



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL NO. 28 OF 2019**

**SAMWEL AMBASA.....1<sup>ST</sup> APPELLANT**

**CHARLES AMBASA.....2<sup>ND</sup> APPELLANT**

**NERBART AMBASA.....3<sup>RD</sup> APPELLANT**

**SELLA AMBASA.....4<sup>TH</sup> APPELLANT**

**-VERSUS-**

**STELLA INGASIA.....RESPONDENT**

**JUDGEMENT**

**A. INTRODUCTION**

1. This Appeal emanates from the Judgment and decree of Hon. L. N. Mesa dated 20<sup>th</sup> December, 2018 in Kehancha Principal Magistrates' Court Civil Case No. 12 of 2015, in which the Respondent's claim instituted by way of Plaint dated 10.06.2015 was allowed against the Appellants herein. The grounds in the Memorandum of Appeal are that: -

- i. The Learned Trial Magistrate erred in law and in fact when he failed to consider that the Respondent failed to prove the particulars of illegality, unlawfulness and unreasonableness as she pleaded.**
- ii. The Learned Trial Magistrate erred in law and in fact when he failed to consider all the circumstances surrounding the case, specifically that the Appellants are not in occupation of the suit land known as BUKIRA/BUHIRIMONONO/1816.**
- iii. The Learned Trial Magistrate erred in law and in fact when he failed to consider the fact that the Respondent failed to produce and mark the Surveyor's report to prove trespass as alleged.**

2. The background of this appeal is that the sometimes in 1992, the Plaintiff (now Respondent) purchased the suit property parcel No. L.R No. **BUKIRA/BUHIRIMONONO/1816** measuring **0.042Ha** from the late FRANCIS KEYA CHEMUHENDO and was issued with the title deed of the same. She therefore maintained that she was the lawful registered owner of the said property and produced various documents in support of the said assertions to prove her ownership of the suit property. However, sometimes in 2015, the Defendants (now Appellants) jointly and in collusion trespassed into the suit property by constructing illegal structures and further by burying the remains of the 1<sup>st</sup> Defendant's daughter in-law without the authority/consent of the plaintiff while having knowledge that the plaintiff had already purchased the said parcel of land and had thus acquired the title to the said property.

3. The plaintiff further contended that the Defendants, jointly and severally, unlawfully invaded and took possession of the suit parcel to the exclusion of the plaintiff thereby denying her constitutional rights to own private property. She therefore sought for the eviction of the Defendants from the suit property and a permanent injunction restraining the defendants, their servants or agents, from interfering, trespassing into and dealing with the suit property in any manner whatsoever.

4. The Defendants on the other hand filed a joint statement of defence; they denied all the claims made by the plaintiff that she is the registered owner of the suit property and stated further that there was no proof of the alleged sale of the suit property. The 1<sup>st</sup> Defendant also denied the allegations that the remains of his daughter in-law was buried on parcel No. **BUKIRA/BUHIRIMONONO/1815** which belongs to his late father FRANCIS KEYA and not **1816** as alleged. They also averred that they were in possession of parcel no. 1815 and not 1816 as alleged by the Plaintiff. They thus urged the court to dismiss the suit.

5. On 29.06.2021, this court issued directions that the Appeal be canvassed by way of written submissions to be filed and exchanged within

30days for each party.

6. The Appellants filed their joint written submissions dated 07.07.2021 while the Respondent, through the firm of Thomas Muniko & Co. Advocates, filed her submission dated 18.10.2021 and I have taken the same into consideration in arriving at my decision. I will proceed to determine the Appeal as hereunder.

#### **APPELLANTS' SUBMISSIONS**

7. It was the Appellants' submission that the Respondent failed to prove in the trial court that the suit property No. **BUKIRA/BUHIRIMONONO/1816** measured 0.042Ha while it was evident on the Mutation Form dated 13.07.2001 that the measurements of both parcels **BUKIRA/BUHIRIMONONO/1816 and 1815** were tampered with and/or forged with illegal intentions to favour the Respondent. They further submitted that the Letter of Consent dated 06.10.2000 clearly indicated that BUKIRA/BUHIRIMONONO/1297 was 0.1Ha and was latter subdivided into 2 portions; measuring 0.07Ha and 0.03Ha respectively.

