



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 74 OF 2004

JAMIN LODEKI.....APPELLANT

VERSUS

JOYCE MWALE.....RESPONDENT

[An appeal from the original judgment of F. A. Mabele, Principal Magistrate

in Kapsabet PMCC No. 44 of 1992 delivered on 29th June 2004]

JUDGMENT

1. There are two pertinent questions in this appeal: who is the *genuine* proprietor of the land known as Nandi/Kapgangani/694[*hereafter the suit land*]? Secondly, did the respondent acquire title by *prescription*?
2. The lower court found that the appellant was the *registered* owner of the land. However, the court reasoned that the parcel had been earlier registered in the name of *Harun Asiligwa*; and, that the latter sold it to *Charles Mwale* (the husband of the respondent, now deceased). The lower court dismissed the appellant's claim; and, upheld the respondent's counterclaim for *adverse possession*.
3. The appellant is aggrieved. There is a memorandum of appeal dated 20th July 2004. It raises *nine* grounds. They can be condensed into *four*. First, that the learned trial magistrate misapprehended the evidence; secondly, that the purported sale agreement between the respondent and Harun Asiligwa was null and fraudulent; thirdly, that the learned trial magistrate applied erroneous principles; and, fourthly, that the respondent did not prove her case on a balance of probabilities.
4. The appeal is contested by the respondent. There is no cross-appeal. Learned counsel for the respondent, *Mr. Ngige Mbugua*, implored me to dismiss the appeal.
5. The appellant filed submissions on 7th April 2016. The respondent filed hers on 12th April 2016. On 13th December 2016, learned counsel for the appellant and the respondent addressed me briefly on those submissions. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
6. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.

7. By a plaint dated 25th May 1992 the appellant claimed that he was the registered owner of the suit land. He pleaded that the respondent had trespassed on it. He prayed for general damages and *mesne* profits. The matter at first proceeded *ex parte*; and, judgment was delivered in favour of the appellant. The decree was subsequently set aside; and, the respondent was granted leave to defend.

8. In a statement of defence dated 23rd March 2001, the respondent denied the claim *in toto*. She also pleaded a counterclaim that she had acquired title by prescription. She accordingly sought a declaration that she was the owner of the land. The appellant joined issues in a reply to the defence dated 29th March 2001.

9. The relevant evidence in the lower court was as follows. The appellant, Joseph Muremi and Harun Asiligwa are brothers. The suit land was inherited from their father. He died in 1975. The appellant testified that the deceased bought two separate pieces of land. The one he bought from *Arap Tiony*, was given to his two brothers Joseph Muremi and Harun Asiligwa. The one purchased from *Arap Kipkemei* was the lower one where they were living together. The appellant produced the title for the suit land. He said that the respondent has trespassed on the land. The appellant's case is that the respondent's late husband bought land from Harun Asiligwa; and, that it is a separate parcel.

10. The appellant contends that his portion is the one he was given by his late father. It measures 0.6 hectares. The appellant was working as a waiter in Nairobi from 1972 up to 1988. He received a letter from his mother informing him that the respondent had moved into his land and erected a house. He went home in 1986 and confirmed it. He referred the matter to the panel of elders. The decision went his way; and, the respondent was ordered to move out of the land.

11. PW2 was the appellant's mother. On cross examination, she said that by 1976, the land had been sub-divided. She could not recall where the respondent was staying in 1989. She said the portion Asiligwa sold to Mwale (the respondent's husband) had a house which was pulled down. Thereafter, Asiligwa went to live in Matunda. When Mwale died, he was buried in the disputed land. The daughter was also interred there. PW2 was emphatic that all the three brothers had separate portions of land; and, that the respondent had encroached upon the appellant's land.

12. PW3 was Thomas Kitungulu. He was a clerk or secretary. He testified that the appellant and his two brothers were allocated land by their father. PW3 prepared the agreement of sale between Asiligwa and Charles Mwale in 1976. The consideration was Kshs. 6,600 for 2.3 acres. The *shamba* had no number then because the mother title was with *Arap Tiony* then numbered Nandi/ Kapkangani/692.

13. Upon cross examination, he said that the appellant's father sub-divided the land in 1971. He could not recall when Joyce (the respondent) entered the disputed. He witnessed the sale agreement in 1976. He said the house the respondent's husband occupied was demolished by Joseph Muremi. He was emphatic that the respondent had encroached upon the appellant's land. When Mwale bought the land he occupied the house that Asiligwa left. Mwale relocated to avoid the tribal clashes of 1992. When he returned, he built on another portion (No. 692) and not the suit land. PW3 said that Joseph Muremi is the one who cultivates the land that Mwale bought.

14. The evidence of PW4, Harun Asiligwa is material. He testified as follows-

"I sold the share of my land that I had been given by my father and went to buy at Moi's Bridge. I sold the land to Charles Mwale. I sold the whole portion that I [had] been given. I had built a house, a store and a latrine and also trees that I sold to Charles Mwale. I showed Charles Mwale the portion. When I sold the land my elder brother Joseph Muremi was present. My younger brother Jamin Lodeki was not present. He was at his place of work in Nairobi. I sold the land for Kshs. 6,600/- and Charles Mwale paid me the whole Kshs. 6,600/-. I then moved to Moi's Bridge and left him to live in my house. We had an agreement..... There were 3 witnesses - Joseph Muremi, Japhetha Lugohe and James Kibendi. The 4th was the secretary who was Tom Kitungulu. We just wrote our agreement and did not go to another witness as a lawyer. After going to Moi's Bridge I stayed for 6 years without coming back....."

15. There is then the evidence of the respondent. She testified that Harun Asiligwa sold the suit land to her husband. In the material part of her evidence, she stated-

“In 1992 when this case was filed in court I was living on the [suit land]. I am still there. It was alleged in the proceedings that our land is in a different parcel but I had not been shown that. I do not know any other parcel apart from No. 694. I was not involved in the earlier case No. 16 of 1986. With respect to this dispute we had another case before the DC on 24.4.1990.....The DC ordered that Jamin Lodeki should not build on this land. He was then building. He completed and is now staying there.....By 1989 I had occupied that parcel from 1983 when we built for 6 years. According to me Parcel No. 694 was for Harun Asiligwa who sold to us and we fully paid him and he gave us that number.”

16. Mariko Kiptolo was called as a witness by the respondent. He was an Assistant Chief. He testified that he took part in the proceedings before the District Officer. The latter ruled that Mwale be shown where to build. He claimed that Joseph Muremi, Harun Asiligwa and their mother were ordered to show Mwale where to build. He said that Harun Asiligwa disappeared. They thus went with Joseph Muremi and his mother. Mwale died in 1999. He said Mwale's home is still at the spot where he was directed to build.

17. The last defence witness was Joseph Muremi. He witnessed the sale agreement drawn by PW3. He said it related to Asiligwa's parcel number 694 and not 692. He testified that when his father died in 1975 he had not sub-divided the land. He said that Asiligwa sub-divided the land; took some part; and, left the other one for Jamin Lodeki (the appellant). He said he did not know how the appellant was registered as the owner of parcel number 694. He claimed that the appellant forged the title in order to evict the respondent.

18. I will first deal with a preliminary procedural matter. This appeal was lodged at the High Court in the year 2004. Under Article 162 (2) of the Constitution of Kenya 2010, it would have been a matter squarely within the sphere of the Environment and Land Court. But this appeal predates the Constitution. The High Court thus has jurisdiction to determine the suit. Learned counsel for both parties conceded the jurisdiction of the court.

19. I will now turn to the evidence. The substratum of the respondent's case is that her late husband bought the suit land from Harun Asiligwa; or, in the alternative, that she has acquired title by *prescription*. It is then material to establish the parcel of land that *Harun Asiligwa* was selling. A historical journey cannot be avoided. The appellant, Joseph Muremi and Harun Asiligwa are brothers. The suit land was inherited from their father. He died around 1975. The deceased bought two separate pieces of land: one from *Arap Tiony*; and the other from *Arap Kipkemei*. At the time of his death, he had *not* sub-divided the land but he *showed* the three sons their respective portions. Those facts are not in contest.

20. The crux of the matter is the parcel belonging to Harun Asiligwa. The sale agreement between the latter and Charles Mwale (the respondent's late husband) was for land known as Nandi/ Kapkangani/ 692. The suit land is Nandi/ Kapkangani/ 694. On that score alone, the respondent's husband was purchasing a different piece of land. That is borne out by the evidence of PW3, Thomas Kitungulu, the clerk who drew the instrument of sale. There is no evidence that a transfer was executed or that the consent of the Land Control Board was ever obtained. It is thus telling that the respondent has fallen back on the doctrine of adverse possession

21. If the appellant is to be believed, his father gave his two brothers Joseph Muremi and Harun Asiligwa the piece of land he bought from *Arap Tiony*. I have also studied the title deed in favour of the appellant for *Nandi/ Kapkangani/ 694*. The size of that land is *0.6 hectares*. That is approximately *1.48 acres*. Doubt is completely removed by the *green card* submitted at the trial. The respondent claims that her late husband bought *2.3 acres* or thereabouts for consideration of Kshs 6,600. I have thus formed the clear impression that the parties are fighting over different portions of land.

22. Furthermore, the respondent's husband had been shown where to erect a house. The respondent claims to be still living there. The trouble is that from the evidence of Mariko Kiptolo (DW2), Harun Asiligwa disappeared when he was ordered by the District Officer to show Charles Mwale where to build. The persons who pointed out to Mwale where to construct a house were *Joseph Muremi* and his mother. Mwale died in 1999. That may partly explain the confusion or scheme to defraud the appellant.

23. There was a curious assertion by Joseph Muremi (DW3) that after Mwale bought the land, he went to Mombasa for two years; and, that after he returned, he was chased away by Harun Asiligwa (the seller) and his mother. That became the genesis of the proceedings before the District Officer that the respondent testified about. Joseph Muremi said that the appellant forged the title of the suit land as a strategy to evict the respondent.

24. The evidence of *irregularities* in the title of the suit land cannot be wished away. The land was registered under the Registered Land Act (now repealed). First, the green card shows that on 29th April 1983, the land was registered in the name of someone known as *Aron Asirikwo*. The name is obviously different from *Harun Asiligwa*. That entry is cancelled. There is then a transfer on 23rd June 1989 to *Jimmy Rodeji*. I note that it is *not* the name of the appellant - although in his oral testimony he claimed to be the same and only one. If this parcel originated from *Arap Kipkemei* or even *Arap Tiomy*, I would have expected them to be the *transferors*. There is no clear evidence that the sons of the deceased took out letters of administration to their father's estate. The only other entry after that is a *caution* lodged by the respondent on 23rd January 1990. In that caution, the late Mwale continued to insist that he bought 2.3 acres of land; way beyond the size of the suit land.

25. On a balance of probabilities, I am not persuaded that the respondent's late husband (Charles Mwale) bought Nandi/ Kapkangani/ 694 from Harun Asiligwa. I am not saying that he did not buy any land from Harun Asiligwa: but it is another portion of the land belonging to Harun's father. On the available evidence, the portion would seem to be number 1166; or, the part now occupied by Joseph Muremi. I am fortified by the respondent's evidence. She referred to previous proceedings in Kapsabet Civil Case 16 of 1986 *Jamin Lodeki v Joseph Muremi & Harun Asiligwa*. The decision of the court was that Joseph Muremi and Mwale (her late husband) were entitled to parcel number 1166; Jamin Lodeki to parcel number 694.

26. Like I stated, it is thus not surprising that the respondent has set up a counterclaim for *adverse possession*. Adverse possession however is not a good shield. There is no clear cut evidence of the date when the respondent entered on the property; or, that she enjoyed *uninterrupted* possession for over 12 years. I say so in view of earlier proceedings in the lower courts; before the District Officer; and, the panel of elders.

27. The fact that the appellant was working as a waiter in Nairobi from 1972 up to 1988 (a period of 16 years) does not inevitably translate to *uninterrupted* occupation by the respondent. I am fortified because the respondent spoke of taking possession only in the year 1983. She said: "*By 1989 I had occupied that parcel from 1983 when we built for 6 years*". The burden of proof of occupation remained on the respondent. The respondent could have moved the court by *originating summons* for a declaration that she had obtained title by prescription. The trouble now is that her *counterclaim* is also caught by *limitation*. See *Mary Rogo v Tabitha Kipyaba*, Eldoret, E&L Appeal 18 of 2013 [2014] eKLR. I am alive that the contest seems to be over the same physical space; and, that her late husband and daughter are buried there.

28. Granted the evidence, I, with great respect, disagree with the decision of the learned trial magistrate. The judgment of the lower court finds little support in law and evidence. Furthermore, the learned trial magistrate did *not* give *reasons* why he did *not* believe the appellant; or, why he found *for* the respondent. He only stated-

"I accept what the defendant and DW2 and DW3 have told this court. Even though DW3 says that he does not get on well with his brother he appears to have spoken the truth. I accordingly find that the plaintiff has not proved his case on the balance of probabilities. The same is dismissed

with costs. I also enter judgment in accordance with the defendant's counter claim."

29. I have stated that there was an irregularity in the manner the appellant obtained his title. The names in the *green card* and title do *not* tally with *his* name. The proprietor is someone known as *Jimmy Rodeji*. So much so that on a balance of probabilities, the appellant did *not* also prove his case in the lower court. Furthermore, the appeal itself is replete with procedural irregularities. For example, the decree appealed from is missing from the record of appeal; and, key affidavits and documents produced in the lower court are not annexed. This despite four amendments of the record of appeal. There is a blatant violation of the *mandatory* provisions of Order 42 Rule 4 of the Civil Procedure Rules.

30. In the result, the appeal succeeds only in part. The judgment of the lower court dated 29th June 2004 is hereby *set aside*. Instead, the appellant's (plaintiff's) *suit* in the lower court is *dismissed*. The respondent's *counterclaim* in the lower court is also *dismissed*. Each party shall bear its own costs in the lower court as well as in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of January 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Okara for the appellant instructed by Mburu Okara & Company Advocates.

No appearance by counsel for the respondent.

Mr. J. Kemboi, Court Clerk.