



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 2 OF 2015

PATRICK MWANG'OMBE MTIGO.....APPELLANT

VERSUS

RENSON MWANGINDA MSHAMBA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Mr. W.K. Kitur (RM)

in Civil Suit No. 17 of 2008 in the Senior Resident Magistrate's Court,

Taita Taveta on the 15th January 2015)

JUDGMENT

1. This is an Appeal arising from the Judgment of Honourable W.K. Kitur, Resident Magistrate, Taita Taveta delivered on **15th January 2015** in **Civil Suit No. 17 of 2008**.

2. The Appellant filed a Memorandum of Appeal dated **13th February 2015**, appealing against the whole judgment on the grounds that the Learned Magistrate erred in law and in fact by:

(1) Holding that the Plaintiff had proved his case as by law required.

(2) Failing to appreciate that the plaintiff did not provide any proof of ownership of the parcel of land where the Defendant has built his houses.

(3) Holding that the plaintiff's plot No. 2 California estate, Taveta Township exists and that it is the same plot occupied by the defendant.

(4) Misapprehending the evidence and failing to give due weight to the evidence of the Defendant while giving undue weight to the evidence of the plaintiff.

3. The Appellant prays that the appeal be allowed, the judgment and decree of the learned Magistrate be set aside, the respondent's suit be dismissed and the appellant be awarded costs of this appeal and court case.

4. The brief background to this appeal as can be gathered from the record of appeal is that the Respondent, then plaintiff, filed a suit against the Appellant, then defendant, vide a plaint dated **24th June 2008** seeking eviction orders against the Defendant from **Plot No. 2, California, Taveta**, costs and interest.

5. It is apparent from the record of appeal that the Respondent pleaded that he was the lawful owner of a plot designated as **Plot No. 2, California, Taveta Township** and that the appellant had without any lawful reason or sanction trespassed upon the said Plot, and commenced construction and active occupation thereon.

6. The Appellant in his statement of defence dated **12th September 2008** denied the Respondent's claims and averred that he is in occupation of **Plot No. 65** which he purchased from Agro-Development and Co. Ltd in the year **1999** and that he was not in occupation of **Plot No. 2** as alleged in the plaint. The matter was set down for hearing at which the respondent called three witnesses while the appellant testified alone in furtherance of his case.

7. The court delivered its judgment on **15th January 2015 2019** in which the Learned Magistrate held that the respondent had proved his case on a balance of probabilities.

8. Directions for the hearing of the instant appeal were taken and this court ordered that the appeal was to be disposed of by way of written submissions. The appellant filed his submissions on **22nd September 2020** while the respondent filed his on **7th October 2020**.

Appellant's Submissions

9. In his submissions, Counsel for the Appellant framed the issues for determination as follows: whether the trial court was right in holding that **Plot No. 2** refers to the plot appellant was in occupation of; whether the trial court was right in disregarding the evidence of the appellant; whether the trial court was right in holding that the respondent had proved his case on a balance of probabilities and what orders should issue regarding costs of the appeal.

10. As to the first framed issue, counsel submitted that from the evidence on record, the respondent had claimed that he owned **Plot No. 2** which he alleged that the appellant had occupied; that the appellant had denied occupying **Plot No. 2** but stated that his plot was **No. 65** and that therefore the burden of proof lay on the respondent to prove that the land that the appellant was in occupation of was **Plot No. 2**. Counsel submitted that although a site visit was intimated by the respondent, the same was not conducted and that further there was no report from a surveyor that was presented to court by the respondent.

11. It was counsel's submission that the respondent failed an elementary requirement, that is to prove that the appellant was in occupation of his alleged land.

12. Counsel therefore submitted that the respondent failed to prove that the parcel of land in occupation by the appellant which according to him was then **Plot No. 65**, was the same as the **Plot No. 2** claimed by the respondent. Reliance was placed on the case of **Njeri Mary Makumbo V Phyls Wangwe (2019) eKLR**.

