



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
CIVIL APPEAL NO 12 OF 2019

PATIENCE ABAID TSUMA.....APPELLANT

VERSUS

ASHA SAID TUAHA.....RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. R.K. Ondieki, Senior Principal

Magistrate delivered on 12th June, 2019 in Kilifi PMCC No. 129 of 2013)

JUDGMENT

This Appeal arises from the Judgment dated 12th June 2019 delivered by Hon. R K Ondieki Senior Principal Magistrate delivered in ***Kilifi PMCC No 129 of 2013***. The Appellant herein being aggrieved by the Judgment lodged a Memorandum of Appeal dated 3rd February 2021 and listed the following grounds:

- a) ***THAT the Learned Magistrate had erred in law by failing to consider that the Respondent had not established a prima facie case to warrant a permanent injunction over the suit property.***
- b) ***THAT the Learned Magistrate erred in law and in fact by failing to determine the actual property in contention between Plot 203 and 266 Kilifi.***
- c) ***THAT the Learned Magistrate erred in law and fact by failing to consider the Appellant's testimony and evidence.***
- d) ***THAT the Learned Magistrate erred in taking irrelevant factors into consideration.***

A brief background to this Appeal is that the Respondent filed a Complaint dated 2nd July 2013 claiming to be the owner of Plot Kilifi township /10/44/203 allotted by Ukombozi project committee. The Respondents claim against the Appellant was one of trespass having erected a house on the said property upto the lintel stage and prayers sought in their Complaint was permanent injunction against the Appellant. The Respondent later on filed an Amended Complaint dated 16th April 2014 seeking to add further prayers to the Complaint to have the Appellant's structure demolished and the Appellant to hand over vacant possession.

The Appellant herein put in a Defence dated 5th August 2013 denying the allegations of trespass and asserted that she was rightful owner of Plot 203 and construction thereon was legal. The Learned Magistrate heard the case and delivered a Judgment in favour of the Respondent which is the subject of this Appeal.

During trial two witnesses testified for the Respondent/Plaintiff whereas, 3 witnesses testified for the Appellant/Defendant.

Counsel agreed to canvas the Appeal vide written submissions which were duly filed.

APPELLANT'S SUBMISSIONS

Counsel for the Appellants submitted on the grounds of Appeal as filed in the Memorandum of Appeal and stated that the Learned Magistrate did not mention the issue whether the Respondent had established a prima facie case anywhere in his Judgment to warrant the permanent injunction over the suit property granted to the Respondent.

Counsel relied on the cases of **Nguruman Limited –vs Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012; (2014) e KLR** and **Justus Ntabo Gekone V Embassava Sacco (2021) eKLR**, on principles for grant of injunctions and submitted that the Learned Magistrate failed to consider that the Respondent had not proved a prima facie case to warrant the grant of permanent injunctive orders on the ground that the Respondent did not have a title over the suit property and only produced a beacon certificate which the Appellant’s Witness challenged that no beacons had been put on the property; that the Respondent had been told to be on plot No 266 and not 203 which letter was written by the Ukombozi Committee; that the Respondent did not produce a Sale Agreement for purchase of the property; and finally that the Learned Magistrate failed to consider on whose favour the balance of convenience tilted

Counsel relied on the case of **K. Anbazhagan V. State of Karnataka and Others**, which stated as follows

“.....it is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.....The duty of the Judge is to consider the evidence objectively and dispassionately.....An objective Judgment of the evidence reflects the greatness of mind-sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the Judgment itself. A judge must avoid all kind of weakens and vacillation. That is the sole test. That is the litmus test.”

Counsel also cited the case of **Mary Wanjiku Gitagia vs Lucy Mwhaki Wa Ngugi & 2 Others (2016) eKLR** where the court stated that: -

“in any event, a beacon certificate by itself without any other supporting document, is a very weak document to use as proof of ownership of land.”

It was counsel’s further submission that the respondent having not produced any title deed to the property as proof of ownership, the beacon certificate did not assist the case and in addition to that, the Chief’s letter to the Appellant herein claimed that the suit property was registered under the name of the Respondent/ Plaintiff according to records yet the same were not availed whether in the form of allotment letters or title deed.

