



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 14 OF 2020

BENSON NJAGI.....APPELLANT

VERSUS

WILSON MIRITI THAARA.....RESPONDENT

(Being an appeal from the Judgment of Hon. H.N. Ndungu (C.M.)

delivered on 11th July 2018, in Meru CMCC No. 420 OF 2010)

JUDGMENT

1. Through an appeal dated 10.2.2020 the appellant faults the lower court judgment for allowing the suit when there was no sufficient evidence to support it to the required standard; misapplying the intention of the Land Consolidation Act and its purpose and by failing to find the respondent was a total stranger to the land and who only got the land in a fraudulent manner in 2010.
2. This being a first appeal, the court has to rehearse, rehear and re-evaluate the lower court record and come up with its own findings and conclusions bearing in mind the trial court had the benefit of hearing and seeing the witnesses. **See Selle -Vs- Associated Motor Boat Company Ltd., [1968] EA 123.**
3. The respondent as the registered owner of Parcel No. 1389 had sued the appellant as a registered owner of Parcel No. 1985 in Akaiga Adjudication Section for trespass into his parcel, harassment and threats and cultivation thereof. He sought for a permanent injunction restraining any interference with peaceful occupation of his land.
4. The appellant opposed the claim on the basis that the respondent's parcel had been illegally, fraudulently and unlawfully allocated within his parcel, hence was superimposed in collusion with the lands adjudication committee who excised and removed 2.50 acres from his land and gave it to the respondent.
5. Further the appellant averred he was under exclusive occupation of his land since 1975 till 2010 and prayed for the 2.50 acres illegally excised from his parcel to revert to his land.
6. In a reply and defence to counterclaim the respondent denied the alleged collusion or fraud and stated he lacked such powers to excise land as alleged or at all.
7. The respondent testified that the appellant had encroached into and remained on his land hence denying him use of the land since 2010 upon excision of the portion by the land adjudication officers. He told the court that before 2010 the land belonged to the public. He denied perpetuating any alleged fraud and or denied being aware of any claim by one Peter Gitonga over the disputed portion.
8. Further the respondent stated he was not aware the appellant was cultivating 16 acres since 1967. He stated he only got his land in 2004 after it was adjudicated to him and eventually settled there in 2010. The respondent produced a consent letter dated 21.4.2010 a confirmation of ownership together with a sketch map and a letter requesting for the consent as **P exh 1, 2, 3 and 4** respectively.
9. PW2 confirmed he knew the respondent's parcel of land after it was allocated to him in 2004 though initially it was being used by the appellant. He admitted he was a land adjudication committee member then and was aware of the appellant's complaint that his land had been allocated to the respondent. He told the court he could not tell how the appellant had acquired his land prior to the adjudication though the area had not been declared a settlement scheme. He denied the land committee had fraudulently allocated the appellant's land to the respondent.

10. PW3 further told the court the records from the land's office showed the respondent's land was 5.60 acres as at 21.4.2017 while the appellant's was 4.70 acres. He testified the respondent had bought 2 more acres after which the land was beaconsed on 6.4.2010 when the appellant raised an objection. He confirmed issuing the respondent with a confirmation of ownership letter dated 21.4.2010 and which was produced as **P exh 4**.
11. In cross examination PW3 confirmed the appellant had acquired the land either as a gift or purchase and could not tell how the respondent had acquired his land though he denied ever excising any land from the respondent and giving it to the appellant. According to him the register was clear the appellant's land was 4.7 acres. He clarified after the demarcation of the 4.70 acres, the respondent acquired more 5.50 acres from Parcel No. 6444 and 1 acre from Parcel No. 3889.
12. DW1 adopted his witness statement dated 5.8.2011, claimed his land was 6.20 acres as per the copy of the register for existing rights which he produced as **D exh 1** and a confirmation letter to that effect as **D exh 2**. He stated a land adjudication officer had in April, 2010 allegedly allocated the respondent his land as Parcel No. 1389 which he prayed the land reverts to him.
13. In cross examination, DW1 insisted his land was supposed to be 6.20 acres and not 4.70 acres as indicated on the register of existing rights. Further, he told the court prior to the adjudication he was using 10 acres but the land adjudication officer only allocated him 4.70 acres leading to a complaint as per his **D exh 2** which clearly talks of 6.20 acres.
14. DW2 told the court he had settled in the area together with DW1 and that PW1 had settled on his land in 2010 though he had been using the land since 1974. Further, DW2 testified that though PW1 was allocated the land, it was DW1 who was utilizing it together with his family.
15. In cross examination DW2 maintained the respondent had initially come as a visitor, was not aware his land was 5.5 acres and insisted he was present when the respondent was being allocated his land but it belonged to DW1.
16. By written submissions dated 4.10.2021, the appellant submits the respondent had not proved entitlement to a permanent injunction. Secondly, it is submitted the appellant had proved his counterclaim given fraud and illegalities committed by the respondent together with the demarcation officers as can be discerned from the inconsistencies, and discrepancies in the respondent's evidence.
17. To prove fraud, the appellant relies on Court of Appeal holding *George Mbiti Kiebia & Another –vs- Isaya Theuri M'Lintari [2014] eKLR* on the proposition that when or whoever has personal knowledge of a fact and fails to prove or disprove it, the court should rule against such a party.
18. In this case, it is submitted that the respondent failed to disprove fraud by explaining how he acquired his portion and dislodge the notion of illegal and fraudulent acquisition of the land, given there was evidence of use and occupation of the same by the appellant prior to 2010.
19. Third, the appellant submits the court misapprehended the essence and the purpose of land consolidation, adjudication and demarcation at page 120 of the record of appeal contrary to the preamble of the two sets of laws.
20. In essence the appellants submits as the first one in occupation and possession he ought to have been given preference unlike the respondent. He relies on *John Masinde Kanchenja –vs- Land Adjudication Settlement Officer Trans-Nzoia County & 2 Others; Jeremiah Marabu Miyoro (Interested Party) [2021] eKLR* on the proposition that it would be against the principles of governance on equity and transparency under Article 10 of the Constitution to uproot a person in possession in favour of a stranger not in possession and allocate him the land though occupied by someone else. Further reliance on the same point is made on *Charles Opondo Ochieng & 2 Others –vs- Kabarak Farm Ltd & 19 Others County Government of Trans-Nzoia & 7 Others [2021] eKLR* on the proposition that it would be discriminatory to allocate land to new comers against those in occupation.
21. Forth it was submitted the court was wrong to allow the respondent's claim which amounted to a forceful eviction of a lawful occupier as held in *Lucy Kariuki Kirambia –vs- Muthengi M'Mwathi Muthigu & 2 Others [2019] eKLR*.
22. On the part of the respondent by written submission dated 18.10.2021 he submits the suit was filed during the adjudication process, during which the law granted officers powers under the **Land Consolidation Act** to balance the interests of both the existing and new persons lawfully entitled to land, hence there was nothing untoward in the demarcation and adjudication under his name.
23. Secondly it is submitted failure to plead and sue the land adjudication officer over the alleged fraud made the trial court to find and rightly so, the counterclaim was unsustainable.
24. Thirdly the respondent submits on a balance of probabilities, he had proved ownership of the suit land and trespass to his land and which the appellant had admitted and hence the court was right to issue permanent orders of injunction.
25. Fourthly the respondent submits **Sections 15 (2) (a) and 21** of the **Land Consolidation Act** allowed for the relinquishing of land for the need of the community and grants the committee power to consolidate lands and the giving up of areas already occupied for merging.
26. Fifthly it is submitted the decision of a adjudication officer shall be final as well as the record of existing rights as per **Sections 19 and 21** of the **Land Consolidation Act**.
27. On that aspect, it is submitted the trial court did not hold that the law was aimed at depriving people of their land but involves movements of land and consolidation of the same in areas with available space.

28. As regards the issue of respondent being a stranger, it is submitted the land consolidation law allows for translocation of people to areas where there is available land hence it cannot be true the respondent was being given any land by the land adjudication officer purportedly in a fraudulent or illegal scheme.

29. Lastly the respondent urges the court to find no decree appealed against has been attached contrary to **Order 42 rule 13 (4) of Civil Procedure Rules** and relies on *Kenya Cannery Limited –vs- Titus Muiruri Doge. (2006) JELR 105416 and Ndegwa Kamau t/a Sideview Garage –vs- Fredrick Isika Kalumbo [2017] eKLR.*

30. In any event the Constitution allow one to live and own land anywhere in Kenya.

31. As a rejoinder to the lack of a decree appealed against the appellant urges the court to find the omission not-fatal and relies on *Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 6 Others* as well as **Section 19 (1) of the Environment Court Act.**

32. In my view and due to the foregoing, the issues for determination in this appeal are:-

- a) **If the respondent proved his claim on a balance of probabilities.**
- b) **If the appellant had proved his counterclaim on a balance of probabilities.**
- c) **What was the law applicable to the facts of this case?**
- d) **If the trial court misconstrued the facts, evidence and the law hence reaching the wrong decision.**

33. The respondent's claim is based on trespass to and illegal occupation of Parcel No. 1389 Akaiga Adjudication Section pursuant to a consent to seek for eviction orders dated 28.9.2010 and issued under the **Land Consolidation Act Cap 283** and the **Land Adjudication Act Cap 284 Laws of Kenya.**

34. The appellant denied the claim and lodged a counterclaim alleging fraud and prayed for an order that 2.50 acres be excised from Parcel No. 1389 and to be included on his Parcel No. 1985.

35. Even though the land is admitted to have been still under adjudication, the appellant did not produce any consent in line with Sections 29 and 26 of the **Land Adjudication Act** and **Land Consolidation Act** respectively to sue the respondent. See *Jason M'Laichena –vs- Francis Mugambi Likanya & 2 Others [2013] eKLR.*

36. Further the appellant produced no evidence that he had lodged any appeal to the Minister or in the alternative applied in court for judicial review to overturn the decision to excise his portion. See *Bernard Musyimi Mbweli –vs- Musee Mbweli Ngao & 2 Others [2018] eKLR.*

37. The power to ascertain and demarcate trust land under both the **Land Adjudication Act** and **Land Consolidation Act** is donated to the land adjudication officer and the land adjudication committee respectively. The court's powers are supervisory in nature and do not include excising and reversal of adjudicated portions as prayed by the appellant in his counterclaim. See *Tobias Achola Osindi & 13 Others –vs- Cypriano Otieno Ogola & 6 Others.*

38. Additionally the appellant's claim was based on fraud. **Order 2 rules 4 and 10** requires fraud to be specifically pleaded and proved.

39. In *Virjay Morjaria –vs- Nansingh Madhusingh Darbar and Another [2000] eKLR* the court held fraud must be specifically pleaded and particulars stated on the face of the pleadings. Further it was held a fraudulent conduct must be distinctly alleged and distinctly proved and not to be left to the court to be inferred from the facts.

40. Where's the appellant listed particulars of fraud at paragraph 9 of the counterclaim, the respondent in his reply to the defence and defence to counterclaim stated he lacks powers in law to excise land, move the numbers, superimpose the numbers, make any notification to the appellant and or answer on behalf of the committee or the land adjudication officer.

41. The appellant did not produce any or evidence to prove the aforesaid allegations of fraud. **D exh 1** lacked stamps or authentication as to its source and or maker. Further the appellant failed to put any specific questions based on the allegations in the aforesaid paragraph to PW3.

42. Again the appellant did not issue, serve and or seek for a notice to produce any record by the respondent or his witness especially PW3 to help establish any fraudulent conduct on his part or the office for that matter.

43. In *Rosemary Wanjiku Murithi –vs- George Maina Ndinwa [2014] eKLR* the court held that proof of fraud involves questions of fact.

44. In his submission the appellant relying on *Kiebia case* appears to be saying the respondent failed to disapprove the notion of fraud as pleaded. With respect the appellant misunderstood the said holding. The burden of proof under **Sections 107 and 112** of the **Evidence Act** never shifted to the respondent at all.

45. It is the appellant who alleged fraud and hence the burden of proof squarely lay on him. In absence of production of vital documents leading to the creation of 2.50 acres out of the appellant's parcel in favour of the respondent, the oral testimony by DW1 and DW2 fell too short in establishing any fraud. See *Demutilla Nanyamu Pururmu –vs- Salim Mohamed Salim [2021] eKLR.*

46. Turning to the application of the **Land Consolidation Act** and **Land Adjudication Act** the appellant submits the trial court misapplied the law so as to sanction a denial of his land rights which he had occupied since 1974 and granting the same to outsider contrary to the principles of equity, fairness and nondiscrimination under **Article 10** of the **Constitution**.

47. There is no dispute that the **Land Consolidation Act** provides for the ascertainment of rights and interests in and for the consolidation of land in special zones or areas while the **Land Adjudication Act** provides for rights and interests in community land.

48. In ***Peter Kimandiu –vs- Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR*** the court noted the centrality of the land adjudication committee as the primacy decision making organ under **Land Consolidation Act** while the primary organ is the Land Adjudication Officer under the **Land Adjudication Act**.

49. In discussing the role of the adjudication committee, the court stated **Section 11** of the **Land Consolidation Act** mandated the committee to adjudicate upon and determine in accordance with African customary law the claim of any individual person to any right or interest in any land within the adjudication section. The committee if unable to ascertain the claims refers the matter to the arbitration board. The committee also has the responsibility of preparing a record of existing rights under Section 15.

50. It is the same committee which has powers to set aside land to cater for the needs of the community, consolidate different parcels of land to which a land owner is entitled and to create the rights of way.

51. Under **Section 17**, upon completion of the record of existing rights any person named or affected by the aforesaid inaccurate or incomplete may within 60 days lodge an objection. So there are clear stages in which a dispute undergoes before the completion of the adjudication register.

52. **Under Section 26** any person aggrieved by the allocation land as entered in the adjudication register may within 60 days inform the adjudication officer stating grounds of his objection and the adjudication officer shall consider the matter with the committee and may dismiss it or if valid seeks the committee to take action under **Section 21**.

53. **Section 26 (3)** states no appeal shall lie against any decision by the adjudication officer's decision to dismiss an objection or order rectification or to award compensation. Under the **Land Consolidation Act** an appeal does not lie to the Minister as held in ***Joseph Mathita Ikirima Exparte Solomon Mworio Samuel [2020] eKLR***.

54. In the instant case, it is not clear if the appellant lodged his complaint with the adjudication officer in line with Section 26 hereof. He seeks the court to find the excision irregular and order for the land measuring 2, 50 acres to revert to him.

55. The court cannot usurp the powers of land adjudication committee and the land adjudication officer. The court can only play a supervisory role to ensure that the process is carried out within the law. The court can only interpret and determine any point or issue of law that may arise in the course of the adjudication process. See ***Tobia Achola Osindi (Supra)***. See ***Stephen Kirimi M'Rintari –vs- Land Adjudication & Settlement Officer Igembe District & 3 Others [2020] eKLR***.

56. In my view the appellant had not enjoined both the land adjudication officer and the adjudication committee to the suit through a consent to sue duly issued under **Section 26** of the **Land Consolidation Act** hence his claim, if any fatally defective. On the other hand, the respondent had documentary evidence to prove allocation of land in his favour and a consent to sue for eviction of the appellant who had illegally and unlawfully trespassed into his parcel of land. PW2 and PW3 testified in support of the respondent's claim. In my considered view the respondent discharged his burden why he deserved permanent orders of injunction as held in ***Mrao Ltd –vs- First American Bank of Kenya Limited and 2 Others [2003] eKLR and Nguruman Limited -vs- Kenya Civil Aviation Authority & 3 others [2014] eKLR***.

57. The last issue raised by the respondent was the failure to annex a copy of the decree to the record of appeal. Whereas no decree has been attached to the record of appeal, the lower court file had a decree signed on 27.9.2019 and which was collected by the respondent on 30.9.2019.

58. In as much as the same has not been attached to the record of appeal, my finding is that there is no prejudice which has been occasioned to both the court and the respondent.

59. In furtherance of the overriding objectives under **Sections 1A, 1B and 3A** of the **Civil procedure Act** as read together with **Article 159 2 (2)** of the **Constitution** my finding is that the court must always strive for substantive justice especially if no prejudice has been occasioned to opposite party.

60. In view of the foregoing I find the appeal lacks merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

Murango Mwenda for appellant

Gichunge Muthuri for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE