Namachitu & another v Wanyama (Environment and Land Appeal 12 of 2020) [2022] KEELC 3765 (KLR) (4 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3765 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 12 OF 2020

BN OLAO, J

JULY 4, 2022

(FORMERLY BUNGOMA H.C.C.A NO. 52 OF 2020)

BETWEEN

FLORENCE NAMACHITU ..... 1ST APPELLANT

RONALD KERRE ..... 2ND APPELLANT

AND

DORIS WANYAMA ..... RESPONDENT

((Being an appeal arising from the Judgment and Decree ofHon. S. O. Mogute – Principal Magistrate delivered on 15th May 2020 in Bungoma Chief Magistrate's Court Civil Case No 85 of 2018))

JUDGMENT

1. The land parcel No East Bukusu/South Kanduyi/8863 (the suit land) was first registered in the names of Wanjala Mukewa Sasita the deceased husband of Doris Wanyama(the respondent) on June 22, 2006as per the copy of the Green Card forming part of the documentary evidence herein. On November 21, 2017, it was registered in the names of the Respondent and her three (3) children namely: -

    1. Phanice Gilande Wanjala
    2. Kevin Wanjala Wasariand
    3. Caleb Wanjala Masinde

    That was pursuant to the Certificate of Confirmation of Grant issued in Bungoma High Court Succession Cause No 250 of 2014 issued on June 16, 2017 in which the suit land was the only property distributed to the beneficiaries.

2 However, on January 8, 2018, the Green Card shows that Florence Namachitu Kere(the 1st appellant) lodged a caution claiming a beneficial interest in the suit land. That prompted the respondent to move to the Subordinate Court where she filed bungoma C.M.CC No 85 of 2018 initially against the 1st appellant seeking the main remedy that the said 1st appellant be evicted from the suit land. The plaint was subsequently amended to implead Ronald KerE (the 2nd appellant) as the 2nd defendant. In her amended plaint, the respondent pleaded that whereas she is the registered proprietor of the suit land, the 1st appellant had placed a caution thereon while the 2nd appellant had constructed a house on the suit land and had refused to vacate therefrom. The Respondent therefore sought the following orders against the 1st and 2nd appellants as per the amended plaint: -

1. Removal of the caution placed on the suit land.
2. Eviction of the Appellants
3. Costs
4. Interest

3. The Appellants filed separate defences.

4. In her defence and Counter – Claim, the 1st appellant admitted that the respondent is the registered proprietor of the suit land. She added however that the respondent is a mere trustee and her title is subject to all the liabilities attaching thereto. She pleaded further that she and her family have been occupying the suit land since 1991 following land purchase agreements between Wanjala Mukewa Sasita and Sasita Wasare and therefore she cannot be evicted. She therefore Counter – Claimed for four (4) plots in the suit land.

5. The 2nd appellant filed his defence on February 25, 2019 in which he too pleaded that the Respondent is only registered as proprietor of the suit land but holds it in trust. He denied having constructed a house on the suit land but added that he is simply a care – taker residing in a house built by his late brother Cleophas Webala Kerre who purchased the land in 1991 from Wanjala Mukewa Sasita and his father Sasita WasarE and he cannot therefore be evicted.

6. The suit was heard by Hon S. O. Mogute (principal Magistrate)and in a Judgment delivered on May 15, 2020, he found that the respondent had proved her case and dismissed the 1st appellant's Counter – Claim. He awarded costs of the suit and Counter – Claim to the Respondent.

7. Aggrieved by that Judgment, the Appellants promptly filed this appeal on May 22, 2020 seeking to set it aside and to allow the Counter – Claim with costs. The following seven (7) grounds of appeal were proffered: -

1. The learned Magistrate erred in law and in fact in the framing of issues for decision.
2. The learned Magistrate erred in law and in fact by not making any finding on the time frame for ownership of land title No East Bukusu/south Kanduyi/8863 and occupation thereof by the defendants.
3. The learned Magistrate erred in law in relying on a document referred to as "Minutes of the family meeting" when there was no such document in the documents produced by the plaintiff.
4. The learned Magistrate erred in law and fact in blaming the defendants alone for not calling Sasita Wasareas a witness when the plaintiff equally had the duty of calling him.

5. The learned Magistrate erred in law and in fact in allowing the plaintiff's case against the 2nd defendant without any clear particulars of date of entry onto the suit land.

6. The learned Magistrate had no justification in dismissing the 1st defendant's Counter – Claim when the defence to it by the plaintiff was a mere blanket denial.

7. The learned Magistrate erred in law in his comments on the 1st agreement produced by the defendants in support of their case.

Directions having been made that the appeal be canvassed by way of written submissions, the same were filed both by Mr J S Khakulainstructed by the firm of J S Khakula & Company Advocates For the Appellants and by Ms Lucy Nanzushi instructed by the firm of Lucy Nanzushi& Company Advocatesfor the respondent.

8. I have considered the grounds of appeal, the record as well as the submissions by Counsel.

9. This being a first appeal, I must bear in mind that it is by way of a re – trial. The principles which will guide me is that I should reconsider the evidence, re – evaluate it and draw my own conclusions. Even as I do so, I should always bear in mind that I neither saw nor heard the parties and their witnesses and make due regard for that. In *Peters v Sunday Post Ltd* [1958] EA 424, it was stated thus: -

> It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

The same principles guide this court handling an appeal from the Subordinate Court.

10. In *Okeno v R* 1[972]EA 32, it was stated thus: -

> It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw it's own conclusions in deciding whether the Judgment of the trial court should be up – held."

11. In his submissions, Counsel for the appellants abandoned grounds No 3 and 7 and pursued the remaining 5 grounds.

12. In grounds No 1, Counsel has submitted that: -

> The issues for determination as framed by the learned Magistrate were prejudicial to the appellants."

Counsel then goes on to summarise the plaint both in it's original form and as amended and states: -

> The issue should have been 'whether the defendants have been in occupation of the suit land since 1991.' Had such an issue been framed as it ought to have been, the learned Magistrate may well have reached a different conclusion and Judgment."

I have perused the trial Magistrate's Judgment. At page 73 of the record of appeal, he addressed that issue as follows: -

> I have duly considered the pleadings herein, the evidence tendered and the submissions on record. The main issues for determination are as follows:-
>
> 1: Whether the plaintiff has proved her case on a balance of probabilities as required by the law.
>
> 2: Whether the 1st defendant has proved her Counter – Claim herein on a balance of probabilities as required.
>
> 3: What reliefs are appropriate herein after having determined the aforesaid."

Arising out of the pleadings by the parties herein, I do not see how the trial Magistrate erred in law or fact in the manner in which he framed the issues for his determination. What is important is whether this court, on appeal, is able to conclude from the impugned Judgment, if the issues raised by the parties were infact considered and determined by the trial court. Indeed, even the mere failure to frame issues for determination is not fatal. In *S N Shah v C M Patel & others* [1961] EA 397, the then East African Court of Appeal said: -

> Whereas there would have been considerable advantage in framing the issues before the evidence was called, issues had been joined upon the pleadings and it was not, therefore, obligatory upon the learned Judge to frame issues. The fact that he did not do so would be no justification for upsetting his decision."

From my own evaluation of the trial Magistrate's Judgment, I am satisfied that he properly identified the issues which the parties wanted the court to resolve and that he determined them. Those issues, put in another way, were basically whether the appellants were trespassers on the suit land which is the sole property of the respondent and were therefore liable for eviction or if infact the respondent was a mere trustee holding the title to the suit land in trust for theappellants. That ground must therefore fail.

13. Counsel for the appellants has submitted on grounds No 2 and 5 together. He argues that the Respondent produced a Certificate of Search for the suit land which shows only two entries dated November 21, 2017and January 8, 2018but which do not show for how long the suit land had been in existence although it belonged to her late husband Wanjala Mukewa Sasita. Counsel submits further that the respondent went to live with her parents in 1992 and when she returned to the suit land in 2000, she found the Appellants had built structures thereon. Arising out of the above, Counsel concludes as follows: -

> By the time she came back in 2000 the defendants were on the land. Between 1992 and 2000 is a period of 8 years. She did not file this suit until 2018 making their occupation some 26 years. If the learned Magistrate made any finding on this aspect of the case, he may well have held that this suit was dismally time barred and given different Judgment."

If I understand that submission well, and I think I do, Counsel is suggesting that the Respondent's interest in the title to the suit land was infact extinguished by operation of the law during the period between 1992 and 2018 when she filed this suit. If that is what the Appellants were claiming, then the route they should have taken should have been to claim the suit land by way of adverse possession. In any event, the Respondent was not, through her amended plaint claiming the suit land which has been registered in her names and those of her children since November 21, 2017and before that, in the name of her late husband Wanjala Mukewa Sasitasince June 22, 2006. Her ownership of the suit land is well

documented from the Certificates of Official Search exhibited herein. What she was seeking from the trial Court was the removal of the cautions lodged on the suit land by the 1st Appellant on 8th January 2018 and the eviction of both Appellants therefrom. The Respondent's ownership of the suit land, unless lawfully interrupted, would therefore be infinite. I do not, in the circumstances, see how the trial Magistrate was expected to "make any finding on the time frame for ownership of land title No E. Bukusu/skanduyi/8863 and occupation thereof by the defendants" as pleaded in ground 2 of the Memorandum of Appeal.

