



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAORK

ELC APPEAL NO. 2 OF 2018

JAMES KIMANI KIHARA.....1ST APPELLANT

KENNETH OBURU BICHANGE.....2ND APPELLANT

JOSEPH T. LANKE.....3RD APPELLANT

JOHN MAINA.....4TH APPELLANT

VINCENT KONANA YIAPAN.....5TH APPELLANT

LAMECH NYAMGEMA OMABIA.....6TH APPELLANT

GODFREY NASSER OLE MANTA.....7TH APPELLANT

-VERSUS-

JOSEPH THUKU KIMANI.....APPLICANT

JUDGEMENT

This is an appeal arising from the Judgement of Hon. A.K. Ithuku delivered on 26th January, 2016 in which the Appellants in the Memorandum of Appeal have raised 10 grounds of Appeal namely: -

1. That the learned Magistrate erred in law and fact in refusing to take into account the report by the District Land Registrar which states that Plot No. 275 which is what was sub-divided, occupies its position and that of Plot No. 274 and not 273.
2. That the learned Magistrate fatally misconceived the facts by stating that the report dated 1/11/12 stated that Plot No. 275 was completely displaced on the land while in fact both reports dated 2/2/11 and 19/10/12 state that it is plot No. 273 which is completely displaced.
3. That the learned magistrate erred in law and facts by failing to take into account the inconsistency in the reports dated 2/2/11, 19/10/12 and the report on implementation dated 4/4/13.
4. That the learned Magistrate erred in law and fact in failing to consider that the Plaintiff/Applicant had no locus standi to apply for the eviction of the Defendants/Respondents from Plot No. 274 as he lacks legal and equitable claim over the parcel of land.
5. That the learned Magistrate erred in law and fact in failing to consider that the Defendants were 3rd parties who had bought the said parcels in good faith and had valid titles to the land.
6. That the learned Magistrate erred in law and fact in failing to consider that some of the defendants had been in possession of the contested parcels of land for over 20 (twenty) years and had erected permanent structures thereon.
7. That the learned Magistrate erred by failing to take into account that the Plaintiff had facilitated the settling of the defendants into the claimed land by supplying them with construction materials at the land which he now claims ownership.
8. That the learned Magistrate erred in law and fact in proceeding to give judgement without the Defendants ever being notified of the hearing dates, after the withdrawal of their appointed advocate, either personally or through their agent.

9. That the learned Magistrate erred in law by delivering judgement without hearing the evidence from the defendants.

10. That the learned Magistrate erred in law by failing to accord the defendants their constitutional right as provided for under article 50 (1) of the Constitution.

It is the Appellants contention that the learned Magistrate had failed to take into account the report of the land registrar which stated that land parcel No.275 which was sub divided occupies the position of 274 and 273 and further that the learned Magistrate has failed to consider inconsistencies in various reports dated 2/2/11, 19/10/12 and an implementation report dated 4/3/13.

The Appellants had also taken issues on the proceedings and judgement being delivered in their absence when hearing dates were taken subsequent to the withdrawal of the advocates who acted for them.

The Appeal was disposed off by way of written submissions and both parties have filed their submissions.

The Appellants in their submissions have stated that the Plaintiff in the court and 2 other witnesses testified and after the Defendant (Appellant) failed to attend court the suit proceeded in their absence. They stated that it was the conduct of their advocates which compromised them even though an application to cease acting by the Appellants Advocate was allowed they were never served and for the said reasons they suffered for the mistakes of their counsel.

The Appellants contend the actions of their advocates made them not to tender their evidence and hence the suit can be said to have been determined on merit.

The Appellants further contended that they were third parties who had purchased the land and they bought the same from others after a sub division and that they had acquired the property in good faith.

The Appellants in their submissions stated that they have been in possession of the suit land since 1992 and thus have a claim of adverse possession and the possession of the same has been continuous and without interruptions and also that the Plaintiff had no locus standi at the time the suit was instituted as the subject land was owned by John T. Ole Maalaso and not the Plaintiff and consequent he lacked the capacity to file suit and seek the orders made in the judgement.

Lastly the Appellant contended that the suit land which is Cis Mara/Oleleshwa/275 ceased to exist the same having been sub divided.

The Respondent in his response contended that contrary to the assertion by the Appellants on the question of locus standi the respondent/plaintiff was the registered owner of the suit land and he tendered evidence in court to demonstrate the same a fact that was not controverted by the appellants.

The Respondents on the issue of representation contend that the appellants were represented by a counsel from the beginning to the end of the suit.

I have considered the memorandum of appeal and the submissions made by counsel for the parties. This is an appeal for the dismissal of the Magistrate's Court Narok decision in respect of land parcel 275. From the record of appeal, it is evident that the suit herein proceeded for hearing on 13/12/14 in which 3 witnesses had testified including the Plaintiff, Respondent and 2 others. The Plaintiff in his evidence in chief stated that he was the registered owner of land parcels Cis Mara/Oleleshwa/272 and 275. He tendered a copy of the title and was cross examined by the advocate for the appellants. At this stage, the respondent had tendered his title to the land and the appellants did not challenge this and thus I find the grounds that the respondent did not have locus standi is an afterthought.

On whether the Appellants were accorded a hearing from the record it is clear that they were represented by an advocate. From where the suit was filed till when their advocate had filed a notice to cease acting on 26/6/14 on 10/7/14 the appellants advocate still continued to appear for them despite an application to cease acting until 18/9/14 when the advocates were formally released from acting and the court directed that the appellant be served.

On 13/5/15 the matter was for defence hearing and when the defendant's advocates failed to appear and the magistrate satisfied himself that they were served he stated that the defendant though served were absent and hence marked the case as closed.

From the above it is clear that the appellants had knowledge that the case will proceed for hearing and they choose not to attend court for whatever reasons. I have looked at the affidavit of service and it is clear that they accepted service and had not received same under any protest. Even though the appellants blame their advocates it must be borne in mind that cases are for the parties and not the advocates. There is a duty on them to follow up on their cases and know what is their status. The appellants did not even attempt to find out from their advocates.

Having considered the submissions, I find that the instant appeal lacks merit and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **24TH** day of **FEBRUARY, 2020**.

Mohammed Kullow

Judge

24/2/2020

In the presence of: -

CA:Chuma/Kimiriny

Mr Kiptoo for the respondent

Ms Namunyak N/A for the Appellants

Mohammed Kullow

Judge

24/2/2020