



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 88 OF 2019

TABITHA KARENSEA MITHIKA.....1ST APPELLANT

FESTUS MURIIRA MITHIKA.....2ND APPELLANT

CHRISTOPER KABERIA MITHIKA.....3RD APPELLANT

VERSUS

LINGERA KANAKE.....RESPONDENT

JUDGMENT

(Being an Appeal from the Ruling/Decision of Hon. A.G. Munene in C.M.C.C No. 230 of 2013

(Maua) Dated 30th October 2018)

Introduction

The Respondent who had instituted CMCC No. 230 of 2013 (Maua) in a plaint dated 1st September 2013 sought the following orders:-

- (a) An order directed to the defendants to vacate from the plaintiff's land.*
- (b) Costs of the suit.*
- (c) Any other relief that this Honourable Court may deem just and expedient to grant in the circumstances.*

By an amended defence dated 5th November 2014, the defendant denied the plaintiff's claim and sought to have the same dismissed with costs. In a ruling dated 30th October 2018, the trial magistrate adopted a surveyor's report which had recommended the defendants to move from the plaintiff's land and occupy land parcel No. 5890. Aggrieved by that decision, the defendants/Appellants filed the present Appeal citing the following grounds of Appeal:-

- (1) The learned trial magistrate erred in law and fact in relying solely on the Surveyor's Report and finding that the appellants should move from the disputed land without giving parties opportunity to give evidence or cross-examine the surveyor on the Report.*
- (2) The learned trial magistrate erred in law and fact in that he failed to consider and appreciate the Acts of Parliament relevant in the case and further failed to appreciate several legal issues raised in the matter.*
- (3) The learned trial magistrate erred in law and in fact in that he failed and erred in not considering the defence of the appellants which raised several issues e.g. locus of the plaintiff to bring the suit, limitation of Actions Act, the issue of fraud, and that the plaint was defective.*
- (4) The learned trial magistrate failed to note that there were three defendants and not one.*
- (5) The Ruling/decision of the learned trial magistrate is bad in law.*

Submissions by the Appellants

The Appellants through the firm of M/S Maitai Rimita & Co. Advocates submitted on the five grounds of Appeal as follows:-

Ground No. 1

On the first ground, the appellants argued that the learned trial magistrate was wrong in relying on the Surveyor's Report on grounds that the parties did not agree or consent to have the report by the surveyor be used to decide the case. The appellants contend that the Report was bad in law as the same was to be done by both the Land Registrar and the Surveyor. However, the Surveyor decided to do the Report alone after visiting one parcel of land.

The appellants further submitted that instead of the parties being allowed to cross-examine the surveyor, the trial magistrate jumped the gun and ordered that he will write a judgment based on the Report and directed the parties to file their written submissions. They submitted that once the case was filed, it was subject to the *Civil Procedure Act* and the Rules made thereunder and that the trial magistrate was bound to hear the parties and their witnesses in accordance with the law unless the parties by consent agreed otherwise. They submitted that the trial magistrate had no jurisdiction to dictate how he wanted the dispute resolved other than the laid down procedures under the law.

Ground No. 2 & 3 combined

On the 2nd Ground, the appellants submitted that the learned magistrate was bound to follow the *Civil Procedure Act and Rules* and since the parties had closed their pleadings and complied with *Order II CPR*, the trial magistrate was bound to hear them and their witnesses in accordance with the law. The appellants also submitted that they raised pertinent issues in their defence which the trial magistrate was bound to frame issues for determination e.g.

- (i) That the plaintiff's title was not in his name but in the name of his deceased father and therefore had no locus standi.
- (ii) That the plaintiff's claim was statute barred.
- (iii) That the plaint was bad in law as the plaint was not properly verified.
- (iv) That there were issues of fraud raised in their amended defence.

Ground No. 4

On ground No. 4, the appellants submitted that from the ruling of the trial magistrate, he referred the defendant/appellants in singular and not in plural since they are more than one.

Ground No. 5

Based on the grounds herein above, the appellants submitted that the decision/Ruling by the trial magistrate is bad in law and ought to be set aside. No decisions were cited by the appellants.

Submissions by the Respondent

The respondent through the firm of M/S MBAABU M'INOTI & CO. ADVOCATES submitted on the following two issues:-

- (i) Whether the learned magistrate erred in law and fact in relying on the Surveyor's Report?
- (ii) Whether the learned magistrate erred in law and fact in failing to consider defendant's defence?

(1) Whether the learned magistrate erred in law and fact in relying on the Surveyor's Report?

