



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 8 OF 2019

(Formerly HCCA NO. 211 OF 2016)

JOHN WAWERU RIBIRO.....APPELLANT

VERSUS

MARGARET WACHU KARURI.....RESPONDENT

(Being an appeal against the judgement of Honourable N.MAKAU (R.M))

delivered at Limuru on 30th March 2016 in Limuru SPMCC No. 179 of 2014)

JUDGMENT

Background.

This is an appeal against the whole judgement and decree of Hon. N.Makau, RM delivered on 30th March 2016 in Limuru SPMCC No. 179 of 2014, John Waweru Ribiro v Margaret Wachu Karuri (hereinafter referred to only as “the lower court”). The Appellant herein was the plaintiff in the lower court while the Respondent was the defendant. The Appellant commenced the lower court suit by way of a plaint dated 3rd June 2014 that was amended on 27th November 2014. In his amended plaint, the Appellant sought the following reliefs;

- a) An order for the forceful eviction of the defendant(Respondent) from all that parcel of land known as L.R No. Limuru/ Bibirioni/ 4131 (hereinafter referred to as “the suit property”).
- b) Costs of the suit.
- c) Any other or further relief the court may deem fit to grant.

The Appellant’s case in the lower court was that, he was the registered proprietor of the suit property which he acquired from one, Mary Wambui Mwachigi, deceased (hereinafter referred to as “the deceased”). The Appellant averred that when the deceased transferred the suit property to him, there were temporary structures thereon one of which was occupied by the Respondent. The Appellant averred that the Respondent had denied him access to the suit property and was claiming ownership of the same. The Appellant averred that despite demand and notice of intention to sue having been served upon the Respondent, the Respondent refused to vacate the suit property.

The Respondent filed a defence in the lower court on 11th December 2014 denying the Appellant’s claim in its entirety. The Respondent admitted that the Appellant was the registered proprietor of the suit property. The Respondent averred however that the Appellant held a portion of the suit property measuring 25 feet by 80 feet in trust for the Respondent. The Respondent averred that the suit property came about following subdivision of the hitherto larger parcel of land known as Limuru /Bibirioni/223 (hereinafter referred to as “the mother title”). The Respondent averred that the mother title was initially registered in the name of one, Mwachigi Nganga, deceased (hereinafter referred to only as “Mwachigi”). The Respondent averred that on 5th August 2000, Mwachigi sold to her a portion of the mother title measuring 25 feet by 50 feet (hereinafter referred to as “the disputed land”). The Respondent averred that after paying to Mwachigi a deposit, he allowed her to take possession of the disputed land and to construct a house thereon. The Respondent averred that by August 2000, she had fully settled on the disputed land. The Respondent averred that she was living on the disputed land with her family and was also carrying out cultivation thereon. The Respondent denied that she entered the suit property in 2012.

The Respondent averred that Mwachigi later agreed to add her more land from the mother title. The Respondent averred that the size of the disputed land was adjusted upwards to 25 feet by 80 feet and the parties agreed on additional consideration in respect of the additional land. The Respondent averred that she was a beneficial owner of a portion of the suit property measuring 25 feet by 80 feet (the disputed land).

The Respondent averred that when Mwachigi died, her widow, Mary Wambui Mwachigi (the deceased) acknowledged the agreement that the Respondent had entered into with Mwachigi and the Respondent's entitlement to the disputed land.

The Respondent averred that the Appellant was a nephew of the deceased. The Respondent averred that in 2011, the deceased subdivided the mother title with the intention of distributing portions thereof amongst her children and other dependants. The Respondent averred that following the subdivision of the mother title, it was agreed that the suit property which was one of the resultant subdivisions of the mother title and on which the Respondent's parcel of land measuring 25 feet by 80 feet (the disputed land) was located was to be registered in the name of the Appellant and the Respondent pending the completion of payment of the balance of the purchase price for the said disputed land by the Respondent after which the Appellant was to transfer the disputed land to the Respondent.

The Respondent averred that instead of transferring the disputed land to her, the Appellant had turned around and was demanding possession thereof. The Respondent reiterated that she was the legitimate owner of the disputed land and that the Appellant was holding the same in trust for her. The Respondent averred further that she had occupied the said portion of the suit property for over 14 years as at the time the Appellant's suit was filed and as such the suit was time barred.

At the trial, the Appellant gave evidence and closed his case without calling any other witness. The Respondent on the other hand gave evidence and called two witnesses. In a judgment delivered on 30th March 2016, the lower court dismissed the Appellant's case with costs to the Respondent. The lower court made a finding that when the Appellant was registered as the owner of the suit property, he was aware that the Respondent was in occupation of a portion thereof and that the Appellant was supposed to share the suit property with the Respondent. The lower court made a further finding that the Respondent had purchased a portion of the suit property (the disputed land) from Mwachigi and as such she was lawfully in occupation thereof. The lower court found no basis for making an order for her eviction from the suit property.

The Appellant was aggrieved with the said judgment of the lower court and preferred the present appeal to this court.

The Appellant's case on appeal.

In its Memorandum of Appeal dated 26th April 2016, the Appellant challenged the decision of the lower court on fifteen grounds. Most of the grounds of appeal are in my view outside the findings and holdings of the lower court. In its judgment, the lower court framed only one issue whose determination laid the Appellant's claim to rest. The issue was whether or not the Appellant was entitled to an order for the eviction of the Respondent from the suit property which was the only relief sought in the amended plaint. The lower court answered that issue in the negative as I have alluded to earlier. All the grounds of appeal put forward by the Appellant can be summarized into only one ground, namely; that the lower court erred in its finding that the Appellant was not entitled to an order for the eviction of the Respondent from the suit property and in dismissing the Appellant's suit.

The appeal was heard by way of written submissions. The Appellant filed his submissions dated 8th July 2020 on 24th July 2020 while the Respondent filed her submissions dated 10th June 2021 on 23rd June 2021. I have considered the said submissions and the various authorities cited in support thereof.

Determination.

As mentioned earlier, the main issues arising for determination in this appeal which summarises the grounds of appeal put forward by the appellant are;

1. Whether the lower court erred in refusing to grant the order of eviction that was sought by the Appellant; and
2. Whether the lower court erred in dismissing the Appellant's suit.

The two issues are intertwined and as such I will consider the same together.

This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

It is also well settled that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v Sunday Post Ltd. [1958] E.A 424 and Makube v Nyamuro [1983] KLR 403.

After carefully reviewing the pleadings by the parties and the evidence that was tendered before the lower court, I am unable to disturb the findings of the lower court on the one issue that was framed for determination. The Appellant's suit in the lower court was based on the tort of trespass. The Appellant had claimed that the Respondent was a trespasser on the suit property and as such should be forced to vacate through an order of eviction.

Section 3 of the Trespass Act, Chapter 294 Laws of Kenya provides:

- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.**

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass. To establish trespass, the Appellant was required to prove that he was either lawfully in possession of the suit property or was the owner thereof and that the Respondent entered and occupied the property without any justifiable cause.

It was common ground that the suit property was registered in the name of the Appellant as the absolute owner thereof. That being the case, the burden shifted to the Respondent to prove that she had justifiable cause for occupying the suit property. The Respondent pleaded and led evidence that she purchased the disputed land which is within the suit property from Mwichigi and that her ownership of the disputed land was acknowledged by the deceased who transferred the suit property to the Appellant. The Respondent pleaded and led evidence that the suit property was supposed to be shared between the Appellant and she and that the Appellant held the portion thereof occupied by the Respondent (the disputed land) in trust for the Respondent. The Respondent also contended that the Appellant's suit was time barred.

The Appellant did not dispute the fact that when the suit property was registered in his name, the Respondent was in possession of a portion thereof. The Appellant did not dispute the fact that the Respondent had purchased the disputed land from Mwichigi who owned the mother title before it was transferred to the deceased and subsequently subdivided. The Appellant did not also dispute the fact that the deceased acknowledged the Respondent's interest in the disputed portion of the suit property. As at the time the Appellant was registered as the owner of the suit property on 24th April 2012, the Respondent had been in occupation of the disputed land for about 12 years having taken possession thereof in 2000. I am of the view that although the Respondent had no title to the portion of the suit property that she was occupying (the disputed land) she had a beneficial interest in the same arising from the agreements that she entered into with Mwichigi and the deceased and by virtue of her occupation of the land. The Appellant was aware of the Respondent's said interest in the suit property when the property was transferred to him as a gift by the deceased who was his aunt.

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 30 of the Registered Act provided as follows:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(b) natural rights of light, air, water and support;

(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;

(e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”

Under Section 30(g) of the Registered Land Act reproduced above, the Respondent's possession of the suit property was an overriding interest on the property and the Appellant had an obligation to make inquiry as to the interest if any that the Respondent had in the property before the same was given to him as a gift by the deceased. The evidence that was tendered in the lower court left no doubt that the Appellant was aware of the Respondent's interest in the suit property. Even if he was not, he had an obligation imposed by law to make inquiry on the Respondent's occupation to establish if she had any interest on the property. Since the Appellant was aware of the Respondent's interest in the suit property which in law was an overriding interest on the said property, the interest that was acquired by the Appellant in the suit property was subject to the Respondent's interest in the property.

I am in agreement with the finding of the lower court that the Appellant and the Respondent were to share the suit property in that the Appellant was supposed to transfer the disputed land to the Respondent once the Respondent had completed the payment of the balance of the purchase price in respect thereof. The Respondent's evidence in the lower court in this regard was corroborated by DW1 and DW3 who were related to both the deceased and the Appellant and who also took part in the subdivision of the mother title. I am satisfied that the

Respondent proved in the lower court that the Appellant held the disputed land in trust for her and as such she had a beneficial interest in the property.

Due to the foregoing, the Respondent did establish that she had a justifiable cause for occupying the suit property. The lower court cannot therefore be faulted on its finding that the Respondent was not a trespasser on the suit property. The lower court rightfully denied the Appellant an order of eviction that he had sought against the Respondent. The lower court having reached a finding that the Respondent was not a trespasser on the suit property and that there was no basis for her eviction, the Appellant's suit in the lower court was for dismissal. It was therefore rightfully dismissed.

Conclusion.

In the final analysis and for the foregoing reasons, the Appellant's appeal has no merit. The same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022

S. OKONG'O

JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

N/A FOR THE APPELLANT

MR. WACHIRA FOR THE RESPONDENT

MS. C.NYOKABI-COURT ASSISTANT