Counsel submitted that the letter from the Town Engineer did not support the beacon certificate which letter was never produced in court as an exhibit and relied on the case of **Danson Kimani Gacina & Another V Embakasi Ranching Company Ltd (2014) eKLR**, where the court held that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner.” The Respondent/Plaintiff did not show an unbroken chain of documents but merely a beacon certificate after 8 years of supposed owning the suit property.”

Counsel therefore urged the court to allow the Appeal as prayed

RESPONDENT’S SUBMISSIONS

Counsel for the Respondent submitted that the Appeal is incurably defective on the grounds that the Appeal was filed in a Miscellaneous Cause which was determined on the 29th day of January, 2021, that the record of Appeal dated 18th February, 2021 was filed out of time without leave of the Honourable Court and that the Respondent’s supplementary list of documents was omitted from the record of Appeal.

It was counsel’s submission that upon the Appellant being granted leave to file an Appeal against the Judgment out of time, the Appellant ought to have filed the Memorandum of Appeal in a new and separate cause and not in the present cause which had served its purpose and which was determined on 29th January, 2021. Further that the Appeal was filed outside the timeline issued by this Honourable Court which was 14 days.

Counsel relied on the case of **James Murage Nguvu v RNN (Minor Suing through next friend RNK) & Another (2021) eKLR** where the court stated as follows: -

“...it is my view that failure to file the record of Appeal within the prescribed time or at all rendered the Appeal fatally incompetent”

Counsel also cited the cases of **Munir Aboubakar Masoud (As member of Tawheed Muslim Association) v Ali Abdalla Salim & Another (2018) eKLR** as well as the authority of **Patrick Kiruja Kithinji vs Victor Mugira Marete (2015) eKLR**.

Ms Wambani further submitted that the Record of Appeal dated 18th February, 2021 is incomplete as the supplementary list of documents dated and filed on 18th August, 2015 was omitted from the record and relied on Order 42 Rule 13 (4) (b) of the Civil Procedure Rules, 2010, together with the case of **Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others (2015) eKLR**.

Counsel therefore urged the court to dismiss the Appeal as the Appellant has not established that the Learned Trial Magistrate based his Judgment on wrong principles of law and without relying on the evidence on record.

ANALYSIS AND DETERMINATION.

This being the first Appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its

conclusion. This position was taken in the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** the court held as follows:

***“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally.*”**

This court will also only interfere with the trial court’s decision if it is established that the court misapprehended the applicable law and failed to take into account the relevant facts or took into account an irrelevant fact as was held in the case of **Ocean Freight Shipping Company Ltd –vs- Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995**):-where the Court held that;

“.....and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”

Upon perusal of the record and written submissions together with the authorities cited by the Appellants, I find that the issues for determination are as follows:

- a) Whether the learned Magistrate err in holding that a beacon certificate was sufficient proof of ownership of property.**
- b) Whether the appeal has merit**

When dealing with unregistered land, the court must be certain that the documentation that will lead to the issuance of title and the history of the suit land must be clear. This does not mean that unregistered land does not have owners. If that was the case, then there would be many Kenyans who own land but due to lack of adjudication or issuance of title documents they would be dispossessed from their lawfully acquired land.

The Respondent gave evidence on the root of his claim for ownership which was a beacon certificate which was not the only document that he tendered as proof of ownership. There was oral evidence to corroborate the beacon certificate which was not challenged with credible evidence.

The Respondent in her testimony told the court that she bought Plot 203 from Ukombozi Resident’s Committee where is a member. Her evidence was duly corroborated by the evidence of PW2 who confirmed to court that the Respondent was a member of the Committee having bought Plot 203. A register was duly produced as well as a beacon certificate.

I have considered the Appeal, the submissions by counsel and come to the conclusion that the Learned Magistrate did not err in granting the orders of injunction which are equitable remedies. I therefore dismiss the Appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.