



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC APPEAL NO. 36 OF 2018

MAHAT ISSACK HUSSEIN.....1ST APPELLANT

FATUMA OGAS AHMED.....2ND APPELLANT

HABIBA S. ABDI.....3RD APPELLANT

VERSUS

HABIBA SHEIKH ABSHIROW.....RESPONDENT

JUDGEMENT

1. The Appellants lodged this appeal against the decision of Honourable Linus Kassan, Principal Magistrate which was given on 19/8/2013 in Wajir Civil Case No. 8 of 2012. The dispute related to ownership of the parcel of land known as Plot number R2443 (B) measuring 300 by 300 feet located behind the Ministry of Works in Wagberi location in Wajir town ("the Suit Property"). The Plaintiffs claimed that the Suit Property was allocated to them by the County Council of Wajir on or about 1993. The Plaintiffs stated that the Defendant started laying claim to the Suit Property in 2004 and that after deliberations and interventions by the elders, the Defendant was told to stop interfering with the Plaintiffs' plot and move to her own plot which was adjacent to the one in dispute. The Defendant denied the Plaintiffs' claim and averred that she was the owner and had developed land reference number 13607/240. She claimed that the Plaintiffs had been interfering with her quiet possession of her land.
2. Parties entered into a consent on 23/4/2012 to the effect that the Clerk to the County Council and the District Surveyor were to visit the site and identify the boundaries or beacons while indicating the owner of the disputed plot. Both parties were to present documents confirming their ownership of the plot to the Clerk of the County Council and District Surveyor for the purposes of identification of the plot in dispute. If the documents presented by both parties showed that there was only one plot that was possibly allocated to two parties, then the court would proceed to hear witnesses and determine the matter. Further, the Clerk to the County Council and the District Surveyor were required to file a joint report of their findings in court within 30 days. Parties further agreed that if the report prepared by the Clerk and the District Surveyor was in favour of one party, the other party who was unsuccessful was to vacate the plot in favour of the successful party and seek another remedy. The Clerk and the Surveyor were to be accompanied by the police officer and the parties on the designated date.
3. Following the recording of that consent Hon. Kassan delivered his judgement on 28/8/2013. In his judgement he stated that the surveyor went to the site and was able to locate the Defendant's plot but was unable to locate the Plaintiffs' plot. The Learned Magistrate stated in his judgement that the Town Administrator stated to the court that he was unable to locate any of the plots in dispute. The Administrator suggested that there might have been a double allocation but according to the Learned Magistrate, the administrator's findings could not be relied upon because he was unable to pinpoint the plots.
4. The Learned Magistrate went by the consent and concluded that the Defendant's plot had been located and his documents verified which meant that there was evidence that the land in issue belonged to the Defendant. The Learned Magistrate adopted the report prepared by the surveyor which he noted had not been challenged by the Town Administrator. The Learned Magistrate observed that the issues relating to the allegation that the title deed was obtained by fraud were not within his mandate and fell within the jurisdiction of the High Court.
5. In the amended Memorandum of Appeal filed in court on 13/11/2019, the Appellants contended that the Learned Magistrate erred in law and fact by failing to adhere to the conditions and terms of the consent entered into by the parties. They faulted the Learned Magistrate for making a final determination on a land ownership dispute despite knowing that he lacked jurisdiction. Further, the Appellants contended that the court should have given the parties an opportunity to present their documents for scrutiny before making a final determination. The Appellants contended that the Learned Magistrate failed to recognise that the consent provided that if there was a dispute on ownership both parties were to be accorded an opportunity to argue their case in court.
6. The Appellants faulted the Learned Magistrate for entering a consent judgment without interrogating the documents in the Appellants' possession and for failing to note that the Respondent had not provided any consideration and did not therefore acquire the Suit Property.
7. The Appellants contended that the Learned Magistrate erred by failing to take into consideration the fact that the consent recorded by the

parties required a joint report to be prepared by the County Clerk and the District Surveyor. They faulted the Magistrate for ignoring the report of the former Town Clerk which was in the court file. The Appellants sought to have the judgement of the Learned Magistrate set aside and to have the case referred back to the Wajir Magistrates Court for it to be heard *de novo*.

8. Parties filed submissions which the court considered. The 1st and 2nd Appellants submitted that the evidence adduced to the court pursuant to the court order did not meet the tenets of that consent agreement especially on the aspect that no report was tabled in court after conditions a, b and c of the consent were fulfilled which according to the Appellants rendered the whole consent nugatory. Further, the Appellants contended that parties were not given an opportunity to present their positions on the investigation of title and demarcation of the boundaries in accordance with the fifth clause of the consent. In addition, that no report was presented to court or the parties. The Appellants contended that the Learned Magistrate lacked jurisdiction to determine issues relating to the legitimacy of title which according to them was the mandate of the Environment and Land Court. They faulted the Learned Magistrate for dismissing their claim prematurely and submitted that since the suit was never determined on its merit, the matter should be referred to the proper court for a determination of the issues in dispute.

9. The 3rd Appellant filed separate submissions and urged that the suit before the Magistrates Court was not determined on merit and that there was a miscarriage of justice. She submitted that parties were not afforded an opportunity to ventilate the issues raised in the suit. The 3rd Appellant submitted that by basing his judgment on the testimony of the District Surveyor and Town Administrator, the Learned Magistrate descended to the arena of litigation.

10. The Respondent submitted that upon recording the consent, the court was barred from interrogating other issues outside the consent. The Respondent argued that her land was identified on the ground based on the documents that she availed to court and the survey department and that the land that the Appellants claimed to own was found to exist only on paper. The Respondent contended that the consent was properly entered and should not be disturbed as it would amount to review which is not within the jurisdiction of this court.

11. The Respondent submitted that the consent recorded in court on 23/4/2012 was intended to settle the matter and that the consent was followed through and a report submitted in court before the judgement was given. Further, that the consent was binding on the parties and that the subsequent judgement entered pursuant to the consent should not be disturbed.

12. The Respondent maintained that the 3rd Appellant's right to be heard was not curtailed by the Learned Magistrate since she was represented by an advocate who was given a hearing at all steps of the trial. The Respondent argued that the Appellants submitted to the jurisdiction of the trial court and that a party to a suit should not be allowed to subsequently challenge the forum he chose to resolve the dispute after the process was completed. The Respondent urged that the grounds for setting aside a consent judgement had not been demonstrated by the Appellants and that fraud or collusion had not been proved.

13. The issue for determination is whether the court should grant the orders sought in the appeal. The appeal revolves around the issue whether the consent entered into by the parties on 23/4/2012 was given effect by the Learned Magistrate when he arrived at his decision on 28/8/2013. Looking at the terms of the consent, clause (c) stated that if the documents of both parties pinpointed one plot only then the court was to hear the parties. Clauses (a) and (b) of the consent anticipated that both the Clerk to the County Council and the District Surveyor would be able to identify the plot in dispute. From the judgement of the Learned Magistrate, it is apparent that the Clerk to the County Council was unable to identify any plot which is what guided the Learned Magistrate to rely on the Surveyor's report indicating that he was only able to ascertain the Defendant's plot. Without any report being filed by the Clerk in court in line with clause (d) of the report, it cannot be said that the judgment complied with the terms of the consent.

14. The Learned Magistrate observed that the Town Administrator's opinion was not to be trusted on his suggestion that there might have been double allocation of the same plot because the Town Administrator could not find any of the plots. That would make sense for how could there be double allocation of a plot which you cannot even find on the ground. From the terms of the consent which unfortunately was not drafted unequivocally, if the report of the clerk and surveyor was in favour of one party then the unsuccessful party was to vacate the land. The consent anticipated that the report arising from the site visit would be prepared jointly by the Clerk and Surveyor after looking at the documents presented by the parties. The fact that the Clerk was unable to identify the plot in dispute therefore means that the consent was not complied with when no joint report was prepared. The court notes that the surveyor's report was not included in the record of appeal.

15. The other issue that emerged from the pleadings and the memorandum of appeal which the Learned Magistrate addressed in his judgement was that of the Magistrate's jurisdiction to determine the allegations that the Respondent's title was obtained through fraud. That may have been the position in 2013 before Magistrates Courts were given jurisdiction to deal with disputes relating to land based on the value of the land in dispute and their monetary jurisdiction. Magistrates now have jurisdiction to hear environmental and land disputes.

16. The court allows the appeal and sets aside the judgement and order of the Learned Magistrate. The case is referred back to the Wajir Principal Magistrates Court for hearing afresh. Each party will bear its own costs of the appeal.

Delivered virtually at Nairobi this 17th day of May 2021.

K. BOR

JUDGE

In the presence of: -

Ms. C. Kimani holding brief for Mr. Eric Kinaro for the 3rd Appellant

Mr. Sylvester Metto for the Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 1st and 2nd Appellants