REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA 9A OF 2019

JOHN KAUA MBIJIWE.....APPELLANT

VERSUS

HAJI HASSAN KALLA MOHAMED.....RESPONDENT

(Being an appeal from the judgment and Decree of the Hon. Resident magistrate

E. Ngigi SRM delivered on 14.12.2018 in Isiolo PMCC No. 39 of 2006).

JUDGMENT

Introduction

1. John Kauma Mbijiwe herein after the appellants has by an amended memorandum of appeal dated 8th June 2020 appealed against a decision rendered on 14th December 2020 by Hon. E. Ngigi senior resident magistrate in Isiolo CM No. 39 of 2006. Haji Hassan Kalla Mohammed vs John Kaua Mbijiwe. The appellant has raised twelve grounds of appeal as follows:

i. That the learned senior resident magistrate erred in granting orders of injunction against the appellant when the respondent had not satisfied the conditions upon which such orders could be granted.

ii. That having found that the suit plot claimed by both parties was the same on the ground the trial magistrate erred in law and fact by failing to find that since the appellant was 1st in time to acquire the same his occupation could not be disturbed.

iii. That the learned senior resident magistrate erred in law and in fact in finding that the suit property plot no. B. Jua Kali belongs to the respondent in the presence of a sale agreement and part development plan provided by the appellant with regards to the same property.

iv. That the trial court being a court of equity erred in law and fact by failing to apply the equity maxim correctly to the facts of this case and specifically the maxim, where the equities are equal, the earlier in time prevails.

v. That the learned senior resident magistrate erred in law and in fact failing to hold that the suit property Plot No. B. Jua Kali belongs to the appellant having bought the suit property from one David Mwiraria and in possession of the Sale agreement, part development plan and the receipts from the county for payment of rates.

vi. That the trial magistrate analysis of evidence was flawed in law and fact and therefore the finding.

vii. That the learned senior resident magistrate erred in law and in fact by allowing the respondent to proceed to testify in the absence of the appellant who had clearly indicated to the court that he was attending a matter at Nakuru formerly Nairobi High court no. 151 of 2014 and currently CMCC no. 3195 of 2014.

viii. That the trial magistrate erred in law and fact in the manner he analyzed the law on injunction and therefore fell into error.

ix. That the learned senior resident magistrate erred in law and in fact failing to allow the immediate relatives of the (deceased) David Mwiraria to testify as witnesses that the deceased indeed sold the suit land to the appellant.

x. That the decision of the trial court was against the weight of evidence tendered.

xi. That the learned senior resident magistrate erred in law and in fact in failing to allow the appellants application to visit the suit property no. B. Juakali.

xii. The trial court erred in law and fact by finding that the respondent had proved his claim of ownership of the parcel while the same belonged to the appellant. The respondents documents were not proper documents of ownership and therefore and did not prove ownership of the suit land.

Pleadings before the trial court

2. By a plaint dated 21.9.2006 the respondent sued the appellant pleading to be the registered owner of commercial plot no. B. Jua kali (PDP No. ISL/117/98/251 Isiolo situated in Isiolo having purchased it from one Issa Sheikh Hamo on 13th May 1999 followed up all the necessary procedures made up payments and was subsequently granted an allotment letter and has since been paying requisite authorities.

3. It was pleaded the appellants efforts to start development on 4th July 2006 were thwarted by the respondent, through Isiolo police station, police officers, forcible entry and demands to stop any further construction. The respondent went on to plead this despite showing the police all her records of ownership, the appellant did not surrender but instead continued to use the police to frustrate his developments hence resorting to court for a permanent injunctive orders against such trespass and interference.

4. In support of the claim the respondent filled two lists of documents dated 30th December 2011 and a supplementary list dated 5th September 2019. Alongside the plaint the respondent also moved the court by way of a certificate of urgency on 2nd September 2006.

5. The court record also indicated on 15.7.2008 by consent of parties. An order was made for the county surveyor to file a response within 30 days with regard to the rival claims upon supply by each party of their documentation. The response was filed on 8.9.2008 and each party given a copy for perusal. It was read out in the open court by the court on 12.5.2009.

6. The appellant entered appearance on 12.10.2006 and filed a defence dated 24th October 2006. He denied the contents of paragraph 3, 4, 5-9 of the plaint and sought the suit be dismissed. In support of the defence he field a list of documents dated 9th July 2012. Again he filed a replying affidavit to the notice of motion sworn on 36th October 2006.

7. The record does not indicate if any list of agreed issues for determination were filed by the parties, or agreed list of documents through the same documents through the same documents. Nevertheless the case could not proceed for one reason or the other until the court ordered to process on priority on 1st October 2013 when the appellant did not attend and it was adjourned to 20th November 2013.

Respondent's testimony.

8. In his testimony the respondent adopted his statement dated 16.1.2012. He said he bought plot no. Jua Kali for Issa Sheikh Thamo in 1999, was given an affidavit of transfer dated 15.5.1999, took vacant possession fenced off the plot using posts and barbed wire.

9. He told the court he continued paying land rates till the land was surveyed, allocated a new number 103 and eventually got an allotment letter, and a past development plan from the commissioners of land. The respondent testified that he had a building plan but when he moved in with development materials the appellant blocked her using the police hence he has been unable to put up any building. He prayed for restraining orders. The respondent produced his documents as per list of documents of 30.12.2011 as plaintiff exhibits 1 – 14 and the list dated 5.9.2017 as plaintiff exhibits 15-36.

10. The respondent confirmed the defendant was not in possession and that there was no criminal case over the suitland.

11. In cross examination he confirmed he had produced a sale agreement receipts and a transfer document. According to him the respondent said the appellant only had a PDP and not an allotment letter.

12. He confirmed he had an acceptance letter to the letter of allotment dated 22.8.2006, acceptance payments and letters written in 2006. The respondent maintained the payment was done within 30 days of receipt of the allotment letter though it indicated it was done in 2006 which is 7 years down the line.

13. The defendant maintained he had a witnesses to the transfer. As regards interference by the appellant the respondent told the court he deposited it to the county council both the appellant did not answer the summons.

14. In re-examination, the respondent maintained he signed the affidavit, transfer application before the seller and county council officers. In his evidence he maintained the two documents are equivalent to a sale agreement. Further the respondent maintained the plot was genuinely his as he had confirmation and clearance certificates from the county council as well as the allotment letter which the appellant had not subjected since issuance.

15. The respondent closed his case and the matter was adjourned at the instance of the appellant who was absent and was given 16.10.2018 defence hearing.

16. On 7th November 2018 the appellant gave his testimony that he was later called by one M'Kiugu Karani on 23.5.1997 and informed one Daniel Mwireria was selling a plot in Isiolo town.

17. Upon checking the said Mr. Karani negotiated on his behalf for a prize of Kshs.180,000 sent to him and a transaction was done on his behalf before Mr. Kioga advocate. He told the court he came later on to see the plot, took possession and instructed Mr. Karani to fence it off. The appellant informed the court he continued paying rates for the council up to 2008. When he was informed the respondent was allegedly interfering with his plot to which he instructed Mr. M'Inoti advocate to intervene through OCPD Isiolo police station by stopping any developments thereon. He produced his ownership documents being a sale agreement dated 23.5.1997, D. exhibit 1, receipts dated 23.5.1997 and 28.5.2008, fees for the agreement from his lawyers D. exhibit 2 (a) (b) & (c). He told the court he had a part development plan which he produced as D. exhibit 3 and an acknowledgement request for the purchase price which he produced as D. exhibit 4. He prayed for dismissal of the suit and he be grated ownership of the plot.

18. In cross examination the appellant confirmed DW 1 is the one who negotiated on his behalf, signed on his behalf, visited the county offices for the transfer documents (see a copy of the transfer forms) but though perhaps his lawyer is in possession of the said documents. He told the court such details could only be answered by Dw 2 who was his representative during the same and transfer.

19. Further the appellant in cross examination, told the court is plot measures 50 by 100 it was plot no. 489, is located in Isiolo town centre, the agreement does not say exactly where in Isiolo town the PDP number was given to him by physical planner Isiolo. The plot no. had been given to his previous owner, was not given another number in 1997, the PDP was prepared in 2001 and that the same was not signed by the Director of planning and approved by the commissioner for lands.

20. Further the witness told the court D. exhibit 4 was signed by Karani on his behalf though it lacks a plot number. Similarly in cross examination the appellant told the court, that though he was a police officer he still retain legal rights to complain over infringement of his land rights especially against the respondent. In his view he had instructed counsel to stop the construction through a court order and believed it was done. He further testified he was paying rates but was not aware if the respondent was also paying the same. The witness confirmed he had done no developments on the plot other than fencing off which the respondent removed it and destroyed it. The witness maintained he was not duped through the seller was now deceased. The witness confirmed to the county council since he bought the plot from Mwiraria.

21. In re-examination the appellant stood his ground that plot no. 489 was in Isiolo town. He knew its exact position and the seller is deceased.

22. DW 2 told the court the appellant bought the plot from Mwiraria on 25.5.1997 and handled both the sale, transfer and payments for and on behalf of the appellant.

23. In cross examination, the witness told the court he thought the appellant was the one given ownership and transfer documents and would not know about them.

24. The witness told the court the father did not show him any ownership documents but verbally told him he was the owner. Further the witness testified he did not visit the county council offices before the transaction but only went to the lawyer for the transaction with the seller.

25. Again the witness could not say much about the transfer but the appellant is capable of explaining about it. Similarly the witness stated at the sale only a fence and a gate were on the plot. He could not however remember if the plot was known as Jua Kali and who was putting up construction when he passed by and further that at the sale and transfer he did not have any other witness. The defence closed their case and the parties were directed to file written submissions.

26. By submissions dated 13th November 2018 the respondent stated the issue for determination as; Which of the parties has a more legitimate claim of the entitlement to the disputed land whereas the appellant listed his issues for determination as follows:

- Whether the suit property is adequately ascertained.
- Whether there is non-joinder of Isiolo county government.
- Whether the plaintiff has discharged his burden of proof.
- Whether the court should grant the orders sought.
- Who should bear the costs?

Analysis of the evidence tendered by the parties.

27. It is trite law that issues flow from pleadings and a court can only make a determination on issues as framed by the parties unless evidence has been tendered on an issue left for courts determination.

28. As stated elsewhere in this judgment the respondent claims was for permanent orders restraining the appellant from trespassing into property no. B. Jua Kali PDP ISL/117/98/251 as per allotment letters produced as exhibit. The respondent pleaded he had been in possession and had started his development when in 2006 the appellant allegedly used the police to stop his developments alleging the property to belong to him on account of purchase.

29. On the other hand the defence dated 24th October 2006 the appellant generally denied the contents of the plaint, raised no counterclaim, did not offer an alternative description of the land in issue, nor did he plead when, how and through which means he acquired the suitland if at all it was the same property.

30. In law issues flow from pleading as such it is my finding that the trial court was right in framing the three issues for determination. Coming to the first issue for determination, the appellant submits as granted 1A, 2A, 3A that the trial court erred in law and in fact in finding

the respondent to have established a prima facie case, hence being entitled to a permanent injunction when the property in question was not identifiable against the evidence tendered.

31. As mentioned elsewhere in this judgment by consent of parties an order was made by the trial court for the country surveyor a Mr. Ndereba to furnish a report in court on the exact status of the land. The same was duly done and a report filed in court. It formed part of the court's record. Each of the parties had been ordered to supply their documents for verification by the county surveyor. The report was also read in the open court. So on the issue of identification of the plot, other than the said report, each of the parties had occasion to produce documentary evidence in court and show a trail of documentation on the manner of acquisition. The appellant submits the trial court relied on documents produced by the respondent which had glaring mistakes, were an-authentic and lacking backing from the relevant departments. Having gone through the court records, the appellant did not object to the production of plaintiffs exhibits marked 1 – 36.

32. The appellant did not pose any specific question as to the authenticity, correctiveness and or truthfulness of such documents. Similarly, the trial court gave pre-trial directions on filing and exchanging of documents. There was no specific request that the appellant intended the makers of the said documents to be availed and or summoned.

33. Again the appellant did not move the court to visit the locus in quo. As indicated above, there was already a report made by the relevant county officers which each of the parties was aware of. The same was made upon each of the parties availing their documents for authentification.

34. The report was to guide the court and the parties to narrow down the dispute. None of the parties rejected the report and or called the maker for cross examination and or clarification. The appellant was all along aware of the report even as he took the witness stand. He did not see it fit to summon the officer so as to be his witness.

35. It is therefore my finding the trial court cannot be faulted for not visiting the locus in quo. After all it is the parties who if there was any necessity to move the court. Already there was a report and accompanying documents for each to ventilate their respective claims.

36. Second the appellant submits he was the first in time to acquire the land and hence the court was wrong to deny him the ownership. The respondent pleaded, testified and produced documents flowing from the county council of Isiolo including an allotment letter.

37. On the other hand the appellants defence exhibits 1 -4 were all made in the absence of the appellants. He testified during cross examination and through his witnesses DW 1 confirmed he did not visit engage and or involve the county officials prior to, during the transaction and before testifying in court. The appellant did not cause any search, site visit and or site identification prior to and after he acquired the plot no. 489. He had the burden to proof authenticity of his documents and secondly to trace the line of his paper trail from the person he acquired the plot from. During cross examination it was put to him why he did not see it fit to visit the county offices to ascertain if his property exists on the ground. His answer was he could only follow whoever sold him the property who is now deceased.

38. Further DW 2 confirmed during cross examination that he only visited his lawyer's offices for the transaction and not the county offices. Again DW 2 confirmed he was not shown any ownership documents by the seller. Further the appellant and his witness did not know the whereabouts of the transfer forms if any and whether they lodged them with the county council. Similarly the appellant did not call his lawyers to shed light on the same. D. exhibit 1 does not specifically state where the property is situated in Isiolo town. It does not refer to any county reference, paragraph 3 says the vendor has already transferred the property to the purchaser from Isiolo county council and shown boundaries of the plot to DW 2 before the execution of the agreement.

39. The transfer was not availed before this court. The agreement does not state if the county officials were involved and confirmed the status of that plot if it existed as alleged in their records. There is no indication in the agreement on the date of taking possession. The purchaser is DW 2 and not the appellant herein. Similarly D. exhibit 2 (a) (b) & (c) the name of the appellant does not feature anywhere as the purchaser.

40. Again D. exhibit 4 is not signed, stamped and or authenticated by the relevant officers including the ministry of lands physical planning, defendant and the commissioner of land. The said documents are also not prepared in the name of the appellant.

41. Given the glaring inconsistencies and gaps in the appellants exhibits, it was his duty to have them authenticated before production in court as well as to call for back up evidence from the county council officers, if at all he was certain the vendor, who sold him the land had actually rightfully acquired though allocation by the county council of Isiolo.

42. In my considered view that obligation rested with the appellant to show genuineness of his documents as opposed to the respondent. Moreover the appellant did not plead a counterclaim in which he would have sought to have the court grant him the land if at all he was certain his land was one and the same one as allocated to the respondent. The appellant had an obligation to call for the county land register to ascertain indeed plot 489 is the same as plot 103.

43. It is not the duty of the court to assist the parties on how to prove their cases and call forth evidence. The appellant has submitted that the trial court erred in law and in fact by allowing the claim when there was non-joinder of the county government of isiolo.

44. The record shows parties attended court for pre-trial conference and or directions. None of the parties suggested there was need to join the County Government of Isiolo as a party or an interested party. There was no claim by any of the parties for indemnity. Again none of the parties alleged there was forgery and or fraud so as to suggest that there was need to join a county government of Isiolo as an interested party. At the time the matter was filed counties were not in existence and no parties ever suggested there was need to join the county council of Isiolo as it then was. In his own pleadings the appellant did not allude to that fact.

45. The appellant faults the trial court for not allowing him to call relatives of the deceased David Mwiraria to testify. The record shows the

parties filed pleadings accompanied by list of documents and witness statements as early as 2006. The suit commenced for hearing in 2018. There were pre-trial direction given. There is no record to suggest that the appellant fought to file additional witness statements and was denied that chance. The appellant had all the opportunity for close to ten years to organize his witnesses. He did not seek leave to call for additional witnesses even at the close of defence testimony. There is no evidence that the appellant sought for and was denied an opportunity to introduce extra testimony.

46. The court is a neutral arbiter of facts and law. It cannot direct who to be called as witnesses by the parties. That freedom is left with parties in an adversarial system as ours is. There was therefore no obligation placed on the court to help the appellant call the deceased vendor. Similarly no such request was ever made and hence the said ground of appeal is lacking substance.

47. Regarding ground no. 6 the court has perused the court proceedings and records. It has not come across any application for the court to move to the locus in quo and especially from the appellant. As stated elsewhere in this judgment given that there was a report made at the request of parties. It is the courts considered view that it was not necessary for the trial court to visit the site.

48. The appellant further faults the trial court underground 4 for allowing the testimony of the respondent to be taken in the absence of the appellant. This court has gone through the court records.

49. On 23.7.2013 the court noted the matter was old and was supposed to be heard on priority hence fixed for hearing on 1.10.2013. During that date the plaintiff attended but the defendant was absent hence adjournment was granted for 20.11.2013. Again the matter was adjourned for 18.1.2014 in which parties attended but could not proceed on account of sickness of the plaintiff counsel.

50. A hearing date was taken for 18.3.2014 in which the matter did not proceed since the appellant was held up in a criminal case elsewhere. The parties took a hearing dated of 26.5.2014. Both parties did not appear and their lawyers took by consent a hearing date for 23.9.2014. The appellant did not attend leading to an adjournment for 10.11.2014. Counsel for the appellant sought an adjournment for 3.11.2015. On 24.2.2016 a date was taken by consent for 24.2.2016 which date the matter did not proceed and was taken out. It appears the next time parties took date by consent was for 4th September 2018 when the respondent took the witness stand.

51. There was no application for adjournment made by the appellant's counsel neither was there an explanation why the appellant was not in court since the date had been taken by consent on 3.7.2018. The appellants counsel did not object to the testimony of the respondent being taken in the absence of the appellant. In any event the appellant's counsel on record adequately cross examined the respondent.

52. Further when the matter resumed for defence hearing on 12.9.2018, it is when the court was informed the appellant was attending a criminal case in Nakuru. There was no objection from the respondent hence the matter was adjourned for 16th October 2018 when the appellant did not even attend and another defence hearing date was fixed by consent for 7.11.2018 when the appellant testified. There was no request made to recall the respondents nor did the appellant suggest he had been prejudiced in anyway. In my considered view the said ground of appeal has no merits and is rejected for lacking any basis.

53. Regarding ground no. 1 3A, 4A, 5A & 6A, the court has looked at the pleading, issues for determination, evidence of the parties in totality and the submissions made. As an appellant court of first instance, it is its duty to review, re-evaluate and re-analyze the court record, bearing in mind the trial court had the benefit of seeing the demeanor of witnesses and come up with its own independent conclusion, findings and outcome to establish if the learned trial magistrate reached the correct factual findings and appropriately applied the correct law under the circumstances.

54. The respondent sought for permanent injunction barring and restraining the appellant from trespassing into Plot NO. B. Juakali for the court to find in his favor the respondent had to prove that he was deserving of the prayers sought. It is evident the respondent had an obligation to show the root of his interest over the suitland.

55. In **Munya Maina vs Hiram Gathiha Maina** the court of appeal held thus;

> **"We have stated when a registered proprietor root of title is challenged it is not sufficient to dangle the instruments of title as proof of ownership. It is not instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interest which would not be noted in the register".**

56. As already noted, the appellant did not support his averments in the defence and hence they remain mere allegations and the said court did and holds it did not prove the root of its title or interest in the land. Furthermore the county council did not in the first instance show the appellant or his agent DW 2 exact locality of plot 489 at the time he allegedly purchased in 1999.

57. The respondent on the other hand showed a clear paper trail of his land and traced the same to the county council of Isiolo and the commission for lands leading to issuance of a letter of allotment. The said letter of allotment has not been doubted by any of the officers who issued it nor has the appellant demonstrated through pleadings and evidence that it is either a forgery, fraudulently obtained and in any other way that it is an illegality.

58. In **Rukaya Ali Mohammed vs David Gikonyo Nambacha and another** it was held thus;

> **"Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers an absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was rightly illegal or it was against the public interest".**

59. The appellant herein had not pleaded he was reallocated the said land or that the allotment letter herein was invalidated and or lawfully cancelled.

60. In **Hubert L. Martin & 2 others vs Margaret J. Kamar and 5 others (2016) eKLR** the court held;

> **"A court faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property…".**

61. Every party must show that their title has a good foundation and passed properly to the current title holder. The appellant did not call the person who sold him the land alleging he was an allottee by the county council of Isiolo. Even assuming the vendor was deceased he could as well call the county government of Isiolo officials to come and support his assertion that he was a lawfully allotee and that his land was the same as the one claimed by the respondent. On the other hand the respondent brought plaintiff exhibits 1- 36 which are consistent regular, lawful and prima facie evidence of right to interest over a specific land.

62. In my considered view the trial court rightly applied the maxim *"when two equities are equal the first in time shall prevail given the respondent over and above a sale agreement he has transfer forms made payments for the land to the regular offices and was eventually allocated the land by the commissioners of land subsequent to which he met the terms and conditions of the letter of offer.* There is no suggestion that the said documents are not authentic and or did not emanate from the aforesaid allocating officers. Hence the respondent as correctly found by the trial court was entitled to enjoy proprietary rights and interests as per sections 24 and 25 of the Land Registration Act as read together with Article 40 of the Constitution.

63. The appellant was therefore a trespasser in law and should give way to the respondent to develop his land. In the premises I find the appeal herein is lacking merits. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

Nyamu Nyaga for respondents

HON. C.K. NZILI

ELC JUDGE