Torome & another v Cheda (Environment and Land Appeal E007 of 2021)
[2022] KEELC 14523 (KLR) (3 November 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E007 OF 2021

CG MBOGO, J

NOVEMBER 3, 2022

BETWEEN

BENARD PARSALOI TOROME ..... 1ST APPELLANT

YOGESH KUMAR PATEL ..... 2ND APPELLANT

AND

CHEDA ALI CHEDA ..... RESPONDENT

JUDGMENT

1. Being dissatisfied with the decision and or judgment of Hon. GN Wakahiu (Chief Magistrate) delivered on February 28, 2020, the appellants who were the defendants in Civil Suit No 195 of 2016 appealed to this honourable court against the entire judgment and decree of the learned Magistrate and sets forth the following grounds: -

    1. That learned trial magistrate erred in law and fact by filing to consider the evidence before him and therefore arrived at an unjust decision.

    2. That the learned trial magistrate erred in law and fact by failing to apply the relevant laws thus deciding the claim in favour of the respondent herein as far as section 107 (1) and (2) of the *Evidence Act* is concerned.

    3. That the learned trial magistrate erred in law and fact in failing to consider the defendants submissions and therefore arriving at an unjust judgment.

    4. That the learned trial magistrate erred in law and fact by creating and determining issues that were not disputed by the parties to the suit.

    5. That the learned trial magistrate erred in law and fact by finding that the county government was not a necessary party in the suit.

6. That the learned trial magistrate erred in law and in fact by failing to address the issues raised during trial.

2. The appellants pray for: -

   a. That the appeal be allowed in its entirety.

   b. The judgment and or decree of the learned trial magistrate dated February 28, 2020 be set aside and or quashed.

   c. That this honourable court makes a declaration that plot number 363 block 4 is distinct from plot number 299 Block 4.

   d. The cost of the appeal herein and those incurred in the subordinate court be borne by the respondent.

   e. The costs of the appeal herein and those incurred in the subordinate court be borne by the respondent.

   f. Any such or further orders that the honorable court shall deem just expedient in the circumstance.

3. The appellants filed written submissions dated July 15, 2022.The appellants submitted on grounds 1-4. On the first ground, the appellants submitted that the learned magistrate failed to consider that both parties presented ownership documents to the plot numbers 299 and 363 which indicate that both properties exist and not the same property and that the trial court erred in making a determination that plot number 363 is plot number 299 without an elaborate illustration by the respondent. The appellant submitted that from the said allotment letters, the difference in the areas is clear that plot number 363 is in the township area while plot number 299 is in Masikonde. The appellants further submitted that an issue regarding land disputes maps plays an integral part in determining the said dispute and a close look at the cadastral map, based on the evidence of the 1st appellant herein in his examination in chief during trial show that the said plot 363 block 4 and others were a creation of an unmarked area of land between plot 278 and 279.The appellants submitted that the numbering of the newly created plots are in sequence with the previously existing plots and there is no interference whatsoever noted on the numbering and the map itself. Further, that the respondent did not contest the map produced by the appellants nor produced a map to counter theirs. Further, that a total of 13 plots ie 352-363 were created in the unmarked area as testified by the 1st appellant which is a clear illustration that indeed there was an unmarked parcel in between plot 278 and 279.

4. The appellants further submitted that the 1st appellant followed due process of allotment wherein his application was considered and was allocated plot number 363 block 4 vide allotment letter dated November 9, 2011.Further, that it is only until the 2nd appellant had started construction that the respondent appeared claiming ownership of plot number 363 block 4.The appellants submitted that the testimonies, documentations and illustration is a clear indication that plot number 363 block 4 had good title and not related to plot 299 block 4.

5. On ground 2, the appellants submitted that pursuant to section 107 (1) of the *Evidence Act*, the burden of proof was on the party alleging and it was the responsibility of the respondent to illustrate their allegation that plot number 299 was renamed 363 fraudulently as they alleged the 1st appellant used his position in the county government to influence the replacement and that until the end of the trial court proceedings the respondent herein has not attempted to illustrate any proof to claim that plot

number 299 block 4 is the same as plot number 363 block 4. As such, the appellants made great strides to prove ownership as illustrated by their testimonies in court and documentations.

