



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 29 OF 2019

NKUCHIANA NGARA.....APPELLANT

VERSUS

JOSEPH KALUNGE EKANDI.....RESPONDENT

(Being an appeal from the judgement of the Hon. A.G.Munene (SRM) Delivered on 31st December 2018 in MAUA CMCC NO. 164 OF 2013)

JUDGMENT

1. The appellant herein was the plaintiff in the trial court, while the respondent was the defendant. The appellant instituted the suit in the trial court vide a plaint dated 3rd August 2012 seeking an order compelling the respondent to pull down all structures constructed on land parcel No. 5895 Antubetwe Kiongo Adjudication Section and in default, he be evicted forcefully.
2. The appellant averred that he is the sole registered owner/proprietor of Parcel No. 5895 measuring 0.20 acres. That in the year 2000 he entered into an oral agreement with the respondent for exchange of locations in respect of land parcels No. 5894 and 5895 Antubetwe Adjudication Section. This was done on the map and on the physical grounds.
3. That the respondent took the physical ground of the appellant's land and constructed semi- permanent kiosks thereon but refused to pull down and/or give vacant possession of his land to the appellant.
4. The Respondent filed his statement of defence dated 30th August 2012 denying entering into an agreement with the appellant. He also denied the existence of Plots Nos. 5894 and 5895 and stated that he is the owner of Plot No. 1056 Akiromwathi/Ntaki which he has owned since 1985. He further pleaded that plaintiff's claim is time barred in terms of the Limitation of Actions Act.
5. The trial court found that the appellant had failed to prove his case to the required standard of proof, since he failed to demonstrate that he has any right over the suit land.
6. Being aggrieved by the aforesaid determination, the appellant lodged an appeal on 25th January 2019 enumerating five (5) grounds of appeal as follows;

(i) The Learned Senior Magistrate erred in law in failing to find that whereas section 3 (3) of the law of contract Act Cap 23 provides that no suit based on contract or disposition of interest on land can be entertained unless the same is in writing, the section makes an exception in cases where there is part performance as held in this courts authority in *Anderson Omondi Owandho (suing as the legal representative of the estate of Thomas Rajwal (deceased) vs Augustinos Ondieki (2007) eCLR* and thereby erroneously relying on a wrong legal position to dismiss the appellants suit.

(ii) The learned Senior Resident Magistrate erred in law and fact in failing to find that the appellant and respondent's agreement to exchange the suit lands was concretized by their representations being captured by the land Adjudication officer as per the provisions of the Land Consolidation Act Cap 283 Laws of Kenya and therefore, there was no need for a further written agreement.

(iii) The learned Senior Resident magistrate erred in law and in fact in finding that the appellant had not controverted the respondent's allegation that the respondent was operating business on the premises even before the time of alleged exchange and using that as a further basis for dismissing the appellant's case.

(iv) The order decree/judgement by the learned trial magistrate of the lower court is itself not equitable and badly discriminates against the appellant.

(v) The judgement/decree is against the weight of the evidence before the superior court.

7. On 25/11/2019 this court directed the parties to canvass the appeal through written submissions, of which both parties have since filed their respective submissions. The appellant submitted that the provisions of Section 3 (3) of the Law of Contract Act was not applicable at the time and in the manner applied by the trial magistrate as it came into force in the year 2003 after the oral agreement for the exchange of the plots were made in the year 2000. The Appellant also submitted that there was part performance on his part as confirmed by the letter of the District Land Adjudication & Settlement Officer dated 6th October 2011. That the Respondents documents relate to a different plot as opposed to the plots in issue in the suit herein.

8. The appellant relied on the following cases; **Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR**, **Joseph K. Cheronno vs Kiplagat Kimiei (1995) eKLR**, **Anderson Omondi Owandho (suing as the legal representative of the estate of Thomas Rajwal (deceased) vs Augustinos Ondieki (2007) eKLR**.

9. The Respondent submitted that the cited authorities by the Appellant are distinguishable to this case based on the facts proved in court by both documentary and witnesses testimonies. It was submitted that the Respondent owns parcel No. 1056 and there is no connection whatsoever between the respondent's land parcel No. 1056 and the alleged land parcel No. 5895 and 5894, the appellant has no claim on the respondents parcel no. 1056, that the letter from DLASO dated 6/10/2011 does not confirm ownership and that there is equally an elaborate mechanism established under the Land Adjudication Act and the Land Consolidation Act Section 26 and 29 to solve disputes arising therefrom.

10. The respondent further submitted that the court lacked jurisdiction to entertain the suit as the claim (on contract) was filed outside the Limitation period i.e. the suit was filed on 3rd August 2012 whereas the cause of action arose in the year 2000, a fact the Respondent had outlined in his defence.

11. The respondent cited the case of **Easter Produce (K) Limited versus James Kipketer Ngetish (2005) eKLR**.

Analysis and Determination

12. This is a first appeal, hence it is the duty of this court to re-evaluate the evidence and draw its own conclusions – See **Selle –Vs- Associated Motor Boat Co. Limited 1968 E.A. 123**.

13. **Pw1, the appellant** testified and he adopted his statement dated 3.8.2012 as his evidence. He contends that he is the registered owner of parcel 5895 Antubetwe Kiongo Adjudication Section. He bought his initial land years ago from Nturichia. That they later exchanged the land with the respondent. That Musa Mwarithia was part of the Adjudication Section committee which facilitated the exchange of the portions. That he is not familiar to plot No. 4056 and its owner, and that plot no. 1056 is not his but the Respondent was on his land.

14. He produced the following list of documents in support of his case; **Pexh 1 Letter from the Land Office dated 6/10/2011, Pexh 2 Letter from the O.C.S-Laare Police Station dated 8.8.2011, Pexh 3- Demand Letter dated 24/5/2010 and Land ownership letter dated 6/10/2011 which is the same document as P-EXH 1**.

15. **Dw1 the Respondent** testified and equally adopted his statement dated 30.7.2013 as his evidence. He contends that he bought his land i.e. plot No 1056 from M'Mberia M'Aurua and he has extensively developed the plot by constructing semi-permanent buildings consisting of a shopping kiosk, butchery, hotel and a bar. He further stated that he did not have an agreement for the exchange of the land with the appellant. That the committee colluded to have his land registered in the name of the appellant. He however did not report their incident to the police station.

16. He produced the following documents in support of his testimony; **Trade License to Joseph Kalunge, Liquor License, Bundle of receipts for payment of the trade licences to the government, Defendants letter to the land Adjudication officer dated 16th July 2000** (the letter is actually dated 18.10.2011 from appellants advocate to DLASO).

17. I have considered the evidence on record and the submissions of the parties. The Respondent in his Submissions raises two preliminary grounds which I shall first consider before dealing with the grounds of appeal, if need be. Both grounds relate to the jurisdiction of the trial court in handling the matter. In paragraph 7 of the Respondents defence, the respondent stated that the claim set out by the plaintiff is not available in law, as the same is time barred under the Limitation of actions Act. In Paragraph 10 of the same defence, the respondent disputed the jurisdiction of the trial court as no proper or valid consent was obtained.

18. I do note that the preliminary objections were not raised by the respondent during the hearing of the case in the trial court. In **Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2014] eKLR** the court while facing a similar scenario cited the case of **Platt JA in Wachira v. Ndanjeru (1987) KLR 252**, where it was held as follows:

“The discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court....”

19. In **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR** the Court of appeal also considered the various principles to be adhered to in considering new grounds raised at the appellate stage and the court stated as follows;

“Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises.....”

Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court.”

20. The Respondent ought to have raised his preliminary objection at the earliest opportunity. Despite raising the issue in his defence, the Respondent did not move the trial court to canvass and consider the same. In any event, the respondent subjected himself to the Jurisdiction of the trial court. I therefore take it as a new point raised in the appeal. I also find that dealing with the preliminary objection on consent and limitation at this stage would put the appeal herein at variance with the issues canvassed in the trial court. The same has been raised late in the day without granting the appellant the opportunity of adducing evidence that may be necessary to counter or dispel the new points, hence this line of objection fails.

21. I shall now proceed to consider the grounds of appeal raised by the Appellant. The grounds raise two distinctive issues for determination; **a) that the trial magistrate relied on the wrong principles of the law by subjecting the appellants claim to the provisions of Section 3(3) of the law of contract Act whereas the cause of action occurred before commencement of the Act. b) That the trial magistrate failed to consider that the evidence on record supported the appellants claim.**

22. On the issue of the Law of Contract, I make reference to the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR**, where the issue in contention was an Oral agreement for sale of land entered into by the parties in the year 1964. The Court of appeal held as follows in respect to the provisions of the law of Contract Act;

“Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

25. *We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act”.*

23. In **Anderson Omondi Owandho (suing as the legal rep. of the Estate of Thomas Owandho Rajwai (Deceased) v Augustinos Ondiek [2017] eKLR**, the court similarly held as follows;

“It is further my view that Section 3(7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. Section 3(3) of the Law of Contract Act having come into effect in 2003 does not apply to an oral contract for sale (or exchange) of land concluded before it came into effect....”

24. The above authority was cited by the appellant at the trial court. The same clearly places the suit herein outside the provisions of Section 3 (3) of the law of Contract Act, which came into effect on 1st June 2003. The applicable law was the one in place before the year 2003 amendment which is captured well in the above case of **Peter Mbiri Michuki (supra)**. The trial Magistrate therefore relied on the wrong provisions of law.

25. Despite this shortcoming, the appellant was still bound to adduce evidence to support his contention that there had been a contract to exchange the land with the respondent, and that there was part performance where he took possession of the property or that he was already in possession of the land and he continued to occupy the same.

26. I have considered the facts on the record in the trial court. The documents availed by the appellant only relate to the efforts he undertook to report the matter to the Land Adjudication Officer. The evidence produced by the appellant did not support the element of a contract and specific performance.

27. The appellant appears to have heavily relied on the letter authored by the DLASO (P-EXH 1). However, the appellant did not call the surveyor who made the maps capturing the alleged exchange of the land in question between himself and the respondent. The appellant failed to call a member of the committee despite the fact that he alleged that the committee had concretized the agreement between the parties I.e, Musa M' Araju M' Mwambia who allegedly witnessed the agreement was not called. The appellant also failed to distinguish parcel No. 1056 and parcel No, 5895 & 5894. The proceedings before the committee that supposedly exchanged the parcels were not availed. I also do note that the time taken by the appellant to file the suit i.e. 2012 to challenge a transaction that took place in the year 2002 served to make the claim of the appellant hopeless.

28. The respondent clearly stuck to his guns that his land is parcel 1056. This fact was not controverted by the appellant. The documents availed by the respondent all indicate that his parcel was no. 1056 which is a commercial plot where he had been running various types of businesses like hotel and bar long before year 2000. Just to mention a few, respondent's trade licence for the hotel in plot 1056 is dated 27.7.1998, while the liquor licence is dated 19.8.1994.

29. The well-known aphorism, "*he who asserts must prove*" was augmented by the Court of Appeal in **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR** as follows;

"We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

30. In this case the appellant failed to call crucial witnesses and/or avail crucial documents to assert his ownership over the suit premises. I am therefore in agreement with the trial Magistrate that the Appellant did not prove his case on a balance of probabilities.

31. The upshot of this determination is that the appeal herein lacks merits and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this judgment was given on notice. 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 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment 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