



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MERU**

**ELCA NO 46 OF 2014**

**HALIMA HUKA GODANA**

**NURIA GODANA**

**FATUMA MOHAMMED** (suing on their behalf and in a

Representative capacity on behalf of 20 other interested persons, members of

**KILIMANI WOMEN SELF HELP GROUP).....APPELLANTS**

**VERSUS**

**HUSSEIN LIBAN JILLO.....RESPONDENTS**

**JUDGMENT**

1. This is an Appeal dated 05.12.2014 from the judgement of Hon. J. Irura Ag PM, Isiolo in Isiolo PMCC No. 36 of 2010 delivered on 11/11/2014 as lodged by the Appellants herein on the following grounds; -

- a. The learned trial magistrate erred in law and fact in failing to properly evaluate the evidence and find that the Appellants sufficiently proved ownership of plot number 8 LMD.
- b. The learned trial magistrate erred in law and fact by holding that the Appellants did not show or produce any application for the plot, which requirement was unnecessary in the circumstances of this suit.
- c. The learned trial magistrate erred in law and fact by holding that the plot in dispute was not the same as where the Respondents resides, which fact had been resolved through site visit.
- d. The learned trial magistrate erred in law and fact in holding that the Appellants did not prove having occupied the plot, which evidence was sufficiently on record.
- e. The learned trial magistrate erred in law and in fact in holding that the Respondent's father owned any other land at LMD, which requirement is extraneous and irrelevant in the circumstance of this suit.
- f. That the learned trial Magistrate erred in law and fact in failing to find that the Respondents did not demonstrate any right or interest capable of nullifying or limiting the Appellants proprietary right thereon, and find that the Respondents was a mere trespasser.
- g. That the judgement of the learned trial Magistrate is against the law and weight of evidence on record.

2. The Appellants filed suit before the trial Court against the Respondents seeking; -

- a. A declaration that the one-acre land in LMD area, West location known as Plot No. 8 Kilimani, is lawfully owned by the plaintiff.
- b. An order for vacant possession.
- c. Costs of the suit
- d. Any other and further relief as may be just and expedient to so grant.

3. The Honorable Magistrate after taking into consideration the fact that no demarcation had been done in the area and the Respondents is the one currently occupying the plot, found that it would not be in the interest of justice to disturb the status quo, that the orders as sought in the plaint were not awardable in the circumstances. The plaintiff's suit was thus dismissed with costs to the defendant.

4. The Appellants' claim before the trial Court was in respect to an ownership right over a parcel of land measuring 1 acre or thereabouts in an un-registered and un-surveyed land located in LMD area within West location of Isiolo District which the Appellants believed to be trust land. The Appellants contended that they were always in possession and control of the said plot. That sometimes in 1987 they were provided with funds by the Government to construct a cattle boma on the suit land which funds they utilized to construct the said boma. They claimed that the Respondents later with support of the chief of the area, forcefully entered the suit land, destroyed the Appellants' fence. That he threatened the Appellants with violence. Thereafter the Appellants approached the county council of the area who assigned the suit land Plot no.8 Kilimani and they started paying land rents to the council. The Respondents denied all the averments made by the Appellants and the matter proceeded viva voce before the trial Court.

5. Three witnesses testified for the plaintiff's case. Pw1 was the chairlady of the Appellants who explained that the purpose of their self-help group registered in 2003 was to solicit assistance from well-wishers and buy cows from which they would make a livelihood. That they approached the area councilor and elders who gave them some land measuring about 1.25 acres which fenced with Euphorbia plants. The social services department gave them 21 cows and some wire mesh and wood to build a shed for the cattle. That later in 2007 they applied to the council to be formally allocated the plot and were thus allocated plot. No. 8 Kilimani. That thereafter some cattle died and they sold others. The PW2 and PW3 collaborated the averments made by PW1.

6. The Respondents contended the suit land belonged to his family and had lived there with his family. Initially it was occupied by his father Liban Jillo and his two wives and later he and his step mother settled on the land while he attended school. That during the holidays he came back and found that the Appellants had built a cattle boma on the suit land and his step mother informed him that the husband of one of the plaintiff's had requested to build the cattle shed there so that they can take care of her. That his step mother died in the year 2000 and by then the Appellants had already removed the cattle from the suit land. He later learnt that the Appellants were planning to sell the suit land, where upon he reported the matter to the Chief who authorized him to construct a house on the suit land which he did and was later attacked by the Appellants. He thus produced some treatment records. He reported the attack to the chief who provided him with security to construct the house with approval from the District Officer of the area. He was later sued in CMCC case No. 48 of 2007 which was withdrawn.

7. DW2 whose mother was a member of the Appellants testified that by the year 2000 the cattle that belonged to the group had been released to the grazing fields.

8. DW3, a neighbor to the suit land stated that the defendant's family owned the suit land and had been in occupation for many years. He was aware of the scuffles that had been ongoing between the parties herein. And that the Appellants owned a different parcel of land that had two tanks and a shop.

9. The trial magistrate made his verdict after making a site visit and evaluating the evidence on record. The Court observed that the land in the area was un-demarcated and un-registered, both parties herein could not clearly identify the location of the parcel of land on the ground. The Court noted that the Respondents was in possession and occupation of the suit land in declining the Appellants' claim.

10. On the 17/10/18 parties elected to canvass the appeal by way of written submissions. At the time of writing this judgement only the Appellants had filed their Written Submissions.

11. It is trite that an appellate Court will not interfere with the exercise of discretion by a trial Court as held by the Court of Appeal for East Africa in **Mbogo V. Shah (1968) EA 93**, per Newbold, P. that:

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

12. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict, however I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

13. Having considered the record of appeal and the submissions where filed, the issues that fall for determination are as follows;

- a. Whether the Appellants proved ownership of the suit land.
- b. Whether or not the suit land is Plot No 8 Kilimani?
- c. Who meets the cost of the suit

14. I shall combine grounds Nos a and b under issue No a which is whether the Appellants proved ownership of the suit land. It is commonly accepted that the suit land is unregistered and unsurveyed land situate in LMD area within West Location of Isiolo District which according to the Appellants was trust land. There are two competing interests on the suit land by the Appellants and the Respondents.

15. The Respondents has asserted that the land belonged to his father who worked at the LMD Isiolo since 1962 and had two wives. Upon his death his two wives lived there before one of them died and one continued living there. It was his evidence that one of their clan members and his wife requested his step mother Tume Liban Jillo to construct a boma for purposes of keeping cows for the women group. That on his

return from school he sought security to built on the suit land which he was supported by the local administration to reclaim his father's land. By then Tume Liban had passed on in 2000. DW2 and DW3 admitted that the place where the Respondents built his house is where the cattle boma was situate. That he built the house when the cattle had been moved to the grazing fields. DW3 stated that Tume was one of the members of the Appellants group. The observations made by the Court during the site visit show that both the Appellants and the Respondent's representatives pointed out the places where the Respondent's mother used to reside on the land. This evidence is consistent with the evidence of the Respondents and his witnesses that the land belonged to his family.

16. The Appellants have averred that they were given the land by the local unnamed councilor and elders of the area. They aver that they settled there with the 21 cows that they were given by the social services and constructed a boma. That in 2007 they were legally allocated the suit and by the council and paid land rent in the sum of Kshs 920/-. The Appellants have not demonstrated to the Court in terms of documentary evidence the allotment letter, the terms of the allotment, the description of the land for which it was allocated to them. This would have been presented in form of a part development plan or such other plans as can be obtained from the council which would show where the suit land is situate. I have perused the receipt dated 11/2/2008 which indicates the sum was received on account of Plot No. 8 Kilimani. It is this plot No 8 Kilimani that the Appellants have laid claim. The Learned Magistrate visited the site and the Appellants did not identify the plot as No 8 on the ground. They did not call a surveyor or the council employee to identify the plot as being No 8 as claimed by the Appellants. They have not demonstrated that indeed the receipt refers to the suit land. There is nothing to persuade the Court that the said plot is the same as No 8 Kilimani.

17. The claim of the Appellants is based on allocation of the plot. That being the case it called for proof on documentary evidence. The Court has taken judicial notice of the fact that Local councils even in their days of allocation of land would allot land in writing through an allotment letter. Section 107 of the Evidence Act states as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

18. Further section 109 of the Evidence Act states as follows;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

19. The burden of proof to demonstrate that the Appellants owned the suit land at all material times and held allotment letters from the county council or for that matter the County Government of Isiolo rested with the Appellants. The Appellants are bound by their pleadings. The burden of proof cannot shift to the Respondents. They did not discharge the burden and for that reason the Court holds that the Appellants did not demonstrate any ownership of proprietorship in the suit land.

20. PW2 stated in evidence that the Appellants had a plot on which is they constructed a shop. That the shop plot was different from the plot that held their cattle. The question that the Court would ask is whether the description of the plot as No 8 Kilimani referred to the shop. As I have explained earlier the Appellants did not discharge the burden of proof that the plot No 8 Kilimani is the suit land. It is in evidence and admitted by the Respondents that the suit land is unsurveyed and undemarcated however his family has settled on it since the 1960s. This evidence was supported by DW1 and DW2 and the local elders as well as the local administration. PW2 admitted in evidence that Tume came onto the suit land in 1974 and the Appellants settled and constructed a boma to hold their cows in 1987. The Court takes that the first in time in equity is the one that prevails. The evidence shows that on a balance of probability the Respondents family settled on the suit land before the Appellants. This is consistent with the site report that showed that she had a house on the land where the boma was built. There is also evidence that Tume lived on the land and was a member of the Appellants group. The Respondents informed the Court that Huka Kanu was a member of his clan and in the evidence of the PW1 he and her husband pointed out the land of the old lady to build the boma for the cows.

21. The trial Court exhaustively analyzed the evidence on record before making the well-reasoned verdict. The Court had also made a site visit. The appeal does not disclose express errors of law or omissions committed by the trial magistrate. Consequently, I find no ground to overturn the decision of the Learned Magistrate.

22. The appeal is not merited. It is dismissed.

23. The Appellants shall pay the costs of this appeal and the suit in the lower Court.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MERU THIS DAY OF 8<sup>TH</sup> DAY OF APRIL 2019.**

**J. G. KEMEI**

**JUDGE**

**In presence of;**

C/A Mutwiri

