



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 8 OF 2018

GOEFFREY KIREMA M'INDIERA.....PLAINTIFF

VERSUS

M'TURUCHUI M'MWITHIGA.....DEFENDANT

(Being an appeal from the judgement of the Hon.S.A.Abuya

(SPM) delivered on 28/2/2018 in Meru CM ELC No 1 of 2017 judgement)

JUDGMENT

1. The appellant herein was the plaintiff in the subordinate court's case No.CM ELC 1 of 2017 where he filed the plaint on 24/10/2017 against the defendant alleging that he was the owner of land parcel No. Ntima/Igoki/221 (the suit land) which had been transferred upon by the defendant. The plaintiff had therefore sought the following orders:

I) Mesne profit and general damages.

II) A permanent injunction restraining the defendant, his servants and agents from trespassing upon the plaintiff's parcel of land L.R Ntima/Igoki/221.

III) Costs of the suit and interest.

2. The suit was not defended and the matter proceeded for formal proof.

3. During the trial, the plaintiff testified that he sued the defendant because the later had trespassed on his land No.Ntima/Igoki/221. Defendant's land borders the suit land.

4. In support of his case, the plaintiff had produced the following documents:

i) The ruling in Meru Misc. app No 69 of 2017 granting the plaintiff leave to file suit out of time.

ii) A map.

iii) Green cards for parcels Nos. 173, 324 and 221.

5. Judgement was delivered on 28/2/2018 whereby plaintiffs suit was dismissed as plaintiff did not prove that he was the owner of the suit land Ntima/Igoki/221 hence this appeal.

6. In the memorandum of appeal filed on 28.3.18 the appellant has raised 3 grounds which are; That the learned trial magistrate erred in law and fact by dismissing the suit, That the learned trial magistrate erred in law and fact by misconstruing the facts and evidence tendered and therefore arrived at a wrong decision and that the judgement was against the weight of evidence tendered.

7. I note that though respondent did not defend the suit in the lower court case, he has fully participated in this suit without any objection from the appellant. In the circumstances and keeping in mind that justice shall be done without undue regard to procedural technicalities, I will proceed to consider the arguments raised by the respondent too.

8. This being a first appeal, it is the duty of this court to re-evaluate the evidence, assess it and make its own conclusions but remembering that it neither saw, nor heard the witness and making allowances for that- See **Selle vs Associated motor boat company Ltd (1969) EA 123.**

9. I have carefully considered the record and the submission of the parties. I will deal with all the three grounds together.

10. The appellant submitted that him and respondent are from the same clan whereby the land was registered in the name of the father of the respondent but each party was in occupation of a definite portion of land. The appellant cited the provisions of section 30 of the Registered Lands Act (repealed) and section 28 (b) of the Land Registration Act to buttress the point that a customary trust existed which the magistrate failed to take cognizance of. The appellant cited the cases of **Kanyi vs Muthiora (1984) KLR 712 and the case of Gathiba vs Gathiba Nairobi HCCC NO 1647 OF 1984** to buttress his averments.

11. I find it necessary to reproduce the opening content of the appellant's testimony where he stated thus:-

“I am Geoffrey Kirema M’Ndiera. I live in Ruiri. I am a farmer. My land is L.R No Ntima/Igoki /221. I sued defendant as he trespassed into my land L.R No Ntima/Igoki.221. His land borders mine.....”

12. Nowhere in his pleadings and during the trial was the appellant claiming the suit land on the basis of a customary trust. In the **Court of Appeal Case No.219 of 2013 Nairobi, Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mate and 3 others**, the court stated that:

“parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”

13. The trial magistrate was certainly not expected to determine the issue of customary trust when the same had not been raised by the appellant.

14. It is also not lost to this court that the appellant never challenged the registration of the land Ntima/Igoki/221 which land was registered in the name of the respondent since 4/4/2000 as per the green card produced by the appellant as plaintiff Exh 5.

15. Perhaps the appellant had believed that his case would be allowed as the respondent had not defended the suit. In his testimony, he stated that;

“I want court to give me my land as the defendant failed to file a defence and attend court.....”

16. In the case of **Rosaline Mary Kahumbu vs. National bank of Kenya ltd HCCC (2014) EKLR, Havelock J** cited the case of **Samson S. Maitai and another vs African safari club ltd and another (2010) eKLR** where Emukule J had observed as follows on matters formal proof;

“I have not seen judicial definition of the phrase formal proof..... Proof is that which leads to a conviction on to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfied the court into the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute....”

17. I am therefore in agreement with the submissions of the respondent that appellant did not comply with the provisions of **section 107 of the evidence Act** where it is stipulated that;

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

18. The fact that the matter had proceeded for formal proof did not in any way discharge the burden of proof placed upon the appellant to prove that he owned the suit land.

19. All in all, I conclude that the trial magistrate considered all the issues raised before her and that she arrived at a correct finding. This appeal is therefore dismissed with costs to the respondent (in the appeal).

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22ND JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Ayub for defendant/respondent

Kaimba for appellant

Appellant

Respondent

HON. LUCY. N. MBUGUA

