2017, the committee resolved that the land belongs to the appellant. He contends that defendant has been on the land for the last 33 years.
8. DW 3 one Sora Molu is also an elder in the area. His evidence was more or less similar to that of DW 2.
9. In the judgment delivered on 5.11.2018, the trial court allowed the claim of the plaintiff/respondent paving way for the eviction of the appellant.
10. Aggrieved by the said judgment, the appellant lodged the memorandum of appeal raising the following grounds:
 - i. The learned trial magistrate erred in law and fact in failing to consider that plot no. 443 Sagante Adjudication Section falls under Cap 284 Laws of Kenya and the land consent was mandatory before hearing of the suit and the same was not filed together with plaint as required under section 30.

- ii. That learned trial magistrate erred in law and fact in failing to consider that the appellant was entitled to the suitland by way of adverse possession having been in possession of the suitland for over 34 years.
- iii. The learned trial magistrate erred in law and fact in failing to consider that the author of the ownership document was not called as witnesses even after the said document was challenged to be forgery.
- iv. The learned trial magistrate erred in law and fact in failing to visit the locus on the ground to ascertain the owner and the boundaries on the ground.
- v. The learned trial magistrate failed to find that the appellant had acquired interest in the and through adverse possession and ignoring the appellant counter-claim that he had sought compensation after his properties were damaged by the respondent.
- vi. The learned trial magistrate erred in law and fact in failing to order transfer of the suit land to appellant even after proof of adverse possession was satisfied.
- vii. The learned trial magistrate erred in ignoring the appellant both documentary evidence and prove that he occupied the suit property for over 34 years.
- vii. The learned trial magistrate erred in law and in ignoring the letters from the land office confirming that the area is not demarcated.
- viii. The learned magistrate erred in failing to consider that the respondent deceased husband and the appellant had no dispute in regard to the suit property.
- ix. The learned magistrate erred in law and fact in entertaining proceedings of suit property which is under adjudication section without consent as provided for Under Section 30 of cap 284 Laws of Kenya.

11. On 10.7.2019, the court gave directions for the appeal to be heard by way of written submissions. I have only seen submissions of the appellant.

12. It was submitted for the appellant that no consent was obtained in line with the provisions of section 30 of the land adjudication act or section 8 of the land consolidation act hence the court had no jurisdiction to handle the matter. On this point, the cases of **Stanley Lezen Mliwa vs Leonard Kagala Makangu & 2 others (2007) eKLR** and owners of **Motor Vessel "Lilian "S" vs Caltex Oil Kenya Ltd (1989) IKLR** were relied upon.

13. It is further submitted that under section 26 of both Cap 283 and 284, disputes arising in adjudication areas ought to be resolved through the available dispute resolution mechanisms. That the respondent ought to have filed an objection with the committee to determine his dispute as the adjudication process is still ongoing. Having failed to exhaust the aforementioned mechanisms then his case should not have been entertained.

14. It is further submitted that the trial court failed to consider that the appellant had acquired the suit land by dint of section 38 (1) of the limitation of actions act through the doctrine of adverse possession, since he has been on the land for more than 33 years. On this point, the case of **Josinter Atieno Ouma & Another vs Joshua O. Omiti & another (2018) eKLR** has been proffered.

Determination

15. This being a first appeal, it is the duty of this court to re-evaluate the evidence, assess it and make its own conclusions but remembering that the court neither saw nor heard the witnesses and making due allowance for that: *see Selle vs Associated Motor Boat Company Ltd (1968) E.A 123, Arrow car Limited vs Bimamo & 2 others (2004) 2 KLR 101.*

Grounds 1 & 10 - Consent in adjudication

16. It is rightly submitted by the appellant that pursuant to provisions of section 30 of the Land Adjudication Act and section 8 of the Land Consolidation Act, a consent from the Land Adjudication officer is required when a person is filing a suit in court. This however applies to claims of rights and interest in land falling in the adjudication processes – *see Reuben Mwangera M'Itelekwa vs Paul Kigea Nabea (2014) eKLR.*

17. The question is, is the suitland situated in an area undergoing adjudication process? There was no tangible evidence adduced indicating that the area was declared an adjudication section in terms of section 2, 3 and 5 of the Land Consolidation Act or section 3 and 5 of the Land Adjudication Act. A document availed by the appellant himself which is a letter from the land adjudication officer (found on page 89 of the record of appeal) states that adjudication process has not commenced in the area. Even in his recorded statement before the trial court, the appellant was emphatic that adjudication had not taken place. It follows that the consent envisaged under the adjudication statutes was not a requisite document.

18. However, even if the dispute had fallen in the adjudication arena, this court would still not have entertained the objection raised by the appellant primarily because this point was not made a subject of contest before the trial court – *see Kiplagat Korir vs Dennis Kipngeno Mutai (2006) eKLR, Coastal Professional Freighters Limited vs Welsa Bange Oganda & 2 others (2019) eKLR (Supreme court).*

19. On the issue that the respondent ought to have exhausted available remedies under the adjudication statutes, I find that the dispute did not fall under the ambit of the dispute resolution mechanisms established under the aforementioned statutes because there was no ongoing adjudication process. Again the issue was not raised before the trial court and in the grounds of appeal. It was only raised in the submissions.

Grounds 2, 6 and 7 on adverse possession.

20. The appellant has faulted the trial court for not determining the issue of adverse possession in his favour. However nowhere in his statement of defence and counter claim did the appellant plead adverse possession.

21. **In Galaxy Paints Company Ltd vs Falcon Guards Ltd (2000) eKLR**, the court held that:

“It is trite law and the provisions of O. xiv civil procedure rules are clear that issues for determination flow from the pleadings.....”.

22. The trial magistrate did not err in failing to determine a claim which was not anchored in the pleadings.

Ground 3: Forged document

23. The applicant avers that the author of the ownership document was not called as a witness and that the said document was challenged as a forgery. The appellant has not pointed out at what point during the lower court’s proceedings the issue of production of the ownership document was put into question. The respondent produced 3 documents on page 34 and 35 of the record of appeal and no objection was raised.

Ground 4: Scene visit

24. The appellant has faulted the trial court for not visiting the scene. However, again the proceedings don’t reflect that a request for scene visit was made but denied.

Ground 5: compensation.

25. The applicant has faulted the trial magistrate for failing to make the award for compensation. True the claim for compensation is the only one specifically pleaded by the appellant. However the trial court did not establish that the appellant owned the land. He can therefore not be faulted for failing to make an order for compensation.

Ground 8: Demarcation of the land.

26. The letter from the lands office indicated that the area is not under adjudication. The trial magistrate however never made any reference to the effect that the area is adjudicated. The trial court considered the documents availed by the respondent and none made reference to adjudication. What emerges is that the respondent was recognized as a rate payer in the County Government in respect of an identifiable plot.

Ground 9:

27. Appellant has made an averment that the trial magistrate failed to consider that the respondent deceased husband and the appellant had no dispute in regard to the suit property. However, this issue was not put across as one for consideration during trial.

Conclusion

28. All in all I find that the appeal is not merited. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 17.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

