REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. APPEAL NO. 06 OF 2020

DAVID KIMANI CHEGE.....APPELLANT

VERSUS

IDDI SHABAN ONIALE.....RESPONDENT

(Appeal against the Judgment of Senior Resident Magistrate

Hon. B.M. Cheloti delivered on 30th April, 2020)

JUDGMENT

Introduction

By a Memorandum of Appeal dated the 21st May, 2020, the Appellant appeals against the whole of the Judgment delivered by Hon. B. M Cheloti, Senior Resident Magistrate at Kajiado Chief Magistrate's Court on the 30th April, 2020. The genesis of this appeal is the Judgment of the Senior Resident Magistrate Hon. B. M. Cheloti in Kajiado CMCC No. 20 of 2019, where the trial court proceeded to enter Judgment in favour of the Plaintiff *(Respondent)* and issued eviction orders against the Defendant *(Appellant).*

The Appellant being dissatisfied by the whole Judgement filed an appeal at the Kajiado Environment and Land Court on 20th May, 2020.

The Memorandum of Appeal contained the following grounds:

1. That the learned Magistrate erred in both facts and in law, in finding that the land LR. No. Kajiado/Kisaju/3584 belonged to the Plaintiff/Respondent without considering the evidence of the parties adduced at the hearing.

2. That the learned Magistrate erred in facts and law by determining the issues between the parties summarily at an interlocutory stage.

3. That the learned Magistrate erred in facts and law in making a determination of the application and converting the same to be the Judgment of the suit.

4. That the learned Magistrate erred in facts and law in issuing a Judgment based on ***Giella vs. Cassman Brown Co. Ltd 1975 EA 358***, notwithstanding same is about whether a party has a *prima facie* case to warrant issue of temporary orders.

5. That the learned Magistrate erred in facts in finding that official search confirmed that the Plaintiff/Respondent is the beneficial proprietor of L.R No. Kajiado/Kisaju/3584 without the evidence adduced by the Defendants at the trial considering.

6. That the Defendant/Appellant being in occupation of the property required that evidence be considered on how the Defendant, came to be in possession of the property.

7. That the learned Magistrate erred in facts in finding that the Plaintiff has proved his case on a balance of probabilities while ignoring the parties at trial.

8. That the learned Magistrate erred in both facts and law in totally ignoring the Defendant/Appellant's case which is not mentioned at all in the Judgement.

9. That the learned Magistrate totally misdirected herself on the orders sought by the Plaintiff/Respondent vide the application dated 13th June 2013 and proceeded to issue a Judgment instead of a Ruling notwithstanding that the suit was heard on 8th October, 2019 and submission filed on 17th December, 2019.

It is proposed to pray to this court for orders that:

a. The Appellant pray that the Judgment and Decree of the Honourable B.M. Cheloti – Senior Resident Magistrate delivered on 30th April, 2020 and 14th May, 2020 respectively be wholly overturned.

b. Costs of the Appeal.

The appeal was canvassed by way of written submissions.

Appellant's Submissions

The Appellant contends that his submissions were totally ignored and yet he had provided a detailed explanation on how he came to be in possession of the suit land. Further, that the Sale Agreement produced by the Respondent herein in his bundle of documents in the lower court was for sub-division of Kjd/Kisaju/2898 measuring 0.04 Hectares. However, Kjd/Kisaju/3584 is a sub-division of Kjd/Kisaju/1652 and it measures 0.045 Hectares. The Respondent admitted in Court to having lived in his current residence Kjd/Kisaju/3581 since 2009.

He further submitted that the lower court declined to consider the fraud allegation in the Defendant/Appellant's pleadings and submissions. He proceeded to highlight the anomalies in the Respondent's documents of title. He reiterates that it is a fact admitted by the Respondent that the Appellant was in possession of the suit property and is still in possession of the same from the year 2009. Further, that the trial court made an error by refusing and/or negligently declining to interrogate how the Appellant/Defendant came to be in possession of the land.