8. Further, they submitted that no evidence was adduced before the trial court to support the claims by the Respondent of trespassing into her property, threatening her or even destroying the boundaries of the suit parcels. It was their contention that the Respondent had failed to meet the evidentiary burden and thus her suit ought to have been struck out on technicality. They also faulted the Respondent for failure to adduce and adopt the surveyor's report as part of her evidence in court to prove the issue of trespass.

#### **RESPONDENT'S SUBMISSIONS**

9. The Respondent on the other hand submitted that she was the lawful registered owner of the suit property measuring 0.042Ha which she legally purchased in 1992 and was issued with a title deed for the same after due process for the transfer.

10. It was her submission that the 1<sup>st</sup> Appellant's admission that he was arrested, charged with trespass on her suit property no. 1816, found guilty and sentenced to 3years imprisonment was further proof that there had indeed been trespass on account of the Appellants onto the Respondents parcel of land.

11. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate certainly does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. See the Court of Appeal decision in **Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR.**

12. Further, the Court of Appeal in **Selle v Associated Motor Boat Co. [1968] EA 123**) held as follows: -

***“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

13. I will now proceed to re-evaluate and re-assess each of the party's claim, their witnesses and exhibits produced from the lower court record. On 27.08.2018, the matter did proceed for the plaintiff's case (now the Respondent). The Plaintiff/Respondent testified as PW1; it was her testimony that in the year 1992, she bought the parcel of land measuring approx. 0.042Ha from Francis Keya and his wife, who are the parents of the Defendants/Appellants. After the purchase, they went to the Land Control Board for the requisite consent for purposes of having the title to the portion of land transferred to her name. The original land parcel L.R No. BUKIRA/ BUHIRIMONONO/1297 was subdivided into portions; L.R No. BUKIRA/ BUHIRIMONONO/1816, belonging to the Plaintiff and 1815 which was retained by the family of Francis Keya. She was issued with title of L.R No. BUKIRA/ BUHIRIMONONO/1816.

14. She further testified that upon the death of Francis Keya, the 1<sup>st</sup> Defendant/Respondent forcefully entered and occupied her parcel of land and even took her building materials. The matter was reported to the police and the 1<sup>st</sup> Defendant was convicted for trespass and sentenced to 3<sup>1/2</sup> years in prison. She thus urged the court to have the Defendants evicted from her land and make a declaration that L.R No. BUKIRA/ BUHIRIMONONO/1816 belonged to her. On cross-examination she indicated that the Defendant and his family had been interfering with a portion of her land, they constructed on her same portion after demolishing her house and had also moved the boundary between the two parcels of land; No. 1815 & 1816.

15. She produced the following documents as exhibits in support of her claim of ownership of the suit property L.R No. BUKIRA/ BUHIRIMONONO/1816 namely;

- i. Copy of the Title Deed to L.R No. BUKIRA/ BUHIRIMONONO/1816– PEXHIBIT 1
- ii. Copy of the Official Search Certificate of the Suit Property - PEXHIBIT 2
- iii. Proceedings in Criminal Case No. 70 of 2012- PEXHIBIT 3

16. On 01.11.2018, the matter proceeded for the Defence hearing, the 1<sup>st</sup> Defendant/ Respondent testified as DW1, on his own behalf and on behalf of the Co-Defendants/ Respondents and thereafter closed his case. He asked the court to adopt his witness statement as his testimony in court. He also maintained that he owns L.R No. BUKIRA/ BUHIRIMONONO/1815 and that is where his daughter in-law was buried and

not on then suit property as alleged.

17. On cross-examination he stated that he was the legal owner of L.R. No. L.R No. BUKIRA/ BUHIRIMONONO/1815 and that L.R No. BUKIRA/ BUHIRIMONONO/1816 was registered in the name of the Plaintiff/ Respondent, though he denied being aware of the sale of the land and subsequent transfer of the same to the Plaintiff by his father. He also confirmed having been charged and convicted for trespass and further the existence of the sale agreement of the suit property.

18. Further, the Plaintiff/Respondent made an Application on 1.07.2015 to have the Surveyor visit the two land parcels L.R No. BUKIRA/ BUHIRIMONONO/ 1816 & 1815 and establish and/or determine the boundary issue between the 2parcels. The Surveyor's report dated 12.10.2015 was then filed in court, a copy of the same was availed to the parties and even explained to the Defendants who at the time were acting in person.

19. I have reviewed and considered the Memorandum of Appeal, Record of Appeal, herein and the rival submissions and the proceedings and exhibits produced in the trial court wholesomely and I am of the view that the main Issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its judgement.

20. The gist of the Appeal herein is the ownership of suit property L.R No. BUKIRA/ BUHIRIMONONO/1816 and whether there has been encroachment on a portion thereof. The Appellants maintains that the Respondent is not the legal owner of the said suit property but was just a tenant renting one of the houses. He further asserts that he has never trespassed into the said portion as alleged. It is therefore his position that the trial magistrate erred in relying in the evidence produced by the Respondent and making a finding in favour of the Respondent without any evidence of trespass.

21. It is trite law that he who alleges must prove. Section 107(i) of the Evidence Act provides that: -

***“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

22. Under section 26 of the Land Registration Act Certificate of title will be held as conclusive evidence of proprietorship, the section provides as follows;

***“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

23. Section 24(a) of the Land Registration Act on the other hand provides as follows;

***“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***

24. This position was reiterated in **Dr Joseph Arap Ngok Vs Justice Moiwo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997** where the Court of Appeal stated as follows: -

***“Section 23 (1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.***

25. From a re-evaluation of the evidence adduced and the testimonies of each of the parties in the trial court and the submissions made herein, I find that the Appellant did not adduce any evidence whatsoever in support of his averments; he did not challenge the validity of the Title Deed or certificate of official search of the suit property belonging to the Respondent and produced as exhibits, he did not either challenge the title deed on grounds of fraud, misrepresentation or illegally, unprocedurally. He further did not support his claims with regards to the issue of acreage as alleged; he claims that the acreage on the Mutation Form and that on the Consent by the Land Control Board are different and the same is an indication of fraud. He has not tendered any evidence to prove these grave allegations against the Respondent in terms of a different Mutation Form bearing different acreages from the one supplied in court. His assertions therefore remain mere unsubstantiated allegations that cannot pass the evidentiary test.

26. The Respondent on the other hand produced exhibits; a copy of the Title Deed registered in her name, a copy of the Certificate of Official Search and proceedings in the criminal case in Kehancha Criminal Case No. 70 of 2012 where the 1<sup>st</sup> Appellant was charged with the offence of forcible entry/trespass and convicted. The said conviction has never been appealed against or overturned. The Title Deed is conclusive evidence of proprietorship of the holder of the said title as provided under section 26 of the Land Registration Act stated above. The law is extremely protective of titles and provides only two instances for the challenge of title; where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally,

unprocedurally or through a corrupt scheme, both of which have not been adduced in the instant case. The Respondent's title therefore remains unchallenged.

27. To this end, I agree with the finding of the trial magistrate that having produced a valid indefeasible title deed to the suit property, the Respondent is the rightful legal proprietor of the suit land measuring 0.042Ha and is therefore vested with absolute ownership thereof together with all rights and privileges thereto to the exclusion of the Appellants or any other person.

28. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the Plaintiff's claim against the Defendants jointly. The analysis and subsequent decision was purely made upon examination of facts presented before him and the evidence adduced in support of each party's claim. I find no need to interfere with the said decision.

### **CONCLUSION**

29. In conclusion, I accordingly find and hold that the Appeal is **not merited** and is therefore dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON THE 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of: -**

Non-Appearance for the Appellants

Non- Appearance for the Respondent

Tom Maurice – Court Assistant