



Kimutai v Seventh Day Adventist Church Limited, Eldama Ravine (Environment and Land Appeal 20 of 2022) [2023] KEELC 16062 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 20 OF 2022
L WAITHAKA, J
MARCH 9, 2023
FORMERLY ELDORET ELC APPEAL NO. 3 OF 2016**

BETWEEN

GRACE CHEPKOSGEI KIMUTAI APPELLANT

AND

**SEVENTH DAY ADVENTIST CHURCH LIMITED, ELDAMA
RAVINE RESPONDENT**

JUDGMENT

Introduction

1. By a plaint dated July 16, 2010 and filed on July 20, 2010 the respondent herein instituted a suit in the lower court to wit Kabarnet PMCC No 66 of 2010 seeking judgment against the defendant for eviction orders and demolition of structures erected by the appellant on the parcel of land known as Eldama Ravine Block 1/488, (hereinafter the suit property).
2. The respondent's case was premised on the ground that it was the registered owner of the suit property. The respondent complained that the appellant was in occupation of the suit property and had erected structures thereon and that efforts to get the appellant give it vacant possession of the suit property had been unsuccessful.
3. Through her statement of defence filed on August 27, 2012, the appellant contended that there was an unresolved dispute concerning ownership of the suit property between her and the respondent; that she had been in occupation of the parcel of land known as UNS Residential Plot "B" Eldama Ravine for over 40 years and that she was allocated the parcel of land she occupied by the Commissioner of Lands on February 22, 2001.
4. The appellant further contended that the suit property was allocated to the respondent sometime in 1998 in disregard of her interest therein; that the respondent fraudulently obtained lease documents



for the suit property in disregard of her interest in the suit property. The appellant further contended that the court lacked territorial jurisdiction to hear and determine the case.

Evidence

The Plaintiff's Case

5. When the matter came up for hearing, Reuben Kiprotich Korir, who testified as PW1, informed the court that the suit property was issued to the respondent in 1998. He produced the letter of allotment issued to the respondent in respect of the suit property as Pexbt 1. The letter of allotment was issued on June 10, 1998. After receiving the letter of allotment, they paid Kshs 5980 to the Commissioner of Lands vide Cheque No 011314. He produced the cheque as Pexbt 2.
6. On January 14, 2019 they prepared to survey the land but some people came out and claimed that the land belonged to them. He informed the court that the claimants included the appellant herein. They raised the issue with the County Council of Eldama Ravine and the Commissioner of Lands.
7. He informed the court that the issue raised by the appellant's claim was resolved by resettlement of the appellant's grandmother who claimed that she had been living in the suit property.
8. PW1 further informed the court that there was another allotment letter that had been issued to the appellant. He stated that the letter of allotment issued to the appellant was cancelled on October 10, 1998.
9. They applied for registration of the suit property and on May 25, 2010 got issued with a certificate of lease in respect thereof. He produced the certificate of lease as Pexbt 4.
10. They wrote several letters to the County Council of Eldama Ravine concerning the dispute between the respondent and the appellant over ownership of the suit property. He produced a bundle of the letters as Pexbt 5.
11. He informed the court that their attempt to get the appellant to vacate the suit property were futile.
12. In cross examination, PW1 informed the court that the respondent's land is divided into two portions and that the appellant took a portion thereof and fenced it.
13. Upon been shown letters dated November 21, 2011; October 25, 2011 and October 11, 2021 (PMFI 1, 2 and 3), he stated that he does not know anything about them.
14. He maintained that the suit property belongs to the respondent and that the certificate of lease was lawfully acquired.
15. PW2, Sospeter Kipkemoi Chemgioni, a committee member and elder of the respondent Church, informed the court that the suit property was given to the respondent in June 1998 by the county council and the land's office.
16. He acknowledged that the appellant and her grandmother used to live in the suit property before it was allocated to the church but asserted that it belongs to the respondent.
17. He lamented that the appellant continued to live in the suit property even after the respondent was issued with a certificate of lease in respect thereof.
18. In cross examination, he informed the court that he came to Eldama Ravine in 2004 and that he found the appellant in occupation of the suit property.



19. Like PW1, he stated that the appellant's grandmother was relocated to another parcel of land and the suit property given to the respondent.