13. On the second issue, counsel submitted that the appellant produced several documents of proof of his ownership of the parcel of land which he is in occupation of which documents included a letter of allotment and a title deed for **Taita Taveta Scheme Phase 1/69**. It was submitted that the trial magistrate admitted the documents in evidence but failed to consider them in his judgment which, in the appellant's view, was wrong since a legitimate issue arose therefrom and that he ought to have held that the appellant had a title deed in his possession giving him exclusive ownership of his parcel of land.

14. The appellant urged the court to uphold the appeal with costs to the Appellant.

Respondent's Submissions

15. Counsel for the Respondent submitted that the burden of proof in such a matter is on a balance of probabilities. The case of **Miller vs Minister of Pensions(1947) 2 ALL ER** quoted in the case of **Juliana Mulikwa Muindi vs Board of Management of Yangu Mixed Secondary School & Another Civil Appeal No. 16 of 2017 (2018) eKLR** was cited to emphasize this position.

16. Counsel also submitted that from the proceedings of the trial court, it was not stated which party abandoned the site visit and that therefore the allegation that the respondent abandoned the request was made in bad taste. Counsel further submitted that the Appellant's defence on **page 7** of the record of appeal states that he is in occupation of **Plot No. 65** and not **Plot no. 2** as alleged by the Appellant; however the plaintiff in his testimony at **page 56** of the record of appeal confirms that there was an issue of double allocation of the disputed plot notwithstanding the numbers referred to by the parties.

17. Counsel urged the court to dismiss the appeal with costs to the respondent.

Analysis and Determination

18. The duty of this Court as a first appellate court is to reconsider the evidence, re-evaluate it and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited [2009] 2EA 212** where the court held *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

19. I have considered the record of appeal as well as the submissions by both parties and I am of the view that the main issues for determination are as hereunder:-

1. Whether the Learned Magistrate erred in finding that Plot No 2 as claimed by the respondent was the same land claimed as Plot No. 65 by the Appellant;

2. Whether the respondent had proved on a balance of probabilities that he was the rightful owner of the suit land;

3. What Orders should then issue?

20. The issues are addressed as hereunder:-

a. Whether the Learned Magistrate erred in finding that Plot No. 2 as claimed by the respondent was the same land claimed as plot No. 65 by the Appellant

21. **Section 107** of the **Evidence Act Cap 80** provides as follows:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

22. **Section 108** of the **Evidence Act, Cap 80** provides as follows

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

23. Going by the above provisions of the law, the respondent had to prove his claim in the trial court that the appellant was in occupation of his plot which he referred to as **Plot No. 2** and if no evidence was produced by both parties the respondent would have failed.

24. From the proceedings of the lower court, both contesting parties gave a chronology of how they acquired the suit land.

25. Did the evidence produced by the respondent in the trial court warrant the granting of judgment in his favour on the basis that by that evidence he had proved his claim on a balance of probabilities?

26. The evidence of the respondent in the trial court was that he purchased the land while it was vacant and later after his going to Nairobi for about 3 years he came back only to find that the appellant had built some permanent houses on the land. He then allegedly spoke with the appellant who allegedly admitted that he had not bought the land from the person who had sold the land to the respondent. The appellant allegedly asked the respondent to compensate him for the houses he had built on the suit land. When cross-examined the respondent admitted that the agreement does not mention **Plot No. 2** and that no receipt was issued for the **Kshs. 50,000/=** he alleged to have paid to the seller. The respondent also said that the appellant had purported to have bought the land from a company owned by Basil Criticos Agro-Development Co. Ltd, and that the seller who sold the land to the respondent had been given the land by the same Criticos. The respondent admitted to not having gone to the company alleged to have sold the appellant the land to clarify the issues arising.

27. **PW2** the alleged seller to the respondent, admitted that the land was not titled at the time of sale. He stated that he could easily identify the suit plot. However, as no site visit was ever conducted the identification was not done. Also, the evidence of **PW3** and **PW4** was that **PW2** was one of the persons given land *gratis* by Basil Criticos in the **1990s**. **PW3's** evidence was that the letters issued to the allottees bore the letterhead of a company he could not identify. No document save the agreement alleged to have been executed between **PW1** and **PW2** was produced in evidence in favour of the respondent.