He argued that the orders given in the Judgment clearly indicated that the learned Magistrate was referring to an Application, and that she was persuaded to grant an injunction but queries how the said orders became eviction orders. He further submitted that the reasoning and analysis in the Judgment is convoluted and ought not be allowed to stand.

Respondent's Submissions

The Respondent in his submissions insisted that he has an absolute title warranting an order of eviction, as he indeed produced in court an original title deed for L.R. No. Kajiado/Kisaju/3584 without any encumbrances. He further submitted that the Appellant is dishonestly stating at paragraph 4 of his Memorandum of Appeal that the learned Magistrate issued Judgment based on the principles espoused in ***Giella vs. Cassman Brown Co. Ltd (1975) EA 358*** while the eventual order that was granted by the trial court was an order of eviction prayed for in the Plaint but not a temporary injunction as wrongly stated by the Appellant. He argues that the Appellant cannot come to Court and claim that the matter was not heard on merit and without evidence and that issues pertaining to how he came to be in possession of the suit property have not been canvassed, yet he clearly failed to seize all opportunities and avenues available to him. Further, the Appellant has not shown any evidence that he has any right to the suit property, neither has he challenged the Respondent's position that he bought property L.R. No. Kjd/Kisaju/15/2975 from the same Joseph Ndegwa Kamau who also sold to the Respondent Kajiado/Kisaju/3584. He reiterates that the Appellant seeks to use Certificate of title for Kajiado/Kisaju/1654 to lay claim on the Respondent's Kajiado/Kisaju/3584. He reiterates that submissions by the parties were considered by the Learned Magistrate before delivery of her judgement on 30th April, 2020. He avers that by consent of the parties, the trial court was invited to consider all the material on record in arriving at just conclusion of the matter in the interest of justice. Further, that the learned Magistrate thoroughly reviewed evidence presented by parties hence the Judgment instead of a Ruling. He reaffirms that all pleadings, evidence and submissions were considered and no error was made by the learned Magistrate. To support his arguments, he relied on the following decisions: **Peninah Wanjiru Njane vs. Jane Waweru Mworia (2012) eKLR; Peter Kinyari Kihumba vs. Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI121 of 2005 (6/05NYR*).***

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and the rivalling submissions, I have summarized the following issues for determination:

- Whether the evidence of the parties was considered before the entry of Judgment in this matter.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal.

Before I proceed to deal with all the aforementioned issues jointly, I wish to provide a background of this matter and highlight an excerpt from the impugned judgement which is the fulcrum of the Appeal herein;

"5. Having perused the application, the Affidavits in support for and against the suit, the submissions and annexures in support and against the application, I find the issues before court include the determination of the rightful owner of L.R. No. Kajiado/Kisaju/3584 and whether the remedy prayed for is merited…."6. The Plaintiff adduced a copy of the Sale Agreement, payment receipt, a Title Deed and a copy of the official search identifying him as the legal owner of L.R. No. Kajiado/Kisaju/3584. On the other hand, the Defendant adduced a copy of payment receipt and a Certificate of Ownership of L.R. No. 1654/KJD/Kisaju… 7. Having thoroughly reviewed the documents before the court, court finds the Plaintiff to have proved his case beyond a balance of probabilities and hence therefore the rightful owner of the suit property by virtue

of holding a valid Title Deed to L.R. No. Kajiado/Kisaju/3584."

In the Plaint which culminated in the impugned judgement, the Plaintiff sought for the following orders:

a. An order of eviction of the defendant from LR No. Kajiado/Kisaju/3584.

b. Costs of this suit.

Further, the Defendant in his Defence denied the Plaintiff's averments and insisted he purchased his land from one Joseph Ndegwa Kamau in 2004, has put up semi permanent structures thereon and has been residing with his family on it for about nine (9) years.

From the proceedings in the lower court, I note the matter proceeded for hearing on 8th October, 2019, wherein the Plaintiff called three witnesses while the Defendant also had three witnesses. After the hearing, the Learned Magistrate proceeded to deliver her Judgment on 30th April, 2020.

As per the impugned judgement, the trial Magistrate entered the same in favour of the Respondent. From the proceedings which I have highlighted above, I note the matter was actually heard as each party tendered evidence of ownership of suit land in court before the impugned judgement was entered. I note in the Judgment, the trial Magistrate referred to an application and affidavit before making a determination of the suit. However, from a perusal of the proceedings, it emerged that both the Appellant and the Respondent purchased their respective parcels of land from the same vendor Joseph Ndegwa Kamau. Further, the Appellant has been in possession of the land which the Respondent claims, belongs to him. The Respondent even produced a copy of a title and certificate of official search to that effect. The Appellant also produced a Certificate of Ownership from the vendor. I note the Appellant confirmed he paid Kshs. 55, 000 to the vendor Joseph Ndegwa Kamau, took possession of the land and has been thereon. PW1 (Respondent) admitted in cross examination as follows: '***The mutation form has subdivisions for Plot No. 1834, Plot 4 of Kajiado/ Kisaju/1652 which is 0.004 hectares, My plot is 3584. …… I don't have mutation form for 2898, which is in the bundle of documents no. 7.*** 'In re examination, the Respondent stated as follows:' ***The title deed I have is for 3480 which is the land I am claiming. I bought the property from Lucky Base who undertook all the transactions on my behalf.'***

Insofar as the Respondent held title to the suit land, I opine that this was a typical case where the root of his title was being challenged as he seems to be claiming a different parcel of land. Further, there seems to be confusion in respect to the mutation on where the suit land emanated from. The Appellant as DW1 stated as follows: ***'I know the plot No. 3484 which I bought from Lucky Base Shelter which I was showed by a surveyor and one Ndegwa. I bought the land on 20th September, 2004 and 3 months later he showed me my beacons and I later developed the plot. I constructed a foundation and also put up a mabati structure. In 2006, I moved into my structure and even took my children to the schools nearby. In 2012 is when the Plaintiff started claiming ownership of the land. The Plaintiff then has some land near me and even put up a home in 2007 and moved in there in 2012.'***

From the lower court proceedings, it is very clear, that there was confusion in respect to the parcel of land being claimed by the Respondent. The Respondent in his submissions insist he has a title and the learned Magistrate was correct in granting eviction orders. In the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009,** the Court of Appeal held that:- **"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that 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 interests which would not be noted in the register."**

In associating myself with this decision, I find that it was incumbent upon the Respondent to prove the root of his title. I further find that the trial Magistrate in her decision failed to consider the evidence tendered before her and only relied on the Certificate of Title but did not delve into the history of the respective titles, although the same was presented before her. Further, it is a bit ironical that the Respondent who resides in a nearby plot never stopped the Appellant who had been on the suit land from 2004 from developing it but opted to file a suit later on.

On whether the Appeal is merited, based on the materials that were placed before the trial Magistrate, I find that she erred by failing to consider the evidence presented before court in respect to the root of the Respondent's title but proceeded to uphold it. I find the impugned Judgment a bit convoluted as at one moment she was referring to an application for determination but later proceeds to refer to the evidence and grant orders for eviction. Since the Judgement was convoluted, it is my considered view that in the interest of justice, it is pertinent for the matter to be heard afresh so that justice is seen to be done. I beg to disagree with the Respondent that the learned Magistrate thoroughly reviewed evidence presented by parties hence the Judgment instead of a Ruling. Further, that all pleadings, evidence and submissions were considered and no error was made by the learned Magistrate. I also disagree with the Respondent that the Appellant should have filed a Counterclaim. It is my view that the burden of proof was upon the Respondent *(Plaintiff)* who sought eviction orders, to prove the proper location of his land and the extent of encroachment by the Appellant.

On the issue of costs, since it is the trial Magistrate who created confusion on whether she was dealing with an application or the main suit, I direct each party to bear their own costs.

In the circumstances, I do find the Appeal merited and will proceed to make the following final orders:

a. The Judgment and Decree of the Honourable B.M. Cheloti – Senior Resident Magistrate delivered on 30th April, 2020 and 14th May, 2020 respectively be and is hereby set aside.

b. This matter should proceed a fresh for hearing before a different Magistrate.

c. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE