



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 111 OF 2019

TIMOTHY MARETE NCHEBERE.....1ST APPELLANT

MERU WOOD INDUSTRIES LTD.....2ND APPELLANT

VERSUS

JAPHET BUNDI.....RESPONDENT

(Being an appeal from the Judgment of Hon. H.N. Ndungu (C.M.)

delivered on 22nd August, 2019, in Meru ELC No. 144 of 2018)

JUDGMENT

A. PLEADINGS

1. The appellants who were the defendants in the lower court were sued by the respondent for trespassing into his **Parcel No. 977 Ruiiri/Rwarera** adjudication section with effect from 29.6.2013 and commencing developments thereon without his consent, approval or justification. He sought for a permanent injunction barring and restraining the appellants from interfering with his peaceful occupation and utilization of the suit premises.

2. The appellants denied the claim on the basis that it was the 1st appellant's family who had been in occupation of the land which was alleged to be ancestral land hence was a bonafide owner and occupier; that the 2nd appellant was a purchaser for value and that the respondent was an outsider who the 1st appellant had never dealt with before.

B. TESTIMONY

3. In his testimony, the respondent produced a confirmation letter from the land adjudication and settlement officer, a consent to sue dated 2.7.2017, OB No. 5 of 28.5.2012, demand letter dated 29.5.2013 and a surveyor's scene visit report dated 7.2.2014 as exhibits in support of his case which he produced as **P exh 1 – 5**.

4. He insisted he acquired the land in 1980 but the 1st appellant had allegedly entered into it in 2013 whereof he demanded that he vacates the land. In his view, the 1st appellant occupied approximately 2.37 acres while the 2nd appellant was using 3.36 acres.

5. The land adjudication and settlement officer told the court following a court order he visited the site and established the suit land was occupied at a ratio of 2.37 acres and 3.63 acres by the appellants respectively as per **P exh 4**. He testified the parcel numbers were issued in 1999 following demarcation and that he was not aware there was an order stopping the District land adjudication and settlement officer from proceeding with the adjudication process. The 1st appellant's testimony was that the suit land had been left to the family by his deceased father after he was given the land by the late Minister for lands Mr. Angaine in 1969.

6. He insisted the land was still undergoing an adjudication process and that as a family they sold to the 2nd respondent 22 acres of the land in 2013.

7. The 1st appellant denied he was in possession of any ownership documents showing his late father had acquired the land from Mr. Angaine as alleged or at all.

8. Regarding the demarcation of the land registration in favour of the respondent, the 1st appellant admitted knowledge of the same but alleged he had filed objection No. 4346 on 12.2.2016 concerning Parcels No's 979, 3028, 5036 and 1117 but which was dismissed. Eventually, the 1st appellant claimed he appealed to the Minister though he possessed no documents to that effect. He denied ever being asked to vacate the land but admitted he had other pending issues before court.

9. The 1st appellant testified the court had in **High Court (Nairobi) Misc. Appl. No. 344 of 2003** nullified issuance of parcel numbers over the adjudication section and directed people living on the land to continue being in possession until a fresh demarcation process was commenced. He denied ever seeing the respondent on the land ever though he had objected to the respondent being issued with a parcel number to the land. He also denied that there was an order evicting him from the suit land. He however admitted the land adjudication and settlement officer had visited the subject land but failed to issue any parcel numbers.

10. The 2nd appellant testified that he bought the land from the 1st appellant, took vacant possession, established an office and built a wood factory/concrete transmission poles factory and a dairy processor factory. He admitted he possessed no parcel number(s) and knew nothing about **Parcel No. 977**. He told the court it was the 1st appellant who sold to him 22 acres of the land in July 2013 and was in the process of acquiring parcel numbers. He told the court that he had visited the land adjudication offices at the time of the purchase but found out the land had no parcel numbers issued in favour of anybody at the time.

11. The 2nd appellant admitted that he occupied 3.63 acres which land according to him had no parcel number but was in the process of being issued with one.

12. The 2nd appellant denied being present at the scene visit by the land surveyor. According to him, the process of the land adjudication was still ongoing since previous parcel numbers had been quashed by the court and that the land he had bought was unregistered land at the time of purchase.

C. WRITTEN SUBMISSIONS

13. Parties opted to canvass this appeal through written submissions dated 1.11.2021 and 15.11.2021 respectively.

14. The appellants submitted the subject land fell under Mugae area which administrative decision by the District Land Adjudication Officer Meru Central District was the subject of **Nairobi Misc. Appl. (J.R) No. 344 of 2003** hence given the above case, it could not have been a basis of ownership.