The Defendant's Case

20. The appellant, Grace Chepkosgei Kimutai (DW1) informed the court that she was born in 1968 in the suit property and grew up there. In 1994 she applied to be allocated the land but John Ngetich acquired it in Nairobi.
21. In 1997, the respondent came to the suit area and sought to have the area surveyed. They got a letter from the county council and served it on the respondent.
22. She conceded that the certificate of lease issued to the church had not been cancelled.
23. DW2, Nancy Lily Kimutai, informed the court that she was born on the suit property; her mother was also born on the said land. They had grown up in the area and knew it as their home. In 1994 they saw people surveying the area. They sought for guidance on how they were to be given the plot. Grace (appellant) obtained letters of allotment which they had in court.
24. DW2 further informed the court that they were evicted from the plot by Silvester Keitany. They complained to the District Commissioner (DC) who sought to know from Silvester where they were to go (Silvester had sold the land to the Church).
25. They went to the land office and were given lands documents by Mr Amiani. Mr Amiani asked the surveyor to divide the suit land between them and the church but when they went to Nairobi they found that the church had obtained a certificate of lease in respect of the suit property.
26. She urged the court to help them as they did not have another place to go.
27. In cross examination, DW2 maintained that Silvester Keitany had sold the suit property to the church.
28. She informed the court that they had gone to the DC to get the dispute over ownership of the suit property resolved.
29. She stated that they got their plot in 2001 but could not tell its acreage.
30. Concerning the letter dated December 20, 2010, she stated that it states that a letter of allotment was issued but does not say that the church had obtained their letter of allotment fraudulently.
31. She further stated that the surveyor did not give them his report when he visited the scene.
32. On the basis of the case pleaded by the parties and the evidence tendered before the court, the Learned Trial Magistrate (TM) rendered himself as follows:-

“As per the evidence tendered the plaintiff had obtained its letter of allotment on 18/6/1998 whereas the defendant had obtained her letter of allotment on 22/2/2001. It is clear that the plaintiff's letter was first in time and it prevails over the defendant's letter.

The plaintiff pursues her rights over the subject land and it obtained lease on 20/5/2010 and certificate of lease on 25/May/2010. The defendant did not obtain any other documents after the letter of allotment and thus the plaintiff has a better title to the defendant.

The defendant claimed that the plaintiff's documents and title were obtained by fraud but she did not tender any evidence to that effect and that cannot be true as she was the one who obtained her letter of allotment after the plaintiff.



The defendant claimed that she stayed on the land for many years before it was allocated to the plaintiff. Her stay did not give or confer any right on her as the land was government property and her stay cannot justify ownership.

The plaintiff's registration was first and thus it was protected as held in the case of Nairobi ELC 747 [2007] Obiero & Opiyo and Others [1972] E.A 227.

The issue of fraud herein was not proved and thus the plaintiff's title was legitimate.

I have considered the cited cases and am satisfied that indeed the plaintiff's title on the subject land is lawful and protected and the defendants claim had no basis and she should thus move out of the plaintiff's land.

The certificate of lease produced as exhibit P4 indicates that the plaintiff's land was approximately 0.5383 hectares. The plaintiff should thus engage a surveyor to pick the said measurement and if the defendant is found within the said measurement the structure thereon should be demolished and proper boundaries erected.

The plaintiff's case thus succeeds as prayed with costs."

33. Aggrieved by the said determination, the appellant appealed to this court on 15 grounds, which can be reduce to one namely the TM erred by holding that the respondent had proved its case.
34. Pursuant to direction given on July 26, 2022 that the appeal be disposed of by way of written submissions, the parties to this appeal filed submissions which I have read and considered.

The Appellant's Submissions

35. Through her submissions filed on October 21, 2022 the appellant submits that the TM failed to appreciate the case urged by her. In this regard, she submits that her case was that the respondent and her had letters of allotment in respect of the suit property and that on account of the circumstances leading to issuance of each party's letter of allotment, the court ought to have recognized each of the party's letter of allotment without considering which was issued first or was superior to the other.
36. She faults the TM for recognizing the certificate of lease issued in favour of the respondent and for failing to find that the certificate of lease held by the respondent was obtained unprocedurally and illegally.
37. She also faulted the TM for holding that the registration of the respondent as the proprietor of the suit property was first and lawful.
38. Based on her evidence to the effect that she was in use and in occupation of the suit property when the respondent obtained its letter of allotment and that there existed a dispute between her and the respondent which was resolved by the Commissioner of lands by ordering resurvey of the suit property to give effect to the allocation made in favour of her, the appellant submits that the respondent ought not to have applied and obtained a certificate of lease in respect of the whole suit property.
39. Terming the action of the respondent of applying for the whole of the suit property in the circumstances unprocedural and unlawful, the appellants maintains that the TM ought not to have determined the case on the basis of who was first allocated the suit property or who obtained title first.
40. According to the appellant, her case turned on appreciation that both parties had letters of allotments which were paid for.



41. According to the appellant, the order which commended itself in the circumstances of the case was an order of resurvey of the suit property to enable the parties get their respective portions of the suit property.

The Respondent's Submissions

42. The respondent through the submissions filed on November 11, 2022 has submitted that the appellant's evidence fell short of the standard required to proof ownership. In that regard, the appellant is said to have failed to show that she had a certificate of lease, that the respondent had obtained its certificate of lease through fraudulent means; that the respondent had acquired the suit property from a third party; that the letter of allotment and the certificate issued in respect thereof were obtained fraudulently and that they made payments to acquire the suit property.
43. It is further submitted that a party who has title to land is entitled to quiet possession and protection from intruders.
44. Because its letter of allotment was the first one to be issued, based on the maxim that between equal equities the first in order of time shall prevail, the respondent submit that its letter of allotment must prevail in the circumstances.
45. Based on the provisions of section 27 of the *Registered Land Act*, Cap 300 Laws of Kenya (now repealed), the respondent submits that by operation of law, it is the absolute owner of the suit property. The respondent further submits that the appellant has not made up a case for interference of the title it holds in respect of the suit property by this court.

Appellant's Further Supplementary Submissions*

46. In a rejoinder, the appellant filed further submissions reiterating her contention that the action of the respondent of obtaining certificate of lease in respect of the suit property was unlawful and unprocedural hence not deserving any protection under Section 25 and 26 of the *Land Registration Act, 2012*.
47. The appellant maintains that the respondent had no valid claim to the entire suit property because the suit property was re-surveyed in 2000 to create the parcel she occupies and which parcel she had been in use and occupation for over 44 years.
48. Because the respondent obtained its letter of allotment when she was already in use and occupation of the suit property, the appellant asserts that the respondent did not obtain its letter of allotment lawfully to warrant being adjudged a valid owner of the whole of the suit property.
49. The appellant urges the court to order that she is entitled to her portion of the suit property and to order re-survey of the suit property to create her portion measuring 60 x 100 feet out of the suit property.

Analysis and determination

50. As stated herein above, the main issue arising from the Memorandum of Appeal and the submissions filed by the parties is whether the TM erred by finding and holding that the respondent had proved its case.
51. Concerning that issue, in discharge my duty as the first appellant court, I have reconsidered, analyzed and evaluated the evidence tendered before the lower court with a view of arriving at my own independent conclusion. I have also taken into account that I can only interfere with the decision of the



trial court if there is no evidence to support its conclusion and/or if it is shown that the TM failed to appreciate the weight or bearing of circumstances admitted or proved or had plain gone wrong. In that regard see the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR where it was stated:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons.”

52. Also see the case of *Peters v Sunday Post Ltd* [1958] EA 424 where it was held:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution, if there is no evidence to support particular conclusion, or it is shown that the trial judge failed to appreciate the weight or bearing of circumstances admitted or proved, or had plained gone wrong, the appellate court will not hesitate so to decide.”

53. From the evidence tendered before the lower court it is common ground that the appellant was in use and occupation of the suit property before it was surveyed and allocated to private individuals. The evidence adduced before the lower court shows that despite having been the one in use and occupation of the suit property at the time of survey and allocation of the area, the suit property was allocated to the respondent. It is not clear the circumstances upon which the suit property was allocated to the respondent but it's not in dispute that the suit property was allocated to the respondent. That fact is made clear by the letter of allotment dated June 18, 1998 (Pexbt 1). According to the letter of offer, the respondent was offered unsurveyed plot described as RB 30/86/31 Eldama Ravine measuring 0.585 hectares.

54. The respondent accepted the offer and paid the consideration of Kshs 5980 demanded in the letter of offer. The suit property was surveyed and the registry index map amended to reflect the suit property, (Pexbt 2). Subsequently, the respondent was issued with a lease (Pexbt 3) and a certificate of lease (Pexbt 4).

55. Whilst the appellant vide paragraph 6 of her statement of defence pleaded that the respondent fraudulently obtained lease documents for the entire suit property, I note that no particulars of fraud were provided as by law required. Nevertheless, from paragraphs 3, 4 and 5 of the statement of defence the appellant appears to have hinged her claim on the fact that she was the one in use and occupation of the suit property before it was allocated to the respondent and that following her complaint to the Land Commissioner, the Land Commissioner had ordered that the suit property be re-surveyed to create the portion occupied and claimed by her. Indeed, there is evidence that the area was resurveyed and a letter of allotment issued to the appellant, dated February 22, 2001 (Dexbt-2). However, it is noted that the letter of allotment issued to the respondent was not cancelled. There is no evidence that the respondent was party to the proceedings or complaint that led to issuance of the directive for resurvey of the suit property. In the circumstances, the appellant cannot reasonably urge her case on the impleaded fraud against the respondent.

56. While I sympathize with the appellant for having not been allocated the suit property despite having been the one who was in use and occupation thereof, being of the view that the suit property having been offered and allocated to another person by its owner, the Government, and subsequently registered in favour of the allottee, the appellant cannot sustain her impleaded case of fraud against the respondent.



57. Consequently, I find and hold that the appellant has not made up a case for interfering with the decision of the TM.
58. The TM properly directed himself on the issues of law and facts placed before him and cannot be faulted. There was no basis for determining that each party keeps the portion allocated to them as it was not proved that the portions are different or distinct.
59. The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondent.

RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 9TH DAY OF MARCH, 2023

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:-

M/S Korir holding brief for Mr Arusei for the appellant

Mr Nyachiro for the respondent

Christine Towett – Court Assistant

