



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 02 OF 2020

ISAAC RUTEERE.....APPELLANT

VERSUS

JOHN BUNDI (Suing as the legal representative of

The estate of MANYARA MBOROKI..... RESPONDENT

ERASTUS NKUMBU KAIMENYI (Suing on Behalf of

Christ Worship Centre International..... 2ND RESPONDENT

Being an appeal from the Judgment of Hon. S. Abuya (S.P.M.) delivered on 27th November, 2019, in Meru CMELC No. 17 of 2017)

JUDGMENT

1. By an appeal dated **8.6.2020** the appellant faults the lower court decree for not considering the facts, evidence and law; reaching to the wrong conclusions on both facts and law and lastly leading to denial of justice in his favor.
2. This being the first appeal, the court is supposed to rehear, rehearse and re-evaluate the entire file, come up with its own findings, and conclusions while aware the lower court had the benefit of seeing the witnesses as held in ***Selle and another –vs- Associated Motor Boat Company Ltd and others [1968] 1 EA123.***
3. At the lower court the appellant was sued by the respondents as representatives of the estate of the late **Manyara Mboroki** over **Parcel No. L.R Ntima/Igoki/3473** together with **Fredrick Kinoti M’Mwongo & Erastus Nkumbu Kaimenyi** suing on behalf of Church Worship Centre International as the 2nd plaintiff for trespass and illegal construction. They sought for general/special damages and a permanent injunction restraining the respondents from interfering with the suit property.
4. The appellant denied the claim alleging a purchaser right since 1976 and raised a preliminary objection as to the capacity to sue and transfer land in Absence of for grant of letters of administration.
5. With leave parties complied with **Order 11**, filed case summaries, issues for determination dated 11.6.2018 and 7.6.2018 respectively.
6. The plaint was amended on **3.7.2019** to include particulars of special damages of **Kshs. 108,000/=** but the prayer was not amended to include the sum.
7. A defence to the amended plaint was filed dated 12.7.2019, admitted the land belonged to the estate of the deceased, stated the 2nd plaintiff started inferring with the land in August in 2017 but was told by the authorities to keep off.
8. **PW1 (1st respondent)** adopted his witness statement made on 9.10.2019 and produced his list of documents being an **OB entry, copy of the grant, copy of a search** and an **agricultural officer’s assessment report** as **P exh 1 – 5** respectively.
9. In **cross examination PW1** denied the respondent the alleged sold sale, admitted the land had been subdivided into **Parcel Nos . 3472 and 3473**, part of which was sold by his father and not to the the respondent, denied knowledge of the alleged citation, claimed he was unaware of any developments on the land by the 1st appellant and admitted he was assisted by the 2nd respondent to lodge a succession cause to which he gave them the land to occupy though the land was still in the name of his deceased father.
10. He told the court he Had no objection the church remaining on the land, which they had been occupying since **March 2017**. The witness said after his father sold a portion to one Edward what remained was approximately **¾ of an acre**.