On this issue, the respondent submitted that the issue in dispute relates to boundary. He referred to the plaint filed on 1st October 2013 where the respondent claimed that the appellants had encroached his land parcel No. AMWATHI/MAUA/1261. The appellants in their amended statement of defence denied having encroached on the plaintiff/respondent's land and/or illegally occupied the same. In his directions, the trial magistrate ordered a report to be conducted by the Land Registrar and the surveyor upon visiting the said land. He further submitted that the Land Surveyor visited the suit land and made a report which was adopted by the learned trial magistrate and which is the subject of this Appeal. According to the respondent, it is clear from the remarks by the Surveyor in his report that the two parcels of land being AMWATHI/MAUA/5890 and AMWATHI/MAUA/1261 exist and exist separately and that the two exist in different sheets. He further submitted that the defendants/appellants are in occupation of AMWATHI/MAUA/1261 which is registered in the name of the plaintiff/respondent while land parcel No. AMWATHI/MAUA/5890 which the defendant/appellants claim to be in occupation of is actually unoccupied. He submitted that the defendants /appellants have ignorantly occupied the plaintiff/respondent's land and therefore the learned magistrate correctly relied on the report to issue eviction orders.

(ii) Whether the Learned Magistrate erred in law and fact in failing to consider Defendant's Defence?

The respondent submitted that the issues raised by the defendants/appellants in their defence are matters of law which could be well raised through a Notice of Preliminary Objection. However, there is no Preliminary Objection that was filed by the defendants in the trial Court. As such, the matter proceeded without the defendants/appellants raising any Preliminary Objection to the point that the trial Court ordered for a Surveyor's Report. He submitted that what the appellants are attempting to do is to introduce a Preliminary Objection on a matter

which is concluded and therefore taking the Court in circles as to the conclusion of litigation in this matter. In conclusion, the respondent submitted that the issue as to the ownership of the disputed land parcel was conclusively determined by the Surveyor's Report and the learned trial magistrate correctly placed reliance on it and that the appeal herein is devoid of merits and that the same should be dismissed with costs.

Analysis and Disposition

I have carefully analyzed, re-evaluated and re-assessed the extract of the record of the Appeal particularly the pleadings and the submissions by the parties. From the prayers sought in the plaint dated 1st September 2013, the main issue for determination was the ownership of the suit property land parcel No. AMWATHI/MAUA/1261. At paragraph 5 of the said plaint, the plaintiff/respondent averred as follows:

“The plaintiff further avers that the defendants have encroached and have been illegally occupying the plaintiff's land cultivating on the plaintiff's proprietary rights”.

By way of a response, the defendants/appellants filed an amended defence, denying the plaintiff's claim and on a without prejudice basis at paragraph 11 thereof the defendants/appellants averred as follows:-

“WITHOUT PREJUDICE to the foregoing, and by way of further defence, the defendants aver that if at all the plaintiff has a title deed in respect of the land that the defendants are currently occupying, using, developing and enjoying, which the defendants hereby expressly and vehemently deny, then the said title deed and the records thereof (including the maps and register) have been prepared obtained, acquired and/or otherwise made fraudulently and/or mistakenly”.

Particulars of Fraud

- (i) Pretending to own the defendant's land.
- (ii) Securing and/or carrying out the overlapping of land parcel No. AMWATHI/MAUA/1261 onto land parcel No. AMWATHI/MAUA/5890 on the land records including the relevant maps.
- (iii) Stealing the defendant's land.
- (iv) Colluding and conspiring with the land officers to alter change and/or otherwise tamper with the records of land parcel No. AMWATHI/MAUA/5890 fraudulently and secretly.
- (v) Misleading and/or otherwise causing the land officer to alter, change and/or otherwise tramper with the records of land parcel No. AMWATHI/MAUA/5890 fraudulently.
- (vi) Displacing land parcel No. AMWATHI/MAUA/5890 fraudulently.

The plaintiff in their issues for determination dated 3rd March 2016 and contained at page 25 of the record of Appeal sought the determination of the following issues:-

- (1) *Did the plaintiff come to be the owner of AMWATHI/MAUA/1261 through Land Adjudication process in 1992?*
- (2) *Are the defendants illegally occupying the plaintiff's land?*
- (3) *Is this the first registration of title Number AMWATHI/MAUA/1261?*
- (4) *Is the plaintiff registered as the owner of land title No. AMWATHI/MAUA/1261?*
- (5) *Who should bear the costs of the suit?*

When the matter came for hearing before the trial Court on 21/2/2018, the counsel for the plaintiff made a verbal application to have the Land Registrar and Surveyor visit the suit parcels and do a report in respect of the two parcels in dispute being AMWATHI/MAUA/1261 and AMWATHI/MAUA/5890. The counsel for the defendants M/S MUNGA expressed no objection to the proposal. The trial Court then ordered the Surveyor and Land Registrar Meru North District to do a joint report and file it within 60 days from the date thereof. The plaintiff was directed to extract the order and serve it upon the said Surveyor and the Land Registrar.

On 18th July 2018, the matter was again mentioned and the trial Court was informed by counsel for the plaintiff one M/S Kiama that the report by the Surveyor was ready. The report was then read to the parties and the trial Court expressed intention to adopt the same as its judgment. The Court therefore asked the counsels appearing for the parties to file their respective submissions in respect of the report.

In a brief ruling read on 30th October 2018, the learned trial magistrate adopted the Surveyor's report and ordered the defendants to move from the plaintiff's land parcel No. AMWATHI/MAUA/1261 and occupy land parcel No. AMWATHI/MAUA/5890. Based on this Background, I now determine the Appeal as follows:-

Ground No. 1 and 2 combined

Though a verbal application was made by counsel for the plaintiff before the trial Court to have the Surveyor and Land Registrar, Meru North District to file a joint report in respect of the disputed parcels of land parcels No. AMWATHI/MAUA/1261 and AMWATHI/MAUA/5890, the trial Court should have drawn the terms of reference with the involvement of the parties and their advocates to address all the issues in the dispute. The submissions filed by the defendants through the firm of MAITAI RIMITA & CO. ADVOCATES opposed the adoption of the report on numerous grounds. One of the grounds raised by the defendants was that the alleged Report did not comply with the directions given by the trial Court in that there was no input from the Land Registrar, Meru North District. The Court record clearly shows that on 21/02/2018, the trial Court had ordered that the Surveyor and the Land Registrar were to conduct a joint report. That order was not set aside and/or reviewed by the trial Court. It is also my finding that the report did not address the main issue in controversy in the suit which was ownership of land parcel No. AMWATHI/MAUA/1261.

I also find that the trial magistrate erred in law and in fact by adopting the report without giving an opportunity to the parties to interrogate the same by way of cross-examination. I further note from the record that the defendants/appellants had opposed the adoption of the report by the Court on numerous grounds one such reason is that the two parcels of land in dispute being No. AMWATHI/MAUA/1261 and AMWATHI/MAUA/5890 were separate and appearing in different sheet numbers and do not even share a common boundary. Those in my view were sufficient grounds to require the trial Court to order for full hearing to enable the maker of the report to be cross-examined on the contents of the Report. The manner in which the trial magistrate determined the suit by adopting a Surveyor's report was erroneous and unsupported by law.

The record clearly indicates that the parties had complied with *Order 3, 7 and 11 of the Civil Procedures Rules Cap. 21 Laws of Kenya* and that witness statements, list of documents and issues for determination had also been drawn and filed. One conclusion to be drawn from those proceedings is that the issue in controversy was the ownership of land parcel No. AMWATHI/MAUA/1261. The manner in which the trial magistrate determined the dispute of ownership of land by a summary procedure of adopting a Surveyor's report which was strenuously opposed by one of the parties cannot be allowed to stand.

Ground No. 3, 4 and 5 combined

The defendants/appellants filed an amended statement of defence denying the plaintiff's claim and averred that if the plaintiff has a title deed in respect of the suit land in which they were occupying, using and developing, then the same must have been procured, obtained acquired and/or otherwise made fraudulently and/or by mistake.

The defendants also raised a defence of limitation under the statute of *Limitation of Actions Act Cap. 22 Laws of Kenya*. These are serious issues which required the trial Court to direct the suit to be heard on merit.

Disposition

The upshot of my re-evaluation and analysis is that this Appeal is merited and the same is allowed as follows:-

- (1) The order/ruling of the learned Senior Resident Magistrate Hon. A.G. Munene issued on 30th October 2018 in CMCC No. 230 of 2013 (Maua) be and is hereby set aside and/or vacated.*
- (2) This is an apt case for remission to the trial Court. In light of the above, I order that the lower Court file be sent back to the trial Court Maua for hearing by another magistrate other than Hon. A.G. Munene.*
- (3) No order as to costs, given that the parties are not themselves attributed to the failure to determine the dispute in accordance with the law. I therefore order each party to bear their own costs of this Appeal and that in trial court.*

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. Appellants/Advocate- Absent
2. Respondent/Advocate- Absent
3. Fardowsa ; Court Assistant- Present