



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND AT MERU**

**ELC APPEAL NO. 10 OF 2018**

**CYPRIAN MWENDA.....APPELLANT**

**VERSUS**

**ADAN BONAYA WAKO.....RESPONDENT**

*(An appeal from the judgment of HON. R. G. MUNDIA delivered on 11/04/2018 in Isiolo CMCC No. 9 of 2013)*

**BETWEEN**

**CYPRIAN MWENDA.....PLAINTIFF**

**VERSUS**

**ADAN BONAYA WAKO.....DEFENDANT**

**JUDGMENT**

1. The appellant being the plaintiff in the trial court sued the respondent seeking a permanent injunction restraining the respondent from entering, constructing upon and or in any way interfering with the plaintiff's proprietary rights over L. R. 7918/214 Isiolo township plus costs of the suit. The defendant filed a defence and counter-claim seeking the same orders but against the plaintiff as well as general damages. On 11/04/2018 the trial court dismissed the plaintiff's case and allowed the counter-claim. The trial court granted the defendant the permanent injunction, declared the defendant as the rightful owner, and awarded him costs and interests.

2. The appellant being aggrieved by the decision filed this appeal based on the following six (6) grounds;

(i) That the learned trial magistrate erred both in law and fact by dismissing the plaintiff's case against the bulky evidence on record in favour of the plaintiff/appellant's claim.

(ii) That the learned trial magistrate misdirected himself on the standard of proof in civil cases i.e. on a balance of probability by failing to find that there was a preponderance of evidence on record in favour of the plaintiff's claim.

(iii) The learned trial magistrate erred both in law and fact by failing to find that the defence evidence on record is disjointed and that there are unexplained gaps in the defence testimony.

(iv) The honourable trial magistrate by failing to analyse the other two issues as framed by court erred both in law and fact as clearly from the evidence on record the conduct of the defendant in his dealing with the suit property was fraught with fraud.

(v) The honourable court erred both in fact and in law by finding in favour of the defendant in his counterclaim when clearly there was no evidence on record in support thereof.

(vi) The honourable court shut its eyes by failing to see that there was clearly a cover-up in favour of the defendant and by failing to take note the frustrations the plaintiff suffered especially when the plaintiff sought to avail the best evidence to enable court unravel the dispute.

3. The appeal was canvassed by way of written submissions. The appellant submitted that he bought the Suit Land from the respondent at a price of Ksh.70 000 and the transfer was effected at Isiolo County offices. He then took over possession until 2013 when the respondent illegally made entry into the Suit Land which prompted him to file this suit. That the trial magistrate's decision was not based on the evidence on record as the magistrate deviated and assigned a higher standard of proof. It is further submitted that the appellant did indeed prove his case hence the appeal ought to succeed.

4. The respondent submitted that the trial magistrate did not err in dismissing the suit based on the evidence on record. That the trial magistrate arrived at a sound judgment and there are no grounds to fault the said judgment, hence the appeal ought to be dismissed.

#### **ANALYSIS**

5. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

6. The suit before the magistrate's court had proceeded to hearing where each party called their witnesses.

7. **PW1 Cyprian Mwenda** stated that on 11/7/1978 his customer Mahamud Guyo brought the defendant to his shop. The defendant wanted to sell the Suit Land to him. On 21/8/1978, the defendant took him and his wife to view the plot, where they agreed on a purchase price of Kshs. 70,000/-. They went to Muthaura & Mwarania Co Advocates then to Isiolo County Council and did the transfer. On 21/8/1978 he gave the defendant Kshs. 67,600/- this is because he had earlier given him Kshs. 100/-, Kshs. 100/- and Kshs.2, 200/- on 11<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup> August 1978 respectively. PW1 then took possession of the Suit Land where he fenced it, constructed and built three (3) permanent rooms.

8. Later on 8/3/2013, the defendant entered the Suit Land and demolished what was on the land. He reported the matter at Isiolo Police Station and later to the CID. When the defendant was questioned he stated that he did not know him. Pw1 had produced council minutes, a letter from the commissioner and sale agreement. PW1 had then gone to the clerk of the county council of Isiolo who requested the administrator to provide the minutes of 1979. The said minutes indicated that pw1 was the rightful owner.

9. PW1 further stated that he used to pay the county council land rates but had defaulted for a couple of years. When he went to pay in 2013, he was informed that defendant had paid, for he had brought papers and they registered him. He affirmed that his name was entered in the register in 1978. He was never told why his name was removed. On 20/4/2011 his house burnt down and he lost all his property documents including the sale agreement, transfer form and payment receipt. In 2011 there was a dispute as to the ownership of the Suit Land as evidenced by the letter dated 29/03/2011.

10. In support of his case, pw1 had produced the following documents as his exhibits; police abstract dated 24.4.2011, letter dated 11.9.2001 exhibit 2, PDP exhibit 3, letter dated 10.9.2001 exhibit 4 and an application for development as exhibit 5.

11. **PW2 No. 58197 CPL James Mwenda** is a police officer who at some point was attached at Isiolo CID office. He appeared in court through summons. He stated that on 12/3/2013 the defendant's brother came to report that his brother's plot had been invaded and because his brother was sick he came to report on his behalf. The reportee had told pw2 that he suspected the plaintiff as the person who had caused damage on the plot as the latter had earlier on complained that he owned the plot. The, the following day. The plaintiff came and complained that some people had damaged his plot. Pw2 realized that both complainants had a competing interest in the Suit Land. He advised them to go and resolve the dispute at Isiolo County Council office.

12. On 13/3/2013 the defendant's brother came and brought a letter from the Isiolo County Council dated 11/3/2013 which indicated that the Suit Land was registered to the defendant. Then on 15/3/2013 the plaintiff came with a letter from Isiolo County Council which stated that the plaintiff had a claim to the Suit Land and the defendant was requested to stop further interference with the parcel. Both letters were signed by Mr. Kathuraku.

13. **PW3 Stella Mwende**, wife to the plaintiff, corroborated what had been stated by **PW1**. She added that after the sale agreement, the transfer was effected at the county council by a person known as Nyaga. On the Suit Land, they constructed wooden houses which were being guarded by their two relatives. However, the defendant's relatives came and chased them away and demolished their houses. The Suit Land belongs to them of which they have been paying land rates. Unfortunately, on 28/02/2011 their house burnt down together with all their documents.

14. **PW4 Habiba Liba**, an employee of the County Government of Isiolo, told the court that she was employed in 1994 and has worked in different departments but since 2008 she has been in plot rates and rents. She is in charge of the plot rates and rents register. She does not have the minutes, which is No.7/1979, sought by the summons and that the person who would have them is the incharge of registry one Ibrahim Sheikh Hamicha.

15. **PW5 Ibrahim Sheikh Hamo**, testified that he is an office messenger with the county council, and was summoned to provide the minutes No. 7 of 1979. He stated that he has never seen the minutes of 29/3/1979. He also acts as a registry clerk and he forwards the files to the committees.

16. **DW1 Daudi Abdi Jillo**, a former senior chief in Isiolo County location for 21 years stated that he knows the Suit Land which is 100 meters from his house. He stated that the property is occupied by Fatuma Bonaya and Dahabo Bonaya. There were two kiosks, one selling milk and the other operating as a butchery by one Hassan Bulle. That it was the sister of the defendant who built the first structure. In 2013 Fatuma Bonaya came and reported that the said structures had been brought down by the plaintiff who ran away.

17. **DW2 Hussein Gurre** lives 200 meters from the Suit Land. He stated that it is the defendant who owns the Suit Land for he used to operate the butchery from one of the two structures on the plot and used to pay rent of Kshs. 1,500/- to Fatuma Bonaya. The defendant's sister was using the other structure as a milk bar. The said structures were constructed in 2006 by Fatuma. Dw2 never saw the plaintiff on the plot during his stay there. One morning in 2013 he saw around ten (10) people running away from the Suit Land. The watchman had been tied up and the gang destroyed the structures, cut the mabati fence and two water tanks. He saw the plaintiff run away from the Suit Land but he did not see him destroying it.

18. **DW3 Fatuma Bonaya** is the wife to Wako Bonaya the defendant. She adopted her statement signed on 26/10/2015 as her evidence. She stated that her husband is the owner of the Suit Land which he acquired in 1972 after it was allotted to him by the County Council of Isiolo in a plot allocation committee held on 7/07/1972. She has had physical possession of the Suit Land since then. She and her sister – in – law constructed two wooden structures which they rented out as a butchery and milk kiosk. She affirmed that the plaintiff, whom she came to know in court, has never been in possession of the Suit Land.

19. **DW4 Abdul Razaus Bonaya** is the eldest son to the defendant, and he adopted his statement signed on 21/5/2015 as his evidence. He stated that the defendant acquired the Suit Land in 1972 after it was allotted to him by the County Council of Isiolo in a plot allocation committee held on 7/07/1972. The defendant granted **DW3** the physical possession who put up two (2) temporary structures, which were let to two business persons who used to pay her rent. Their family has enjoyed quiet possession until 2011 when the plaintiff hired goons who demolished the said structures and fence. The issue was reported to the police station. The allegations that the defendant sold the Suit Land to the plaintiff are untrue.

20. In support of the defence case, the following documents were produced as exhibits; The letter of allotment exhibit 1, minutes of the county council of Isiolo dated 7.7.1972 exhibit 2, bundle of receipts dated 26.10.1999, 3.12.2010 exhibit 3, letter addressed to plaintiff authored by Guyo Bukicha dated 29.3.2011 exhibit 4, approval for construction dated January 2013 exhibit 5, and receipts dated 6.3.2013 exhibit 6.

21. During the trial, defendant passed on and was substituted by his son Dw4 (Abdul Razaq).

22. The issue for determination is: **who is the legal proprietor of the Suit Land or who has entitlement to the same.**

23. When it comes to ownership of land **Section 26(1) of the Land Registration Act** recognizes a holder of certificate of title as the prima facie indefeasible owner of the land. Consequently, a registered proprietor of land is entitled to the protection of the law. The question is, what is the nature of rights and interests in land in situations where the land is not registered and doesn't appear to be in the process of registration. Such is the fate of the current dispute, which is a common phenomenon in Isiolo County. In that County, the land tenure holding appears to be vague with the process of land adjudication as well as titling being a mirage. That however did not stop the council from alienating the land haphazardly without any clear formal process. For instance in this case, when the dispute erupted between the litigants and spilled into the police station in March 2013, the brother of respondent was given a letter by the council on 13.3.2013 stating that respondent was the registered owner of the land. Two days later on 15.3.2013, the appellant presented to the police a letter from the same council stating that plaintiff had a claim to the land.

24. Despite the mess created by the former county council, the legal position remains, that he who alleges must prove, See **Charter-House Bank Limited (Under Statutory Management) v. Frank N. Kamau (2016) eKLR, Lucy Njeri v. Isaac Wangoya Mwangi & Another (2018) eKLR**. Also see **section 107 - 109 of the Evidence Act**.

25. In this suit the rights and interests in the suit land possessed by the respondent before 1978 are not disputed. What the appellant avers is that in 1978 he bought the Suit Land from the respondent. Thus the actual question for determination is whether this sale took place.

26. The appellant avers that he bought the suit land at a consideration of Kshs. 70,000/-. They went to an advocate who drafted the sale agreement. However, the said advocate is deceased. The matter went to the relevant committee and transfer was effected in 1979 which indicated him to be the rightful owner. The appellant stated that he took possession of the Suit Land and built three permanent structures.

27. The appellant has availed a letter dated 11/09/2001 (*P Exhibit 1*) from county council of Isiolo addressed to the Commissioner of Lands stating that the office of County Council of Isiolo does not object to the transfer of the Suit Land to the appellant and that the Commissioner of lands can process the ownership documents. This document does not capture the basis of the alleged transfer, particularly the owner of the plot, reasons for the transfer, and when the transfer was effected in the council's records. Further, the letter is only copied to the appellant and not the respondent. This document in itself does not prove that there was a sale agreement.

28. No other document has been availed to support appellant's claim that a transfer of the suit land was recognized by the council. The document availed by the appellant as exhibit 4 (letter by appellant to the commissioner of lands dated 10.9.2001) appears to be the only form of follow up of appellant's claim. If indeed appellant had bought the land from the respondent in 1978, and the transfer was effected by the county council, how comes the appellant was not registered as the owner of the suit plot by the council. This is a situation whereby appellant claims that he does not know how he was de-registered as the owner of the suit land. He also avers that he used to pay land rates to the council. It follows that his claim ought to have been directed to the council in the first instance. However, for all those years, from 1978 up to when his documents allegedly got burnt in year 2011, the appellant never sought legal redress against the council. And even when appellant filed this suit in year 2013, he never brought the council on board.

29. The minutes from the council which the appellant constantly referred to as minutes No. 7 of 1979 of the full council meeting held in the council chamber 29/03/1979 which allegedly gave him the plot were nowhere to be found. **PW4** and **PW5** who were summoned from the county government to produce the said documents were not helpful as they were not the custodians of the said documents and they had never seen the same.

30. From the evidence adduced by the appellant he has failed to prove that the respondent sold to him the Suit Land, hence the appellant did not acquire any rights and interests in respect of the suit land from the respondent. I therefore find no basis to interfere with the Judgment of the Trial Magistrate. **In the circumstances, this appeal is hereby dismissed with costs to the respondent.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 21<sup>ST</sup> DAY OF MAY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**