6. On ground 4, the appellants submitted that the allegation of double allocation by the respondent is unfounded and had it been an issue of double allocation it would occur only when a specific alienated government land is allocated to two different persons but in this case, the respondent failed to prove the same. The appellants submitted that the trial court erred in determining that plot number 299 was indeed renamed to 363 and allocated to the 1st appellant yet in the council records and maps the same plot 299 and 363 appear independently and separately within the same map.

7. The appellants further submitted that the trial court erred by determining issues on court jurisdiction a concept that was never contested, and determining the concept of double allocation which was not pleaded by the parties. That the allegation that plot number 363 is plot number 299 was never proved hence making the determination by the trial court that there was double allocation unfounded and misleading.

8. On ground five and six, the appellants submitted that they dispense the same in totality. The appellants relied on the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 and *William Kabogo Gitau v George Thuo & 2 others* [2010]1 KLE 256.

9. The respondent filed written submissions dated September 28, 2022 and raised 4 issues for determination as follows: -

    1. Whether plot number 299 block 4 (original Narok Township plot No 281 Block 4 is the same on the ground as 363 block 4?

    2. Whether non joinder of the Narok county government was fatal to the proceedings?

    3. Whether the plot was available for re-allocation.

    4. Who bears the costs?

10. On the first issue, the respondent submitted that on the ground, plot number 363 block 4 is one and the same with plot number 299 block 4 which belongs to him. The respondent further submitted that the 1st appellant in utter abuse of power as the MCA for Narok Town Ward and the majority leader in the Narok county assembly hatched a scheme to dispossess and that in renaming plot number 299 block 4 was to facilitate grabbing of the plot. The respondent further submitted that he was already in occupation of the said parcel on the ground and the 1st appellant ought to have reverted back to the allocating authority that the plot he has allegedly been allocated is being occupied by the respondent. The respondent further submitted that the appellants relied on a map that is neither an approved physical development plan by the survey department nor authenticated by the director of surveys, ministry of lands under the *Survey Act*. Further, that the said document was not produced by the Narok county government or surveyor who drew to authenticate it and it no stamp from the county government of survey department.

11. On the second issue, the respondent submitted that if there is a party that ought to have invoked order 1 rule 15 of the *Civil Procedure Rules* on third party notice proceedings, then it is the appellants and that article 159 (2) (d) of the *Constitution* abhors procedural technicalities at the expense of substantive justice. The respondent relied on the cases of *William Kiprono Towett & 1597 others v Farmland Aviation Limited & 2 others* [2016] eKLR, *Republic v District Land Registrar, Uasin Gishu & another* [2014] eKLR and *Raila Odinga v IEBC & 4 others* Petition No 5 of 2013. The respondent submitted that the principal objectives of the contents of order 1 rule 9 of the *Civil Procedure Rules* and article

159 of the *Constitution* is intended to ensure that each party is afforded a fair trial guaranteed under article 50 (1) of the *Constitution*.

12. On the third issue, the respondent submitted that if the allotment dated November 9, 2011 allocated to the 1st appellant was to be genuine, such 2nd allotment is irregular if the 1st allotment was not procedurally cancelled. The respondent relied on the cases of *Rukaya Ali Mohamed v David Gikonyo & another*, Kisumu HCCC No 339 of 2008, *Peter Ndegwa Wachira v Christopher N Kiboi, Emmanuel Kazungu, Nairobi City Council & Peter Kimaru Muguku* [2013] eKLR and *Republic v Minister for Transport & Communication & 5 others ex-parte Waa Ship Garbage Collector 7 15 others* Mombasa HCMCA No 617 of 2003 [2006]1 KLR (E&L) 563.

13. This being the first appellate court, I am required to reevaluate 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. For this reason, I will give due allowance but most importantly, I will endeavor to subject the evidence tendered before the trial court to fresh scrutiny and at the end determine whether the trial court arrived at a just determination. The principles guiding the first appellate court were set out in the case of *Selle & another vs 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...".

