



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL CASE NO. 62 OF 2018

LUKA RUTEERE.....1ST APPELLANT

MWENDA RUTEERE.....2ND APPELLANT

MWIRIGI RUTEERE.....3RD APPELLANT

VERSUS

MARCELLA KINAITORE MWIMBLI.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. G.N. Wakahiu - C.M (Maua) in CMCC No. 289 of 2010 delivered on 7th December 2018)

Summary of Facts

By an amended plaint dated 1st November 2010, the Respondent herein (then Plaintiff) sued the Appellant (then Defendant) for unlawful entry and occupation of Parcel No. 883/Kiengu/Kanjoo Adjudication Section (herein after referred to as the suit property) registered in her deceased husband's name. She had obtained a limited grant of representation on 18th October 2010 which empowered her to file the suit on behalf of the estate of her deceased's husband. The Respondent thus approached the court seeking the following orders:

- a) An eviction order directing the Defendants to give vacant possession of land Parcel No. 883/Kiengu/Kanjoo Adjudication Section to the Plaintiff;***
- b) Special Damages;***
- c) Costs of the suit and interest at court rates;***
- d) Any other relief that the Honourable Court may deem fit and just to grant.***

The Defendants therein filed their amended statement of defence and counterclaim on 20th December 2011. The Defendants denied the matters pleaded in the plaint and raised the following counterclaim:

- a. That the 1st Defendant is the recorded owner of land parcel no.1142 Kiengu/Kanjoo Adjudication Section since 1992, wherein he has cultivated and lived with the 2nd and 3rd Defendants;
- b. That the 1st Defendant avers that his parcel of land No. 1142 Kiengu/Kanjoo Adjudication Section was demarcated in the year 1992 bordering land parcel No.1141 on sheet No.3/2/3;
- c. That when the 1st Defendant visited the Land Adjudication Office in the month of September 2011 enquiring about sheet No. 3/2/3, he discovered that land Parcel No. 883/Kiengu/Kanjoo Adjudication Section had been fraudulently superimposed on his parcel No. 1142.

The Defendant thus sought orders for a declaration that P/No. 883 Kiengu/Kanjoo Adjudication is unlawfully superimposed on P/No.1142 Kiengu/Kanjoo Adjudication Section; an order directing the Land Adjudication and Settlement Officer, Igembe District to rectify the relevant records so that P/No.1142 Kiengu/Kanjoo Adjudication Section borders P/No.1141 Kiengu/Kanjoo Adjudication on sheet No. 3/2/3; and for the costs of the suit and the counterclaim.

The matter was heard and determined in the Chief Magistrate's court at Maua in civil case no. 289 of 2010. In the judgement issued on 7th December 2018, the trial court found in favour of the Plaintiff and granted orders (a) and (c) of the prayers sought.

Issues for Determination

Aggrieved by the judgement of the trial court, the Appellants herein mounted the present appeal, lodging their memorandum of appeal on 19th December 2018. The Appellants set out six grounds of appeal as follows:

1. *That the learned Magistrate erred in law and fact by ordering an eviction within 30 days of the Appellants from their land parcel which they have occupied since 1992;*
2. *The learned Magistrate erred in law and fact by failing to appreciate the remedies provided under Section 11 of the Land Adjudication Act, Cap 284 Laws of Kenya and as a result came to the wrong conclusion;*
3. *The learned Magistrate erred in law and fact by failing to have regard to the Appellant's defence and counterclaim that the Respondent's land Parcel was superimposed upon the Appellant's own land parcel;*
4. *The learned Magistrate erred in law and fact by concluding that the Appellants had encroached upon the Respondent's land parcel without due regard to the Appellant's evidence that the Respondent's land was superimposed upon the Appellant's own land parcel;*
5. *The learned Magistrate erred in law and fact in failing to sufficiently consider the Appellant's case and evaluate evidence that was adduced therefore he misconstrued the testimony of the Appellants thereby arriving at the wrong conclusion;*
6. *The judgement of the learned trial Magistrate is against the weight of evidence on record.*

Submissions of counsels for the Appellant and Respondent

The Appellants filed their submissions on 14th September 2020, while the Respondent filed hers on 28th September 2020.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal. They reduced the issue for determination to the conflicting ground position of the Respondent's parcel of land, being Parcel No. 883/Kiengu/Kanjoo Adjudication Section which appears to be situated on the Appellant's land, being Parcel No. 1142 Kiengu/Kanjoo Adjudication Section. The Appellants pray that the decision of the trial court be set aside and that judgement instead be entered against the Respondents on the grounds set out in the counterclaim.

