



**Patrick v Kamwiko & another (Environment & Land Case 51 of 2018)
[2020] KEELC 3994 (KLR) (23 September 2020) (Judgment)**

Peter Mbaabu Patrick v Rose Kamwiko & another [2020] eKLR

Neutral citation: [2020] KEELC 3994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 51 OF 2018
LN MBUGUA, J
SEPTEMBER 23, 2020**

BETWEEN

PETER MBAABU PATRICK APPELLANT

AND

ROSE KAMWIKO 1ST RESPONDENT

PROTASIO KANAKE 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. E. Ngigi – S.R.M
delivered on 13/12/2018 in Isiolo CM ELC Case No. 39 of 2012)*

JUDGMENT

1. The appellant being the plaintiff in the trial court sued the respondents for a declaration that he is the owner of all that parcel of un surveyed/un adjudicated land measuring $\frac{1}{2}$ acre situated at Kandebene Market and bordering Isiolo-Muriri Road, Mr. Andriano Laibuni and Mr. Mithiaka M’Ikiugu; an order that the defendants give vacant possession or be forcefully evicted; and a permanent injunction restraining the defendants whether by themselves or their agents from trespassing onto the Suit Land or any other way interfering with the plaintiff’s user and occupation of the Suit Land.
2. The respondents, being the defendants, put the plaintiff to strict proof. They also filed a counter-claim where they sought orders that they be declared as the rightful owners of the Suit Land and a permanent injunction be issued against the appellant.
3. On 13/11/2018 the trial court dismissed the appellant’s/ plaintiff’s case while allowing the counterclaim of the respondents/defendants.
4. The appellant being aggrieved by the decision filed this appeal based on five (5) grounds which may be summarized into three (3): that the learned magistrate erred in law and fact erred by disregarding the



appellant's evidence, failing to consider that the Suit Land was in the year 1986 under Meru Society and not under individual ownership and that the standard of proof of ownership was ascertained by the appellant.

5. This matter was canvassed by written submissions. The appellant submitted that he is the registered proprietor of the Suit Land which he bought for value in 2012 before it was surveyed and adjudicated. That the Suit Land in 1986 was under Meru Society and not under individual ownership. That while the appellant was in possession of the Suit Land, the respondents illegally and fraudulently conspired with other adjudication officers in speeding up the process of issuance of title deeds. Thus, the appellant is the rightful owner of the Suit Land, which is now Land Parcel No. 3220 Ngaremara Adjudication Scheme.
6. The respondents submitted that the appellant failed to prove ownership since his only evidence of acquisition was through a purported sale agreement. Neither could he prove that the land did belong to the seller, the late Samuel Lichoro Maara. Therefore, he could not have bought land from a person without ownership documents. Besides the respondents were already in lawful possession of it. In addition, the respondents have been recorded as the owners of the Suit Land parcel No. 3220 Ngaremara Adjudication Scheme. They relied on the following cases; Merit Development Limited v Lenana Investment Limited & 2 others [2018] eKLR and Aggrey Khajira Indeche v Jonah Andanje Muchilimani [2018] eKLR to support their submissions.

Determination

7. 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.
8. PW1 Peter Mbaabu Patrick testified that one Samuel Maara Lichoro approached him three times asking him to buy the Suit Land. On 12/09/2007 at about 10.00AM they met at the site where he saw the plot. In the presence of one Chief Bernard Mwiti Ariitho they reduced the transaction into an agreement which was witnessed by one Justus Kiraithio and Samuel's wife. Samuel agreed to sell to him the ½ acre plot at Kshs. 12,000/-. Since the means of transport was poor he asked Samuel to continue taking care of the land until a time when he would be able to utilize it.
9. The suit plot was not surveyed but it had a fence and was demarcated. When he wanted to develop it in 2012, it became difficult. On 26/09/2012 he went with Samuel and the assistant chief and spoke to the defendants and informed them that he wanted to develop the suit land and the respondents requested for 7 days to leave the land. On 3/10/2012 Samuel showed him the boundaries and he took possession of it. On 4/10/2012 he got a report that the posts had been uprooted by the defendants.
10. PW2 Bernard Mwiti Ariitho, assistant Chief Kandebene sub-location, recalled that on 12/09/2007 PW1, Samuel Maara and his wife came to his office. PW1 first wanted him to confirm that he knew Samuel which he confirmed for he knew him. He then told him that he wanted to buy a plot and he requested pw2 to accompany them to identify the land. He knew the plot belonged to Samuel. They then drew an agreement in his presence which he countersigned. He also issued PW1 with a letter which identified the suit parcel. He affirmed that the whole parcel belongs to Samuel who sold ½ acre to PW1 and left the other half in his name.
11. PW3 Gerald Mbui M'Imara, is the son to Samuel Maara who is deceased. He stated that his father informed him that he sold a parcel of land to the plaintiff at Kandebene for Kshs. 12,000/- which he paid in full. He then fenced the plot and started cultivating. The defendants however came and constructed two structures and removed the fence. He affirmed that his father was residing on the said



- plot and lived there until his death. However, he had not constructed a house on the plot neither was he buried there. The last time he was at the Suit Land was in 2006 but declared that the defendants were not in occupation of it.
12. DW1 Rose Kamwiko adopted her statement dated 26/02/2013 as her evidence. She stated that she and her husband the 2nd defendant have been in exclusive, uninterrupted occupation of the suit land since 1997 when they built their house although they had commenced cultivation thereon in 1986 up to date. The plaintiff who is a neighbor alleges to have bought the shamba from the father to her husband, Samuel Maara Richirio. However, she cannot tell whether her father in law did so as she is not aware. The plaintiff attempted to evict them on 3/10/2012 but was unsuccessful. He however demolished some structures and fence. It is untrue that they invaded the Suit Land on 05/10/2012. That when the case was filed, the Suit Land had not been surveyed. Her father in law had ½ acre of land but instead he purported to sell their ½ acre of land.
 13. DW2 Mitheka M’Kiugu, testified that he is the sub-area of the area known as Lailuba sub-location. He is also the immediate neighbor of the defendants as they share a fence. That on 03/10/2012 he witnessed the demolition of the defendants’ fence, toilet and animal structures by the plaintiff and his agents. He is aware that the 2nd defendant started cultivating the Suit Land in 1986 or thereabout. He settled on his parcel of land in 1995 while the defendants settled on the Suit Land in 1997. They have been neighbors for years and he can attest to their possession. He does not know the plaintiff neither is he aware that he constructed a house.
 14. The issue for determination is; who is the rightful proprietor of the Suit Land.
 15. Going by the pleadings and the evidence adduced before the trial court, the land which is the subject matter of this suit was an un-surveyed, unregistered land measuring ½ acre situated at Kandebene Market and bordering Isiolo-Muriri Road as at the time the suit was filed.
 16. Article 61 of *the Constitution* of Kenya provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Article 63 defines community land to include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral land and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments.
 17. The process of adjudication is normally conducted to ascertain the rights and interests a person has in land which is under a customary tenure system. This process had not occurred by the time the appellant allegedly bought the Suit Land from Samuel. The appellant has contended that the land belonged to Meru Society tenure system (which I believe refers to the Ameru land customary system) and not individual tenure system. In that case, it was incumbent upon the appellant to adduce evidence showing how the rights and interests in the land possessed by Samuel Maara were defined in that Meru Society system. There is no evidence to show that the clan of Samuel was involved in the alleged sale of the suit land. As rightly submitted by the respondents, the maxim “nemo dat quad non habet” (no one can give what he does not have) is applicable herein.
 18. It appears that during the course of the trial, the process of adjudication commenced whereby 1st respondent was registered as the owner of the land as plot no. 3220 on 13.4.2018. The contention by the appellant that he is the registered owner of the suit land is hence unfounded. Further, the appellant has alleged fraud on the part of the registration of the land into the name of 1st respondent, but he has not challenged the aforementioned registration through the dispute resolution mechanisms provided under the adjudication statutes I.e, by lodging an objection case, See Reuben Mwangela M’Itelekwa



(Suing as the legal representative of the estate of M’Itelekwa M’Mucheke vs. Paul Kigea Nabea, ELC Meru Petition 6 of 2017.

19. This is a case whereby the appellant was trying to assert his claim of occupation of the land by use (actually misuse) of a court order. When he filed the suit, he also filed an application under a certificate of urgency where he sought orders restraining the respondents from entering or using the suit land and he managed to convince the court to have the orders granted ex-parte. In his evidence, he states that when he got these orders, he served the respondents because; “I had wanted to evict them from the plot as they had no permission to occupy my plot....”. This happened in November 2012. It is clear that this is the time the appellant was attempting to occupy the suit land and not before. However, the orders did not last long as his application was eventually dismissed after the inter-partes hearing.
20. Before I give the final orders, I must express my dismay in the manner the record of appeal was prepared. The documents have been filed haphazardly in two separate bundles such that one has to look for important documents like pleadings all over the two bundles. Some crucial documents like the exhibits of the respondents (particularly the registration record of the suit land) have not been availed and the court has to fall back unto the original file.
21. All in all, I find that the appellant’s case is not merited. This appeal is hence dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

Order

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 9.7.2020. 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.