14. With regard to grounds 5 and 6 of the Memorandum of Appeal, the appellants assail the trial Magistrate for "allowing the plaintiff's case against the 2nd defendant without any clear particulars of date of entry onto the suit land." It is not clear whether the "date of entry onto the suit land" refers to the appellants' or to the respondent's "entry onto the suit land." What is clear however is that the Appellants were infact laying claims to the suit land on the basis of a purchase. In her statement dated June 11, 2019 and which she adopted as her evidence during the plenary hearing on September 25, 2019, the 1st appellant states as follows in paragraph 3: -

> 3: "Land parcel No E. Bukusu/S.Kanduyi/8863 is derived by way of subdivision from land parcel No E. Bukusu/s.kanduyi/5516 which was originally registered in the names of Sasita Wasari. In 1991 my late son purchased a portion of the land measuring 150 ft by 300 ft or 3 plots from the plaintiff's father in law Sasita Wasariand her late husband Wanjala Mukew Sasita. He built residential premises on it."

In his statement dated June 11, 2019 and which he adopted as his testimony when he testified onSeptember 25, 2019, the 2nd Appellant has also stated as follows in paragraphs 3, 4 and 5: -

> 3: "In 1991 my late brother Cleophas Webala Kerrepurchased 3 plots of land of 50 ft by 100 ft from the lateWanjala Mukewa Sasita. The plots were to be hived from the land parcel No E. Bukusu/S.Kanduyi/5516 which was registered in the name of his father Sasita Wasari. The purchase agreement was as a result made in the name of the seller and his father as vendors."
>
> 4: "In 1994, he purchased a further adjacent plot directly from the said Wanjala Mukewa Sasitato make a total of 4 plots."
>
> 5: "By this time,Wanjala Sasita had been given his own title E. BukusuS. Kanduyi/5966."

15. The Appellants' case therefore was that they purchased their parcels of land from Sasita Wasarewhich were subdivisions of the land parcel No East Bukusu/south Kanduyi/5516. The Green Card to that parcel of land shows that it was indeed first registered in the names of Sasita Wasare on August 12, 1991. That title was closed on November 27, 1992upon sub – division to create parcels No East Bukusu/south Kanduyi/5964 to 5970. On the other hand, the Green Card to the suit land shows that it was a sub – division of parcel No East Bukusu/south Kanduyi/6702. Therefore, whatever land the Appellants purchased from Sasita Wasare in 1991, it could not have been the suit land which, as is now clear, was never a sub – division of the suit land which was only created on 22nd June 2006 and most importantly, it was not created out of the sub – division of the land parcel No East Bukusu/ South Kanduyi/5516 but rather, it was created out of the sub – divisions of the land parcel No East Bukusu/ south Kanduyi/6702. The trial Magistrate did not therefore err in law or in fact when in his Judgment at pages 74 and 75 he made the following findings: -

> I have also observed from the 1st agreement stated above that the parcel number mentioned is E. Bukusu/S. Kanduyi/5516 and not E. Bukusu/S. Kanduyi/8863 which is the suit land

herein. The Search Certificate produced by the defence dated 16.5.14 makes reference to the suit land but not land parcel number E. Bukusu/S.Kanduyi/5516. Sasita Wasare who is said to be alive todate was one of the vendors as shown in the agreement dated 11.6.91. He was not enjoined in these proceedings as a party to enable the court hear from him what he had to say in regard to the said agreement.

The second agreement produced by the 1st defendant dated 25.3.94 makes reference to land parcel No 5966 and not land parcel number 8863 (the suit land).

From the aforesaid, it is clear in my mind that what is stated in the land sale agreement produced herein does not refer or has no connection whatsoever to the suit land subject matter herein."

Given the above circumstances, the conclusion by the trial Magistrate that the Respondent, rather than the appellants, had proved her claim, was inevitable and cannot be faulted. When a party claims land registered in the names of another party, the identification of the land being claimed should not be a matter of conjecture. It must be certain so that another person's property rights protected by article 40(1) of the ***Constitution*** are not violated. In this case, whatever land the appellants purchased could have been any land but not the suit land.

16. Further, the law is that parties being adversaries, it is the responsibility of each of them to formulate their cases in such a manner that the court can understand what it is required to determine and what remedy to grant. In this case, it is not clear exactly what the 1st appellant's Counter – Claim was premised on. I shall set it out in extensor: -

Counter – Claim

6: The defendant joins issue with the plaintiff and reiterate the averments in paragraph 1 to 5 hereof.

7: The defendant avers that the land purchase agreements referred to in paragraph 4 hereof were made between Wanjala Mukewa Sasita and his fatherSasita Wasareon one part and Cleopha Webala Kerreon the other. Both Wanjala Mukewa Sasitaand Cleopha Webala Kerreare now deceased but Sasita Wasareis still alive. The plaintiff is the widow of the late Wanjala Mukewa Sasitawhile the defendant is mother of the late Cleophas Webala Kerre.

8: The late Cleophas Webala Kerrepurchased 4 plots of land measuring 50 ft by 100 ft each in 1991 and 1994 was given possession thereof. His family is still in occupation. The defendant's Counter – Claims from the plaintiff title to the 4 plots.

Whereforethe defendant prays that the plaintiff's suit herein be dismissed and her Counter – Claim allowed with costs."

From those pleadings, it is not clear what the 1st appellant's Counter – Claim was premised on. Was she seeking to enforce the sale agreements between Cleopha Webala Kerre and Wanjala Mukewa Sasita with respect to the 4 plots? Was her Counter – Claim based on adverse possession or trust, or was it, as pleaded in paragraph 3 of her defence, based on the averment that the respondent "is not an absolute owner" but "is a mere trustee who should respect all the beneficiaries and all liabilities attaching to the title at time of being registered?" The appellants' pleadings could certainly have been much better, even if not elegant.

17. The respondent filed a 6 paragraph defence to the Counter – Claim on March 20, 2018reiterating her ownership of the suit land, denying that she is a trustee and putting the 1st Appellant to strict proof thereof. I do not consider that defence to the Counter – Claim to be a mere blanket denial as

pleaded in ground 6 of the Memorandum of Appeal. The onus shifted to the 1st Appellant to lead congent evidence to prove, on a balance of probabilities, that she was entitled to the orders sought. Given the paucity of her evidence in support of that Counter – claim which is itself not very clear, the trial Magistrate was entitled as he did, to make the finding that the Respondent had led congent evidence not only to prove her claim but also to dislodge the Counter – Claim.

18. Grounds 2, 5 and 6 of the Memorandum of Appeal are hereby dismissed.

19. Then in ground 4 of the appeal, the appellants have faulted the trial Magistrate for blaming the appellants alone for not calling Sasita Wasare as a witness when the respondent equally had the duty to calling him. It is the 1st appellant who pleaded in her defence that she and her family have occupied the suit land following land purchase agreements entered into with Wanjala Mukewa Sasita and his father Sasita Wasare. And that being the central plank of her defence and Counter – Claim, onus was on her to lead evidence to prove that indeed Wanjala Mukewa Sasita and Sasita Wasare sold the suit land to her son Cleophas Webala Kerre. It is well settled that he who asserts must prove. Sections 107, 109 and 112 of the *Evidence Act* make that clear as follows: -

> 107(1) "Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 109 "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> 112 "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

In the course of his Judgment, the trial Magistrate stated as follows: -

> Sasita Wasare who is said to be alive todate was one of the vendors as shown in the agreement dated 11.6.91. He was not enjoined in these proceedings as a party to enable the court hear from him what he had to say in regard to the agreement."

Therefore, since it was the 1st appellant whose case was that the land was purchased from Sasita Wasare, the burden of proving that fact lay with her and not with the respondent. It cannot be true, as raised in ground 4 of the Memorandum of Appeal, that "the plaintiff equally had the duty of calling him." That duty was solely the responsibility of the appellants. And the fact that the appellants did not see it fit to call him as their witness yet he was alive at the time of the trial, can only be interpreted to mean that he would not have supported the 1st appellant's Counter – Claim.

20. That ground of appeal is also dismissed.

21. Finally, it is clear from the 1st appellant's statement and which she adopted as part of her testimony that she was aware about the succession process that culminated in the suit land being registered in the names of the respondent and her children. It was not part of her testimony during the trial that she was not aware of the process. What she stated in her evidence is that the respondent "ought to have made provision for my late son's portion of land but she did not. Instead, she has come to Court seeking to evict me and the 2nd defendant." In the absence of any evidence from the Appellants suggesting that the succession proceedings were conducted secretly, it was rather late in the day for them to allege at the trial that they too were beneficiaries and that the respondent holds the suit land in trust on their behalf. It is clear from the Green Card that the respondent's late husband Wanjala Mukewa Sasita was the first registered proprietor of the suit land on June 22, 2006 and if the appellants had any claim thereon, they didn't have to wait until January 8, 2018 to lodge a caution thereon. And by the time it was being

transferred to the Respondent through transmission, there was no caution lodged against it. She was therefore not under any obligation during the succession proceedings to disclose any beneficiaries or liabilities which were un – known to her. The fact that the caution was lodged on the suit land some 18 years after the demise of Wanjala Mukewa Sasita, the first registered, owner raised more questions than it answers. But one inevitable conclusion can only be that their interest is in a different parcel of land and not in the suit land.

22. From my own re – evaluation of the evidence in this matter, I am persuaded that the trial Magistrate arrived at the correct and just conclusion.

23. The up – shot of all the above is that this appeal is devoid of merit. It is accordingly dismissed with costs both here and in the Court below.

Boaz N. Olao.

J U D G E

4th July 2022.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 4TH DAY OF JULY 2022.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

4th July 2022.