



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. APPEAL NO. 11 OF 2017

JOHN MSAGHA

ELIZABETH MUMBUA MSAGHA.....APPELLANTS

VERSUS

FERUZ ABDULREHMAN (through his lawful attorney)

SALMA JAMAL AWADH.....RESPONDENTS

JUDGEMENT

1. The Appellants filed this appeal from the judgment of Hon. Lesootia, Senior Resident Magistrate, Mombasa delivered on 10TH March, 2017 in Mombasa CMCC No.390 of 2013.

2. Through his appointed Attorney, the Respondent had sued the Appellants seeking the following orders:

a) A declaration that the plaintiff is the owner of the portion of land measuring 40 x 40 feet existing in Bamburi

b) A mandatory injunction compelling the defendants personally or through their employees, agents and/or servants to remove the fence they have erected around the plaintiff's portion in plot No.10564.

c) A permanent injunction restraining the defendants either by themselves, their agents, employees, agents or servants from entering unto, constructing on or in any way whatsoever interfering with the plaintiff's portion on and/or possession in plot. No.10564.

d) Mesne profits at the rate of Kshs.20,000/= per month from January 2012 until the delivery of vacant possession.

e) Costs of and incidental to this suit.

3. In the plaint, it is alleged that by an agreement dated 5th July 2011, the Respondent bought a portion of land measuring 40 x 40 feet on plot no.10564 at Bamburi, Mombasa at a consideration of Kshs.240,000/=. The Respondent averred that in or about January 2012, the Appellants without any colour of right or authority trespassed into the Respondent's property and violently removed the Respondent's fence and fenced it with their own fence and took possession thereby completely denying the Respondent access to his land. The Respondent averred that by reason of the Appellants unlawful occupation of his property, he continued to suffer loss of mesne profits at the rate of Kshs.20,000 per month from January 2012 until delivery of vacant possession.

4. In a joint statement of defence, the Appellants denied the Respondent's claim. The Appellants' averred that at the time the Respondent alleges to have purchased a plot on 5th July, 2011, the Appellants were already in possession and occupation of the portion of land which they alleged they purchased since March 2010 and that the plot belongs to them. The 1st Appellant averred that he purchased the plot on 30th March 2010 initially measuring 70x40 feet and afterwards the size was increased on 9th July 2010, 19th July, 2010 and on 28th July 2010. That on 2nd September 2010, the 2nd Appellant purchased another portion of land to add on what the 1st Appellant had purchased. The Appellants averred that upon purchasing the said plots, they immediately took possession and fenced the same and subsequently the entire plot was surveyed on 24th October, 2010 for purposes of subdivision and a plan drawn showing the Appellants plot marked "A" was prepared and beacons were duly placed and the Appellants continued putting up structures and buildings thereon including sinking a borehole.

5. The Appellants averred that prior to the survey, the sellers Ali Swaleh Yusuf and his brother Yusuf Swaleh informed the appellants that the title to the suit property was being held by their grandmother at Mishomoroni after she had spent her money to procure the title on their behalf and they still owed her Kshs.25,000/= which they requested the Appellants to settle on their behalf. The Appellant paid Kshs. 25,000/ to her and the title was handed over to Ali Swaleh Yusuf. The Appellants further averred that the permanent house and borehole were complete by early March 2011 and no person interfered with their possession and development on the said plot. That the first time the Respondent came to the suit property was on 27th November, 2012 when he attempted to forcefully enter but was repulsed by the Appellants. The Respondent reported the matter to the police who summoned the Appellants on 3rd December, 2012. The Appellants averred that they presented their documents to the police who, upon examining the same in comparison with the Respondent's confirmed that the Appellants were the owners of the plot and no charges were preferred against them. The Appellants averred that they were in lawful occupation and possession of their plot and have never trespassed on the Respondent's alleged plot.

6. After hearing evidence from both the Respondent and the Appellants, the subordinate Court found in favour of the Respondent and entered judgment in terms of prayers (a), (b) and (c) of the plaint. The trial Magistrate found that the claim for mesne profits had not been proved and therefore dismissed it. The Respondent was also awarded costs of the suit.

7. The Appellants were dissatisfied with the said decision and filed the present appeal on the following grounds:

1. The learned Magistrate erred in law and in fact in granting a declaration that the Respondent was the owner of portion of land yet the same has neither been surveyed nor its boundaries identified.

2. The learned Magistrate erred in law and fact in granting an order of injunction to restrain the Appellants from entering or constructing on the land yet the Appellants had already entered and completed construction of the building in March, 2011 before the suit was filed.

3. The learned Magistrate erred in law and fact in granting an order for Mandatory Injunction against the Appellants without proof of any wrong doing to warrant the grant of such orders.

4. Having found that the Respondent purchased the portion of land after the Appellants had purchased the land from the same family and were in occupation and possession, the learned Magistrate erred in law and fact in granting the reliefs sought.

5. The learned Magistrate erred in law in relying on a document, namely an alleged judgment in Kadhi Case No.195 of 2014, to find that Ali Swaleh from who the Appellants purchased the land had no capacity to sell the same yet the said judgment was not produced in evidence.

6. Having found that both vendors in the transaction had sold the various respective portion of the land to parties herein before the alleged judgment in the Kadhi Case No.195 of 2014 as aforesaid had been delivered, the learned Magistrate erred in law and fact in holding that the sale of the portion of land to the Respondent was legal and the sale to the Appellants illegal.

7. The learned Magistrate misapprehended the law and facts in finding that the equities were not equal yet the evidence was clear that both the parties had purchased the portions of land from persons who were family members and that Appellants were the first to purchase and were in actual occupation and possession to the portion they purchased.

8. The learned Magistrate completely misapprehended the law and the facts and thereby reached an erroneous conclusion.

8. The appeal was canvassed by way of written submissions which were duly filed by both parties. It was the Appellants' submissions that the Respondent had not proved his case on a balance of probabilities and that the trial Magistrate erred in law in allowing the claim. They argued that the Respondent based his claim on agreement of sale dated 5th July 2011 while the Appellants were already in occupation and possession since 30th March 2010. The Appellants relied on the principle of equity which states that where two equities are equal, the first in time shall prevail and relied on the case of Chrispinus Andera Mangeni –v- Agnes Odour (2014)eKLR. The Appellants submitted that the Respondent did not demonstrate that the Appellants were not the legal owners of the suit land. It is the Appellant's argument that from the evidence, it is clear that they bought the suit land first from its legal owners and are therefore entitled to the same. The Appellants further submitted that the Respondent did not prove that the Appellants violently removed their mangrove posts fence and replaced the same with their fence made of galvanized iron sheets. The Appellants argued that they had made developments on the suit land by March 2011 and as such the property was no longer available for sale. The Appellants submission was that the trial Court could not restrain what had already taken place, adding that the Court was acting in vain.

9. The Appellants also submitted that the trial Court erred in law in relying on a document, namely a judgment in Kadhi Case No.195 of 2014 to find that one Ali Swaleh whom the Appellants purchased the land from had no capacity to sell yet the said judgment was not produced in evidence. They relied on the case of Kenneth Nyaga Mwige –v- Austin Kigua & 2 Others (2015) eKLR in which the Court of Appeal faulted the trial judge in evaluating the evidence on record and basing his decision on a document which was not formally produced as an exhibit. The Appellants reiterated that it is a general principle in law that where equities are equal the first in time shall prevail. They submitted that since both parties purchased the suit land from persons who were family members and the Appellants were the first to purchase and were in actual occupation and possession, they were entitled to the suit land.

10. It was the Respondents' submission that he brought to the trial Court the persons who sold him the plot and who were the owners of the plot. That they produced the judgment of the Kadhi Court showing that they were the rightful owners. The Respondent submitted that the Appellants claim to have purchased the plot from one Ali Swaleh but did not call the said person as a witness to prove that indeed he sold the Appellants the plot. The Respondent added that the Appellants did not also show in what capacity the said Ali Swaleh sold to them the plot.

The Respondent further submitted that the 1st Appellant's evidence before the trial Court was that at the time of purchase the plot was vacant and that the Respondent's attorney became aware that the plot had been fenced on 3rd October 2011 when she went to pay the final instalment. The Respondent further submitted that the Appellant's reliance on when they commenced or completed development is immaterial as they must show they entered the plot through a lawful purchase from a person who had the legal authority to sell and transfer a good title. The Respondent submitted that the learned Magistrate was right in his decision in holding that Ali said Yusuf had no right to deal with the land in question.

11. Regarding the judgment of the Kadhi's Court, the Respondent submitted that the same was produced as an exhibit by PW2, adding that the recording as "MFI" is a mistake and or a procedural technicality which he argued is curable by Article 159 (2) (d) of the Constitution. The Respondent pointed out that the Record of Appeal had many errors and/or mistakes. The Respondent added that the Appellants advocate cross-examined the witness (PW2) on the said judgment and the Appellants are therefore estopped from denying its existence. The Respondent submitted that his claim rank first in equity as it is supported by all the lawful owners and backed by the Judgment of the Kadhi's Court.

12. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the Court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned Magistrate were justified on the basis of the evidence presented and the law.

13. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

i) **Whether the trial Magistrate relied on a document that was not formally produced as an exhibit.**

ii) **Whether the Respondent proved his case as required by law.**

14. With regard to the first issue, the Appellants have submitted that the trial Court erred in law in relying on a document, namely a judgment in Kadhi case No.195 of 2014 yet the said judgment was not produced in evidence. At page 207 of the record of appeal, Yusuf Swaleh Yusuf testified as PW2. In paragraph 2 the witness is recorded to have stated, *inter alia*:

"..... A Judgment had been passed by the Kadhi that the land was ours (heirs). The land in question is no.10564. There is the one now occupied by the 1st Defendant. I wish to produce the judgment of the Kadhi. MFI 6- Judgment Kadhi Succession No. 195/14. Ali has not challenged the Kadhi's Court judgment. It is my testimony that the land belongs to the plaintiff". (emphasis added.)

15. It is clear from the evidence of PW2 that the judgment in Kadhi succession No.195 of 2014 was produced. When the witness stated that he wished to produce the said judgment, the record does not indicate that there was an objection raised to the production. Indeed at page 228 of the record of appeal, the trial Magistrate in his judgment stated as follows:

"To buttress his case the plaintiff produced a power of attorney an agreement for sale a letter from the local area chief, 3 photographs and a judgment of a Kadhis Succession Cause No.195/2014 as P-Exhibit 1-6 respectively".

16. Ordinarily, where the production of a document is objected to, the Court records the objection. There was no such objection in the present case. Although the impugned judgment was indicated as MFI 6, the trial Court in the judgment is clear that the said document was produced as an exhibit. It is apparent from the record of appeal that the proceedings have several typographical errors and/or mistakes. However, when the appeal came up for directions on 18th December, 2018, both the advocate for the Appellants and the advocate for the Respondent agreed that the record of appeal was in order. The Appellants cannot now pick on one error and/or mistake and fault the judgment of the trial Magistrate. As already pointed out, the trial Magistrate in the judgment was categorical that the said judgment of the Kadhi's Court was produced and marked as P.exhibit 6. It is therefore my finding and I so hold that the learned trial Magistrate did not rely on a document that was not produced in evidence. This is so because the evidence on record indicates that the said document was produced as an exhibit.

17. The second issue for determination is whether the Respondent had proved his case on a balance of probabilities. It was the Respondent's evidence that he purchased the suit property from one Fatmah Swaleh, one Yusuf Swaleh and one Saidi Swaleh. The Appellant's evidence was that they bought the same property from one Ali Yusuf. The evidence on record did not show in what capacity the said Ali Swaleh Yusuf sold the suit property to the Appellants. He was neither the owner nor heir or beneficiary of the said property. On the contrary, the evidence on record is clear that the Respondent bought the suit property from and with the consent of Yusuf Swaleh, Fatma Swaleh and Sudi Swaleh. Yusuf Swaleh testified as PW2 while Fatma Swaleh testified as PW4. Both confirmed that the Respondent had lawfully purchased the suit property from them. It is not in dispute that the suit land was an inheritance from the estate of Kibibi Ali and Swaleh Yusuf Swaleh. The judgment in Mombasa Kadhi's Cause No.195 of 2014 which was produced as P.exhibit 6 conferred and vested the suit plot to Swaleh Yusuf, Sudi Swaleh and Fatma Swaleh in different shares. The rightful heirs are the ones who gave evidence at the trial Court in support of the Respondent's case. There is no evidence that Ali Swaleh Yusuf who purportedly sold the suit property to the Appellants had the legal authority to do so. Indeed the learned Magistrate was alive to this fact when he stated that the said seller (Ali Swaleh Yusuf) had no title to confer upon the Appellants and the said sale to the Appellants was illegal.

18. Section 25 of the Land Registration Act Provides that the rights of a proprietor may be acquired on first registration or subsequently for valuable consideration or by an order of Court. Section 36 of the same Act provides that an interest in land shall not be disposed of or dealt with except in accordance with the Act, and any attempt to dispose of any interest in land otherwise than in accordance with the Act or any other law shall not extinguish, transfer, vary or affect any right or interest in that land.

19. In the present case, there was evidence that the person who sold the suit land to the Respondent had acquired the land through an order of

Court by transmission in Mombasa Kadhi's Court Succession Cause No. 195 of 2014. There was no evidence demonstrating on how Ali Swaleh Yusuf who allegedly sold the land to the Appellants acquired the land before selling it to the Appellants. Accordingly, it is my finding as the learned Magistrate found, that there were no equal equities as submitted by the Appellants. The purchase by the Appellants was out rightly illegal and so their transaction cannot be sustained before a Court of law. On the other hand, the purchase by the Respondent was lawful and shall prevail as was rightly found by the trial Magistrate.

20. It is my view that based on the evidence that was adduced before the learned Magistrate and based on the law, the trial Magistrate was justified in arriving at the decision he made. The finding and holding of the learned trial Magistrate were well founded and I find no basis to interfere with it.

21. In the result, I find no merit in the Appellants' appeal and the same is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of April 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Hamid holding brief for Respondent

Busieka holding brief for Mwakireti for Appellants

Yumna Court Assistant

C.K. YANO

JUDGE