28. In contrast to the respondent, the appellant stated that in **1999** the Agro-Development Co. Ltd advertised land for sale and from their map he purchased plot number **65** and paid for it. The respondent claimed the plot **10** years later in **2008**. In **2009** the land was purportedly sold to the Government of Kenya and all purchasers were advised to take their documents to the Ministry Of Lands to secure registration and the appellant complied. Consequently allotment letters were issued to the allottees and he got his, **D. Exhibit 3**, in **2012**. Later, he was issued with a title deed in **2013** for the plot under the land reference **Taveta/Taveta Scheme Phase 1/69**.

29. The appellant in his testimony stated that he bought **plot No. 65** from Agro-Development sometimes in **1999**, where a sale agreement was effected. He further stated that he constructed a house thereon and that he was issued with a title deed. It is on record that he produced a title deed in this regard.

30. Having considered all evidence from both parties, I cannot with certainty state that I have seen any evidence showing that the **plot No. 2** and **Plot No. 65** and **Taveta/Taveta Scheme Phase 1/69** all refer to the same plot. A site visit by the trial court or the submission a surveyor's report would have been ideal but the site visit was not conducted and a survey report was not availed.

31. This court notes that the only party who gave a consistent account of how he followed up the documentation of the suit land up to titling stage was the appellant.

32. In the light of the provisions of **Section 26** of the **Land Registration Act**, the burden on the respondent to prove his plaintiff's contents on a balance of probabilities became greater, for only the issues raised in **Section 26** - fraud or misrepresentation or a corrupt scheme - could defeat the appellant's title. This proof would have involved much documentation and oral evidence. However, only the sale agreement **D. Exhibit 2** was produced. The documentary evidence of the respondent in the trial court then paled in comparison to the appellant's.

33. **Section 26** of the **Land Registration Act** protects a registered proprietor whose certificate of title is to be taken by the courts as *prima facie* evidence that the registered proprietor is the absolute and indefeasible owner. The protection excludes titles acquired through fraud or misrepresentation which the registered proprietor is proved to have been party to as well as certificates acquired illegally, unprocedurally or through a corrupt scheme. No such fraud or misrepresentation on the part of the appellant was demonstrated to exist during the trial in the subordinate court.

34. Citing the decision in **Galaxy Paints Co Ltd Vs Falcon Guards Ltd (2000) 2 EA 385**, the trial magistrate considered that the title document was obtained during the pendency of the case and dismissed it, stating that parties are bound by what is in their pleadings. I find this to be a serious misdirection on the part of the trial magistrate since the natural progression of allocation of land is issuance of a title, and therefore where the respondent had failed to amend the plaint to seek a nullification of that title, his suit was fatally flawed.

35. Further, it was upon the respondent to apply for an injunction against the issuance of the title but it is not clear what he did towards this goal.

36. Even if the trial magistrate had confined himself to the evidence relating to the pleadings as they were he would have observed that the dearth of evidence on the part of the respondent considerably disadvantaged the respondent *vis a vis* the appellant.

37. The upshot of the foregoing is that I find that the appellant's appeal has merit. I allow the same and I issue the following final orders:

a. The appeal herein is successful.

b. The judgment and decree of the Honourable Mr. W.K. Kitur (RM) in Civil Suit No. 17 of 2008 in the Senior Resident Magistrate's Court, Taita Taveta issued on the 15th January 2015 are hereby set aside and substituted with the judgment and order of this court dismissing the respondent's case in the trial court.

c. The respondent shall bear the costs of this appeal and of the trial in the Magistrate's Court.

It is so ordered.

Dated and signed at Kitale this 26th day of February, 2021

MWANGI NJOROGI

JUDGE, ELC, KITALE.

Delivered this 23rd day of March, 2021.

MUNYAO SILA

JUDGE, ELC, MOMBASA