11. **PW2** a representative of the 2nd respondent adopted his witness statement dated 9.10.2017.
12. In **cross examination** he told the court he had been on the land since 2017 and the appellant had allegedly damaged crops and trees as per agricultural officer's report.
13. Regarding ownership, PW2 confirmed going to the lands office wherein he found the land bore the name of PW1's late father and that upon request the church helped PW1 file a succession cause since he lives far away in Narumoru. PW2 testified they had built on the suit land while guarding it on behalf of PW1. PW2 stated someone had come without notice, cut down mango and avocado trees, denied he was aware of any purchase by the defendant but admitted being summoned by the area chief at the instance of the defendant.
14. In **re-examination PW2** claimed nobody had objected to their possession and were on the land courtesy of the family of PW1. He insisted there was crop damage but did not know who had occasioned it.
15. DW1 adopted his witness statement made on 31.5.2018 produced **D exh 1** a sale agreement, a receipt acknowledging payment as **D exh 2** and maintained he bought the land in 1972 from PW1 father and had been in occupation throughout and planted mango and avocado trees.
16. He testified he bought one acre though the deceased did not transfer the land to him leading to a citation **No. 26 of 2017**. He was not sure if the succession cause had been filed by the children of the deceased.
17. DW1 admitted it was his son who had cut down the trees and had lived on the land for 42 years with no complaint from PW1 who had moved to Narumoru.
18. In **cross-examination DW1** stated he had no title to the land, was unaware if was supposed to obtain a land control board consent, admitted the church was using the land though he had his items or structures on the land, claimed the plaintiff wanted to evict him since the church was likely to pay more money for the land, and that the church forcefully evicted him from the land while at the same time inflicting injuries to his son. DW1 stated he had not doubted the deceased would ever breach their agreement.
19. **DW2** adopted his witness statement dated 5.6.2018, claimed to be a neighbor to the land and hence knew DW1 from 1976 after he bought the Suitland and though he did not witness **D exh 1**. He claimed DW1 had built a timber structure on the land where he lived with his family. He testified both the church and the defendant were using the land though his land was almost a half kilometer away.
20. In **re-examination DW2** stated DW1 had bought another land more than 1 ½ kilometers from the suit land where he had built. He claimed he was not aware how the church occupied his land.
21. Both parties have put in written submissions date 26.10.2019 and 9.10.2019 respectively.
22. The appellant urges the court to find the trial court got the facts, evidence and law wrong hence arriving at the wrong conclusions. Based on submissions dated 27.10.2021 the appellant urges the court to find the trial court to have proceeded on a wrong motion and that failure to obtain a consent from the land control board within 6 months had rendered the agreement invalid.
23. Further, it is submitted a limited grant could not give the 1st respondent the power to dispose of the estate to the 2nd respondent. The appellant further submits he was an innocent purchaser hence the court was wrong to find him a trespasser even after finding the 2nd respondent could not possibly transfer the land for lack of a full grant.
24. On the other hand, the respondents submit there was no valid agreement or transfer of the suitland to the appellant, the court gave proper interpretation of the law on the issues before it as held in ***Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR*** and in ***Re Estate of Paul M'Maria (deceased) [2017] eKLR*** and further submit in the absence of a consent under Section 6 of the **Land Control Act**, the sale was invalid.
25. Regarding the occupation by the 2nd respondents, it is submitted they did not claim any purchaser's rights and hence the appellants submissions are unfounded. They rely on **Section 120** of the Evidence Act on the doctrine of estoppel.
26. Having gone through the grounds of appeal and submissions by the parties the issues for determination are whether there was a valid agreement between the deceased and the appellant and secondly the status of the 1st and second respondent's relationship over the suit land.
27. It is trite law parties are bound by their pleadings and issues flow from pleadings. The respondents framed three issues namely: registration of **Parcel No. Ntima/Igoki/3473**, if consent from the land control board was obtained in 6 months and if the plaintiffs were entitled to the orders sought.
28. The appellant framed 10 issues namely: if he bought the land from the deceased, if it was transferred to him, if there was any dispute over the sale, if the defendants took possession, occupied and developed the land, if the 1st respondent had authority to sell to the 2nd respondent, if the 2nd respondent erected a pit latrine on the appellant's land and continued harvesting proceeds thereof 2017, destroyed the proceeds, beat up his son and removed the fence poles and the barbed wire.
29. While the appellant produced **D exh 1** the same was not in a language known to the court especially page 2 thereof. There was no English translation. Further no witnesses were called to testify as to the sale. He who alleges must prove. The onus was on the appellant to lead evidence that he was validly sold the suit land by the deceased and if the said agreement was still enforceable in law.

30. Similarly the defence did not plead any constructive trust or possessory rights. There was no counterclaim for the land based on any sale, occupation, possession and trust.
31. The appellant's advocates who drew the sale agreement were not called as witnesses to address the court on the contents of page 2 of the agreement and confirm if the purchase amount was fully paid. The appellant did not produce any consent from the land control board and or for that matter a duly signed consent to transfer land to him by the deceased
32. The issue of the consent was a condition precedent to the transaction. The appellant was unable to procure it on time or at all in line with **Section 6** of the **Land Control Act**.
33. Coming to the relationship of the respondents, PW1 and PW2 did not allude to any sale or transfer of the suit land. PW2 was emphatic that they had been licensed by the family of the deceased to occupy the land and take care of it.
34. The trial court established the 2nd respondent was lawfully on the land but could not assert any purchaser rights. There is no bar in law to occupy land of a deceased person with consent of the family with or without purchaser rights.
35. In cross examination the appellant admitted he had vacated the suit land with effect March 2017. If indeed he had any objection to the same there was no evidence tendered that he complained to any institution so as to assert any purchaser's rights. Even after he was sued by the respondent's, the appellant did not raise any claim over illegal occupation or dis-possession by the 2nd respondent.
36. Similarly, there were no pleadings over destruction of the appellant's items brought against the 2nd respondent and for that matter a counterclaim for damages and or restoration to the suit land.
37. Further the appellant did not plead or lead evidence in support of a claim for the enforcement of the sale agreement and for declaration orders to be deemed as a bonafide purchaser for value of the suit land.
38. In my considered view, submissions however strong in support of a proposition not based on pleadings cannot stand in an adversarial system such as ours. A party must define his claim through known pleadings and serve them upon the opposite party, after which evidence shall be tendered in support of the r assertions.
39. In the instant case the trial court isolated eight issues out of the fourteen issues set out by the parties and went on to decide on each of them.
40. The court established that the respondents had only succeeded in one prayer pending the filing of a succession cause in respect of the estate of the deceased.
41. The respondents had admitted there was no full grant of letters of administration and that the succession proceedings were pending before court
42. The trial court issued orders p within its jurisdiction in line with Sections 1A,1B and 3A the Civil Procedure Act and while awaiting the full distribution of the estate of the deceased.
43. Looking at all the above circumstances, my considered view therefore is the appeal herein lacks merits.

The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Orimbo for appellant

Aketch for respondents – absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE