



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 10 OF 2017

STEPHEN MUTUGI MWENJE.....APPELLANT

VERSUS

MUNICIPAL COUNCIL OF KERUGOYA/KUTUS

(Now known as COUNTY GOVERNMENT

OF KIRINYAGA.....1ST RESPONDENT

ROSE WANJIKU WARUI.....2ND RESPONDENT

JUDGMENT

***(AN APPEAL FROM THE JUDGMENT OF HON. Y.M. BARASA (S.R.M) KERUGOYA
DELIVERED IN C.M.C.C NO. 192 OF 2011 ON 25TH AUGUST 2017)***

BACKGROUND

The Appellant, Stephen Mutugi Mwenje was aggrieved by the judgment delivered by the Senior Resident Magistrate Hon. Y.M. Barasa on 25th August 2017 at Kerugoya in CMCC No. 192 of 2011. The Appellant who was the plaintiff in the Magistrate Court case had sued the Respondents/Defendants for an order of permanent injunction restraining them or their servants and/or agents from interfering with his quiet possession, enjoyment and utilization of Plot No. 316 A (previously 234 A).

The Defendants/Respondents filed separate statements of defence denying the Plaintiff/Appellant's claim. After hearing the parties and their witnesses, the Court on 25th August 2017 dismissed the Plaintiff's suit with costs to the 2nd Defendant. The Court entered judgment for the 2nd Defendant as the lawful allottee of Plot No. 201 A Kutus. The Court also issued a permanent injunction against the Plaintiff in favour of the 2nd Defendant.

In his Memorandum of Appeal dated 25th September 2017, the Appellant set out the following grounds of appeal:

- 1. The learned magistrate erred in law and in fact by failing to find that the Appellant had proved his case on a balance of probabilities.***
- 2. The learned magistrate erred in law and in fact in finding that the 2nd Respondent had proved her counter-claim on a balance of probabilities.***

3. *The learned magistrate erred in law and in fact by failing to find that the consent dated 7th February 2014 and adopted by Court on 17th June 2014 amount to judgment and to the extent that this consent judgment had not been set aside thus the lower Court was bound by the same.*
4. *The learned magistrate erred in law and in fact by failing to find that the consent dated 17th February 2014 amounts to admission of the Plaintiff's claim on its entirety.*
5. *The learned magistrate erred in law and in fact by failing to find that the 1st Respondent is the custodian of all the plots in Kirinyaga and it had admitted that the Appellant is owner of Plot No. 316 A Kutus.*
6. *The learned magistrate erred in law and in fact by failing to consider the Appellant's evidence as a whole thereby showing outright bias.*
7. *The learned magistrate erred in law and in fact by failing to find that the letter dated 27th July 2011 and its contents had been nullified by letter dated 7th October 2013.*
8. *The learned magistrate erred in law and in fact by believing the evidence of one Solomon Mutharu Karani that he had legally sold Plot No. 201 to the 2nd Respondent yet he was not the registered owner of the said Plot No. 201, Kutus.*
9. *The learned magistrate erred in law and in fact by believing the 2nd Respondent and her witnesses' evidence without corroboration as required by law.*
10. *The learned magistrate erred in law and in fact by admitting the authenticity of the 2nd respondent allotment letter dated 3rd March 1987.*

This being a first appeal, this Court duty is to reconsider the evidence which was before the lower Court, evaluate the same and draw its conclusion. I should always bear in mind that I did not have the benefit of seeing or hearing the witness (s) themselves. That was the finding in the case of **Ogeto Vs Republic (2004) 2 K.L.R** where it was held as follows;

“(1) On a first appeal, the Court has a duty to reconsider the evidence which was before the lower Court, evaluate the evidence and draw its conclusion giving due allowance for the fact that it has neither seen nor heard the witness.

(2) A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision.....”

The Appellant before the trial Court testified and called two (2) witnesses. The 2nd Defendant also testified and called two (2) witnesses. The Appellant who was the 2nd Defendant before the trial Court also testified and called two witnesses as well. At the close of their respective cases, the counsels appearing for both parties filed their submissions.

I have reviewed the evidence adduced by both the Appellant and the Defendants and their witnesses. I must remind myself that such jurisdiction must be exercised with caution because unlike the trial Court, I did not have the benefit to see and hear the witnesses. Having warned myself, I note that the Plaintiff testified on 26th April 2017 and stated that he was allocated Plot No. 234 A (also known as 316 A) on 13th May 1987. He produced a copy of letter of allotment and that of his brother adjacent to his plot described as 235 A (also known as 315 A) as Plaintiff's Exhibits No. 1 and 2 respectively. He also produced payment receipts for Ksh. 26,852 and Ksh. 10,000/= dated 28th February 2011 and 31st March 2011 respectively as Plaintiff's Exhibit No. 3.

In February, he decided to develop the plot but a lady came and told him that the plot belonged to her. He went to the Council offices to enquire. He was later summoned by the CID with his sister-in-law. The plaintiff called Mrs. Gidwell Wanjira Mitwe as his first witness who stated that on 13th May 1987, her husband the plaintiff was allocated Plot No. 234 A (now known as 314 A) Kutus. His brother Cyrus Munene Mwenje was also allocated a plot adjacent to her husband being Plot No. 235 A (now 315 A) Kutus. Since then, she has been cultivating on both plots save for the years 2008 - 2009 – 2010 when he failed to cultivate due to shortage of rains. In February 2011, they started laying a stone foundation on the plot with the aim of building rental houses but in the process, a woman came and claimed the same plot. Later her husband the plaintiff was summoned by the CID officers.

PW2 was Samuel Muchira Mugo. He is a businessman and also calling himself a surveyor draftman. He was employed by Kerugoya/Kutus County Council from 1983 until 1985 when he was transferred to Kiambu Municipal Council. He stated that in 1987, he took the plaintiff to the site where he showed him Plot No. 316 A together with his brother. He stated that he was authorized to go to the site.

The 2nd Defendant testified on oath and stated that on 5th February 2002, she bought a plot from one Solomon Karani. The agreement was produced as Defence Exhibit No. 1. The plot was contained in a letter of allotment in the name of Naftaly dated 3rd March 1987. The same was produced as 2nd Defendant's Exhibit No. 2. She paid Ksh. 2,700/= for the transfer. She also confirmed rates had been paid. She produced both receipts as 2nd Defendant's Exhibits No. 3 & 4. She was issued with a clearance certificate and transfer form also produced as 2nd Defendant's Exhibits No. 5 & 6. The Council approved the transfer as per minutes produced as 2nd Defendant's Exhibit No. 7. She has been paying land rates and produced receipts marked 2nd Defendant's Exhibit No. 8. She was taken to the ground by a surveyor and she took possession. Later, another person came and claimed ownership of the plot. They agreed with the person to meet at the Council offices to confirm the true owner. She wrote to the Clerk and produced the letters as 2nd Defendant's Exhibits No. 8 & 9. She was referred to the CID office. She recorded her statement also produced as 2nd Defendant's Exhibit No. 10. The Council responded vide a letter dated 27th July 2007. She said that from the letter, Plot No. 201 belonged to her and Plot No. 316 was not found on the ground. The same was produced as an Exhibit. She made efforts to call the surveyor but the Plaintiff refused. She produced the letter also as an Exhibit. She called Solomon Mutharu Karani as her witness. The said Solomon Mutharu Karani confirmed that he initially owned the property. It was allocated to Naftaly Mwai, his brother in 1987. She entered into a sale agreement with the 2nd defendant herein. He sold the plot to her at Ksh. 80,000/=. She owed land rent and he paid the arrears and transferred the plot to her. The Municipal Council approved the transfer. She was taken to the site by one Muchira who was the County Surveyor. He used a PDP to show the ground (Exhibit No. 12 identified). He was shown the beacons. He later took the 2nd defendant with the surveyor one Elphas Muriuki. The surveyor used the PDP (Defence Exhibit No. 12) to identify the ground. He was later summoned by the CID. He recorded his statement. He was later summoned by the Town Clerk who confirmed that the plot belonged to him. He said that the neighbouring plot was 315 A. He then sold the plot.

The 2nd Defendant's third witness was No. 36937 Police Constable John Kilonzo stationed at Kerugoya CID Office. He stated that sometime in March 2011, one Rose Wanjiku came to their offices and reported a matter concerning Plot No. 201 A situated at Kutus Mjini. He went to the Municipal Council offices to enquire and he was told verbally that it was owned by Rose Wanjiku. He was taken to the site and he found it was vacant. There was a woman at the plot. The second time they went to the site accompanied by a surveyor and Deputy Clerk and found some pillars had been erected. The surveyor said that Plot No. 315 A was next to 201 A and that Plot 315 was for Silas Mwenje while 201 belonged to Rose Wanjiku. 316 A belonged to Stephen Mwenje but it was located elsewhere. He recorded his statement.

From my review of the evidence by the witnesses, I return with the same verdict as the trial magistrate that the Plaintiff did not prove his claim on a balance of probabilities. The 2nd defendant produced a letter of allotment showing that the plot was initially allocated to one Naftali Mwai on 3rd March 1987.

The Plaintiff bought the plot from one Solomon Karani and wrote an agreement which was also produced as exhibit. The arrangement was a common practice and also approved by the Council through minutes of the Town Planning Works and Housing Committee meeting held on 29th January 2009. The 2nd Defendant paid all the rates to the Council. The County Surveyor took the 2nd Defendant to the site where she was shown the plot using the PDP also produced as an exhibit. I agree with the analyzes by the trial magistrate when he stated in his judgment as follows:

“As for the 2nd defendant’s counter-claim, the 2nd defendant through the allotment letter dated 3/8/1987 and the sale agreement dated 5/2/2008 has proved ownership of Plot No. 201 A Kutus”.

As regard the consent entered between the Appellant and the 1st Defendant, I agree with the submissions by counsel for the 2nd Defendant that the said consent had no bearing on the evidence of the parties. Otherwise the Plaintiff would have enforced the same as the judgment of the Court. In other words, there was no need to go for full trial if there was a consent order binding on all the parties.

In the final analysis, I find no merit in this appeal and dismiss it with costs to the Respondent.

READ and SIGNED in open Court at Kerugoya this 5th day of July, 2019.

E.C. CHERONO

ELC JUDGE

5TH JULY, 2019

In the presence of:

- 1. M/S Mohindi holding brief for Ms Ann Thungu for 2nd Respondent*
- 2. 2nd Respondent – present*
- 3. Appellant/Advocate – absent*
- 4. Mbogo Court clerk – present*