Tinina & another v Likama & another (Environment and Land Appeal E016 of 2022) [2024] KEELC 6582 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6582 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E016 OF 2022

MN GICHERU, J

OCTOBER 8, 2024

BETWEEN

JOSEPH SAMPAO TININA ..... 1ST APPELLANT

JOSEPH SAMPAO TININA ..... 2ND APPELLANT

AND

STEPHEN OLONANA LIKAMA ..... 1ST RESPONDENT

STEPHEN OLONANA LIKAMA ..... 2ND RESPONDENT

JUDGMENT

1. This judgment is on the appeal by the appellant, Joseph Sampao Tinina, who seeks to have the judgment in CM'S Kajiado ELC Case No. 52 of 2019 dated 24/2/2022 set aside and substituted with an order allowing the prayers in the appellant's plaint dated 29/7/2019. In the judgment, the learned trial Magistrate dismissed the appellant's suit which sought to declare him the owner of the Plot No. 213/Business-KMQ Trading Centre. He also sought to have the respondent evicted from the suit premises.

2. The six grounds of appeal are as follows. The learned trial Magistrate erred in law/fact/misdirected herself in,

    i. dismissing the appellant's suit without carefully considering, analyzing and evaluating the entire evidence on record, thereby presiding over an extremely unfair trial,

    ii. failing to capture and decipher salient issues and features of the suit before her and thus arrived at an erroneous conclusion,

    iii. by failing to consider the appellant's written submissions dated 16/12/2021 and the evidence on record,

iv. by holding that the respondent is the rightful owner of the suit land thus ignoring overwhelming evidence indicating that the same belongs to the appellant,

v. by deciding that the respondent had constructed on the disputed plot in the year 1995 where no such proof was provided by the respondent,

vi. by holding that the respondent is the rightful owner of the suit premises by merely producing an allotment letter for Plot No. 183/Residential –KMQ Trading Centre dated 6th March 2008 without producing any other supporting document from the allotting authority and in sheer contradiction by the respondent letter dated 10/1/2020 where he was requesting to be issued with an allotment letter.

3. Counsel for the appellant identified five out of the six grounds of appeal as the issues for determination in his submissions dated 28/2/2024. The respondent's counsel on the other hand identified all the six grounds as the issues for determination. I find that it is proper to consider all six grounds as the issues.

4. Before I make a determination on the issues, I find that it is necessary to summarize the facts of the case as I understand them. The appellant's case is that he was allocated Plot No. 213/Business/ KMQ-Trading Centre in the year 2009 and issued with a letter of allotment dated 3/11/2009. He has been paying all the land rates as required. In the year 2018, the respondent trespassed onto the suit land and commenced construction of illegal structures thereon. The matter was reported to the County Government of Kajiado which ordered the respondents to stop any development until a plot regularization exercise was carried out. When the respondent said that he is the owner of the suit premises, the plaintiff decided to file this suit. The appellant is supported by the allocating authority in his assertion that he is the lawful owner of the suit land.

   On the other hand, the respondent's case is as follows. He is an original member of KMQ Trading Centre as can be confirmed by the members list which shows that he is member No. 183. The land was set aside for the members in 1989 by County Council of Kajiado. The members took possession in 1989 and they were promised that letters of allotment would be processed later on upon proper survey and demarcation. In the year 2005, the respondent started constructing a foundation for his houses which he completed in 2016. He has 8 semi-permanent and 3 temporary structures. The foundation and the floor for all the structures is permanent. In the year 2010, the council commenced the issuance of allotment letters but there was corruption in the exercise and some people who are not in occupation got letters of allotment. The appellant's claim is not traceable to 1995 and he is not the owner of the land.

5. I have carefully considered the appeal in its entirely including the record, the grounds, the submissions the issues and the law cited therein. I make the following findings on the six grounds.

6. On the first grounds, I find that the trial was fair. There is nothing on record to suggest otherwise. No application was ever made by the appellant and refused by the court. No evidence sought to be adduced by the appellant or any other party was locked out. A trial does not become unfair just because a party loses the case. There can only be one winner in litigation like this one. The appellant was afforded a fair trial.

7. Regarding the second ground of appeal, I find that the trial Magistrate captured the salient issue which was simply which of the two parties had a better claim to the suit land and why. I find that issue well covered in the short but powerful judgment.

8. When it comes to the third issue of failing to consider the appellant's written submissions dated 16/12/2021, I find the said submissions identified only two issues for determination namely,

i. Whether the plaintiff had proved its (sic) case to the required standard,

ii. Who bears the costs.

These two issues are covered in the judgment at paragraph 11 where the learned Magistrate states as follows in part,

> "...I find the plaintiff has failed to convince this court that he is the rightful owner of the suit property ...the suit herein fails for lack of merit and the prayers sought also fail in that regard..."

The above is a clear finding on the first issue for determination. The trial Magistrate also made a determination on costs. I find no fault on her part.

9. The fourth ground talks of overwhelming evidence proving that the appellant is the owner of the suit land. I do not find any such evidence on record. The only evidence is the letter of allotment which was issued long after the respondent occupied the land. The other evidence is payment of rates. Yet there is evidence to show that the respondent occupied the land much earlier. This evidence is from the respondent. It is credible because it is also corroborated by the evidence of the witness from the allocating authority, Wesley Sankuyan at page 21 of the record of appeal where he states as follows,

> "...The plot has temporary structures which are old and some new. They are fully developed..."

There is no doubt that it is the respondent who is in occupation and such occupation is not recent. Under Section 116 of the Evidence Act, possession is deemed to be ownership and the burden is always on the person who alleges that the person in possession is not the owner. The section provides,

> "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".

The appellant's letter of allotment and payment receipts are not sufficient to disprove the strong evidence adduced by the respondent that he was the original allottee in 1989 and that he occupied the land before it was allocated to the appellant in an irregular manner. I am easily persuaded by the submission by the respondent's counsel that it is trite law that in case of double allocation, the first allocation in time prevails over the second allocation. See the authority of Gitwany Investment v Tajmal Limited and 3 others [2006] eKLR.

This finding also covers the fifth ground because the said ground alleges that there is no proof that the respondent occupied the land earlier than the appellant. Such evidence has been pointed out above. Infact the appellant's claim raises more questions than answers. Questions such as why was he allocated land already occupied by the respondents? Why could he not be allocated vacant land? Why did he not sue the allocating authority? Where is the evidence to show that he was one of the original members of KMQ Trading Centre? All these questions should have been answered by good credible evidence from the appellant. Such evidence is missing from the appellant.

10. On the final issues, I find that the respondent's ownership of the suit land goes deeper than the letter of allotment. It goes to the very beginning of KMQ Market Centre and this ownership is supported by an old list of original members where the appellant is absent and the respondent is present.

11. For the above stated reasons, I find no merit in the appeal and I dismiss it with costs to the respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE