



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 02 OF 2019

PAUL KANJITA KIOME.....APPELLANT

VERSUS

GACHIURU MWINJI MUGAMBI..... RESPONDENT

(Being an appeal against the Judgment of Hon. P. M. Maina (SPM) delivered on 13th day of December, 2018 at Marimanti Law Court's)

JUDGMENT

1. The Memorandum of Appeal in this suit states as follows:

MEMORANDUM OF APPEAL

The appellant herein being dissatisfied with the judgment of P. N. Maina Senior Principal Magistrate's delivered on 13th December, 2018 in Marimanti ELC Case No. 34 of 2018 appeals to this court and set forth the following grounds:-

1. That the learned trial magistrate's erred in law and facts by failing to appreciate that the appellant had fully developed plot on land parcel 1317/Chiakariga 'A'/Adjudication Section as it was then.
2. That the learned trial magistrate's erred in law and facts by failing to make a finding that the appellant had an interest and or lien over land parcel 1317 Chiakariga 'A' Adjudication Section even after the respondent was registered with the said land.
3. That the learned trial magistrate's erred in law and fact by failing to make a finding and hold that there was impropriety, fraud, dishonesty and corrupt scheme in the manner the respondent was registered with 1317 Chiakariga 'A' Adjudication Section.
4. That the learned trial magistrate's (sic) erred in law and facts by failing to appreciate and hold that the respondent impacted un due influence to DLSO thereby depriving the appellant his plot measuring 100 by 100 feet out of the then 1317/Chiakariga 'A'/Adjudication Section which was later registered as Chiakariga 'A' 1317.
5. The learned trial magistrate's erred in law and fact by making a finding that the appellant did not register his claim over a 100 feet by 100 feet land encompassed by what was then 1317 Chiakariga 'A' Adjudication Section during the adjudication while the record shows that the appellant all through the adjudication process was claiming for his 100 by 100 feet portion out of 1317 Chiakariga 'A' Adjudication Section as it was then which later got registered as Tharaka Chiakariga 'A' 1317.
6. That the learned trial magistrate's erred in law and fact by failing to appreciate that the acts of the appellant of seeking for consent under section 30(1) of Cap 284 was laying a claim over 1317 Chiakariga 'A' Adjudication Section which was later registered as 1317 Chiakariga 'A' Adjudication Section.
7. That the evidence on record is overwhelmingly in support of the appellant (sic) case as opposed to the respondent's case consequently the learned trial magistrate's erred in law and facts by reaching the verdict he did in a judgment.

REASONS WHEREFORE the appellant proposes to the honourable court that:

- a) This appeal be allowed.
- b) The orders of the learned trial magistrate's be substituted with an order of this court in the following manner;

i) That the appellant is entitled to 100 feet by 100 feet developed plot on land parcel No. Chiakariga 'A'/1317 and that the land registrar be ordered to rectify the title of land parcel Chiakariga 'A' 1317 by having 100 feet by 100 feet comprising of the appellant (sic) developed plot curved there from be registered with the appellant.

c. That the respondent be ordered to pay cost of this appeal and cost in the lower court proceedings.

2. This appeal was canvassed by way of written submissions.

3. The appellant's submissions, without any changes including spelling or any other mistakes, take the following form:

APPELLANT (sic) FINAL SUBMISSION (sic)

1. My lord this is an appeal against finding and judgment of P.N MAINA SENIOR PRINCIPAL MAGISTRATES MARIMANT ELC CASE NO.34 OF 2018 delivered on 13th December 2018 . I have seven grounds of appeal which I would like to submit on.

2. The first ground of appeal is to the effect that the learned magistrates erred in law and facts by failing to appreciate that the appellant had a fully developed plot on land parcel 1317/CHIAKARIGA 'A' ADJUDICATION SECTION as it was then. The trial magistrates failed to appreciate that I had been living on this land before adjudication at the time of the trial and after the trial of the suit appealed against and that am still in the land to date.

That the trial magistrates failed to appreciate that I have been on the land since 2006 to date and I have development therein such as trees and residential house and I cultivate the portion measuring 100feet by 100feet comprised on the suit land. I pray that you allow the appeal on this ground.

3. The second ground of appeal is to the effect that the learned trial magistrates erred in law and fact by failing to make a finding that the appellant had an interest and or lien over land parcel 1317 CHIAKARIGA 'A' ADJUDICATION SECTION even after the respondent was registered with the said land by virtue of his long occupation use or position . That by the time the respondent was recorded with land parcel 1317 CHAKARIGA 'A' ADJUDICATION SECTION I was on the parcel of land measuring 100 feet by 100feet. The respondent, the chief of the area imposed a due (sic) pressure and influence upon DLASO to record the suit land with him. He promised me as the appellant and others , that he would give us the land elsewhere. He did not accomplish this fit. The trial magistrates ought to have made a finding that the respondent was involved in a fraudulent scheme whereby I lost my parcel of land that measuring 100feet by 100feet. The respondent position as a local administrator was used to deprive me of my parcel of land 1317 CHIAKARIGA 'A' ADJUDICATION SECTION measuring 100feet by 100feet. My lord this ground shall succeed.

4. That the learned trial magistrates erred in law and fact by failing to make a finding and hold that there was impropriety, fraud, dishonesty and corrupt scheme in the manner the respondent was registered with 1317 CHIAKARIGA 'A' ADJUDICATION SECTION. This is ground 3 of appeal. The respondent grabbed my land and many others , he walked the boundaries of only 50 by 100 feet portion , using his influence as the chief he caused several land fragment to be recorded in his name including my land parcel 1317 CHIAKARIGA 'A' as it was then . he usually told as (sic) not to panic for he would give our land later, and others who are affected by the activities of the chief did not put any objection for they believed in the word of the chief(respondent) little did we know that the respondent was acting fraudulently and dishonesty . That about 27 persons were affected by the fraudulent scheme of the respondent. The trial magistrates seemingly did not seem to appreciate this situation. We urge the court to allow the appeal on this ground.

5. That the learned trial magistrates erred in law and fact by failing to appreciate and hold that the respondent impacted un due influence to DLASO thereby depriving the appellant his plot measuring 100 feet by 100 feet out of the then 1317 CHIAKARIGA 'A' ADJUDICATION SECTION which was later registered as CHIAKARIGA 'A' 1317. As pointed out supra the respondent was the local chief . on (sic) application by the appellant that the court do visit the status quo, the learned trial magistrates (sic) declined without giving any reasons. The trial magistrates refused to be guided by the map sheet which showed my land fragment and so was the others and the trial be guided by the map sheet , he would have found out that the appellant land parcel had been clearly demarcated. The trial magistrates (sic) however refused the appellant to produce the map sheet covering 1317 CHIAKARIGA 'A' ADJUDICATION SECTION. Injustice was carried out during the trial. The learned magistrates approach was not seemingly not for quest of justice but to finalize the matter to the appellant detriment and disadvantage. My lord I pray that this ground be allowed.

AT one point of proceeding (sic) the trial magistrates considered ADR, the appellant and the respondent and others were (sic) affected were referred to arbitration. The meeting was convened at the respondent home. The respondent insisted that he would give the plot , but not at the place they were gathered. The parties could not agree on the respondent proposal. On going back to court the judgment was in favour of the respondent which we challenge and fault. We urge the court to allow the appeal based on this ground.

6. The learned trial magistrates erred in law and fact by making a finding that the appellant did not register his claim over 100 feet by 100feet land encompassed by what was then 1317 CHIAKARIGA 'A' ADJUDICATION SECTION during the adjudication process was claiming for his 100 feet by 100feet portion out of 1317 CHIAKARIGA 'A' ADJUDICATION SECTION as it was then which later got registered as THARAKA CHIAKARIGA 'A' 1317. There is humble evidence that I was actively involved during adjudication process in defence of my plot no.1317 CHIAKARIGA 'A' measuring 100feet by 100 feet. The respondent thwarted my effort and many other affected persons to get there rightful entitlement by promising to give us land elsewhere, after he grabbed my plot and others who are as many as 26. The respondent did not act in good faith in the manner he treated the appellant and those 26 others. The respondent scheme was fraudulent dishonest and deceitful.

7. That the learned trial magistrates erred in law and fact by failing to appreciate that the acts of the appellant of seeking for

consent under section 30 (1) of cap 284 was laying a claim over 1317 CHIAKARIGA 'A' ADJUDICATION SECTION which was later registered as 1317 CHIAKARIGA 'A' ADJUDICATION SECTION. That the fact that I applied consent to institute a suit, the suit land was under adjudication is a clear indication that I was laying a claim over 1317 CHIAKARIGA 'A' ADJUDICATION SECTION as it was then. The consent under section 30 (1) cap 284 was consent to institute a suit against the respondent herein. The trial magistrates therefore erred by saying that I did not lay any claim over the suit land LR.CHIAKARIGA 'A'1317 during adjudication. The application for consent under section 30 (1) cap 284 indicate that I was laying a claim over 1317 CHIAKARIGA 'A' ADJUDICATION SECTION as it was then. The consent was allowing a claim over 1317 CHIAKARIGA 'A' ADJUDICATION SECTION to be commenced by me. For this reason we submit that the 6th ground herein is meritorious and the appeal should be allowed.

8. That the evidence on record is overwhelmingly in support of the appellant case as opposed to the respondent case consequently the learned trial magistrates erred in law and facts by reaching the verdict he arrived at in his judgment. I invite the court to go through proceeding and judgment and make a finding that the evidence on record is overwhelmingly in support of the appellant. Had the trial magistrates acted diligently he would have made a finding that on the balance of probability the applicant had proved his case on the balance of probability. It is for this reason and others stated supra that the court should allow this appeal.

REASONWHEREFORE we propose the honorable court that

- (a) That the appeal be allowed.
- (b) That the court do declare that plot no LR.THARAKA NITHI CHIAKARIGA 'A'1317 measuring 100 feet by 100feet is the property of the appellant and not the respondent.
- (c) That the cost of this appeal and the cost of the proceeding in the lower court be paid by the respondent.

DATED AT CHUKA THIS...10th ...DAY OF ...June,...2019

PAUL KANJIITA KIOME THE APPELLANT

4. The respondent's submissions, without any changes whatsoever including correction of spelling or any other mistakes, take the following form:

RESPONDENT'S WRITTEN SUBMISSIONS

1. Your Lordship, according to the Memorandum of Appeal filed on 11/1/2019, the Appellant herein appealed against the decision of the Court in MARIMANTI ELC CASE NO. 34 OF 2018 because:-

"1. The learned trial magistrate's erred in law and facts by failing to appreciate that the appellant had a fully developed plot on land parcel 1317/CHAKARIGA 'A'/ADJUDICATION SECTION as it was then.

2. The learned trial magistrate's erred in law and facts by failing to make a finding that the appellant has an interest and or lien over land parcel 1317 Chiakariga 'A' Adjudication Section even after the respondent was registered with the said land.

3. The learned trial magistrate's erred in law and fact by failing to make a finding and hold that there was impropriety, fraud, dishonesty and corrupt scheme in the manner the respondent was registered with 1317 Chiakariga 'A' Adjudication Section.

4. The learned trial magistrate's erred in law and facts by failing to appreciate and hold that the respondent impacted un due influence to DLSO thereby depriving the appellant his plot measuring 100 by 100 feet out of the then 1317/Chiakariga 'A'/Adjudication Section which was later registered as Chiakariga 'a' 1317.

5. The learned trial magistrate's erred in law and fact by making a finding that the appellant did not register his claim over a 100 feet by 100 feet land encompassed by what was then 1317 Chiakariga 'A' Adjudication Section during the adjudication while the record shows that the appellant all through the adjudication process was claiming for his 100 by 100 feet portion out of 1317 Chiakariga 'A' Adjudication Section as it was then which later got registered as Tharaka Chiakariga 'A' 1317.

6. The learned trial magistrate's erred in law and fact by failing to appreciate that the acts of the appellant of seeking for consent under section 30 (1) of cap 284 was laying a claim over 1317 Chiakariga 'A' Adjudication Section which was later registered as 1317 Chiakariga 'A' Adjudication Section.

7. The evidence on record is overwhelmingly in support of the appellant case as opposed to the respondent case consequently the learned trial magistrate's erred in law and facts by reaching the verdict he did in a judgment."

We humbly wish to submit on the above as follows:-

2. Parcel of land L.R No. THARAKA NITHI/CHIAKARIGA 'A'/1317, the suit land herein, was the subject of an adjudication process before it was registered in the name of the respondent. As such it was, at the material time, subject to the provisions of the Land Adjudication Act (Cap 284 Laws of Kenya). With respect to the ascertainment of interests in land within an adjudication section, Section 13 (1) of the Land Adjudication Act provides that:-

“Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.”

Thereafter an adjudication register, which comprises of the demarcation map and the adjudication record, is prepared and published and according to Section 26 of the Land Adjudication Act:-

“(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

In MARIMANTI ELC CASE NO. 34 OF 2018 there is no evidence on record to show that the appellant herein made his claim to the recording officer and pointed out his boundaries to the demarcation officer in parcel of land L.R No. THARAKA NITHI/CHIAKARIGA 'A'/1317 in line with Section 13 (1) of the Land Adjudication Act. There is also no evidence on record to show that the appellant wrote to the adjudication officer to object the ownership of parcel of land L.R No. THARAKA NITHI/CHIAKARIGA 'A'/1317 within the stipulated time or at all in line with Section 26 of the Land Adjudication Act. In light of this, we humbly submit that the appellant never made his claim over the suit land during the adjudication process, as was required of him, and that the Trial Magistrate rightly found as such.

3. Section 30 (1) of the Land Adjudication Act provides that:-

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

According to the above provision, the written consent of an adjudication officer is a prerequisite for one to institute any civil proceedings concerning an interest in land in an adjudication section where the adjudication register has not been finalized in all respects under Section 29 (3) of the Land Adjudication Act. In our view, obtaining the said written consent does not equate making a claim over a disputed parcel of land in an adjudication section. We therefore humbly submit that the fact that the appellant obtained the consent dated 17/4/2008 does not show that he made a claim over the suit land and we humbly urge this Honorable Court to find as such.

In addition to the foregoing, we also wish to point out to this Honorable Court that the evidence on record shows that the said consent was obtained after MARIMANTI ELC CASE NO. 34 OF 2018 was instituted, contrary to what the said Section 30 (1) of the Land Adjudication Act provides, and thus the Court in MARIMANTI ELC CASE NO. 34 OF 2018 did not have the jurisdiction to entertain that suit at its onset.

4. In view of the foregoing, your Lordship, we humbly urge this Honorable Court to find that the Appellant's appeal has no merit and to dismiss it with costs to the Respondent.

We so humbly pray.

DATED AT MERU THIS26th .. DAY OF ...June,..... 2019

FOR: KIOGORA ARIITHI & ASSOCIATES

ADVOCATES FOR THE RESPONDENT

5. I have carefully considered the pleadings and submissions filed by the parties in support of their diametrically divergent assertions.

6. I do note that the appellant admits in his Memorandum of Appeal and in his submissions that he did not pursue the dispute settlement mechanisms provided for in the Land Consolidation Act and in the Land Adjudication Act. He gives a rather pedestrian excuse that the respondent, who is or was the chief of the area where the suit land is situated, tricked them by promising land elsewhere. This explanation does not nullify the provisions of the Land Consolidation Act and the Land Adjudication Act. For special areas ascertainment of rights and interests in land is done through the procedure provided by the Land Consolidation Act. Ascertainment of rights and interests in land in Trust Land areas is done through the procedure provided by the Land Adjudication Act. One cannot contrive to ascertain his rights and interests autonomously. He must subject himself to the applicable provisions of the law.

7. If the appellant felt that he was being denied rights and interests in his land, he should have made use of the dispute settlement

mechanisms which were available to him under the Land Consolidation Act and the Land Adjudication Act, whichever was applicable in his case. Having not employed those mechanisms, I find that the appellant had not demonstrated that his land was registered in the name of the respondent corruptly, dishonestly and fraudulently.

8. Having perused the proceedings, I find that there is no evidence that the respondent or the Land Adjudication Officer had acted improperly during the adjudication process. Otherwise, the appellant should have made use of the available dispute settlement mechanisms. I also find that there is no evidence that the Land Adjudication Officer acted improperly and was hell bent on assisting the respondent.

9. I opine that longevity of stay on the suit land can only entitle one to the rights and interests in land, if the litigant's claim is ascertained. There is no other way. Regarding the assertion that the District Land Adjudication and Settlement Officer (DLASO) had given the respondent consent to institute the suit which is the subject of this appeal and that that proved that the appellant owned the suit land, nothing can be further from the truth. Consent to file a suit does not, by itself, ascertain the rights and interests in land of a litigant.

10. The respondent has argued that the lower court had no jurisdiction to hear the suit because the appellant only obtained the requisite consent after the suit had been filed, I opine that the issue of jurisdiction should have been raised during the proceedings in the lower court. However, that having been said, section 30(1) of the Land Adjudication Act is pellucid and unequivocal that no person or court shall entertain any civil proceedings concerning an interest in land in an adjudication section without the consent of the Land Adjudication Officer until the register for that adjudication section has become final in all respects under section 29 (3) of the Land Adjudication Act.

11. I find that the appeal lacks merit. Grounds 1, 2, 3, 4, 5, 6, 7 and 8 are disallowed.

12. Consequently, this appeal is hereby dismissed.

13. Costs are awarded to the Respondent.

14. Orders accordingly

Delivered in Chuka this 13th day of November, 2019 in the presence of:

CA: Ndegwa

Kiongo h/b Kiogora Arithi for the Respondent

Paul Kajiita Kiome - Appellant

P. M. NJOROGE,

JUDGE.