



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 135 OF 2019

KABURU M'MUGIRA.....APPELLANT

VERSUS

DAVID KAGIRI MUGIRA.....RESPONDENT

(Being an appeal from the Judgment of Hon. E.M. Ayuka (S.R.M.) delivered

on 128th November 2019, in Nkubu PM ELC No. 2 OF 2017)

JUDGMENT

1. The appellant seeks to set aside the lower court decree on the grounds that: the claim for trust was allowed without proof; for finding Kshs. 6,500/= to have been paid to purchase the land without any sale agreement; relying solely on the evidence of a built house and approval to reside therein; failed to factor in the appellant's testimony; using the evidence of inheritance by the appellant from his late father to his disadvantage and deny him his rights; ordering a transfer whose implications are to render the appellant homeless and lastly disregarding and or failing to consider the appellant's written submissions.

2. This being a first appeal the court is expected to consider the lower court record and come up with its own findings and conclusions while alive to the fact that the lower court had the advantage of seeing and hearing the witnesses. **See Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123.**

PLEADINGS

3. Through an amended plaint dated 26.2.2017, the respondent had sued the appellant as an elder brother for holding **Parcel No. Abogeta/Nkachie/2010** in trust upon sending him monies to buy the land on his behalf. He sought for the declaration of the trust, an order for the subdivision and transfer of the share to him.

4. By an amended defence dated 8.5.2019 the appellant claimed he genuinely owned the suit land out of which 2 acres is ancestral land. He averred he purchased four acres from one Joseph Kanoro Mburu out of his earnings as a casual labourer. He denied ever receiving monies from the respondent to purchase some land for him. He stated he built a house for the respondent since the one he was entitled to was far away. He nevertheless admitted he allowed the respondent to live on his own land after he was evicted from the original family land.

EVIDENCE

5. PW1 adopted his witness statement dated 27.7.2017, claimed he lived away from home due to work but would occasionally send his brother money to purchase land on top of the two acres he had acquired from his parents.

6. Further he testified the suit land was approximately 7.8 acres. Out of the monies he sent, PW1 told the court the appellant built for him a house over and above the purchase of additional land.

7. PW2 a neighbor and a one time employee of the lands office told the court the appellant had approached him to build a house for the respondent on the land he had bought from one Kanoro through monies sent to him for that purpose. He confirmed they built the house to which the respondent came and occupied.

8. In cross examination PW2 confirmed he was present during the whole exercise of the purchase and construction.

9. PW3 as the eldest brother of the parties, confirmed the respondent had sent money to the appellant for the land purchase and construction. He adopted his witness statement made on 2.7.2019. He told the court they shared his late father's estate among themselves. He explained the monies would reach the appellant through a messenger one Geoffrey M'Thinji.
10. DW1 adopted his witness statements dated 8.5.2019 and 6.6.2019 respectively. He testified his land was approximately 6.84 acres which he had duly acquired in 1975. He insisted he bought 4.86 acres from one Kanoro and the rest was his ancestral share. He produced a copy of the search as **D exh 1**.
11. In cross examination DW1 confirmed PW3 as his elder brother allocated him 2 acres of the ancestral land. He insisted PW2 had lied to court since he was the one who bought the land out of his own savings.
12. DW2 adopted his witness statement dated 6.6.2019 and confirmed their senior chief had presided over the land dispute between the parties in which he and ordered the respondent to vacate the land.
13. The above being the evidence used by the lower court to reach the decision the appellant has challenged the same through this appeal and with leave made written submissions dated 28.4.2021.
14. Firstly it is the appellant's submission there was no common intention between the parties toward buying any land for the respondent and that none was proved in evidence as held in **Joel Musembi Kithuku –vs- Bernadet Mbatha & Another [2017] eKLR.**
15. Secondly it is submitted the respondent had not established through evidence sending Kshs. 6,500/= for a purchase of land.
16. Thirdly it is submitted the trial court proceeded on the wrong principles of law, admitted hearsay evidence and failed to consider the respondent lacked financial independence at the alleged time, and that the appellant had merely extended generosity over his young brother who has now turned tables on him by wanting to reap where he had not sowed, yet he had his own inheritance.
17. Further it is submitted the court went outside the law by allowing a claim beyond what was pleaded and proved in total disregard of the appellant's evidence, submissions and the law as per **Section 109 of the Evidence Act**.
18. On the other hand the respondent filed his submissions dated 16.6.2021 outside timelines. He submits no evidence was led that Parcel No. 211 was inherited land.
19. Secondly the respondent submits evidence of an existence of trust was duly produced by his witnesses who were consistent as to his remittances, purchase and the eventual construction of a house. This in his view was out of good and mutual respect as brothers, while away working in Mombasa.
20. Further the respondent submits the trial court's decision was fair and sound based on pleadings and evidence and took into account all relevant factors and hence ought to be confirmed.
21. Having read through the pleadings, evidence on record, the appeal and submissions by respective parties, what turns out to be the issues for determination is whether the trial court followed the law on trust in reaching the decision and two if the judgment herein ought to be set aside.
22. The law on customary trust has been settled by Supreme Court of Kenya in **Isack M'Inanga Kiebia –vs- Isaya Theuri M'Lintari & another [2015] eKLR.** The court held trust may take several forms and a court must make a determination on the basis of evidence and the intention of the parties.
23. The elements to qualify a claimant as a trustee were set out as: land in question was before registration family, clan or group land; the claimant belongs to the family, clan or group; the relationship of the claimant to the family is not remote; the claimant would have been entitled to be registered as a owner but for some intervening circumstances and lastly the claimant is directed against the registered proprietor who is a member of the family.
24. There is no dispute **Parcel No. Abogeta/Nkachie/2010** was issued a title deed on 18.4.1977 in the name of the appellant as per his **D exh 1. D exh 2** indicates that the appellant became a registered owner on 24.5.1975.
25. The appellant at paragraph 7 of the amended defence admits two acres of his land was ancestral land while 4 acres was the land he had bought from one Joseph Kanoro Mburu in 1968. Neither the appellant nor the respondent called the vendor to come and shed any light on who exactly bought land from him among the two. The respondent testified he used to send the money between 1962 and 1972. This was before the land was registered in the name of the appellant. Both parties state they got shares out of the ancestral land though it is not clear when this was done.
26. Whereas the appellant pleaded he bought the part of the suit land from one Joseph Kanoro Mburu in 1968, his testimony in court talked of 1975 while in his supporting sworn on 30.1.2018 he mentions the year of purchase as 1977 and stated the seller's wife was still alive. The evidence on the dates of purchase was contradictory.
27. As as regards the construction of a house and the consent to construct a house and allow the respondent to continue living on his land, at paragraph 12 of the amended defence, the appellant admits those facts though he alleged it was because the respondent had been evicted from his original land by PW3. The appellant did not put any questions to that effect when his elder brother PW3 testified.

28. On the contrary PW3 was consistent he shared out the ancestral land to both the appellant and the respondent part of it being the two acres registered in the name of the appellant.
29. Further PW3 confirmed monies were being sent by the respondent through a recognized agent one M'ithinji Geoffrey. The appellant did not put any questions to PW3 that he was either lying, being biased and or favouring the respondent.
30. The appellant admitted the respondent had occupied his land and continued to live there since 1978 or thereabouts. He could not however explain on what terms and for how long he was going to allow the respondent to live on his land.
31. Whereas in paragraph 5 of the supporting affidavit sworn on 30.1.2018, the appellant stated he had tried to amicably resolve the issue through village elders and who ordered the respondent to vacate the land, the amended defence, witness statement, testimony in court and submissions did not include a request for vacant possession and or eviction from the suit land. The appellant did not term the respondent as a licensee or trespasser at all. The only inference is that he knows and acknowledges that the respondent has rights to use and occupy the suit land.
32. In my considered view the testimony by the respondent's witnesses was that the land was acquired under customary law and which rights were not extinguished upon the registration in 1975 in favour of the appellant under **Section 28, 30 and 126 (1) Registration Land Act** now repealed by **Land Registration Act**.
33. In my view and in the absence of any notice to vacate, it cannot be said the respondent has been living on the at the mercy of the appellant as a licensee as held in *Kangi –vs- Muthiora [1984] KLR 712, Chogera –vs- Marin Wanjiru Kimani & 2 Others [2005] eKLR, Mbui Mukunga –vs- Gerald Mutwiri Mbui [2004] eKLR, Gathiba –vs- Gathiba [2001] 2 E.A 342.*
34. As regards the standard of prove in trust, the Supreme Court of Kenya in *Isaack M'Inianga Kiebia –vs- Isaya Theuri M'Lintari & Another [2018] eKLR*, held the question of possession and use of land is one fact to be proved on a balance of probabilities. The respondent's evidence was that he has been in occupation and possession of suit land with the full knowledge and approval of the appellant.
35. Further the appellant admitted he constructed the house on the suit land for the respondent. PW2 confirmed undertaking the construction. The appellant has admitted 2 acres of his land is ancestral land and was so prior to registration under his name.
36. Looking at the totality of the evidence the respondent proved both actual, physical possession and occupation of the suit land. **See *Monica Mukulu Muteti –vs- Mutava Maingi [2019] eKLR***. The lower court therefore reached a correct decision based on the facts, evidence and law.
37. I find the appeal lacking 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:

Kiruai for the appellant

Kaai Mugambi for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE