



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E015 OF 2020

DORCAS KARAMBU SIGILAI.....APPELLANT

VERSUS

STEPHEN KITHINJI MUGAMBI.....RESPONDENT

(Being an appeal from the Judgment of Hon. Samwel M. Mungai (C.M.)

delivered on 1st November 2018, in Isiolo CMCC No. 69 OF 2015)

JUDGMENT

1. Before the court is an appeal seeking to overturn the lower court judgment on the grounds that:-

The court failed to consider and appreciate the appellant was the genuine owner; giving no strength to the appellant, consistency in asserting his rights especially with regard to petition 6 of 2021; failing to consider the burden of proof threshold and lastly failing to consider it was a gift inter vivos.

A. PLEADINGS

2. This being a first appeal, it is expected the court shall reconsider and re-appraise itself of the lower court record and come up with its own findings and conclusions as held in Selle –vs- Associated Motor Boat Co. Ltd & 2 Others [1968] EA 123.

3. The appellant's claim was based on fraudulent acquisition and commencement of construction by the respondent over his **Plot No. Mwangaza MC 133**, hence prayed for declaration of her ownership rights and permanent orders of injunction.

4. The respondent's defence was that he was in occupation having inherited the suit land from his late father in 1994 who had gathered the same in 1964 hence denied the plot was capable of being allocated to the appellant by Isiolo County Council Government being a private land.

B. EVIDENCE

5. The record of appeal did not include the proceedings. However from the lower court record, the appellant adopted her witness statement and produced **P exh 1** confirming letter of ownership, **P exh 2** a resettlement letter, the notification of displacement **P exh 3**, letter of acceptance of re-location **P exh 4**, bundle of receipts for rates payment as **P exh 5 (a) (b) (c) and (d)**, letter from the D.C.I.O **P exh 6** and a demand letter as **P exh 7**. She alleged her existing structures had been destroyed by the respondent who later on commenced construction of a permanent house.

6. In cross-examination the appellant claimed her plot was 50 by 100 ft, initially she had **2 acres** in **Kiwanja Ndege**, had reported to the police but no action was taken.

7. PW2 adopted his witness statement and insisted the plot belonged to the appellant upon allocation by Isiolo County Council. In cross-examination PW2 insisted he could identify the plot on the ground though he could not indicate the location of the beacons, had no documents showing the land belonged to the County Council though he was aware the appellant had been displaced by the Isiolo airport expansion plan. He maintained the appellant's house was demolished by the respondent. Regarding the respondent, PW2 admitted knowing his father but denied he had inherited the land from the said father.

8. Asked about **P exh 5 (a) – (d)** he confirmed they lacked the names of the officer filing and stamping the documents, date and size of the plot. He similarly admitted **P exh 5 (b)** had not been authenticated but could not remember if any enforced notice had been issued to the respondent.

9. Further, PW2 confirmed there was neither PDP allegedly issued to the appellant and nor was he aware if the area had been declared an adjudication section. PW2 also confirmed he knew about the payment of land rates and one could only be on the plot legally so long as he was recorded as such in the plots register. However he denied the appellants documents were fraudulently obtained through his influence as an officer working with County Government of Isiolo. While admitting the appellant's exhibits were handwritten, he maintained **P exh 4** was from the Council, Mwangaza plots were in three groups, namely A, B & C and that the **P exh 5 (b) & (c)** were copies though not certified.

10. In re-examination PW2 confirmed the appellant was resettled in 2005 by which time the respondent was not in occupation. He insisted the appellant's exhibits were genuine.

11. The next to testify was PW3, claimed to be a neighbor, and insisted the plot genuinely belonged to the appellant right from the time he helped her fence it off after allocation though he could not remember the year of allocation. He confirmed the respondent was the one at the time in occupation.

12. Further, PW3 admitted the respondent's father one Julius Kaburunga was his neighbour. He denied seeing any ownership documents from the appellant.

13. In further cross examination of PW1 stated he was shown the plot in August 2005 started paying rates though she did not produce them. Further she admitted **P Exh 1** had no names, **P exh 3** had no typed name though lacked details of the plot. She confirmed there were cancellations on the documents, that **P exh 5** did not bear her name and the alleged date of balloting was not indicated.

14. She further admitted **P exh 6** was not certified, showed no allotment details and that other than receipts, she had no more ownership documents. As regards her neighbours, she confirmed one of them was Mugambi. As concerns Petition 6 of 2011, she confirmed she had not been enjoined as a party.

15. In further re-examination **PW1** stated **P exh 1** bore her names but **P exh 2** did not disclose it originated from Isiolo County Council, confirmed her work did not involve land matters and that she had not used her influence to obtain the documents.

16. **DW1 (the respondent)** adopted his witness statement and produced **D exh 1-4** among them a letter dated **27.5.2015**. He testified he had been in occupation of the suit land since 1994, claimed all the documents produced by the appellant were not genuine.

17. In **cross examination**, **DW1** stated the area had no ownership documents, but he had inherited the land from his father, did not have prove of rates and rents payment from the County since there were no plot numbers. He insisted he got the land in 1994 in front of elders though he had no documents to that effect.

18. **DW1** further claimed there was a previous case involving his father though he could not tell its details. **DW1** acknowledged a report had been made at the DCIO offices directing him to abandon developments on the plot but a response was made by his lawyers.

19. Further **DW1** stated his father was involved in **Petition No. 6 of 2011** though his name was not included. **DW1** admitted his mother had been married by Samson Mugambi after she was divorced by Kaburunga.

20. Further **DW1** testified he had developed his plot but insisted the applicant's papers were not genuine though he had made no complaint to that effect with the police. **DW1** insisted the area had no plot numbers and wondered where the appellant had got them from but suspected it was out of her influence as a County Government employee. He admitted he had no papers to show how got the plot from his father.

21. Further he insisted after his mother, then divorced, died, Samson Mugambi took him back and gave him the plot to reside in and that the appellant would not possibly be resettled on his plot in 2005 since he was already in occupation. He claimed he did not damage any structures belonging to the appellant since she has never been in occupation. In any event, the DCIO would have charged him with malicious damage to property if that would have been the case.

22. Additionally, **DW1** insisted **PW2** had testified in favour of **PW1** since they were working together though no document was produced by the appellant to indicate the plot ever belonged to the County Government. Moreover **DW1** maintained the government could not possibly relocate, displaced people to his plot without any compensation for forfeiture.

23. **DW2** testified he got the plot in 1969 while aged 12 years as an inheritance from his father. He testified he had three wives among them one of which was the respondent's mother. He insisted he gave the plot to **DW1** in 1994 though he had no plot number. He claimed to have been on the plot since 1969 and denied ever seeing the appellant develop it.

24. As regards the agreement, he insisted he gave **DW1** the land and there was no need to write an agreement. **DW3** as a neighbor repeated the evidence given by **DW1 & DW2**. He stated he had been in the neighborhood since 1995.

C. ANALYSIS AND FINDINGS

25. The appellant complains the learned trial court failed to find her a genuine owner of the suit land based on her testimony and the evidence produced. The appellant pleaded to have acquired and got registered to the plot by the County Council of Isiolo.

26. As a starting point, he who alleges must prove. The onus was on the appellant to prove her case on a balance of probabilities. Once the respondent denied the claim by way of a defence and asserted ownership of the plot, it behooved the appellant to give a consistent and clear material to prove the root of her ownership. She claims the land was allocated to her by the Isiolo County Council. Ordinarily the procedure obtaining then was well known. She did not produce any minutes from the relevant committee and the full board to show that the property belonged to Isiolo County Council initially and the manner in which the council had acquired it so as to have capacity to transmit it to her.

27. Secondly there was no register of plots produced emanating from the County Council of Isiolo and its successor in title showing that indeed the plot numbers arose from the council, she was a rate payer and had beacon certificates. See **Titus Musya Musee –vs- Francis Ichanui M’Mwnea [2020] eKLR.**

28. Further the appellant did not produce any letters of allotment or part developments plans to show that there existed council plots known as Mwangaza A, B & C. Additionally the Town Planner and or Town Surveyor were not called to come and authenticate the appellants exhibits, see **Charles Letoya Mapelu Zakayo –vs- Simiren Segeni [2015] eKLR**

29. Additionally, the appellant did not call any of her neighbours who were allegedly issued the plots at the same time. See **County Council of Meru & 2 Others –vs- PCEA through the Registered Trustees [2020] eKLR.**

30. The appellant’s claim was based on fraud. It is trite law that fraud must not only be pleaded but evidence must be lead to prove every element of fraud. The appellant did not lead any evidence to demonstrate there was any fraud on the part of the respondent in acquiring the plot. See **Urmila W/O Mahendra Shah –vs- Barclays Bank International Ltd. & Another [1979] eKLR.**

31. DW2 and DW3 were consistent on when and how they acquired and came into the land in issue and DW1 undertook developments thereon. There were no single questions put to the defence on the manner they colluded to perpetuate a fraud and unlawfully acquire the land. See **Vijah Marojaria –vs- Nanshingh Madhusingh Darbar & Another [2000]eKLR.**

32. If indeed the appellant knew the plots belonged to the County Council or County Government for that matter, she would have simply reported the acts of development to the County Council or County Government for action and an enforcement notice would have been issued for an unauthorized developments by the respondent.

33. The appellant testified working he working with the County Government of Isiolo.

34. In absence of the above evidence the learned magistrate was in order to find the appellant to have failed to discharge the burden of proof as held in **Central Bank of Kenya Ltd. –vs- Trust Bank Ltd. & 4 Others [1996] eKLR.**

35. Whilst the respondent produced no documents in support of his defence, the evidence of DW3 was cogent and consistent on how he acquired the plot and consistently remained on it and eventually gave it to the respondent. The appellant was in my considered view unable to shake and break that chain of evidence and demonstrate her root course to the plot.

36. Turning to the prayers in the plaint, the appellant sought for the court to declare her the genuine owner of the plot and for permanent orders of injunction against the respondent.

37. Since the appellant was alleging allocation of the plot from a known body, in absence of prove of the source from that body and considering the glaring inconsistencies in her exhibits, the court was right in my view to find her undeserving of the declaratory orders.

38. Turning to the issue of a permanent injunction in absence of a letter of allotment or lease, authentic documents from the County or County Government, the trial court was right to find on a balance of probability that the appellant had not proved ownership of the suit land in whose onus the burden rested. See **Mrao Ltd. –vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR.**

39. In sum, I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Mrs Otieno holding brief for Odhiambo for applicant

C.P. Mbaabu for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE