



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC No. 280 OF 2017

(FORMERLY HCCA No. 50 OF 2014)

FATHER FAUTUS NDENYERE.....1ST APPELLANT

CATHOLIC DIOCESE OF NAKURU.....2ND APPELLANT

VERSUS

LUCY WAITHIRA KARANJA.....1ST RESPONDENT

NJUGUNA KARANJA.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru (Hon. B. Atiang, Senior Resident Magistrate) delivered on 2nd April 2014 in Nakuru CMCC No. 908 of 2004 Lucy Waithira Karanja & Anor v Father Fautus Ndenyere & Anor)

JUDGMENT

1. This appeal traces its roots to plaint dated 2nd April 2004 which the respondents filed in the subordinate court and in which they averred that they were the owners of a parcel of land known as Business Plot No. 6 at Pwani Trading Centre. They further stated that in the month of March 2004 the first appellant ploughed and harrowed the rear access road to the parcel of land thereby interfering with access into the plot. They prayed for an order directing the appellants permanently not to interfere with the road accessing the said parcel, costs of the suit and interest thereon.

2. The appellants filed amended defence and counterclaim in which they denied the respondent's allegations. They stated that the second appellant was the registered proprietor of the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio) and that respondents had unlawfully entered the said parcel on diverse dates between 2003 and 2004 thereby making them unable to enjoy the rights of a proprietor and causing them loss and damage. They prayed for dismissal of the respondents' suit and for a perpetual injunction restraining the respondents and respondents' servants, agents or assigns from entering, occupying, claiming, using or otherwise interfering with their enjoyment and utilization of the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio), an order for the respondents' eviction, general damages, costs and interest.

3. Upon hearing the matter, the subordinate court (Hon. B. Atiang, Senior Resident Magistrate) found merit in the respondents' case and granted an order directing the appellants permanently not to interfere with the road accessing the said parcel. The appellants' counterclaim was dismissed with costs.

4. Aggrieved by the judgment, the appellants filed this appeal in which they pray that the judgment be set aside and the counterclaim be allowed. They also pray for costs. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

- 1. THAT the learned trial magistrate erred in law and fact in upholding plaintiff's suit and dismissing the defendant's counterclaim.*
- 2. THAT the learned trial magistrate failed to appreciate the express provision of law under Cap 300 as regards registered land (Repealed).*
- 3. THAT the learned trial magistrate erred in law in failing to consider the provision of section 27 of the Registered Land Act (now repealed).*
- 4. THAT the learned trial magistrate erred in law and fact in failing to appreciate and uphold the sanctity of title.*

5. THAT the learned trial magistrate erred in law and fact by not considering all material placed before him and in particular the map of the disputed land.

6. THAT the learned trial magistrate erred in law and fact in holding that the plaintiff's case stood unchallenged whereas there was sufficient evidence to the contrary.

7. THAT the trial magistrate erred in law and fact in failing to consider and apply the well established principles of law in respect of title deeds vis a vis allotment letters.

8. THAT the learned trial magistrate was outrightly (sic) biased against the defendants.

9. THAT the learned trial magistrate erred in law and fact in believing the plaintiff's case entirely and rejecting the defendant's case.

5. The appeal was canvassed through written submissions. The appellants collapsed the grounds of appeal into three: whether the subordinate court erred in dismissing the counterclaim, whether the court failed to consider all materials placed before it especially the map and lastly, whether the subordinate court failed to consider and apply legal principles applicable to dealing with a title deed vis-à-vis a letter of allotment.

6. The appellants argued that their title deed is conclusive evidence that the second appellant was the absolute and indefeasible owner of the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio). On the other hand, the respondents' claim to Business Plot No. 6 at Pwani Trading Centre which falls within Kihingo/Likia Block 2/537 (Pwani Mutukanio) was based only on a letter of allotment without any title. They faulted the learned magistrate for placing reliance on the respondents' construction approvals contrary to the doctrine of sanctity of title and in disregard of the provisions of **Sections 27 (a) and 28 of the Registered Land Act (now repealed)**. The cases of **Marcus Mutua Muluvi & Another v Philip Tonui & another [2012] eKLR** and **Gladys Wanjiru Ngacha v Teresia Chepsaat & 4 others [2008] eKLR** were cited in support of those arguments.

7. On the issue of whether the court failed to consider all materials placed before it, the appellants argued that they produced a map of the disputed area which showed that that Business Plot No. 6 at Pwani Trading Centre fell within Kihingo/Likia Block 2/537 (Pwani Mutukanio) and that the learned magistrate did not take that into account. Further, that the court did not take into account that the respondents' parcel had no clear boundary compared to the appellants' parcel.

8. The respondents argued that Business Plot No. 6 at Pwani Trading Centre was allocated to their mother by the council in 1986, building plans in respect of it approved in 1990, construction of a commercial building completed and occupation permit issued on 4th February 1997 by the council compared to the appellants' allocation of 1996 and title deed of 1997. They further argued that the appellants did not take any action to claim the land until 2004 when they ploughed it. They also argued that the appellants did not call a surveyor or a land officer to explain if Business Plot No. 6 at Pwani Trading Centre fell within Kihingo/Likia Block 2/537 (Pwani Mutukanio).

9. The respondents further argued that the authorities cited by the appellants are distinguishable since in this case the respondents had a letter of allotment, paid rates, had approved building plans and obtained occupation permit from the council.

10. Regarding the issue of indefeasibility of title, the respondents argued that the 2010 constitution changed the concept of indefeasibility of title since it now places a higher value to integrity and rule of law which cannot be sidestepped by imposing legal blinders based on indefeasibility. The cases of **Republic v Kisumu District Lands Officer & another [2010] eKLR** and **James Joram Nyaga & another v The Hon. Attorney General & another [2007] eKLR**.

11. I have considered the grounds of the appeal and the submissions. This being a first appeal, the mandate of this court is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**.

12. An important question that arose in the proceedings was: did the part of Business Plot No. 6 at Pwani Trading Centre that the appellants ploughed fall within Kihingo/Likia Block 2/537 (Pwani Mutukanio)? To answer that question, we need to look at how the dispute arose. The respondents are the ones who moved the subordinate court. They averred in their plaint that the first appellant ploughed and harrowed the rear access road to the parcel of land known as Business Plot No. 6 at Pwani Trading Centre in the month of March 2004 thereby interfering with access into the plot. At the trial, the second respondent testified that he received a one month notice to vacate from the second appellant on claims that the area belonged to the second appellant and that soon thereafter the second appellant ploughed and planted wheat in the area. During re-examination, he stated "*I do not know how far the Catholic plot extends to. ... I think my plot is also covered in their title but I do not know*".

13. On her part, the first respondent testified that there was a pathway behind a building that they had constructed on Business Plot No. 6 at Pwani Trading Centre and that the appellants "*ploughed the entire backyard*". There is also on record the evidence of PW3, a planner employed by County Council of Nakuru who testified that he was involved in the allocation of the plots by the said council in 1986 and that the second appellant's title was illegal since there was no subsequent allocation after 1986. Thus, from the respondents' case, it is apparent that the appellants' activities which they had complained of took place on part of what they considered to be their plot: Business Plot No. 6 at Pwani Trading Centre. Further, the record shows that the first defence witness testified that the DC wrote a letter dated 31st May 1991 to the first respondent among other persons asking them to vacate the land and that they did not comply with the notice.

14. There is no dispute that the second appellant holds a title deed in respect of Kihingo/Likia Block 2/537 (Pwani Mutukanio). A copy of the title and a copy of a certificate of search as on 5th July 2011 were produced in evidence. The title was issued on 22nd May 1997 under the **Registered Land Act** (now repealed). Under **Section 18 (1)** of the said statute, the Director of Surveys was required to prepare and maintain a registry map for every registration district. A perusal of the title shows that the relevant registry map sheet for the parcel was number 119/3/11. Indeed, the appellants produced a copy of the said map as an exhibit. Thus, the position and extent of Kihingo/Likia Block 2/537 (Pwani Mutukanio) can be established from the registry map sheet. On the other hand, no map certified by the Director of Surveys was produced showing the position and extent of Business Plot No. 6 at Pwani Trading Centre. The said plot is not registered and all that exists in respect of it is an allotment letter.

15. In view of the foregoing discussion, I am persuaded that on the basis of the respondents' case as pleaded and further in view of the evidence on record, the part of Business Plot No. 6 at Pwani Trading Centre that the appellants ploughed fell within Kihingo/Likia Block 2/537 (Pwani Mutukanio). The learned magistrate while addressing that issue was of the view that the appellants ought to have called the district surveyor or the land registrar to confirm that the respondents' plot fell within Kihingo/Likia Block 2/537 (Pwani Mutukanio). That was a conclusion based on an erroneous analysis of the evidence before the court. Faced only with an allotment letter, the registry map sheet which the appellants produced together with the title was more than adequate evidence in the circumstances.

16. Indeed, the evidence of PW3, a planner employed by County Council of Nakuru who testified that he was involved in the allocation of the plots by the said council in 1986 was that the area was surrendered to the council in 1984 and that the second appellant's title was illegal since there was no subsequent allocation after 1986.

17. The next question is whether the learned magistrate failed to consider and apply legal principles applicable to dealing with a title deed vis-à-vis a letter of allotment. As previously noted, the second appellant holds a title issued to it under the **Registered Land Act** (now repealed). As is discernible from the evidence of PW3, DW1 and a perusal of the title document, the second appellant's title was a first registration. Under **Section 27 (a)** of the said statute, the second appellant's registration vested in it the absolute ownership of Kihingo/Likia Block 2/537 (Pwani Mutukanio). Further, under **Section 28** of the statute, the second appellant's rights as a proprietor were not to be defeated except as provided in the statute. The subordinate court delivered its judgment on 2nd April 2014. As at that date, the **Registered Land Act** had been repealed and the **Land Registration Act** had come into operation with effect from 2nd May 2012. There are comparable provisions at **Sections 24 to 26** of the **Land Registration Act** dealing with the interest conferred by registration, the rights of a proprietor and the conclusive nature of a certificate of title as evidence of proprietorship.

18. Equally, as previously noted, the respondents hold a letter of allotment. The law couldn't be clearer that a letter of allotment is not title to land. It is merely evidence of an offer which may or may not result in title to land. To get title, the allottee has to follow up the offer and comply with all its conditions. In **Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR**, the Court of Appeal stated:

... Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.

19. The Court of Appeal reiterated as much in **Dickson Ngigi Ngugi v Commissioner of Lands [2019] eKLR** where it stated:

[17] Construing the letter of allotment together with the relevant provisions of the Act, it is evident that the letter of allotment was for grant of a lease of unsurveyed farm of 118 Hectares initially for a term of 3 years as a first stage. Before the lease could be granted the land had first to be surveyed. ...

[18] On the above analysis of the law, it is clear that the letter of allotment granted the appellant a mere contingent right to a grant of a lease. To be entitled to a grant of lease, the land had to be surveyed and the applicant had to fulfill the conditions stipulated in the letters of allotment. ...

In the absence of a registrable lease granting the appellant a leasehold interest in the suit land and without fulfilling the mandatory conditions for grant of lease as to development or having been expressly excepted from fulfilling the condition, the letter of allotment lapsed before implementation and the appellant had no legal or equitable proprietary interest in the suit land...

20. Whilst submissions were made before the subordinate court on the effect of a title deed vis-à-vis a letter of allotment, the learned magistrate focused exclusively on what was deemed to be the respondents' comparative longevity of possession and development of the property with approvals from the local authority. With respect, that was an erroneous approach. In view of the appellants' registered title, longevity of possession and development of the property were irrelevant considerations in the circumstances. In any case, there was evidence that the respondents' possession and development of the property had been contested as far back as 31st May 1991 through a letter from the District Commissioner. While it is true that the concept of indefeasibility of title is inapplicable where title to property was unlawfully acquired (see **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR**), the respondents did not plead any claim for cancellation of the appellants' title. As such, any claims in evidence that the appellants' title was defective were just moot.

21. I am therefore not persuaded that the respondents had made a case for issuance of a permanent injunction whose effect was to stop the second appellant from enjoying its rights as a registered proprietor on a portion of its property. Equally, I am satisfied that as a registered proprietor, the second appellant is entitled to a perpetual injunction restraining the respondents or their agents from interfering with the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio) and an order evicting the respondents from the said property. No basis was laid for the appellants' prayer for general damages and the subordinate court cannot therefore be faulted for not awarding it.

22. In the result, I find merit in this appeal. I allow the appeal, set aside the judgment and decree of the subordinate court and replace it with the following orders:

a) The respondents' case in the subordinate court is dismissed.

b) The respondents to vacate from the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio) within 45 (forty five) days from the date of delivery of this judgment. In default, an eviction order shall automatically issue and the appellants shall be at liberty to evict them.

c) A perpetual injunction is hereby issued restraining the respondents by themselves, their servants, agents or assigns from entering, occupying, claiming, using or otherwise interfering with the appellants' enjoyment and utilization of the parcel of land known as Kihingo/Likia Block 2/537 (Pwani Mutukanio).

d) The appellants shall have costs of this appeal, costs of the respondents' case in the subordinate court and costs of the counterclaim.

e) The appellants shall also have interest on all costs at court rates.

23. It is so ordered.

Dated, signed and delivered at Nakuru this 30th day of November 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mwangi for the appellants

No appearance for the respondents

Court Assistants: B. Jelimo & J. Lotkomoi