



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL CASE NO. 31 OF 2020

SAMUEL LUBANGA.....APPELLANT

VERSUS

BENARD OUMA OGUR.....DEFENDANT

(Being an appeal from the Judgment of Hon. M .Obiero (PM, now SPM) rendered

and dated 1st August 2019 in Migori CMCC (Land case) No. 17 of 2018)

RULING

1. The instant appeal arose from the judgment and subsequent decree of the trial court, (Honourable M. Obiero, PM, now SPM) rendered on 1st August 2019 in Migori Chief Magistrate's Court Land case No 17 of 2018 where the court struck out the appellant's suit with no orders as to costs. The learned trial magistrate found that the suit was time barred.
2. The appellant, Samuel Lubanga is represented by the firm of Oduol, Achar and Company Advocates.
3. The respondent, Benard Ouma Ogur is represented by learned counsel, Mr. Jacob Omwenga instructed by M/s Odingo and Company Advocates.
4. The appellant commenced proceedings by way of a plaint (Fast Track) dated 30th April, 2018 filed on even dated at the trial court. He sought the following final orders;-
 - a) A declaration that the acts of the defendant to deny the plaintiff entry and/or use of parcel number Kanyamkago/Kawere II/1373 is unlawful, null and void.
 - b) Alternatively, orders that the defendant be compelled to cause the transfer of parcel number Kanyamkago/Kawere II/1373 to the plaintiff and to execute the relevant documents necessary for transfer to that effect.
5. Briefly, the appellant's claim as per the plaint was that by sale agreement dated 16th August 1985 (PEXhibit 2), he lawfully bought the suit land, LR NO. Kanyamkago/Kawere II /1373 and took possession of the same. That in the year 2014 the respondent and his agents did encroach onto the suit land thus, it precipitated the suit.
6. On 8th June 2019, the appellant testified and relied on his statement (PEXhibit 1) as part of his evidence. He also relied on PEXhibit 2, receipt of payment (PEXhibit 3) and certificate of official search (PEXhibit 4). He stated that he was claiming six (6) acres out of the suit land.
7. The respondent was duly served. However, he failed to enter appearance and or file statement of defence hence the matter was heard by way of formal proof.
8. On 1st August 2019, the learned trial magistrate delivered Judgment as pointed out in paragraph 1 hereinabove. A decree was issued on 23rd September 2020 accordingly.
9. Leave to initiate this appeal was granted on 8th July 2020 in Migori ELC Misc case No. 380 of 2019.

10. As a result, the appeal was initiated by a memorandum of appeal dated 4th August 2020 and filed in court on 6th September 2020 based on grounds 1 to 9 set out on it's face and all noted accordingly. It is therefore, proposed therein that:-

a) The appeal be allowed.

b) The judgment and decree delivered on 1st August, 2019 in Migori Environment and Land Case No. 17 of 2018 at Migori Chief Magistrate's Court by Hon M. Obiero P.M be set aside.

c) The appellant be awarded the costs of this appeal and in the superior court.

11. The appeal was admitted on 16th December 2020. It was canvassed by way of written submissions further to the orders and directions of this court given on 1st February 2021.

12. Accordingly, learned counsel for the appellant filed eight (8) paged submissions dated 8th March 2021 on 23rd April, 2021 where he made reference to the nine (9) grounds of appeal, the orders sought in this appeal and analysed the grounds in favour of the appellant. To buttress the submissions, counsel cited the Court of Appeal decision in **Willy Kimutai Kitilit =vs= Micheal Kibet (2018) e KLR and Macharia Mwangi Maina and 87 others =vs= Davidson Mwangi Kagiri (2014) eKLR** as well as section 26 of the Limitation of Actions Act Chapter 22 Laws of Kenya and Articles 10 (1) (b) 10 (2) (b) and 159 (2) (d) and (e) of the Constitution of Kenya,2010, amongst others.

13. Counsel further orally highlighted the submissions on 14th June 2021 pursuant to this court's orders and directions as well as Order 51 Rule 16 of the Civil Procedure Rules,2010. Learned counsel, Mr. Oduol submitted thus:-

“The appellant was put in possession of land parcel number Kanyamkago/Kawere II/1373 by the respondent upon payment of full consideration to the respondent. He has been in possession of the same todate”

14. The respondent was duly served with the record of appeal dated 18th October 2020 and duly filed on 26th October 2020. He was also served with mention notice and submissions as shown in the affidavit of service sworn on 23rd January 2021 and 2nd June 2021 and discerned in the proceedings of 14th June 2021 herein. However, he failed to participate in this appeal.

15. I have duly considered the entire record of appeal and the appellant's submissions. For discussion purposes, the grounds of appeal in this appeal are compressed thus;

(a) grounds 1,2,4 and 5,

(b) ground 3, and

(c) grounds 6 to 9,.

16. Concerning grounds 1 ,2, 4, and 5, the appellant did demonstrate that the respondent sold to him six (6) acres of the suit land. It was not an oral agreement as observed in the case of **Sumaria and another =vs= Allied Industries Ltd (2007) KLR1**. The same was in consonant with section 3 (1) of the Law of Contract Act Chapter 23 Laws of Kenya.

17. The appellant stated in paragraph 8 of the plaint that he cultivates the suit land since the year 1985. Paragraph 4 of his statement which was adopted as part of his evidence, speaks to that position.

18. Quite clearly, the appellant is in possession of the suit land. I subscribe to the decision in **Titus Onganga Nyachieo =vs= Martin Okioma Nyaruma and 3 others (2017) e KLR** that occupation can take different forms including cultivation of the land in question.

19. It was the assertion of the appellant that he paid full purchase price to the respondent for the purchase of the suit land. This court is conscious of the persuasive decision in **Mwangi and another =vs= Mwangi (1986) KLR 328** as regards trust and priority hearing of land cases.

20. This court is also aware of reasoning in **Kariuki =vs= Kariuki (1983) KLR 227** on the recovery of the purchase price in a void transaction. The trial court held that the appellant has the option to recover the purchase price paid to respondent.

21. Be that as it may, in **Macharia Mwangi Maina case (supra)**, the Court of Appeal applied the principles of equity and delivery of substantive justice; see also **Articles 10 (2) (b) and 159 (2) (d) and (e) of the Constitution of Kenya, 2010**.

22. In the case of **Ahmed Siad Mohamed =vs= Municipal Council of Garissa and another (2014) eKLR**, the Court of Appeal cited it's own decision in **DT Dobie and Company (Kenya) Ltd =vs= Muchina Civil Appeal No. 37 of 1978** where it was expressed that ;-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....”

23. In **Kitilit case (supra)**, the Court of Appeal held that constructive trust and equitable estoppel principles apply in favour of a purchaser

who paid full price and is in occupation of the land in question. That it did not matter whether no consent of the area Land Control Board was obtained or not.

24. Similarly, in **William Kipsoi Sigei vs= Kipkoech Arusei and another (2019) eKLR** at paragraph 20, the Court of Appeal stated in part;-

“..... That in the circumstances of this case, the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act.....”

25. In the foregone, the learned trial magistrate was duty bound to cautiously and carefully consider all facts of the case inclusive of the issue of emerging equitable doctrines before arriving at his decision; see also **Odd Jobs vs= Mubia (1970) EA 476**.

26. I bear in mind the provision of the **Limitation of Actions Act (supra)** referred to in the Judgment of the trial court. Nonetheless in view **D.T. Dobie Macharia Mwangi maina , Kitilit and Sigei cases, (supra)**, I find grounds 1,2,4 and 5 of this appeal successful in the circumstances.

27. As regards ground 3, I am guided by the Articles of the Constitution (supra) stated thereon. I take into account **section 19 (1) of the Environment and Land Court Act ,2015 (2011)** on disregarding procedural technicalities in cases.

28. It is not in dispute that consent of the Land Control Board was not obtained to give effect to PExhibit 2. However, the same is disregarded as a procedural technicality being guided by the authorities referred to in paragraphs 22,23,24 and 27 herein above. Ground 3 succeeds thereby.

29. In his plaint and statement, the appellant stated that the respondent and his agents trespassed into the suit land and destroyed his sugarcane crops thereon. **Section 152A of the Land Act, 2016 (2012)** prohibits unlawful occupation of private land and I am aware of the definition of the term “Trespass” as recognized in the cases of **Anthony Kolani Mwaya-vs-Mwaka Omar Ali (2011) eKLR and Nakuru Industries Ltd-vs-S.S Mehta and sons (2016) eKLR**, among other authoritative pronouncements.

30. In addition, the term “Trespass” is defined in *Clerk and Lindsell on Torts 17th edition paragraph 17-01* thus:

“An unjustified entry by one person upon the land in possession of another.”

31. It is abundantly clear from the record that the respondent has refused to transfer six (6) acres of the suit land to the appellant in spite of PEXh2. Quite clearly, constructive trust and proprietary estoppel which are equitable doctrines under Article 10(2)(b) of the Constitution of Kenya, 2010, **Macharia Mwangi Maina, Kitilit and Sigei cases (supra)**, are applicable and enforceable in favour of the appellant. In the obtaining scenario, the appellant’s claim is firm and has been proved against the respondent on a balance of probabilities. So, grounds 6 to 9 succeed, too.

32. To that end, it is the finding of this court that the appellant’s appeal originated by way of a memorandum of appeal dated 4th August 2020 is full of merits. I therefore, proceed to;

a) Grant orders (a) and (b) as proposed in the memorandum of appeal.

b) Enter judgment for the appellant against the respondent in terms of orders (1) and (2) sought in the plaint dated 30th April 2018.

c) The Deputy Registrar of this court shall execute requisite transfer documents in favour of the appellant in respect of the suit land in the event the respondent fails to execute the same.

d) The appellant is awarded the costs in this appeal and in the court trial court.

It is so ordered.

DELIVERED, DATED and SIGNED via email further to earlier notice issued to the parties, this 29th day of July 2021

G.M.A. ONGONDO

JUDGE