



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 4 OF 2017

(FORMERLY HCA NO. 93 OF 2009)

SAMSON KIMANA.....APPELLANT

VERSUS

DANIEL MUYURI.....1ST RESPONDENT

MERU COUNTY GOVERNMENT.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon W.K.Korir of 28.08.2009

in the Chief Magistrate's Case No. 202 of 2000)

JUDGMENT

1. The appellant herein filed the case, CMCC No.202 of 2000 at Meru vide a plaint dated 1.3.2000 filed in court on 2.3.2000 against the two respondents where he sought for judgment in the following terms:

- a) **“An order that the 2nd defendant do forthwith correct its record to show plaintiff as the sole owner of plot no.5 Muringene Market.**
- b) **Damages for trespass against the 1st defendant and a permanent injunction restraining re-entry by 1st defendant upon the plaintiff's plot.**
- c) **Eviction of the plaintiff (certainly he meant 1st defendant) , and**
- d) **Any further relief the court may deem fit, plus costs and interest”.**

2. The 1st respondent opposed the suit vide his statement of defence dated 2.5.2000 and filed on 3.5.2000 where he contended that he had been the rightful occupant of plot no. 5B Muringene Market which he developed and had been paying rent.

3. The 2nd respondent also opposed the suit vide a statement of defense filed on 11.8.2000 denying the plaintiff's claim while averring that what the 1st respondent had fenced what actually belonged to him and not the appellant's plot.

4. In the judgment of the trial court delivered on 28.8.2009, the court dismissed the appellant's case while making the following findings;

“The plaintiff gave evidence which did not support his pleadings. In the plaint he had averred that he only discovered in 1999 that his plot had been renamed plot no. 5A. The plaintiff in his evidence told the court that when he began developing his plot in 1974 is when he discovered that there was a problem since part of it had been grabbed. He however could not take action in 1974 due to lack of funds. In his plaint the plaintiff averred that the 1st defendant began developing in 1999. In a ruling dated 10.7.2001 N.H. Oundu Resident Magistrate confirmed that he had visited the locus in quo and found that the 1st defendant had old temporary structures on the plot. That means the plaintiff had for a long time known that the 1st defendant was occupying the plot.

Each side produced minutes of the Meru County Council to show how the plot came into being. It is hard to say whether the minutes were genuine or not. One clear thing however is that by 1977 the register showed that plot no. 5A belonged to the plaintiff and plot no. 5B belonged to the defendant and one Nahashon M'Athinyai. This was confirmed by the copy of register which was produced as Exh D5 by D.W.2. This clearly supports the defence case. In fact plaintiff admitted that by 1974 he knew that part of his plot had been grabbed. He did not take any action up to 2000. His action is therefore statute based. The plaintiff appears to allude to fraud on the part of the defendants. He has however not given the particulars of fraud in the plaint.

The defendants clearly told the court how the plaintiff gave part of his plot to the 1st defendant and another person. The defence case is more believable when compared to the evidence adduced by the plaintiff. On a balance of probabilities I find the plaintiff's claim is unproved and I dismiss the same with costs to the defendants."

5. Aggrieved by the aforementioned decision, the appellant lodged this appeal via his memorandum of appeal filed on 8.9.2009 containing the following grounds;

1. "That the trial magistrate erred in law and in fact by dismissing the Appellant's case without considering his evidence properly and that the case was proved on a balance of probabilities.

2. The trial magistrate erred in law and in fact by dismissing the Appellant's case when the respondents were unable to disprove the Appellant's case.

3. The trial magistrate erred in law and in fact by recording the proceedings wrongly and when the Appellant said 1994 the court recorded it as 1974 and hence distorted his evidence, which departed from the pleadings.

4. The trial magistrate erred in law and in fact by failing in considering that land matters are too sensitive and should have been handled and decided with a lot of care.

5. The trial magistrate erred in law and in fact by failing to consider that the 1st respondent failed to prove how he got the suit plot nor did the 2nd respondent prove how the 1st defendant got the suit plot.

6. That the appellant had not applied or signed any document giving the suit land to the 1st defendant.

7. That the whole judgment was against the weight of evidence".

6. The matter has been in the litigation arena for close to two decades. On 26.11.2019 the court gave directions for the appeal to be canvassed by way of written submission, whereby appellant was to file his submissions by 11.1.2020 while respondent was to file by 26.2.2020. None of the parties complied with the given timelines. Nevertheless, the court has duly considered the submissions of both parties even if the same were filed outside the given timelines.

7. It was submitted for the appellant that the trial magistrate erred in holding that the evidence of respondent was more believable. It was averred that the trial court failed to consider the contradictions in the case of the 1st respondent, in particular the court failed to consider the question of how the first respondent had acquired the land, whether he was given the same by the appellant, or whether he purchased it.

8. It was submitted that there was no evidence of an application for subdivision of plot 5 or any application for transfer of the land to the 1st Respondent and one Nahason M'Itinyai. In short, no evidence was tendered by 1st Respondent to show how he got the plot. Further the appellant contends that his land was transferred to 1st Respondent without his consent and the appellant was not involved in changing of the plots and in subdivision of the same. The appellant is therefore not aware of all the transactions between the Respondents who instigated all the fraud to deprive him part of his land.

9. It was also averred that the trial magistrate erred in finding that the suit was time barred yet the same had not been pleaded.

10. In support of the case for the Appellant, the following authorities were cited;

- **Kanyugu Njogu vs. Daniel Kimani Maingi 2000 eKLR.**
- **Scott vs. Brown Doering MCNAB & Co (3) (1892) 2 QB 724.**
- **Malawi Railways Limited vs. Nyasulu (1998) MWSC3.**
- **Gandy vs. Casper Air Charters LTD (1956)23 EACA 139.**
- **Galaxy Paints Co. Ltd vs. Falcon Guards Ltd (2000) 2 EA 385.**

11. It was submitted for the 1st respondent that the appellant had alluded to issues of fraud and illegality of which he was bound to prove the same but he didn't. The 1st respondent contended that the appellant cannot leave the trial court to infer fraud from the facts. On this point, the respondent relied on the case of **Kuria Kiarie & 2 others vs Sammy Magera (2018) eKLR.**

12. The 1st respondent further submitted that the appellant had admitted to having been aware of the occupation of the suit plot by the 1st respondent in 1974 but he did not lodge any complaint as he had no money. The 1st respondent therefore contends that the trial court arrived at a correct observation that the suit was statute barred, the same having been filed 26 years from when he (appellant) discovered that his land

had been taken away.

13. The 1st respondent also stated that the scene visit had revealed that there are two distinctive plots no's 5A and 5B with the latter registered in the name of the 1st respondent and that this evidence is captured in page 99 of the record of appeal.

14. The 1st respondent avers that the appellant's case did not meet the threshold set out in section 107 of the evidence Act and he relied on the following cases; **Daniel Otieno Migire vs South Nyanza Sugar Co. Ltd (2008) eKLR**. The respondent has therefore urged the court to dismiss this appeal with costs.

Analysis and Determination

15. The 1st Appellate court has a duty to consider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses hence making the allowance. *See Selle and another vs. Associated Motor Boat Company Ltd & others (1968) EA 123, Mary Wambui Njuguna vs. William Ole Nabala & 9 Others (2018)eKLR*.

16. **PW1 Samson Kimana (the appellant)** testified that the plot in question was curved out of his own land and moved to the market section and it was given number 111. This approval was done vide minutes dated 8.12.72 which he produced as P Exhibit 1. He paid Ksh.50 to be shown the plot which was then identified as plot no.5. He stated that the plot measured 20 by 80 feet. The receipt for sh.50 was produced as P exhibit 2. The appellant then embarked on building his plot and he obtained building plans which he produced with receipts as P exhibit 3a & b (*not seen in the ROA*).

17. He further testified that he was paying rent to the 2nd respondent whereby one receipt showed his plot as no.5 but another showed his plot as no.5A (*the receipt showing plot no.5 is not seen in the ROA*).

18. He was then informed that his plot had been subdivided into two which is why his plot was no.5a. He averred that he never applied to the council for his plot to be subdivided and that is why he wanted his plot to be returned to him.

19. During cross examination PW1 stated that he did his developments in 1974. It was also in 1974 when he discovered that his plot had been grabbed but he came to court 26 years later in year 2000.

20. He further testified that he is aware of the scene visit by the court where he confirmed that 1st respondent carried out construction in 1988. He also confirmed that he has put up a stone wall on plot 5A while 1st respondent has fenced off plot 5B. He also said he was shown boundary of plot 5A &5B by the council.

21. He concluded that he was paying rates for plot no. 5 and not 5A. He was shown his own exhibit 4a, b, c whose particulars he read out as follows: **"Receipt dated 4.3.1974 is for plot 5, Receipt dated 2.6.2005 and the one for 27.2.2000 are for plot 5A"**.

22. He added that 1st respondent had not constructed before the filing of the suit but he (1st respondent) now has tenants on the plot. PW1 went to court when 1st respondent had started to construct a toilet.

23. In re-examination, PW1 had again stated that 1st respondent constructed on the plot when PW1 filed case and that the construction was done at night.

24. **DW1, Daniel Muyuri** is the 1st Respondent. He testified that he was given the suit plot by the appellant when it was plot no.111A. The appellant had requested for the transfer of the plot to 1st respondent along with one Nahashon M'Itinyai and their plot became 5B. DW1 produced the minutes where the plot 111B was transferred to him and Nahashon as D exhibit 1, while minutes of transfer from 111A and 111B to 5A and 5B as D exhibit 2. Nahashon later died and his wife and children sold their interest to the 1st respondent. The council accepted this application vide minutes produced as D exhibit 3. He has been paying rent for the plot as seen in D exhibit 4 a-f.

25. In cross examination, DW1 stated that the original plot was 40 by 80 feet and he acquired 20 by 80 feet thereof. The basis upon which the appellant gave him the plot, was because he (1st respondent) had been looking after the animals of the appellant.

26. DW1 stated that he had no letter whereby the appellant had requested the council to subdivide the plot and give a portion to him (DW1). However, DW1 stated that his acquisition occurred in 1972, and he has constructed on the plot.

27. In re-examination, he confirmed that there is a stone wall between the two plots and that the appellant had constructed on his own side of the plot.

28. **DW2, Francis Kiburi Mucheke** is from the county council of Nyambene. He testified that the registration particulars of the two plots were available at the council office whereby the owner of plot 5A is the appellant while 5B is in name of 1st respondent and Nahashon M'Itinyai and each plot measures 20 by 80 feet. He produced the council register as an exhibit.

29. DW2 further gave an account of the root of the land. The land was initially private "own" land belonging to the appellant. The appellant had applied to the council for his land to be in Muringene Market of which the appellant was allowed and the plot became no.111.

30. Vide minute no.8/72/(d) 64 of 8.12.1972, appellant applied to change title of plot 111 to read 111A and 111B which application was

approved. DW2 produced these minutes as exhibits. Later, plots no. 111A and 111B became plots no.5A and 5B respectively through minute no. 15/75 (c) (a) 26 of 22.4.1975 which indicated that plot 5A was for appellant while 5B belonged to Nahashon M'Itinyai and Daniel Muyuri. These minutes were also produced as exhibits.

31. DW2 stated that the appellant had never lodged any complaint with the council and that the two plots exist independently and separately.

32. In cross examination, DW2 stated that he was employed by the council in year 2008, but he obtained the documents from their records. He stated that plot 111 was 40 by 80 feet in the register he produced as from 1977. He confirmed that P exhibit 1 are extracts of council minutes of 8.12.1972 at 10.00 identified as no. 8/72 (D/90) and likewise D exhibit 6 is an extract from minute no.5/72 (d) (64). He would not to know how numbering of minutes was being done in 1972. He however did not get any application filed by the appellant. Plots 5A and B came into existence in 1975. He also confirmed that P exhibit 2 was the document for payment of plot indication where plot is no.5 general shop while Plaintiff exhibit 4c dated 4.3.1974 is receipt for payment of rent for 1973 and 1974.

33. In re-examination DW2 stated that plaintiff exhibit 1 doesn't show the size of the plot and the same case applies to plaintiff exhibit 4(c). He also doesn't know whether the applications of 1972 were made formally in writing.

34. I summarize the issues for determination as ***“whether the trial court erred in dismissing appellant's claim and whether the trial court erred in finding that the appellants claim was time barred”***.

35. Before delving into the merits of the appellant's case, I must point out some glaring anomalies in the manner this appeal has been lodged. The Appellant has not availed a copy of his pleadings yet this is the backbone which supports the weight of the claimant's case. Further, page 46 of the Record of Appeal contains the list of the Appellant's exhibits but the documents subsequently availed are not in tandem with the list. It is only two documents which can be traced in that list which are; the minutes of 8.12.1972 and the indication of plot number (See Item 1 & 2 on the list). Finally, the documents produced by the Respondents as exhibits 1-7 have not been availed by the Appellant in the Record of Appeal. Order 42 rules 13 of the Civil Procedure Rules requires that the pleadings and documents presented before the trial court be availed in the Record of Appeal. Thus the appeal itself fails for want of particulars.

36. Turning to the crux of the matter, there is no dispute that the appellant owned the original parcel which was created from his own land to be part of Muringene Market to become plot 111. This approval occurred on 8.12.1972, as per appellant's minutes produced as P exhibit 1. However on the same date, a subdivision of the plot was made to give rise to plot 111A and 111B as per the minutes produced by respondents as D exhibit 1. These minutes were also identified by DW2, a person from the 2nd respondent. In 1975 or thereabout the plot numbers were changed to read plot 5A and 5B. In his judgment, the trial court has stated that it was difficult to say whether the minutes were genuine or not but it was clear that the distinct registration of plot A and B had been in existence at least from 1977. In light of this evidence, I find that the trial court arrived at a correct decision.

37. It is not lost to this court that during his testimony (evidence in chief), appellant stated that:

“I was given plot no.5 Muringene and I was shown the plot. I paid rent. I paid sh.50 so that I was shown the plot. I produce receipt as exhibit 2. Plot measured 20 by 80 feet”.

38. Thus the appellant's own testimony was to the effect that whatever plot was apportioned to him, it measured 20 by 80 feet. This buttresses the evidence of the the respondents to the effect that each one of them (appellant and 1st respondent) occupied distinct plots on the ground.

39. The appellant has advanced a claim that the trial court erred in concluding that the claim was time barred yet this issue was not raised in the pleadings. However it is apparent that the evidence of the appellant when gauged on his own pleadings invited the issue of limitation. The trial court considered that in his evidence the appellant had admitted that his plot had been grabbed in 1974 and he did not take any action until year 2000, yet in his plaint, appellant had allegedly mentioned year 1999 as when 1st respondent began construction. Again, the trial court considered that the appellant had been aware of the construction by 1st Respondent way back in 1988 and this emerged during the court scene visit. I hence find that the trial court arrived at a correct finding in holding that appellants claim was time barred.

40. In his ground 3 of the record of Appeal, the appellant has faulted the trial court for distorting evidence by recording year 1974 instead of year 1994. I have keenly looked at the proceedings where year 1974 is mentioned. The verbatim words of the appellant in reference to year 1974 were as follows:

“That was 26 years after I discovered part of my plot had been grabbed by the 1st defendant”

41. If the year of discovery was 1994 as he claims, surely the appellant could have confirmed that 6 years and not 26 years had gone by at the time he filed suit in year 2000. The appellant's allegations that the court distorted the evidence when his own evidence proves otherwise is a clear indication that the appellant is out to blame all and sundry for his woes including the courts!

42. My conclusion is that the appellant did not prove his case on a balance of probabilities hence the trial court arrived at a correct finding. In the circumstances, I find that this Appeal is not merited. The same is dismissed with costs to Respondents.

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 to the parties/advocates on 24.6.2020. 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