Clement v Chebii (Environment and Land Appeal 43 of 2021)
[2023] KEELC 16142 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16142 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL 43 OF 2021

EO OBAGA, J

MARCH 2, 2023

BETWEEN

MARTIN MWILITSA CLEMENT ..... APPELLANT

AND

PAULINE JESANG CHEBII ..... RESPONDENT

(Being an appeal from the Judgement of Hon. R. Odenyo Senior Principal Magistrate, dated 16th September, 2021 in Eldoret ELC 16 of 2019)

JUDGMENT

Introduction

1. The Appellant filed a memorandum of appeal dated October 8, 2021 in which he raised the following grounds: -

    1. That the Honorable Magistrate misdirected himself both in fact and in law in dismissing the Plaintiffs claim and allowing the Defendants counter-claim taking into account the totality of the evidence tendered during trial.

    2. That the trial court applied the wrong principles in failing to appreciate that the Plaintiff was holding a valid letter of allotment as confirmed by the land adjudication records and the one held by the Defendant was not valid, all factors considered.

    3. That the learned judge therefore erred in law by shifting burden of proof to the Plaintiff in respect of possession, contrary to the law.

    4. That the Honourable Magistrate erred in both fact and in law by failing to correctly evaluate the evidence and Thereby arrived at a wrong conclusion by finding that there were two valid letters of allotment.

5. That the Honorable Magistrate erred in both fact and in law by taking into account evidence that was not tendered during trial and thereby prejudicing the Appellant.

6. That the learned judge erred in law and fact by allowing the Defendant's counter-claim when there was no evidence supporting it and thereby arrived at a completely erroneous conclusion.

7. That the learned judge erred in law and fact by considering irrelevant facts and at the same time ignoring relevant facts and thereby arrived at a completely erroneous conclusion.

8. That the court failed to properly analyze the evidence on record, the submissions and thereby arrived at a completely erroneous conclusion.

9. In all circumstances of the case, the finding of the learned judge are insupportable in Law.

Background

2. On February 7, 2019, the Appellant filed a suit against the Respondent in the Chief Magistrates court at Eldoret in which he sought the following reliefs: -

    a. A declaration that the plaintiff is the legitimate owner of portion measuring 5 cares comprised in plot number 491, Turbo Settlement Scheme.

    b. An eviction order to issue against the Defendant, his agents and/or servants and thereafter an order of permanent injunction restraining them from entering, occupying, selling, transferring, encumbering, wasting and/or otherwise interfering with the Plaintiff's quiet possession, use and/or enjoyment of portion measuring 5 acres comprised in plot number 491, Turbo Settlement Scheme to the detriment of the Plaintiff's right as the proprietor of the same.

    c. Costs of the suit.

    d. Any other relief this Honourable court may deem fit and just to grant.

3. The Respondent filed a defence and raised a counter-claim in which she sought the following reliefs: -

    1. The Defendant prays for a permanent injunction restraining the Plaintiff, his servants, agents, or anyone under his control from interfering with the Defendant's peaceful and quiet use of Turbo Scheme Plot 491.

    2. Further and without prejudice to the foregoing if the Plaintiff had any right (which is denied) the same has been extinguished by effluxion of time. The Defendant avers that, without prejudice to the aforegoing, she has acquired title by operation of the law.

    3. The Defendant further prays a declaration that Turbo Scheme Plot 491 be declared as hers.

4. The bone of contention before the lower court was a property described as plot 491 at Turbo Settlement Scheme measuring 5 acres (suit property). Both the Appellant and the Respondent laid claim to the suit property and produced allotment letters bearing the same date, same serial number and from one allotting authority who was then a District Commissioner in the defunct Provincial Administration. At the conclusion of the hearing, the learned trial magistrate dismissed the Appellant's suit and allowed the Respondent's counter-claim. This is what triggered this appeal.

Submissions by the Parties;

5. The parties to this appeal were directed to file written submissions. The Appellant filed his submissions on October 18, 2022. The Respondent filed her submissions on October 28, 2022.

6. The Appellant submitted that the trial magistrate proceeded on the basis that there was double allocation of the suit property and in the process, he failed to notice that the Respondent's allotment letter was fake and that the Respondent had made a few alterations here and there to make her allotment appear as genuine.

7. The Appellant further submitted that the trial magistrate did not address himself to the issue of adverse possession and that therefore he reached an erroneous finding that the Respondent had proved a case for adverse possession. The Appellant further submitted that the trial court shifted the burden of proof to the Appellant and that the Respondent did not adduce cogent evidence to show that she had been on the suit property since 1995 when she claims to have been allotted the suit property.

8. On her part, the Respondent submitted on each of the grounds in the memorandum of appeal and stated that the findings of the trial magistrate were correct based on the evidence adduced. The Respondent submitted that the Appellant's claim that he was given his allotment letter in 2010 by the late Hon Biwott for whom he stated was working for cannot be true yet he claims to have been allotted the suit property in 1995.

9. The Respondent further submitted that the Appellant's suit was statute barred. The Respondent finally submitted that the findings of the trial magistrate were supported by the evidence and the claim by the Appellant that the trial magistrate took into account irrelevant evidence is not supported by the record of appeal.

Analysis and Determination;

10. This being a first appeal, my duty as a first appellate court was succinctly set out in the case of *Selle & another –Vs- Associated Motor Boat Co Ltd & others* (1968) EA 123 at page 126 as follows: -

> " ...briefly put they are that 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 that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. I have considered the proceedings before the trial court, the submissions by the parties as well as the grounds of appeal. The issues which emerge for determination are firstly, whether there was a case of double allocation of the suit property. Secondly, did the Respondent prove that she was in occupation of the suit property. Thirdly was the issue of adverse possession proved. Fourthly was the Appellants' suit statute barred. Lastly which order should be made on costs.

Whether there was a case of double allocation of the suit property;

12. Double allocation occurs where by mistake which is admitted by the allotting authority, two letters of allocation are issued to two different people in respect of the same property. These allocations must have been issued regularly and procedurally without fraud save for the mistake. If this be the case, then the first in time prevails and the second one cannot suffice.

13. In the instant case, the Respondent adduced evidence on how her husband who was working with East African Tanning and Extract Company Limited (EATEC) and later with Kenya Forest Service failed to be allotted a plot within the Turbo Settlement Scheme. EATEC is the one which used to own the

land where Turbo Settlement Scheme was created from. When the EATEC lease expired, the land was given to Kenya Forest Service. The late President Daniel Arap Moi decided that the forest land be given to Squatters for settlement.

14. The Respondent's husband then devised a strategy to have the Respondent get an allocation. He took his wife who had a young baby on a bicycle to the District Commissioner's office. When the District Commissioner listened to the plight of the Respondent, he asked them to come back. When they went back, he gave the Respondent a letter of allotment and directed a surveyor to go and show her the suit property. She then took possession where she stays todate.

15. The Appellant testified that he was a resident of Elgon View Estate Eldoret and that he used to work for the late Hon. Biwott. He testified that though he was allocated the suit property in 1995, he was given the letter of allotment in 2010. The explanation he gave is that Hon. Biwott had misplaced the letter of allotment but only found it in 2010.

16. Evidence on record shows that the local chief and the District officer started telling the Respondent that she was staying on Hon Biwott's land. The story later changed that the land belonged to Hon Mark Too. The area Chief finally decided that the allotment letter which she held was fake. She was required to go to the District officer's office with the original. Fearing that the original may be confiscated from her, she took a photocopy and handed it over to the District officer. It is at around this time that she received a number of letters summoning her to the Chief's office as well as the District Officer's office. This is around the same time that the Appellant first came out to lay claim to the suit property.

17. Though the Appellant in his statement of claim before the lower court stated that he discovered in 2018 that the Respondent had trespassed on to the suit property and put up temporary structures, he contradicted himself by stating while under re-examination that he was aware that there was someone on the suit property in 2010.

18. The Appellant further contradicted himself by stating in cross-examination that he was given the allotment letter in 2010 by the District Commissioner one Parsankul who was not by then a District Commissioner. He further contradicted himself while under cross-examination that it is Hon. Biwott who gave him the allotment letter which he had obtained from Mr Parsankul.

19. On February 25, 2019, Dan M N Kalamba who was by then an Assistant Director County Land and Adjudication/Settlement Officer Uasin Gishu wrote a letter in favour of the Respondent in which he stated that there was a case of double allocation. This is after the Appellant had filed his case in court. A month later, that is on March 25, 2019, the same officer who was by then the County Land Adjudication and Settlement officer wrote to the Respondent withdrawing the letter of February 25, 2019 on the ground that the Respondent had misled her into writing the letter without disclosing that she had been summoned to various offices of the Provincial Administration where she was required to produce the original allotment letter.

20. The above officer had on June 6, 2018 written to the chairman of Turbo Settlement Scheme confirming that the suit property according to them belonged to the Appellant. Another officer from the settlement office Uasin Gishu wrote on July 30, 2018 stating that according to the records held by the settlement office the suit property belonged to the Appellant. These letters contradict the subsequent letters by the same officer which were written a year later. It is therefore clear that Dan M N Kalamba who testified in favour of the Appellant had something to hide.

21. When he testified in court, he stated that there were two parallel lists of allottees and that after harmonization, one list was prepared. This list which he had in court was not signed and he did not produce it as exhibit. The documents which were produced by the Appellant's side were the letters

which contradicted the officer himself and purported to show that the Appellant was the rightful owner of the suit property. The other alleged list before harmonization was not produced in court. It is therefore clear that there was no case of double allocation. There is a clear conspiracy to sanitize the allotment letter held by the Appellant which was not obtained in a genuine way.

22. The late Hon Biwott may not have been involved but his name may have been invoked to instill fear and have documents prepared in favour of the Appellant who was working for the powerful Hon Biwott. Otherwise how would Hon. Biwott have an allotment letter in favour of one of his aides and keep it for 15 years before handing it over to him in the year 2010.

Whether the Respondent proved that she was in possession of the suit property;

23. The Respondent testified that she took possession of the suit property in 1995 after being given a letter of allotment. She called her neighbours as her witnesses who testified that she was the one who had been in occupation from 1995 to date. She produced photographs showing trees growing on the land. The witnesses who testified said that the trees were more than 10 years old. The Appellant himself while being cross-examined stated that he all along knew that there were people on the land but he could not move to evict them as he had not gotten a letter of allotment from Hon. Biwott. He could not therefore turn round and claim that the Respondent did not prove that she was in possession.

Whether there was proof of adverse possession;

24. The prayer for adverse possession was made without prejudice to the other three prayers in the counter-claim. This prayer was akin to an alternative prayer. I have gone through the entire judgement of the trial magistrate. The trial magistrate did not make any finding on the issue of adverse possession and rightly so. In any case one cannot seek adverse possession on a property which belonged to the Settlement Scheme Fund Trustee. In the case of *Boniface Oredo –Vs- Wabomba Mukile* CA No 170 of 1989 (UR) the Court of Appeal stated as follows:-

> "....the interest of Settlement Fund Trustee is not extinguishable under the Limitation of Actions Act. The period between 1963 and 1991 was not therefore for exclusion in the computation of time in the various cases".

25. The Appellant had not obtained title in his name. The property still remained the property of the Settlement Fund Trustee and time could not being to run before title could be issued.

Whether the appellant's suit was statute barred;

26. The Respondent had raised the issue of the Appellant's suit being statute barred by way of preliminary objection. This issue was determined by the trial court vide a ruling delivered on October 24, 2019. There was no appeal from this ruling. This notwithstanding, the Appellant had in his testimony stated that he became aware of a trespasser who was on the suit property between 1995 and 2010 but he could not go to evict her because he had not obtained a letter of allotment. This came out in cross-examination. However, in re-examination, he stated that it was between 2010 and 2011 that he went and asked the trespasser who was not the Respondent to vacate the suit property. He further stated that the Respondent trespassed on to the suit property in 2015. In his own pleadings, he stated that the trespass occurred in 2018. Whichever the case, the suit was filed well before he was caught up by the twelve years' limitation period. The Appellant's suit was therefore not statute barred.

Disposition;

27. From the above analysis, it is clear that the Appellant's appeal is devoid of merit. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2ND DAY OF MARCH, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Kimeli for Mr. Tororei for Applicant.

Ms. Rotich for Mr. Maritim for Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

2ND MARCH, 2023