Towett v Ntutu (Environment and Land Appeal 10 of 2018)
[2022] KEELC 9 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 9 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL 10 OF 2018

CG MBOGO, J

MAY 4, 2022

BETWEEN

KIPSIELE ARAP TOWETT ..... APPELLANT

AND

LESEIYO OLE NTUTU ..... RESPONDENT

JUDGMENT

1. Being dissatisfied with the decision and or judgment of Hon. T. Gesora (Senior Principal Magistrate) delivered on 30th November, 2018, the Appellant who was the Plaintiff in Civil Suit No. 8 of 2014, appealed to this Honourable court against the entire judgment of the learned Magistrate and sets forth the following grounds: -

    1. That the learned trial magistrate erred in fact and in law in passing judgment in favour of the respondent allowing the respondent's counter claim against the appellant herein contrary to the weight and the evidence of the law.

    2. That the learned trial magistrate erred in law and in fact in making a finding on issues that were not pleaded.

    3. That the learned trial magistrate erred in law and in fact in making observations that were prejudicial to the appellant.

    4. That the learned trial magistrate erred in law and in fact in entertaining and passing judgment on a transaction that he had faulted for all intends and purposes.

    5. That the learned trial magistrate erred in law and fact in entertaining and making a finding on an issue that was beyond his jurisdiction.

    6. That the learned trial magistrate erred in law and in fact in admitting evidence that was not adduced by the witnesses before court during the hearing.

7. That the learned trial magistrate erred in law and in fact in delivering a judgment that was not founded on the evidence and the law.

8. That the learned trial magistrate erred in law and in fact in making a finding that was contrary to the provisions of the *evidence act*.

2. The appellant prays that the judgment of the honourable magistrate be set aside together with the consequential decree and judgment entered in his favour as pleaded in the plaint.

3. The appellant did not file written submissions. The respondent filed written submissions dated 28th February, 2022.The respondent submits that the law provides that every citizen has a right to own and use property which is guaranteed and protected by the *constitution* and that no one has a right to cleverly claim to use another person's property to their detriment using whatever documents available while seeking assistance of the courts while this will amount to a great travesty of justice where an individual uses the courts of justice to visit an injustice in the guise of seeking justice against another.

4. The respondent further submits that all the grounds in the memorandum of appeal have no basis and are a mere denial to the respondent from enjoying the fruits of his judgment. That the documents produced at the trial court were discredited and the appellant has been unable to prove his case on a balance of probabilities. The appellant has also not produced any new evidence and neither did he challenge the evidence produced at the hearing. The respondent cited the case of *Elisius Muranga v Andrew Mwangi Chui & 2 others* ELC Case No. 146 of 2002.

5. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I did not get the benefit of taking evidence first hand and observe the demeanor of witnesses. For this reason, I will give due allowance. The principles guiding the first appellate court were set out in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 where the court stated as follows: -

> " ...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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...".

6. Upon consideration of the materials presented in respect of the Appeal herein, the issue for determination is whether the Judgement in Narok Civil Suit No. 8 of 2014 dated the 30th November, 2018 should be set aside.

7. At the trial court, the matter proceeded for hearing on 5th March, 2015.The Appellant testified that he entered into a lease agreement dated 4th February, 2013 with the respondent for a term of two years commencing 1st January, 2013 to 31st December, 2014.The total acreage of the land was 72 acres and the rent payable was Kshs. 4,000/- per acre bringing a total of Kshs. 576,080/-. It was his evidence that he occupied the farm for one year and in November, 2013 he found the farm had been ploughed by someone else. On cross examination, he testified that he paid the sums in cash before Mr Yenko, Advocate.

8. The Appellant's witness Mr Yenko testified that the Appellant and the Respondent went to his office and he prepared a lease agreement and that no money was brought to his office. The respondent informed him that he had been paid and that they had their own understanding. On cross examination, he testified that he did not see money changing hands and he informed the respondent of the

implications of admitting receipt of money which had not been exchanged. Mr. Yenko understood that the lease agreement was to kick out the other tenant.

9. The Appellant's hearing proceeded further on 22nd March, 2016 where the Appellant's second witness Richard Kiplangat Sang testified that he prepared a report for the Appellant on 18th May, 2015 for Cis Mara/Lemek/2478.He testified that he visited the land upon request to ascertain the crop yield for the land and ascertained that the average wheat crop yield for the year 2014 was 8 bags of wheat per acre and that the farm gate price per bag was Kshs. 2,800/-. On cross examination, he testified that he did not visit the specific parcel to see the crop but he only saw the general area and the Appellant did not show him any planted crop. He also testified that he did not know who planted on the suit land.

10. The matter proceeded for defence hearing on 28th June, 2016 where the respondent testified that Hugowood occupied the land and was tilling but had refused to vacate. He got the appellant to plough the 72 acres but the Appellant did not have money for fuel as he was expecting money from AFC. That Hugowood ploughed the suit land before the appellant could get money and the appellant suggested that they approach an advocate so that they could agree. That they entered into an agreement on 4th February, 2013 in which they also agreed that he had been paid for two years. The essence of the agreement was to restrain Hugowood from further ploughing the land. The appellant did not pay him any money. Instead, he went ahead and sprayed chemicals to kill weeds and planted wheat. The respondent testified that the appellant harvested 600 bags and he informed him that he had been paid Kshs. 900, 000/-.Thereafter, he asked the appellant to pay him and was paid Kshs. 45,000/- for the chemicals. It was then that the respondent leased to Mr. Singh 40 acres through an agreement dated 10th May, 2013.On cross examination, the respondent stated that he did not breach the agreement as he was not paid and that the reason why the entered into an agreement was to ensure that Mr. Wood does not sue the appellant. He reiterated that he was only paid Kshs. 45,000/-.

11. The respondent filed a counter claim seeking Kshs. 288,000/- for the planting season between January, 2013 and December, 2013.The trial magistrate, in arriving at his decision found that the purpose of the agreement was to lock out Mr. Wood and during this period between January, 2013 and December 2013 the appellant ploughed the suit land and harvested wheat. Having taken advantage of the agreement and ploughing the land, it was only fair that the respondent be paid the sum of the land for period in which the appellant ploughed the land.

12. Arising from the above, I see no sufficient reason to interfere with the decision of the trial court. I find that the Memorandum of Appeal dated 24th December, 2018 unmeritorious and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 4TH MAY, 2022.

MBOGO C.G

JUDGE

In the presence of: -

CA: Timothy Chuma