15. Secondly, it was submitted 1st appellant had been living on the ancestral land with the exclusion of the respondent. It is submitted the PW1's evidence was corroborated by PW2.

16. Further the appellants submitted the trial court failed to find the defence evidence on acquisition by the 1st appellant and subsequent sale and transfer and developments thereon genuine, credible and valid.

17. It is further submitted the trial court ought to have established the existence of several cases over the area laying claim on the land relevant especially the consent in **Nairobi CA No. 129 of 2005**.

18. The appellants submitted the process of land adjudication was still going on and new numbers were being issued; that the respondent had no **locus standi** to appeal to the Minister if that application ever existed which they deny. They urge the court to set aside the judgment with costs.

19. The respondent submitted the suit was properly before the court following the consent issued on 2.7.2013 under **Cap 284**, though conveniently left out in the record of appeal and which issue was not challenged in the lower court.

20. The respondent maintained there was confirmation of ownership of **Parcel No. 977** and that the parties herein were not participants before **Nairobi CA No. 129 of 2005** whose decision was never filed before the trial court except **High Court Misc. 344 of 2003**.

21. The respondent submitted the appellants did not produce any documents on the allegation that the adjudication process had been stayed notwithstanding that their pleadings were that the process was ongoing.

22. Additionally, it is submitted that PW2 denied knowledge that the nullification by **Nairobi Misc. No. 344 of 2003** covered the area where the suit land was situated given the Court of Appeal consent was specific to the areas it was to cover.

23. Further, the respondent submitted that PW2 confirmed he was not aware of any blanket bar to the adjudication process. Similarly no evidence was tendered by the appellants to show that the adjudication process had been stopped.

24. The respondent submitted that the 1st appellant in his testimony claimed his objection **No. 4346 of 2016** over **Parcel No's 977, 3028 and 5036** were heard and dismissed. Obviously, he would not have lodged the objection if there was stay or stoppage of the adjudication process by the cases in the High Court or Court of Appeal hence his evidence was unbelievable.

25. As regards evidence tendered, the respondent submitted the evidence of ownership and the existence of the suit land was clear, cogent, credible, authentic and valid. The said evidence was also buttressed by the scene visit report.

26. The respondent therefore submitted he had proved his claim to the required standards and hence the trial court was right in finding him entitled to the prayers sought. Reliance is placed on Appeal No. Nairobi Civil Application No. 161 of 1989 Titus Muiruri Doge –vs- Kenya Cannery Ltd and Nyeri Civil Appeal No. 51 of 2013 Ndegwa Kamau T/A Sideview Garage –vs- Fredrick Isika Kalumbo.

D. GROUNDS OF APPEAL.

27. The appellants attacked the judgment on the basis it relied on exhibits procured unjustly and in unclear manner, failed to honour the consent judgment from the Court of Appeal where a new committee was to oversee and ensure a just adjudication process; issued a judgment when the adjudication process was ongoing; relied on non-existent adjudication number and documents; relied on unsubstantiated scene visit report and ruled against the weight of evidence and submissions tendered.

28. This being a first appeal, the court has a mandate to rehearse and rehear the matter, come up with its own independent findings and conclusions while bearing in mind the trial court heard the witnesses first hand, noting their demeanor. See Peters –vs- Sunday Post Ltd (1958) EA 424.

E. ISSUES FOR DETERMINATION

29. Having gone through the pleading, evidence, written submission and grounds of appeal, the issues for determination are:

1) If the respondent proved his claim on a balance of probabilities.

2) If the appeal is merited.

3) What is the order as to costs.

30. The respondent's claim in the lower court was that the appellants had unlawfully and without justification trespassed into, remained on, started developments and denied him peaceful and quiet possession and occupation of his registered **Parcel No. 977 Ruiru/Rwarera** adjudication section.

31. The appellants' joint defence was that the land was ancestral belonging to the 1st appellant's extended family which he had acquired through inheritance from their ancestors and had occupied it for a long time. The 2nd appellant alleged he was a purchaser for value. The appellant also maintained the respondent lacked any **locus standi** to enforce his contention.

32. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See Independent, Electoral and Boundaries & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR.

33. Each of the parties herein drew separate list of issues at pages 19 and 25 of the record of appeal.

34. The appellants did not raise the issues on the manner he procured the consent to sue, the confirmation letter of ownership of the suit parcel and the **Nairobi Court of Appeal No. 129 of 2005** either through their pleadings or by putting specific questions to the respondent's witnesses during the trial.

35. Further, by a consent dated 6.12.2016, parties agreed to and a ruling was delivered by Hon. Justice P.M. Njoroge for the District land adjudication and settlement officer to visit the **locus in quo**, make a report, file in court and the report to be adopted as the order of court. So ground No. 4 of the appeal is not only unfounded on the part of the appellants but also contrary to the overriding objective of **Sections 1A, 1B Civil Procedure Act and Article 159 of the Constitution** on the expeditious disposal of cases and substantive justice. The appellants are also estopped from denying what they had consented to. Concerning **Nairobi C.A. No. 129 of 2005**, the appellants in their own written submissions dated 10.8.2019 alluded to the issue. It is trite law that however forceful or detailed submissions are, they cannot replace pleadings or amount to evidence as held in Daniel Toroitich Arap Moi & Another -vs- Mwangi Stephen Murithi & Another [2014] eKLR.

36. The appellants did not tender any evidence that the adjudication and issuance of **Parcel No. 977 Ruiru/Rwarera** to the respondent was illegal, invalid and non-existence on account of the Court of Appeal consent order.

37. There was no specific pleading on illegality in the amended joint defence by the appellants. The appellants' did not allude to any illegality and or unconstitutionality of the adjudication process during the testimony of PW1 and PW2.

38. The appellants failed to plead and or prove the above issues during trial. They could not possibly sneak in such evidence through written submissions either at the lower court or before this court. The burden of proof was on them to marshal and offer such evidence particularly the alleged order stopping the adjudication process concerning Parcel No. 977 Ruiru/Rwarera adjudication section.

39. PW2 testified and stated he was unaware of such an order. If at all the appellants were in possession of such evidence, nothing would have been easier than to file the amended defence accompanied by a list of documents among them the alleged order or directions staying or stopping the adjudication process and more specifically **Parcel No. 977**.

40. The appellants submitted the trial court erred in law by relying on official documents tendered by the respondent which were non-existent and unsubstantiated. **Sections 68, 79 – 81 of the Evidence Act** provides the production of public documents. There was no objection made by the appellants when the respondent produced P exh 1 – 5. The appellants did not produce anything to the contrary, that the document's

produced as P exhs were forgeries or fraudulently obtained and or were illegal. See *Jemima Moraa Sobu –vs- Trans-National Bank Ltd [2016] eKLR.*

41. The 2nd appellant alleged he was a purchaser for value. Unfortunately, he did not produce any evidence in line with **Section 3 (3) of the Law of Contract Act**. The burden was on the 2nd appellant to prove the validity of its assertion that it held a better title as opposed to the respondent.

42. Similarly, the 1st appellant claimed ancestral rights on behalf of his extended family members. He did not exhibit any authority to sue or defend such rights. Again, the 1st appellant admitted that his objections during land adjudication were dismissed. He did not tell the court if he ever appealed against the decision in line with the internal dispute mechanism under the **Land Adjudication Act** for redress as held in the *Speaker of the National Assembly –vs- James Njenga Karume [1992] eKLR.*

43. The respondent was seeking for a permanent injunction. He established a right apparently infringed by the appellants calling for rebuttal as held in *Mrao Ltd –vs- First American Bank of Kenya Ltd. [2003] eKLR and Nguruman Limited –vs- Jan Bonde Neilsen & 2 others [2019] eKLR.*

44. The appellants did not rebut the respondent's ownership documents and establish if they had a better title issued by a higher authority than PW2. The appellants alleged the land adjudication process was ongoing yet they did not call any officer from the land adjudication office to confirm the same. Similarly, the appellants were unable to explain why if at all they had any claim or interest in the suit land, same had not been ascertained if at all the process of adjudication was still going on.

45. Whereas at paragraph 4 of the amended defence the appellants admitted the existence of Parcel Number 977 but denied that the respondent was in occupation. During their testimony, they gave conflicting accounts as to whether or not the parcel of land existed in the land adjudication records.

46. Touching on the issue of the alleged pending cases regarding the subject land, the burden of proof again was on the appellants to plead subjudice or resjudicata and produce tangible evidence in support of those allegations. No such evidence was tendered except the written submissions which cannot replace evidence. See *Daniel Toroitich Arap Moi (Supra).*

47. Given the foregoing, my finding is the appeal herein lacks merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 2ND DAY OF MARCH, 2022

In presence of:

Otieno for appellants – present

Gichunge for respondent – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE