



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 146 OF 2017

(FORMERLY HCCA NO. 95 OF 2013)

**NANCY WAMBUI KIMANI (As administrator of the Estate of
GEOFFREY NJOGU (DECEASED)).....APPELLANT**

VERSUS

**GAD NJOROGE KIMEMIA (As administrator of the Estate of
ABRAHAM KIMEMIA MUNYUKO (Deceased)).....RESPONDENT**

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru

(Hon. J.N. Nthuku, Resident Magistrate) delivered on the 17th May 2013

in

CMCC No. 608 of 2010 Gad Njoroge Kimemia v Geoffrey Njogu Njuguna)

JUDGMENT

1. This appeal traces its roots to 3rd June 2010 when the respondent herein filed CMCC No. 608 of 2010 at Nakuru against Geoffrey Njogu (hereinafter 'Geoffrey') who later passed way and who is represented in this appeal by the appellant Nancy Wambui Kimani, the administrator of his estate. The respondent filed the case as the administrator of the estate of Abraham Kimemia Munyuko (hereinafter 'Abraham') who it was averred in the plaint was the owner of the parcel of land known as Plot No. 147 Akuisi/Solai (hereinafter 'the suit property'). It was further averred in the plaint that Geoffrey entered the suit property and started constructing a house on it and cultivating a portion thereof. The respondent therefore sought judgment against Geoffrey for a declaration that the suit property was Abraham's property and for vacant possession. Geoffrey filed a defence in which he denied the allegations in the plaint and stated that the suit property belonged to him and that he had been in possession of it for over 20 years. He urged the court to dismiss the case with costs.

2. Upon hearing the matter, J.N. Nthuku (Resident Magistrate) delivered judgment on 17th May 2013 in which she found for the respondent and ordered Geoffrey to give vacant possession and to bear costs of the suit. Being dissatisfied with the judgment, the appellant lodged the present appeal by filing a Memorandum of Appeal in the High Court on 18th June 2013. The appeal was later transferred to this court. The following grounds of appeal are listed in the Memorandum of Appeal:

1. That the trial magistrate erred in law and fact by allowing the plaintiff's case without showing how she arrived at the said finding.
2. That the trial magistrate erred in law and fact by finding that the appellant's ballot card was stolen when there was no evidence to that effect.
3. That the trial magistrate erred in law and fact by not finding that the plaintiff had not proved his case at all.
4. That the trial magistrate erred in law and fact by not considering all the facts of the case that were presented before her and in the process reached an erroneous decision.

3. The appeal was canvassed through written submissions. For the appellant, it is argued that no evidence was tendered by the respondent to show that Abraham balloted for the suit property and that it was allocated to him. Further that the learned magistrate's finding that the appellant's ballot was stolen was reached without any evidence to that effect and that the trial court relied on the evidence of PW3 the chairman of Akwisi Farmers who was neither present during balloting nor observed the process. The appellant therefore urged the court to allow the appeal with costs.

4. For the respondent, it is argued that PW3 the chairman of Akwisi Farmers was categorical that the ballot for the suit property was stolen and that it was recovered and allocated to the respondent. It is further argued that although Geoffrey stated that he purchased the suit property, the document he relied on did not show the land purchased. All in all, it is submitted on behalf of the respondent that he proved his case on a balance of probabilities and that the appellant failed to adduce any evidence that would tilt that balance. The respondent therefore urged the court to dismiss the appeal.

5. I have considered the pleadings, the evidence and the respective submissions of parties. This is a first appeal. The Court of Appeal stated the duty of a first appellate court in **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** as follows:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

6. I will deal with ground 2 of the appeal then grounds 1, 3 and 4 together.

7. Under ground 2 the learned magistrate is faulted for 'finding that the appellant's ballot card was stolen when there was no evidence to that effect'. So as to put matters in perspective, I reproduce the relevant portion of the judgment:

PW1 evidence is majorly on the documents he found in his father's house after his father passed on. This evidence that his father owned plot No. 147 has been supported by the evidence of PW3 the chairman of Akwisi Farmers who took over from the previous chairman. PW3 explained into detail that there was theft of ballots and the stolen ballots were recalled and given to stakeholders. He said the ballot for plot No. 147 was one stolen ballot which was recalled and given to Abraham Kimemia. The defendant on the other hand testified that the plot No. 147 is his. He testified of having bought shares from Mugo Muthanja what's not clear from his evidence or even the document in relation to that sale is to what parcel of land those documents relate because they make no mention of plot No. 147. DW2 John Muhoho testified that Plot No. 147 was allocated to the defendant after he balloted and the ballot is signed by the chief. On cross-examination he said he never heard about stalling of ballots.

DW2 was a clerical officer at the chief's office. He worked close to the chief so he may have been familiar with the chiefs handwriting but being a clerical officer I find it impossible 'he knew exactly what was happening within Akwisi Farmers company since he wasn't a member thereof. Its no wonder he says on cross-examination that he never heard about stealing of ballots whereas the defendant admitted there was corruption and that's why the provincial administration was called to supervise the balloting. I find the evidence of the chairman of Akwisi Farmers more convincing that the plot in question i.e 147 belongs to the plaintiff's deceased father and although the defendant's ballot shows No. 147 it was one of the stolen ballots which were recalled cancelled and re-allocated to the plaintiff. ...

8. As a basis for the conclusion that the appellant's ballot 'was one of the stolen ballots which were recalled cancelled and re-allocated', the learned magistrate relied on the evidence of Wilson Ndegwa who testified as PW3. There is no dispute that he is a former chairman of Akwisi Farmers Company Ltd. As between him and DW2 who was neither a member nor an official of the company, PW3's testimony on the matter is of more probative value. The relevant part of his testimony was as follows:

... The company's objectives were to purchase land from the white man. We bought land called Akwisi Farm. The land was divided among the members after purchase members were balloting. The members were almost 3000 and one ballot had a number and if you picked nil you don't get land. Kimemia came and said he got nil but because some people stole ballots. The box was guarded by untrustworthy members and if you give them 20/ they give you a ballot. We had a meeting and the DO knew some people had ballots not in the register. This was done by radio announcement and some people brought back ballots. We sat and allocated those stolen ballots to share members and gave them letters to that effect. This is a letter for Abraham Kimemia for plot 147. I signed as a chairman. Allotment letter P Exh. 4. The person had to pay for survey. He paid kshs.400 and a receipt was issued by Musa who disappeared long ago. This receipt is from the company. ... We told our members about unballoted plots. ... I know Geoffrey Njogu as a member. He got land by balloting for No.246. He had one share hence had one plot for every share certificate a person got 1 plot. Its not true for a person to have 2 plots. If he has two plots let him give the receipts. The defendant didn't pay for plot 147 because he had no receipt. ...

9. The issue of theft of ballots, return of some of those stolen ballots and subsequent allocation to Abraham of plot 147 on the strength of one of them were all covered in PW3's testimony. I therefore find no merit in ground 2 of the appeal.

10. Grounds 1, 3 and 4 of the appeal generally deal with the question of whether or not the respondent's case was proven. In a civil case, the

party who proves his case on a balance of probabilities succeeds. As to what is proof on a balance of probabilities, **Kimaru, J** stated as follows in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526**:

In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

11. In this case, the question was who the owner of the suit property was. Both Abraham and Geoffrey were members of Akuisi Farmers Company Ltd, the company that was in charge of allocating land to its members. To support his case, the respondent called a former chairman of the company while the appellant relied on testimony of a former clerical officer in the provincial administration. As observed earlier in this judgment, the testimony of former chairman was of more probative value. If there was any evidence within the company that Geoffrey was the allottee of the suit property, nothing would be easier than the appellant availing that evidence before the trial court. The learned magistrate cannot therefore be faulted for finding that the respondent had proven his case on a balance of probabilities. I equally find no merit in grounds 1, 3 and 4 of the appeal.

12. In the result, I find no merit in the appeal. I dismiss it with costs to the respondent.

13. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 28th day of May 2020.

D. O. OHUNGO

JUDGE