



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 161 OF 1999

KIMANZI KIENYI.....APPELLANT

VERSUS

SAMSON MUTUNGA MUTHELA.....RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate's Court

at Kitui in Civil Case No. 47 of 1999 delivered on 19th October, 1999 by

Hon. K.O. Ogola, Resident Magistrate)

JUDGMENT

1. This Appeal arose from the Judgment of Honourable K.O. Ogola dated 19th October, 1999. In the said Judgment, the learned Magistrate directed the Appellant to give vacant possession of parcel of land known as Mutonguni/Kauwi/79 and for an order of eviction of the Appellant from the said land.
2. In his Memorandum of Appeal, the Appellant averred that the learned Magistrate erred by relying entirely on the facts which were not part of the Plaintiff; that the learned Magistrate manifested bias against the Appellant and that the learned Magistrate's decision was based on conjecture, hypothesis and wrong principles of law.
3. The Appellant finally averred that the Magistrate erred by relying on the Sale Agreement, which was a departure from the Plaintiff and that it is only the Land Registrar or the Land Adjudication Officer who could identify the disputed parcel of land on the ground.
4. The Appeal proceeded by way of writing.
5. The Appellant's advocate submitted that the parcel of land that was sold was indicated in the Agreement to be Mutonguni/Kauwi/81 which was corrected by the consent of the Appellant and the Respondent to read Mutonguni/Kauwi/79.
6. According to the Appellant's counsel, the Appellant was at all material times in actual possession and use of parcel number Mutonguni/Kauwi/79 and that there was no evidence of the existence of parcel of land known as Mutonguni/Kauwi/81.
7. The Appellant's counsel submitted that the alteration of the parcel number from 81 to 79 did not amount to fraud; that the Respondent admitted having sold the suit land to the Appellant in 1986 and that the parties were clear in their mind the land they were dealing with.
8. The Respondent's counsel submitted that the court correctly found that the Appellant had forged a Sale Agreement to read Mutonguni/Kauwi /79; that the Appellant admitted that he altered the Agreement and that the alteration was never countersigned by the Respondent.
9. Counsel submitted that the issue of mistaken identity of the two parcels of land, that is, Mutonguni/Kauwi/79 and 81 never arose; that the Respondent knew his land well and that the Appellant knew the land he was buying from the Respondent.
10. As was held in the case of *Selle vs. Associated Motor Boat Co. Ltd (1968) EA 123*, this court must consider the evidence that was placed before the trial court, evaluate the evidence itself and draw its own conclusions. However, the court should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
11. In the Plaintiff that was filed in the lower court, the Respondent (*Plaintiff*) averred that he is the owner of land known as Mutonguni/Kauwi/79; that the Appellant (*Defendant*) has entered the said land and established a homestead and that the Appellant

(Defendant) should be evicted.

12. In his Defence, the Appellant denied the averments in the Plaintiff and stated that he bought the suit property and that in the alternative, the period of the Land Board Consent having lapsed in 1986, his entry on the land has been adverse to the Plaintiff's (Respondent's) title.

13. The Respondent in this matter (PW1) informed the court that he has several parcels of land in Kauwi; that one of the parcels of land is Mutonguni/Kauwi/79 and that he also owns parcel number 81 in the same area. According to the Respondent, he sold to the Appellant parcel of land number Mutonguni/Kauwi/81 and not parcel number 79; that the Appellant was using parcel number 79 without his permission and that the Appellant should be evicted from parcel number 79.

14. The Respondent stated that he had the Title Deed for parcel number Mutonguni/Kauwi/79, which he produced in evidence. Although the Respondent (PW1) informed the court that he had a Title Deed for parcel number Mutonguni/Kauwi/81, he did not produce the Title Deed.

15. In cross-examination, the Respondent stated that the Appellant is his cousin; that he sold to the Appellant parcel number 81 in 1986 and that the Appellant never took possession of parcel number 81 "as there were irregularities in the Agreement".

16. It was the evidence of PW1 that the Appellant paid him Kshs. 2,000 for parcel number 81 which he has never refunded; that the signing of the Agreement was witnessed by nine (9) people and that the Appellant took possession of parcel number 79 instead of 81.

17. According to the evidence of the Respondent, he sold a piece of land to one Mwendwa Muthela; that Mwendwa Muthela has developed parcel number 81 and that Kyalo Mutunga settled on parcel number 81 many years ago.

18. On the other hand, the Appellant (DW1) informed the trial court that he purchased parcel number Mutonguni/Kauwi/79 from the Respondent vide an Agreement dated 1st February, 1996 and that while writing the Agreement, the Respondent indicated parcel number 81 instead of 79. According to the Appellant, it is the Respondent who told him to cancel number 81 and replace it with number 79; that he was shown parcel number 79 which he took possession and that he had used the land for over thirty (30) years.

19. DW2 informed the court that the Appellant bought the suit land from the Respondent and took immediate possession of the land.

20. In his Judgment, the learned Magistrate held that the dispute between the Respondent and the Appellant is which parcel of land the two transacted in. In his Judgment, the learned Magistrate held as follows:

"As already pointed out, the piece of land the parties mutually transacted over was parcel No. 81/Mutonguni/Kauwi. Two years later, on his own, the Defendant singularly changed the parcel of land to read No. 79/Mutonguni/Kauwi instead of 81/Mutonguni/Kauwi. The court in its wisdom finds that were it true that the Plaintiff had been a party to the subsequent alteration, there would have been no reason for the Plaintiff to make a denial."

21. The trial court went further to hold that the Defendant (Appellant) fraudulently changed the number of the piece of land they transacted over to be No. 79/Mutonguni/Kauwi instead of No. 81/ Mutonguni/Kauwi, and that he was therefore not entitled to occupy parcel number 79.

22. The written Agreement between the Appellant and the Respondent was pivotal in the Judgment of the court. Indeed, the erasure of parcel number 81 on the Sale Agreement and replacing it with parcel number 79 was the Appellant's Waterloo.

23. From the record, it would appear that the purported written Agreement between the Appellant and the Respondent was never produced in the lower court as an exhibit. Indeed, I have perused the Record of Appeal and the Supplementary Record of Appeal and I have not come across the copy of the said Agreement.

24. In the absence of the written Agreement between the Appellant and the Respondent, this court is unable to determine the land that the Appellant purportedly purchased from the Respondent, or the kind of erasures that were made on the said document. Indeed, whether the Respondent purchased parcel of land number 80/Mutonguni/Kauwi or 79/Mutonguni/Kauwi cannot be ascertained.

25. Having not produced the Sale Agreement in the lower court, and the said Agreement being not part of the Record before this court, the Respondent has no basis claiming that he is entitled to parcel number 79/Mutonguni/Kauwi. Such a holding will not only be speculative, but also against the doctrine of sanctity of title, which title is in the name of the Respondent.

26. In his Defence, the Appellant pleaded that the Respondent's rights had been extinguished by adverse possession, having been in continuous, uninterrupted adverse possession of the suit property for over twelve (12) years.

27. According to the Appellant, he took possession of the suit property in 1986. That may be so. However, the perusal of the Title Deed for parcel of land number Mutonguni/Kauwi/79 shows that the same was registered in favour of the Respondent on 28th September, 1994. The suit land was registered on 13th November, 1989, which is the date that the register was opened for the first time.

28. The Respondent's suit in the lower court was based on the fact that the Respondent is the registered owner of parcel of land number Mutonguni/Kauwi/79. The suit land having been registered under the Registered Land Act (*repealed*) in 1989, time started running with effect from 13th November, 1989, and not earlier.

29. The Respondent took positive steps to recover the suit land from the Appellant in the year 1999, which was ten (10) years from the date

the suit property was registered in his favour. That being the case, I find that the Appellant had not been in occupation of the suit land for twelve (12) years for the purpose of extinguishing the Respondent's title.

30. For the reasons I have given, I find that the Appeal before me is unmeritorious. The same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE