



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 4 OF 2017

JOHNSON MUNYWELA KITETU.....APPELLANT

VERSUS

THE HON. ATTORNEY GENERALRESPONDENT

(Being an Appeal from the Judgment and Decree of Chief Magistrate's Court at Kitui in Civil Case No. 567 of 2008 delivered on 1st March, 2017 by Hon. B.M. Kimemia, Principal Magistrate)

JUDGMENT

1. In his Judgment dated 1st March, 2017, the learned Magistrate dismissed the Appellant's Plaintiff. The Appellant has challenged the decision of the learned Magistrate on the ground that the Magistrate made her decision on the basis of a non-existent Plaintiff; that the Magistrate failed to appreciate that the issue before her was the wrongful implementation of the Minister's decision by the Land Registrar and that the Appellant's evidence was never controverted by the Respondent.
2. The Appeal proceeded by way of written submissions. In his submissions, the Appellant's advocate submitted that an Amended Plaintiff was filed in the lower court; that in her Judgment, the learned Magistrate based her findings on the original Plaintiff which was no-existent and that the impugned Judgment was based on a non-existent Plaintiff.
3. Counsel submitted that before the trial court was an issue concerning the implementation of a decision made by the Minister for Lands; that the order of the Special District Commissioner was clear that what was in dispute was portion of land number 342 and that the entire land was not in dispute.
4. Counsel submitted that the land to be registered in the name of Mumo Masila was parcel number 343 and not 342 and that the Land Registrar, Kitui, acting on wrong directions by the Chief Land Registrar, proceeded to register parcel number 342 in the name of Mumo Masila on 16th March, 1988.
5. Counsel submitted that the Special District Commissioner in resolving the dispute over a portion of land parcel number 342 made a contradictory Judgment; that the errors of the District Commissioner led to the detriment of the Appellant who as a result unlawfully and illegally lost his land; that the error was committed by the adjudicating bodies and not the owners of the land and that when an error is committed, the remedy lies under Section 80(1) of the Land Registration Act.
6. This being a first Appeal, this court is obligated to review the pleadings that were filed by the parties in the lower court and the evidence that was tendered, and arrive at its own conclusions.
7. The suit in the lower court was commenced by way of a Plaintiff dated 21st October, 2008 which was filed on the same day. The Plaintiff was amended on 16th August, 2013 and filed on the same day. The only Defendant in the Plaintiff was the Respondent herein.
8. In the amended Plaintiff, the Appellant pleaded that during the land adjudication process, a portion of parcel of land number Kyangwithya/Misewani/342, which was owned by the Appellant, was in dispute; that the dispute was heard by the Minister's representative and that when the Minister's decision was being implemented, the entire parcel number 342 was registered in the name of Mumo Masila contrary to the decision of the Minister.
9. In the Plaintiff, the Appellant prayed for an order that the land's register be rectified and have parcel number Kyangwithya/Misewani/342 be registered in the names of the legal representative of the deceased Plaintiff as the absolute proprietor.
10. The Attorney General filed a Defence and denied the averments of the Appellant. In addition, the Respondent averred that the court's

jurisdiction is limited to striking out the suit because it did not have jurisdiction.

11. At trial, the Appellant, PW1, informed the court that during adjudication, parcel of land number 342 was issued to his father; that during the adjudication, there was a dispute in respect to a portion of parcel number 342 claimed by Mumo Masila and that the Minister of Land determined that issue.

12. According to PW1, the letter that was forwarded to the Registrar of Lands did not represent the decision of the Minister and that the Registrar of Lands registered the entire parcel of land number 342 in the name of Mumo Masila. The Respondent did not tender evidence in the lower court.

13. In his Judgment, the learned Magistrate made the following findings:

“In particular to the written report by the District Land Registrar P. Exh.14, it’s clear that there were inconclusive findings in the Land Parcel 342 and 343. The decisions are not clear even though the Plaintiff claims it was just an error on the findings. The person registered in land parcel 342 Mumo Masila has not been enjoined in the suit hence no orders can be made against a person who is not a party in the suit. The Plaintiff’s claim for a declaration has not therefore been proved on a balance of probabilities since this is not just an issue of rectification of an error but there is no clear decision to be implemented hence no orders can issue.”

14. The Appellant produced a copy of the official search showing that parcel of land known as Kyangwithya/Misewani/342 was registered in favour of Mumo Masila on 16th March, 1988. The registration of the said land in the name of Mumo Masila was done pursuant to the letter of the Chief Land Registrar addressed to the Land Registrar, Kitui. The said letter is dated 4th February, 1988.

15. In the said letter, the Chief Land Registrar informed the District Land Registrar that *“the Minister has decided that the land comprised in the above mentioned title should be registered in the name of Mumo Masila”*.

16. Despite the entire land having been registered in the name of Mumo Masila on 16th March, 1988, the Appellant has not informed the court why he did not join the said Mumo Masila in the proceedings in the lower court. Indeed, and as correctly held by the learned Magistrate, an order of rectification of title could not issue without joining the registered proprietor of the land in the suit. The suit was therefore bound to fail on that ground alone.

17. I have perused the decision of the Special District Commissioner, Kitui dated 19th December, 1985. In his findings, the District Commissioner stated as follows:

“The Appellant has convinced the court that the land in dispute was his property when the court viewed the land it was convinced that the Appellant’s claim was genuine and he had a right on the land. The land will therefore be restored to Parcel No. 343 as property of Mumo Masila. Evidence given has proved the land in dispute is the property of the Appellant”.

18. It is true that the District Commissioner made an order in respect of parcel number 343 and not parcel number 342. Indeed, in his findings, the District Commissioner stated that the Respondent was only claiming a portion of 343 which belonged to the Appellant. The District Commissioner concluded that the portion that the Respondent was claiming actually belonged to the Appellant. However, the issue of the disputed portion that was to be included in portion number 343 was never dealt with in the Judgment of the District Commissioner.

19. The error that emanated from the decision of the District Commissioner should have been a basis for an Appeal in the High Court or Judicial Review. The lower court could not have rectified the title because it had no jurisdiction to deal with the anomaly created by the decision of the District Commissioner. Indeed, the lower court could not have rectified the register of parcel of land numbers 342 or 343 due to the lack of clarity of the said decision.

20. The failure by the Appellant to join Mumo Masila in the proceedings in the lower court, and the failure by the Appellant to file an Appeal or a Judicial Review Application in respect to the decision of the District Commissioner renders the current Appeal a non-starter.

21. For those reasons, I dismiss the Appellant’s Appeal with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE