



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL CASE NO. 54 OF 2009

LESIIIT, J.

M'MUGAMBI THIRINGI.....APPELLANT

VERSUS

M'BIRITHIA GITHONGO.....RESPONDENT

(Being an appeal from the judgment and decree of W. K. KORIR, Principal Magistrate delivered on the 9th June, 2009 in Meru CMCC No. 112 of 2000)

JUDGMENT

1. The Appellant, **MUGAMBI THIRINGI** was the Defendant in Chief Magistrate's Civil Case No.112 of 2000. The Respondent **MBIRITHIA GITHONGO** was the Plaintiff.
2. The claim before the lower court was for three orders namely:
 - a. **An injunction restraining the Defendant and his agents from trespassing and/or interfering with the Plaintiff's user of the subject parcel of land.**
 - b. **Eviction order to evict the Defendant and/or his servants and/or his agents from the Plaintiff's parcel of land.**
 - c. **Costs of the suit.**
3. Judgment was entered for the plaintiff against the defendant as prayed for in the plaint in terms of order (a) and (b).
4. The defendant was dissatisfied with the said judgment and therefore filed this appeal. In the memorandum of appeal, the Appellant raises the following eight grounds:
 1. **The trial magistrate erred in law and fact in failing to find that the suit was not competent in absence of a valid consent as provided by the law;**
 2. **The magistrate erred in law and fact in granting the orders sought in the plaint contrary to the weight of the evidence on record which proved otherwise and on relying on hearsay evidence of PW2.**
 3. **The magistrate erred in law and fact in disregarding the law and particularly the holding of a binding authority MERU HCA 157 OF 2001 ISAAK KABERIA ETILIKIA VS. NTIKA MUNORU & ANOTHER.**
 4. **The court erred in law and fact in not finding that it was the land office mandate to show the locus in quo of 2823 and resolve the issue over the machinery provided by the law but not court's business to determine locus in quo of parcels belonging to parties.**

5. **The court ignored DW2 evidence which was offering the solution to the problem by parties going to the lands office to trace the parcels on the ground and particularly No.2823.**
 6. **The court ignored the records at lands office which showed that it was parcel 3371 which is on the disputed locus in quo and not 2823.**
 7. **The court ignored the fact that the previous land officers had caused the problem on the ground and not the appellant hence should not have penalized the appellant with costs and orders of eviction and should have ordered Status Quo to be maintained and until the adjudication process is over.**
 8. **The entire judgment is unfair as the appellant has done extensive development and has been in occupation for a long time since early 1970's.**
5. There was no dispute that the suit land in question in this case was land held under the provisions of the Land Adjudication Act, as the process of Adjudication had not been completed by the time the suit was filed. There were therefore no titles to land.
 6. The issue in contention was whether the Respondent had any lawful interest over the suit land; parcel No. 2823 Maua Adjudication Section measuring 0.33 of an acre? Or whether the suit land belonged to the Appellant and was land parcel No. 774 measuring 0.33 of an acre?

Appellant's Submissions

7. The Appellant submitted that the Respondent did not visit the subject property and further that the person who was commissioned to visit the ground to draw a sketch map Exh. 2 was not called to testify. He urged that his evidence cannot stand when compared to that of DW2, the Officer in Charge of adjudication in the area, who visited the scene and made a report to the court. The Appellant reiterated that from the evidence of DW2 in re-examination, the Land Parcel No. 2823 was comprised of fragments of land bought elsewhere by the Plaintiff and were imposed where Land Parcel No. 5634 and 5645 are on the ground. These parcels of land are owned by the Plaintiff and the Plaintiff's son respectively. He further submitted that the land parcel no. 3371 which is owned, occupied and developed by him was on its right place on the ground. The Appellant urged that it was the duty of the Respondent to seek to know the exact location of his land from the Land's Office.
8. It is the Appellant's position that until the entire machinery of the ascertainment of interest of land and registration of the rights over land rights under Cap. 284 was complete, no party can conclusively say that it is entitled to registration over the suit land. Accordingly, the court had no jurisdiction, at that stage to issue the orders sought as the process of adjudication is yet to be concluded.

Respondent's submissions

9. The Respondent maintains that he has an interest in the Plot No. 2823. In his evidence, he testified that he owns Plot No. 2823 in Maua which he bought from one Richard Gichunge, the Appellant's brother. He stated that he was shown the boundaries of the plot by the Lands Office. He also stated that the area where the land is situated is still under adjudication.
10. The Respondent submitted that he successfully proved that the suit property belongs to him pursuant to the records held at the Amwathi/Maua Adjudication Office. He urged that the documents he produced in support of his case were in tandem with the records held by the Adjudication Office, bearing an official stamp and signature of the officer who made it.
11. The Respondent urged that as of 6th February 2003, there was overwhelming evidence of the existence of the suit land on the ground and the records at the lands when a demarcation officer Richard Muturi PW2, authorized one of his officers, John Thuo to visit the site on the basis of which he drew a sketch map of the suit land which was produced in court. The Respondent urged that the said map was an authentic and official document.

12. The Respondent discounted the evidence of the Appellant's witness concerning the conflict in the suit property as misleading since the Lands Office could not have allowed the Respondent to institute the suit by granting him consent if the Land Adjudication Office was capable of resolving the issue.
13. The Respondent urged that the Appellant did not produce any documents to challenge the documents he (the Respondent) produced and the evidence adduced by the Land Adjudication Officer, Richard Muturi, showing that the land measuring 0.33 acres existed and was registered in the name of the Respondent.
14. The Respondent further challenged the Appellant for introducing new evidence. He urged that the Appellant pleaded that he was the owner of Land Parcel No. 773 Amwathi/Maua Adjudication Section which fact was denied by the Appellant's own witness, DW2.
15. From the eight grounds of appeal listed, the main issues for the determination in this Court are two-fold:
 - a. **Whether the proper procedure was followed in moving the Court in instituting this appeal?**
 - b. **Whether the trial Court erred in granting the injunction and eviction orders against the Appellant?**
16. In the first ground of appeal, the Appellant faulted the trial Court for failing to find that the trial was incompetent due to lack of a valid consent. It is not in dispute that the subject property is held under adjudication. Section 30 (1) of the Land Adjudication Act provides for consent to institute proceedings in the following terms:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”
17. The Plaintiff produced P. Exhibit. 1 being the consent to institute the suit dated 15th March 1990 issued by the Land Adjudication Department, Maua. The consent therefore satisfies the requirement of Section 30. This ground of appeal therefore fails.
18. The main contention regards the finding of the trial Court in which it granted an injunction and eviction orders against the Appellant.
19. The Respondent called PW2, Richard Muturi, who was a Demarcation Officer at Amwathi/Maua at the material time. PW2 stated that the lands office had the relevant records in relation to the subject property which is registered in the name of the Respondent, measuring 0.33 acres. He produced P. Exhibit. 2, being the sketch map that was drawn by another officer, one John Thuo who visited the ground on 6th February 2003 at the request of the Respondent.
20. The Appellant testified that he owns the piece of land Plot No. 3371 which he stated was inherited from his father. He produced in court documents in support. He stated that the land in question measures 0.40 acres. He denied the Respondent's allegations that Plot No. 2823 was adjacent to his land. It is noteworthy that during cross-examination, the Appellant stated that he does not know the owner of Plot No. 771 of which he had claimed ownership in his statement of defence. The Appellant, I also noted, did not, make an attempt to amend his defence to reflect the correct particulars of the land parcel. The Respondent's submission that the Appellant had adduced new evidence was correct in the circumstances.
21. DW2, Mureithi Kirera, a Demarcation Officer stated that he had both records for Plot Nos. 3371 and 2823 (the suit property). He testified that the registered owner of Plot No. 3371 is the Appellant which is 0.4 acres, while 2823 is registered under the Respondent measuring 0.33 acres. He produced certified copies of the Records of Adjudication, Adjudication Registers and Sketch Plans in respect of Plot Nos. 3371 and 2823. He testified that the two plots are adjacent to each

other and do not overlap. However, he added that the possibility of overlapping could only be ascertained by a site visit.

22. DW2 gave evidence of the site visit carried out on the 11th of August 2008. According to the report of DW2 on the site visit, the land being claimed by the Respondent was found to be measuring 0.27 acres. He noted that the location of the land according to the Respondent encroached onto another piece of land parcel no. 8650 belonging to another person, one Mijugu M' Iwaria. He added that the Appellant also showed the same site that was being claimed by Respondent which was not encroaching on any other piece of land, measuring 0.21 acres. DW2 further stated that on subsequent confirmation of the records following the visit, he found how land parcel no. 2823 came into being. He recounted that parcel no. 2823 was a result of purchases from different parcels of land. Further, according to DW2 the suit property, parcel No. 2823 is demarcated in the wrong place on the ground, where land parcels nos. 5645 and 5634 ought to be which belong to the Respondent and his son.
23. Having considered the evidence presented by DW2, I find it contradictory in several respects. The Appellant at one time stated that on location land parcel no. 2823 is made up of several pieces. He further stated that the location pointed out by the Respondent for land parcel no. 2823 this parcel was the same location where parcel no. 5634 half of which the plaintiff allegedly transferred to his son, which became no. 5645 is located. Earlier on, the witness stated that parcel no. 3371 is supposed to be on the locus of land parcel no. 2823. This clearly, does not add up.
24. DW2 concluded that the problem arose when the total acreage of 0.33 acres in respect of no. 2823 was demarcated over what was already in existence. Even if I were to accept this as the true position, I find that the Appellant bears no interest over the suit property in question. If we were to go with the version by DW2, the Appellant would have no basis for making a claim over the property on the ground, since Parcel No. 2823 is said to be demarcated over an existing property of the Respondent being Parcel No. 5634, which was bought from Karatho, and originally bought from the Appellant.
25. DW2 concluded that the dispute ought to be between Nos. 5634 and 5645 on the one hand and No. 3371 on the other hand. The fact is the said parcels of land were not the subject matter in the case before the lower court, and are therefore not in question in this appeal. The Court cannot start interrogating issues that were not pleaded in the first place. While it is not in dispute that there is a land parcel no. 2823 measuring 0.33 acres and registered in the name of the Plaintiff/Respondent.
26. During cross-examination, DW2 stated that the part that the Respondent encroached into when demonstrating the demarcation for 2823 was parcel no. 8650 which was originally excised from 3371. There were no documents produced to support this contention. DW2 also confirmed that parcel nos. 1133 and 2807 two of the three parcels which the Respondent is said to have purchased to comprise 2823 had not been demarcated on the ground at the time of purchase while parcel no. 990 had been demarcated. However DW2 did not point out the location of the said demarcation while at the same time he contended that parcels that have not been demarcated cannot be reflected on the maps.
27. DW2 added that the records in the office do not show if parcel nos. 5645 and 5634 are demarcated on the ground. In his words, the records could not show *these* two parcels on the grounds. I find the evidence of DW2 cannot be reconciled and I find it difficult to follow his evidence. On the one hand DW2 said that it is not possible to locate something on the ground when the same is not reflected in the records. Yet in his evidence he concluded that the location pointed out by the Respondent as parcel no. 2823 was where nos. 5634 and 5645 are on the ground; yet he also stated that the two parcels of land were not part of their office records. There is seemingly no basis for the conclusion that the ground shown by the Respondent as that of parcel no. 2823 was actually for land parcels no. 5645 and 5634.
28. Again, DW2 in his cross-examination concluded that parcels no. 5654 and no. 5634 which

according to him came from 3371, was on the ground that was claimed by the Respondent. If, parcel no. 2823 rests on the same ground as parcels nos. 5654 and 5634, it is not practically possible that 3371, from which the two plots were excised, would be on the same ground. Furthermore, despite acknowledging that No. 2823 measuring 0.33 acres, and detailing how it came to be, DW2 conveniently concludes that the location of the suit property is uncertain. I find that the evidence of DW2 was illogical and irreconcilable.

29. When shown P. Exh.2, he stated it had been signed by a Demarcation Officer and not the Adjudication Officer. Yet, he admitted that the parcels no. 2823, 5634 and 5645 could not have been appearing on the map if they were not demarcated on the ground. In D. Exh.4, parcel no. 3371 is shown where parcel no. 2823 is shown in P. Exh.2. I find this crafted to suit the Appellant's case. Unlike the exhibit produced by the Respondent which was prepared after the ground visit, the same is not true of the Appellant's exhibit.

30. The authority relied upon by the Appellant as the basis of his ground number 3 of appeal to the effect the learned trial magistrate's decision was *per incuriam* was overturned by the Court of Appeal sitting at Nyeri in **Ntika Munoru & Another v Isaac Kaberia Etirikia Civil Appeal 278 of 200, (2012) eLKR.** The Court, held that:

"..... It is not the correct position in law that an "owner of" land under the Land Adjudication Act before final registration cannot seek the protection of the law where his interest in the property is threatened. Even if the appellants had not yet been registered as the owners of the said plots, their equitable interest in the said properties had already crystallized and was enforceable as against any other third party...In our view it would be contrary to equity and good conscience to deny the appellants herein their right to defend their undisputed interests in the plots in question."

31. Having carefully considered this appeal and the entire evidence adduced in the case before the lower court and the submissions of counsels I find as follows:

32. I find that the learned trial magistrate came to the correct finding that there was a valid consent as required under section 30 of the Land Adjudication Act and therefore the suit was competent.

33. I find that the learned trial magistrate did not err in law or fact when he failed to follow the High Court holding in **ISAAK KABERIA ETILIKIA VS. NTIKA MUNORU & ANOTHER MERU HCCA No. 157 OF 2001,** for the basic reason that the said case was overturned and is no longer good law. The consequence of that finding is that the Respondent had a right to file the suit to have his rights to the suit land determined by the court and was not bound to have the land office resolve the matter, nor was he bound to submit to the land office to show the locus in quo of parcel no. 2823 as the Appellant urged in this case.

34. I find that the court was right not to accept the evidence of DW2 as the same was illogical, contradictory and was not offering the solution to the dispute between the parties. I find that the evidence of DW2 was crafted to aid the Appellant's case. The evidence of DW2 to the effect that the records at lands office showed that it was parcel no. 3371 which was on the disputed locus in quo and not 2823 was a statement made without any basis at all, was misleading and was not acceptable at all.

35. **From a consideration of this appeal :**

a). I find that the Respondent has a legitimate claim over land parcel no. 2823 measuring 0.33 acres, that the said parcel of land did exist at the locus in quo and was registered in the Respondent's name.

b) I find that the Respondent was deserving of the order of Injunction and eviction granted by the lower court in this case.

c) I find no error in the conclusions arrived at by the learned trial magistrate and in the final orders made in the case.

d) The appeal has no merit and cannot therefore be sustained.

e) The appeal is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF NOVEMBER, 2014.

LESIIT, J.

JUDGE