



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 31 OF 2017

ABDUL LIBAN.....APPELLANT

VERSUS

JILLO GUYO.....RESPONDENT

JUDGMENT

(Appeal from the Judgment of Hon. T.M Wafula R.M Marsabit Issued on 21.6.2017)

Introduction

1. The respondent had sued the appellant vide PMCC no. 6 of 2013 (Marsabit) where he sought the following orders:

- (a) An order that the defendant do vacate and render the vacant possession of the plaintiff's plot no. 307 Marsabit County Council
- (b) An order cancelling the surveying and demarcation of land parcel no. 473A upon the plaintiff's plot no. 307 Marsabit.
- (c) Any other or better relief the court may deem fit for the interests of justice.
- (d) Costs of the suit.

2. The appellant filed a statement of defence denying the respondents claim and put him to strict proof thereof. After the suit was heard and judgment given favour of the respondent, the appellant was aggrieved and appealed to this Honourable court citing the following grounds:

- (i) The learned RM erred in law and in fact in giving judgment in favour of the respondent when his case was not proved on a balance of probability.
- (ii) The learned RM erred in law and in failing to find that the appellant was the registered owner of land parcel no. 473A he has been living and extensively developed the same by planting trees and also constructed several houses thereon.
- (iii) The learned RM erred in law and in fact in failing to give the appellant time to vacate the demised plot as required by the law.
- (iv) The learned RM erred in law and in fact in awarding the respondent costs which was not pleaded and proven as required by the law.
- (v) The judgment of the learned RM is against the weight of law and evidence.

Respondent's case

3. In the case before the trial court the respondent/plaintiff who was the plaintiffs before the lower court case testified that they are from the same clan with the appellant Abdul Leban. He stated that sometime in 1993, the appellant was residing at Majengo at his mother's place and that they disagreed with his sisters with whom he was staying forcing him to leave. Upon leaving his mother's place, the appellant came and requested him to allow him reside in his plot no. 307 in Marsabit County. He said that he got the plot in 1975 from the county council of Marsabit which is measuring 100 x 100 ft. He was given a letter from the county council of Marsabit dated 11.10.1991. He then proceeded to build on the plot where he lives with his family. The letter is a photocopy and marked MFI 1. The defendant/appellant told him that he was to build his own house in three months' time. He gave him a space where to build a temporary structure. After three months, the defendant/appellant did not move out because there were clashes and he asked for more time. The defendant also requested to build mud house to sustain toilets. At some point the clashes subsided but the defendant/appellant did not leave but instead suggested that the sub-

divide his plot into two portions measuring 100 by 50 ft and exchanges with his which was equivalent. The plaintiff agreed but he did not reduce the agreement into writing. He did not go to the defendants plot to confirm if it existed. He stated that presently the defendant uses half of the plot while he uses the other half. The defendant has eroded a fence demarcating the two portions. He stated that when he went to the survey he found that the defendant had been allocated title number. He said that the defendant was among the members of the committee appointed to assist the surveyor identify various land owners in the area.

4. When the committee got to his plot, he was not there. He said that he did not sign anywhere allowing the defendant to be given a portion of his plot according to him the defendant is unlawfully residing on his plot.

5. He complained to the elders and the defendant insisted that the plot belonged to him. He stated that plot no. 473A which the defendant claims to be his was obtained fraudulently because he was not involved in the survey process.

6. PW 2 was Hassan Adan Jaro. He is a farmer and a resident of Dar –es-Salaam in Marsabit County. He stated that the defendant in this case sold him a plot in early 1993 – 1994 measuring approximately 100 x 50 ft at a consideration of Kshs.9500/= he took possession and applied for title documents but was later informed by the surveyors that the defendant had taken the title. He said that the plaintiff in this case was a witness.

7. PW 3 was Jillo Roba who is a resident of Milimani estate in Marsabit County and also a farmer. He recalled that in 1975 they took a plot together with the plaintiff in this case. His plot is adjacent to that of the plaintiff. His plot is 447. He stated that both the plaintiff and the defendant are his neighbours. At the time they took the plots the defendant was nowhere. He only came after 10-15 years. He said that he and the plaintiff were given the plots by the government.

Defendant's case

8. The defendant in his defence stated that he bought the plot he is now living from the plaintiff in 1992 at a price of Kshs.5000 measuring 50 x 100 ft. He then build a four roomed self-contained house. He said that there were no clashes that caused the plaintiff to give him the land. He said that they come from the same clan with the plaintiff. He said that he gave the plaintiff a plot which he sold to one Adan Jaro (PW 2). He proceeded to the county council and got title number 473A. He was also issued with a clearance certificate after he paid Kshs.1650. He was issued with a receipt. He said that he paid rent from 2000 to 2013 amounting to Kshs.6,890/= he produced them as defence exhibits 1, 2 and 3 respectively. He also produced a receipt for rent as defence exhibit no. 4. The defendant stated that the physical development plan was done through the newspapers in the daily nation of 17th August 1999. The same was marked MF1 5. The defendant also identified the survey map of Shauri Yako estate as DMFI 6. The defendant further stated that the land dispute started in 2013 after the plaintiff was released from prison for some unknown crime. He said that he has not encroached on the plaintiff's land. He said that in September 2013, he was repairing his kitchen when the plaintiff came and started preventing him from doing the said repairs. He reported to the police. It was that complaint to the police which caused the plaintiff to file this case.

9. DW 2 was Hussein Chalfi Halake. He is the chief of mountain location from the year 2004. He stated the plaintiff and the defendant are from his location. He testified that he was a councilor of Marsabit County Council Mountain Ward between 1998 and 2002. He recalled that between 1996 and 1997 there were clashes at Gadaya Moji between Boranas and Burjis. The defendant who is a Borana was a resident of Wabera. Before the clashes started the defendant was residing at Majengo which was not affected by the clashes.

10. However, he moved to Wabera between 1992 and 1993. In 2013 there was a dispute between the plaintiff and the defendant over a fence and a kitchen. He advised them to report to the police. He visited the scene and found out that there was a house and a chain wire fence separating the plots of the plaintiff and the defendant.

11. DW 3 was Mohamed Wolde Wesa. He is a resident of Shauri Yako Wabera estate and a retired teacher. He stated that both the plaintiff and the defendant are his neighbours. He testified that the two have a dispute in respect of a plot in Wabera. He stated that in 1996, GT2 did a survey in Wabera estate on plots to enable people get titles. A survey committee was appointed and he was appointed as a secretary to take minutes and keep records. He was appointed in 1983 where he found the plaintiff and in 1993 the defendant came and resided there. In 1996, a survey was done and the plaintiff and the defendant got separate plots. He produced a survey map of all the Wabera zone as Defence exhibit no. 6.

Appellant's submissions

12. The appellant through the firm of Halake Rambo Muthoga and Mururi advocates submitted that the trial court lacked the requisite jurisdiction to handle this case because at the time the suit was filed there was a moratorium given vide the Malindi case barring the magistrates court from hearing land related disputes and a such the jurisdiction of the principal magistrate's court is ousted.

13. The appellant also submitted that the magistrate erred in failing to appreciate that the suit was statute barred from filing since the matter was filed out of time without seeking leave of the court.

14. The appellant further submitted that the plaintiffs claim is founded on oral contract made in 1993 and that the limitation period is six years. The appellant also submitted that there are exceptions to oral contracts for sale of land. 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 conducted before section 3 (3) came into force.

Respondent's submissions

15. The respondent through the firm of Mokuia Obiria and associates advocates submitted that through the appellant premised this appeal on fine grounds, it is odd that he has abandoned all his grounds of appeal and proceeded on a new and extraneous limb, the jurisdiction the appellant submitted that the court should consider that the appellant has abandoned this appeal. On the issue of jurisdiction the respondent

submitted that the issue of jurisdiction ought to have been raised early in the proceedings or in submissions before judgment. He stated that nowhere in the proceedings did the appellant raise any objection on jurisdiction and that it is now too late in the day to raise such an issue.

16. The respondent stated that jurisdiction is an afterthought as the appellant has not raised it as one of his grounds of appeal. On the issue of limitation the respondent submitted that it is also a new ground of appeal which the appellant is attempting to introduce through the backdoor. That issue was not raised in the pleadings before the trial court. The respondent sought to have the appeal dismissed with costs.

Decision

17. The issues before the trial court was a dispute regarding the ownership of plot described as number 307 Marsabit County Council. The plaintiff who is the respondent in this appeal stated in this statement of claim filed on 6th November 2013 that he was the registered owner of the suit property and that he only allowed the defendant to occupy a small portion of this and upon request when there were clan clashes in 1993 between the Boranas and the Burji's.

18. The Kenyan legal regime before the promulgation of the constitution in 2010 is that land was classified three namely; government land, trust land and private land.

19. Government land was regulated under the government land act, cap 280 laws of Kenya (repealed) while Trust land was governed under the trust land act, 288 (repealed) under the then government lands act, the president was mandated to make grants or dispositions of any interests or estates in unalienated government land. The power of the president to alienate government land was delegated to the commissioner of lands subject to the provisions of the government lands act aforesaid. As regards land under the trust land act the repealed constitution under section 115 (1) vested all trust land in county council's in whose jurisdiction such land is situated.

20. Section 117 of the repealed constitution gave the county councils immense power to set apart an area of trust land within their jurisdiction for use and occupation by any individual for a purpose which in the opinion of the county council is likely to benefit the residents of the area. Section 13 of the Trust Land Act Cap 288 (repealed) provided for the setting apart of trust land by county council for private use as provided for under section 117 of the repealed constitution.

21. Section 53 of the Trust Land Act gave the commissioner of lands power to administer trust land as an agent of the county councils and execute on their behalf all documents including grants, leases, licences relating to trust land. Section 13 (2) of the trust land act provided that the setting apart of land by a county council must be approved by a resolution passed by a majority of the members of the council.

22. Although the commissioner of lands had power to administer trust lands on behalf of the county councils that power did not extend to approve the setting apart of trust land on behalf of the county councils. That is provided for under section 53 (a) of the trust land act.

23. From my analysis of the procedure for alienating government land as well as trust land under the old legal regime, I find that plaintiff/respondent did not prove his ownership of the suit property before the trial court.

24. The respondent did not even demonstrate whether the suit land as either a government land or a trust land and that he acquired the same in accordance with the law applicable by then. The plaintiff (respondent did not produce a letter of allotment or minutes of the county council of Marsabit setting apart the suit land for his use and benefit. My re-evaluation of the pleadings and evidence adduced leads me to two issues for determination.

25. First is whether the suit property is a government land or a trust land and whether the plaintiff acquired the same in accordance with the law. The plaintiff testified that his land is plot no. 307 while the defendant alleged that he is the registered owner of plot no. 473A.

26. I believe that all plot allocation these records are kept by the county council of Marsabit who was also authorized in law to administer such land on behalf of the residents according to the defunct local government Act. It was the said county council to come and shed light on the ownership of those plots and whether the same was alienated to the parties in accordance with the law. I find that the trial magistrate misdirected himself in law and fact by framing issues for determination which did not relate to the real issue in controversy. By framing issues that did not relate to the real issues in dispute, the learned magistrate erred in law and in fact by giving judgment in favour of the plaintiff/respondent. For those reasons, this appeal succeeds and the same is hereby allowed. I order each party to bear his own costs of this appeal and the suit before the trial court.

27. It is so ordered.

READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28TH DAY OF FEBRUARY, 2019

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E.C CHERONO - JUDGE

In the presence of:

1. Mr. Muriira holding brief for Mokuu for respondent

2. CC: Kananu