The Respondent's submissions agree that there is only one issue for determination, being the ownership of Parcel No. 883/Kiengu/Kanjoo Adjudication Section vis a vis Land Parcel No. 1142 Kiengu/Kanjoo Adjudication Section in relation to their ground positions. She submits that the testimony of the District Land Adjudication Officer (as a custodian of the adjudication records) on the respective ground positions extinguishes the dispute and that therefore the trial court's decision ought to be upheld.

Legal analysis and opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal.

In ***Selle Vs Associated Motor Boat Co. [1968] EA 123***, the legal parameters and considerations for guiding a court of first appeal were set out as follows:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Further guidance is given by the Court of Appeal decision in ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1 KAR 278***:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

From the foregoing, the mandate of this court in the present instance is to evaluate the factual evidence of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. Both the Appellants and the Respondent agree that there is only one issue for determination by the court; that of the ownership of Parcel No. 883/Kiengu/Kanjoo Adjudication Section vis a vis Land Parcel No. 1142 Kiengu/Kanjoo Adjudication Section in relation to their ground positions.

It is not in contention that Parcel No. 883/Kiengu/Kanjoo Adjudication Section belongs to the Respondent, while Parcel No. 1142 Kiengu/Kanjoo Adjudication Section belongs to the 1st Appellant. The Respondent in her plaint before the lower court sought the eviction of the Appellants from her property, being Parcel No. 883/Kiengu/Kanjoo Adjudication Section. The Appellants on the other hand averred vide their counterclaim before the trial court that they were not encroachers on the Respondent's property, but were in occupation of their parcel of land, being Parcel No. 1142 Kiengu/Kanjoo Adjudication Section which happened to be on the same ground position as the Respondents. The Appellants aver that the situation of having the two parcels of land superimposed on one another was occasioned by the Respondent's fraud. It is trite law that allegations of fraud are considered serious accusations, requiring the asserting party to prove, to a standard above a balance of probabilities the existence of the allegations.

At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition** quoting with approval the cases of **Wallingford Vs Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune Vs Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence Vs Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 Ch. D. 473 at 489** it is stated that:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

Again in **Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another [2016] e KLR** the court stated that -

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others, the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. Vs Williams Furniture Ltd Buckley L.J. said:“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

As was observed by the Trial Court, no evidence was led to demonstrate how the Respondent perpetrated the alleged fraud and the counterclaim is painfully deficient in capturing the manner and the circumstances surrounding the alleged fraud. The Appellants argument is hinged on what they believe ought to be sequential numbering of the parcels of land in dispute. In their submissions, they state that since the Respondent has agreed to the fact that the land adjacent to hers is registered as Parcel No. 1141 Kiengu/Kanjoo Adjudication Section, then the next parcel of land ought to be numbered Parcels No. 1142 Kiengu/Kanjoo Adjudication Section (being the Appellant's parcel of land) and not the Respondent's Parcel No. 883/Kiengu/Kanjoo Adjudication Section. Nothing is availed to the court to enable it leap onto this conclusion, merely what the Appellant's opine to be the correct way of going about the numbering process.

On the other hand, the Respondent called as her witness the Land Surveyor, Meru North Office at Maua. As noted in **Daniel Onganki Paul & another Vs John Silas Nyamato & another [2019] e K.L.R:**

“The office of the Director of Surveys and the Ministry of Lands are by law the custodians of all the records relating to registered land and un-alienated land.”

The Surveyor, having six years' experience in matters survey evaluated map sheets 2/3, 2/4 and 22/16 and concluded that there was no way that the Appellants' and the Respondent's parcels were superimposed. In interpreting the survey report prepared by his colleague, he noted that the two parcels of land were not in the same location and were in fact physically distant from each other. In relation to the observation made by the Appellants and admitted by the Respondent that parcel no. Parcel No. 1141 Kiengu/Kanjoo Adjudication Section borders the Respondent's parcel No. 883/Kiengu/Kanjoo Adjudication Section, the surveyor explained that the numbering is determined by the time when the subdivision is undertaken and does not therefore follow a sequential ordering. He however noted that Parcel No. 1141 Kiengu/Kanjoo Adjudication Section is actually opposite to the Respondent's parcel of land.

Based on this Expert testimony, it appears that the Appellant's argument cannot stand. The allegations of fraud on the Respondent's part remain a mere allegation, completely unsupported through pleadings or evidence.

In the end, it is my finding, based on re-evaluation of the evidence that there is nothing in the Appeal to cause the present court to disturb the judgement and decree given by the trial court and that therefore the appeal must fail. Costs are awarded to the Respondents.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Masamba holding brief Kariuki for Appellant
2. Respondent/Advocate-Absent
3. Fardowsa- Court Assistant