



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA NO. 1C OF 2014**

**JOSHUA MWAWASI.....APPELLANT**

**VERSUS**

**ELIAS MWAKAMBA MJOMBA.....RESPONDENT**

**JUDGMENT**

1. The Appellant filed this appeal from the judgment and decision of Honourable K. Orange S.R.M delivered on 17<sup>th</sup> Day of February, 2014 in Wundanyi SRMCC No. 7 of 2013 which dismissed the Appellant's case with costs to the Respondent. It was the Appellant's case that the Respondent had entered and/or encroached into the Appellant's PLOT NO.2186 situated at Kishushe within Taita Taveta County without the Appellant's consent and/or authority or any other lawful, justifiable cause. The Appellant sought an injunction to issue against the Respondent from entering the said plot plus costs of the suit.

2. In his defence, the Respondent stated *inter alia* that he was the lawful owner of the said land having bought it from different people.

3. The subordinate court found in favour of the Respondent and dismissed the Appellant's case with costs. The Appellant was dissatisfied with the said decision and filed the present appeal citing six (6) grounds, namely:

**1. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's suit despite evidence by the Appellant that he was the owner of the said LAND NUMBER 2186 situated at Kishushe.**

**2. That the learned Magistrate erred in law and in fact in failing to consider the evidence by the Appellant and hence dismissing his suit.**

**3. That the learned Magistrate erred in law and in fact in giving undue weight to the evidence of DW1 Elias Mwakamba Mjomba on the production of the receipt of PLOT NO.1645 and without considering that the same was not genuine/fake hence it was of little probative value.**

**4. That the learned trial Magistrate did not take into account of calling an expert to elaborate the evidence produced by the defendant.**

**5. That the learned trial Magistrate erred in law and in fact in failing to apply relevant and pertinent judicial principles precedents and trends regarding the ownership of property.**

**6. That the learned Magistrate erred in law and fact by relying on the wrong and unsound principles of law.**

4. The Appellant urged the court to set aside the judgment of the subordinate court and enter judgment in his favour by awarding ownership of the suit premises to the Appellant plus costs of the appeal and the suit.

5. The appeal was canvassed by way of written submissions which were duly filed by both parties. Mr. Alwenya learned Counsel for the Appellant in his submissions submitted that to prove ownership of PLOT NO.2186 Kishushe, the Appellant produced a notice by the Land Adjudication Officer Taita Taveta Adjudication Area (P.Exh 4); a document issued by the Land Adjudication Officer Kishushe Adjudication Section picking the Appellant as the owner of PLOT NUMBER 2186 Kishushe Adjudication Section (p.exh 4); letter dated 5<sup>th</sup> October 2012 addressed to the Respondent and copied to the Appellant warning the Respondent to respect boundaries or file a case to the adjudication disputes committee (p.exhi 5) and a letter dated 12<sup>th</sup> May 2014 by the District Land Adjudication and Settlement Officer, Taita, Voi & Mwatate Sub- Counties confirming that parcels numbers 1926 and 2186 are recorded in the name of Appellant according to the records. It was Mr. Alwenya's submissions that the foregoing are the formal official documents that are given to a person during land adjudication that

enable that person to obtain a title deed to a parcel of land as first owner thereof. He submitted that the Appellant proved ownership of the suit land PLOT NO.2186 Kishushe before the trial Magistrate on a balance of probabilities.

6. Mr. Alwenya summarized the Respondent's case in what was contained in his defence which looked like a witness statement. The Respondent had stated that the suit premises PLOT NO.2186 Kishushe is part of two parcels of land which he had bought from two people namely, i) Mr. Mchawia Mombo who sold to the Respondent approximately 24 acres of PLOT NO.1922, and ii) Mr. Granton Mangale Mwanyama who sold to the Respondent 8 acres on 6<sup>th</sup> August 2005. The Respondent stated that he had written a letter dated 16<sup>th</sup> August 2011 to the D.O. Wundanyi Division complaining about the Appellant's invasion of his land and threats of violence to his workers. Instead, he received a letter dated 5<sup>th</sup> October, 2012 (p.exh 5) from D. K. Wanyonyi the Land Adjudication Officer confirming that the Appellant had complained of the Respondent's invasion of PLOT NO.2186 by building a goat shed and advising the Respondent to follow the laid down procedures if he had any dispute over the land. Mr. Alwenya submitted that the Respondent made a prayer for a relief in his defence that was not founded on any counter-claim.

7. Mr. Alwenya summarized the evidence of the Respondent and his four(4) witnesses and submitted that if at all Mchawia Mombo sold any land to the Respondent, the Land was PLOT NO.1922 and not PLOT NO.2186. It was Mr. Alwenya's submissions that the sale agreements produced by the Respondent did not provide the parcel numbers.

8. Mr. Alwenya submitted that the learned trial Magistrate made a correct summary/analysis of the evidence tendered by the parties and correctly identified the issue for determination as being whether the Appellant had established whether he was the owner of PLOT NO.2186. He further submitted that the trial Magistrate should have made an additional issue for determination whether the Appellant was entitled to the reliefs sought in the Plaint. Mr. Alwenya further submitted that in determining the issue the trial Magistrate completely disregarded and/or ignored the Appellant's evidence of ownership of PLOT NO.2186. That it was not disputed that the subject land was situated in Kishushe Adjudication Section where adjudication had taken place but title deed were yet to issue, and the only evidence of ownership would therefore be the primary documents of allotment issued by the Land Adjudication officer in charge of the adjudication process. Counsel submitted that the Appellant provided proof of ownership of the suit land through p.exh 3, 4, the letter dated 5<sup>th</sup> October, 2012 and letter dated 12<sup>th</sup> May 2014. He submitted that these documents were sufficient *prima facie* proof of ownership of the suit land by the Appellant. Counsel faulted the learned trial Magistrate for placing undue reliance on the evidence of the Respondent's witnesses. It was counsel's submissions that the Appellant had proved his case on balance of probabilities and urged the court to allow the appeal.

9. Mr. Oddiaga, learned Counsel for the Respondent submitted that the trial Magistrate's finding was not made in error and that he court while making its determination considered all the relevant factors and the law and took into account the correct principles hence arrived at a fair finding in dismissing the Appellant's case. Citing the case of **Abok James Odera t/a A.J. Odera & Associates -v- John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR**, Counsel invited the Court to re-evaluate, re-assess and re-analyze the record and make a finding that the trial Court was correct in its approach and made the correct findings against the Appellant and thus dismiss the appeal with costs to the Respondent.

10. Mr. Oddiaga submitted that the Appellant failed to produce an adjudication number that would have shown that the plot had been adjudicated upon him and that he failed to call a person from the Ministry of Lands to confirm that indeed the land had been adjudicated to him, arguing that the letters of acknowledgment produced as evidence were not enough, and cited the provisions of Section 35 (b) of the Evidence Act. He further submitted that by dint of Section 107 (1) of the Evidence Act the Appellant failed to discharge the burden of proving that the plot had been adjudicated upon him.

11. It was Mr. Oddiaga's submission that the Respondent called witnesses who testified that they had sold their land to the Respondent and that the land did not belong to the Appellant. That having established that the suit property did not belong to the Appellant as claimed, the claim of encroachment rightly failed as determined by the trial court. Mr. Oddiaga submitted that the trial court was right not to award the relief of injunction as prayed in the plaint, and that the trial court was guided by correct principles of law. The Respondent submitted that this court ought not interfere with the trial court's decision, but dismiss the appeal with costs.

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 trial Magistrate were justified on the basis of the evidence presented and the law. The issue for determination in this appeal as I can deduce from the grounds of appeal is whether the decision of the learned trial Magistrate was against the weight of evidence.

13. In the Plaint dated 15<sup>th</sup> July 2013 and filed in court on 16<sup>th</sup> July 2013, the Appellant at paragraph 3 thereof averred that

*“the defendant has now entered and/or encroached into the plaintiff's plot no.2186 situated at Kishushe within Taita Taveta County without the Plaintiff consent and/or authority or any other lawfully (sic) justifiable cause and the land is in danger of being destroyed and/or other permanently altered in nature and the plaintiff shall be permanently deprived thereof or frustrated in respect of any decree herein.”*

The reliefs sought by the Appellant were that the defendant, his employees, servant and assigns to cease, stops and refrain from entering upon the said land as well as costs. In my understanding, the appellant was seeking an order of injunction against the Respondent. In order to succeed in such a claim, the Appellant had to prove ownership of the suit PLOT NO.2186 Kishushe. In doing so, the record shows that the Appellant produced in evidence p.exh 4 and 5 which are letters from the Land Adjudication department showing that he had lodged a complaint against encroachment by the Respondent. On cross-examination, the Appellant stated that he had filed the objection after 14 years. There was however, no evidence indicating the outcome of that objection, if at all it was finalized. Section 26 of the Land Adjudication Act Cap 284 Laws of Kenya provides that any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect, may within sixty (60) days object to the adjudication officer. In the instant case, it is indicated that the objection was made by the Appellant after 14 years. Even then, there was no evidence that the objection was concluded and decided in the Appellant's favour.

14. In his evidence, the Respondent told the trial court that he was the lawful owner of the suit land which he bought from Raphael Mombo, Granton Mangale and Mchawia Mombo. He produced the sale agreements as D.exhi 1. The defendant testified that he has been in occupation of the said land. He was allocated PLOT NUMBERS 1645, 1647 and 1648 by the Adjudication Officer. The Respondent called as witnesses the three people who he said he purchased the land from and they all confirmed that they sold the land to the Respondent and therefore testified that the Respondent was the rightful owner of the suit land.

15. After hearing the parties and their witnesses, the trial Magistrate arrived at the finding that the Respondent had proved that he was the lawful owner of the suit land and therefore the injunction order sought by the Appellant could not issue. In my view, the argument that the trial Magistrate made a decision against the weight of the evidence adduced is incorrect. I am satisfied from the evidence on record that the Appellant failed to prove that the suit land was his. There was overwhelming evidence showing that the Respondent was the lawful owner of the land. An order of injunction in favour of the Appellant could not therefore issue in the circumstances. The Respondent could not be enjoined from his own land. The Respondent acquired the property through purchase and was issued with adjudication NUMBERS 1645, 1647 and 1648, and he is in occupation and possession.

16. In the result, it is my finding that the appeal has no merit and is dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of October 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Alwenya for Appellant

No appearance for Oddiaga for Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**