14. Upon consideration of the materials presented in respect of the appeal herein, the following are the issues for determination:

    1. Whether the Judgement in Narok Civil Case No 195 of 2016 dated the February 28, 2020 should be set aside.

    2. Who should bear the costs of the Appeal.

15. A perusal of the record indicates that the matter was first heard on the November 14, 2018 when the respondent testified that he purchased plot number 281 from Nkingiis vide an agreement for sale dated January 22, 2007 and has continued paying rent and kept receipts of the same. The said parcel of land was later changed to 299.It was later that he found people digging on his portion of land and on enquiry, he was informed that it was the 1st appellant who had sold the parcel of land to them. On cross examination, the respondent testified that he bought the parcel of land 281 and it was changed to 299 and it his belief that the county government made these changes. That the said plot was changed from 281 to 299 and he paid Kshs 77,748/- for the years 2013, 2014 and 2015.During all this time, the respondent was aware of plot number 299 and not 363.During trial, PW2 testified that he sold the land to the respondent which is plot number 281 block 4 vide an agreement for sale dated January 22, 2007 and it was the said plot number 281 which was later given number 299.PW2 testified that he bought the land in 2006 and has been paying the rates.

16. At the trial court, the 2nd appellant testified that he bought the land from the 1st appellant and followed due process. He produced a copy of allotment letter, sale agreement, application for transfer, approval of transfer and copies of receipts confirming payment. He further testified that he also obtained approval from NEMA to develop the suit property and it was three days after that the respondent laid claim on the suit property. The 2nd appellant testified that the 1st appellant sold the land to him while

he was a member of county assembly and which he testified that he purchased plot number 363.He is not aware of plot number 281 or 299 and that between him and Mr.Kamwaro, there is no plot of land.

17. The 1st appellant testified on March 27, 2019 that he was given the suit property as an allottee on November 9, 2011 and later sold it to the 2nd appellant. The said property was plot number 363 block 4 and he paid rates once but did not have the receipt in court. He testified that when he acquired the plot, plots number 278 and 279 were the last plots and there was a gap in between which was not marked and which created 13 plots. On cross examination, the 1st appellant testified that he made an application to be allocated land in 2006 but did not present the same to the court. Further, the initial allotment was recalled during which he made rates payment only once. However, the map shown to him did not show the person who had drawn the map. He further testified that there has to be a resolution to allocate land in the area and he was not allocated land through his status as a member of county assembly.

18. It would be important to note that the matter was before two courts ie Hon Juma who heard the matter and Hon. Wakahiu, who delivered the judgment.

19. The trial court framed seven issues and proceeded to determine every single issue. It is the appellants position that the trial court erred by failing to consider their evidence, relevant laws and written submissions thereby arriving at an unjust conclusion. I have taken time to read the judgment delivered by Hon, Wakahiu. The trial court dealt in my opinion, exhaustively with the issue of jurisdiction where a trial court has ceased to exercise jurisdiction. It is my view that the trial court rightly did so taking into consideration that Hon. Juma had conduct of the matter up and until the defendant closed his case and the matter was ready for judgment. In the said judgment, I do note that Hon.Juma disqualified herself in all matters where Mr. Kamwaro was appearing for any party.

20. On the second issue, the trial court discussed in detail the history of plot number 299 following the evidence that was presented in court. The trial court concluded that plot number 299 first became available in the year 2006 and there was no evidence that the said plot was repossessed. The trial court placed reliance in the case of *Metian Kitaei Nkoiboni v Richard Salaton Torome* HCCC No 339 of 2008.On the third issue, the trial court found that the issue was not on double allocation but whether plot number 299 block 4 is similar to plot number 363 block 4 which it found that the plot was one and the same.

21. On the fourth issue, the trial court was of the view, which I believe was rightly arrived at when he stated that it was the 1st appellant who should have sought to join the county government against whom he would seek compensation and or indemnity should it turn out that the county government of Narok wrongfully allocated a plot to him. Further, that it was the 1st defendant who failed to join the county government as a necessary third party in this case.

22. I see no need to delve into the fifth, sixth and the seventh issues save to say that the trial court was satisfied that based on the evidence tendered, the respondent had proved his case on a balance of probability that he was the rightful owner.

23. I have also perused the documents relied on by the parties during trial. The appellants herein produced a letter of allocation of a plot dated 363 block 4 dated November 9, 2011 and copies of receipt of payments dated July 18, 2016, July 12, 2016 and June 8, 2017, sale agreement to prove due process in acquisition of plot number 363 block 4 Narok Township. I do note, more importantly that the map relied on by the appellant herein does not indicate that it originated from the department of survey.

24. On the other hand, the respondent, produced a letter of allocation of a plot dated August 16, 20006 for plot number 281 block 4 now referred to as plot number 299, copies of receipts dated September

26, 2008, September 22, 2008 September 26, 2011,July 12, 2012 and July 18, 2016.Notably, in the receipt dated 1July 8, 2016, the receipt is indicated as being payment for the old plot number 281.

25. It is important to note that both parties produced letters of allotment as proof of ownership of the suit property. The appellants laid claim as to ownership of plot number 363 block 4 situate in Township area and the respondent laid claim of ownership of plot number 299 block 4 which according to the letter of allocation of a plot is situate in Masikonde.

26. However, none of the parties sought to call expert witness such as a surveyor to establish the ground location and numbering of the plot. None of the parties also sought to call a witness from the defunct Narok county council to shed light on the procedure on allocation of land especially where new numbers are issued and on replacement. The document produced by the appellants and which they sought to rely on are of no use as it cannot be traced where it originated from.

27. In this regard, it is imperative to take cognizance of the provisions of sections 107 and 108 of the *Evidence Act*, which provides as hereunder;

> "
>
> " 107. Burden of proof
>
> (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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

28. I would also wish to place reliance in the case of *Peter Gichuki King'ara v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR, where the court observed as hereunder;

> " The law that appears to me to be the most relevant to this situation is section 119 of the *Evidence Act*, chapter 80 laws of Kenya. It provides as follows:-
>
> 119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> This provision in our *Evidence Act* embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. (See Woodroffe's *Law of Evidence, 9th Edition* at Page 811-816)."

29. From the evidence that was adduced before the trial court, both the respondent and the 1st appellant told the court that their plots were 363 and 299 respectively with each one of them saying that his plot is near that of Kamwaro. There is no doubt that the two were claiming the same suit property herein albeit each one of them indicating the plot number according to the allotment letters that they

had. As observed elsewhere in this judgement, none of the parties earlier called a surveyor to establish the ground location and numbering of the plot amongst other steps that would have been relevant in advancing their respective cases before the trial court. Despite presenting ownership documents for plot numbers 299 and 363, the irresistible conclusion is that the dispute revolves around the same plot which each party claim as their own. It never came out clearly from the evidence that was adduced before the trial court that the two plots were in Masikonde and Township respectively contrary to what the appellants would want this court to believe. Given the above circumstances, it is safe to infer that plot number 363 and 299 are one and the same plot. That being the case, the initial allotment letter issued to Nkingiis Kumomoro (PW2) on 16th August, 2006 preceded that which was issued to Bernard Parsaloi (DW2) and who is the 1st appellant herein on November 9, 2011. Once the suit property was allotted to PW2 on August 16, 2006, it was not open to subsequent allocation to DW2 and who is the 1st appellant on November 9, 2011 unless the former allocation had either been cancelled of forfeited.

Arising from the above, it is my finding that the learned trial magistrate cannot be faulted for arriving at the decision he made on the February 28, 2020. In the circumstances, it is my finding that the appeal herein lacks merit and the same must fail. Since costs must follow the event, the appeal herein is dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 3RD DAY OF NOVEMBER, 2022.

HON. MBOGO C.G.

JUDGE

3/11/2022.

In the presence of:-

CA:Chuma