REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO. 537 OF 2016

MATHEW NDAU KIAMBATI.....APPELLANT

VERSUS

JAMES GICHUKI MAGONDU.....1ST RESPONDENT

EMBAKASI RANCHING COMPANY LTD...2ND RESPONDENT

JUDGMENT

This is an appeal against the decision of the Senior Resident Magistrate Hon. P. Nditika that was made on 14th June, 2011 in Milimani CMCC No. 12559 of 2005, James Gichuki Magondu vs. Mathew Ndau Kiambati and Embakasi Ranching Company Limited (hereinafter referred to as "the lower court case") in which he issued a permanent injunction restraining the Appellant and the 2nd Respondent from trespassing on, interfering with and/or dealing in any manner with the parcels of land known as Plot Numbers 124B, 125B, 126B and 127B situated at Ruai – Nairobi which the court found to be owned by the 1st Respondent. The 1st Respondent had sued the Appellant and the 2nd Respondent in the lower court claiming that he was the owner of all those parcels of land known as Plot Numbers 124B, 125B, 126B and 127B (hereinafter referred to as "the suit properties") and that the Appellant and the 2nd Respondent had trespassed on the same.

In his plaint in the lower court, the 1stRespondent averred that he purchased four (4) parcels of land namely, Plot Numbers 124, 125, 126 and 127 from the 2nd Respondent in 1993 after which he was allocated the suit properties as bonus plots in respect of which he made full payment. The 1st Respondent averred that after being allocated the suit properties, he took possession thereof and fenced the same. The 1st Respondent averred that in June, 2005, the Appellant wrongfully and unlawfully entered and destroyed part of the fence which the 1st Respondent had put up around the said properties and only stopped bringing down the whole fence when the 1stRespondent made a demand upon him to stop the said acts of destruction. The 1st Respondent averred that on or about 15th November 2005 the Appellant with the authority of the 2nd Respondent intimated that he would re-enter the suit properties and pull down the entire fence.

The Appellant and the 2nd Respondent filed a joint statement of defence in the lower court on 22nd January, 2009 in which the 2nd Respondent admitted that he sold to the 1st Respondent Plot Numbers 124, 125, 126 and 127. The 2nd Respondent however denied having allocated to the 1st Respondent the suit properties. The Appellant and the 2nd Respondent denied entering the suit properties and destroying the 1st Respondent's fence as claimed by the 1st Respondent. The Appellant averred that he authorised his agents/servants to fence Plot Numbers MA 156, MA 157, 156B and 157B (hereinafter referred to as "the

Appellant's properties") which he purchased from the 2nd Respondent on or about 1991. The Appellant averred that it is these properties which the 1st Respondent had claimed to be Plot Numbers 124B, 125B, 126B, and 127B ("the suit properties").

When the lower court suit came up for hearing, the 1st Respondent gave evidence and called one witness. In his evidence the 1st Respondent reiterated the contents of his plaint. He told the court that he acquired four (4) plots from the 2nd Respondent and was later allocated the suit properties as bonus plots in early 1990's. He told the court that he took possession of the suit properties and fenced the same. He stated that the suit properties were in the possession of his first cousin. He stated that there was no dispute over the suit properties until the year 2005 when the Appellant started interfering with the said properties. He stated that a demand letter was sent to the Appellant to stop the interference. He stated that he was still in possession of the suit properties and that his cousin was still using the same. He denied that the suit properties are the same as the Appellant's properties. The 1st Respondent's witness was Patrick Mwaki Njuki (PW 2). He told the court that the 1st Respondent was known to him. He stated that he started using the suit properties in the year 2000. He stated that before he started using the suit properties, it was the 1st Respondent who was utilising the same. He stated that in the year 2005 a dispute arose over the suit properties when someone laid a claim over the same. He stated that the suit properties were fenced and there was a stone building next to the same which was built before the year 2000.

For the Defendants in the lower court, the Appellant gave evidence followed by a representative of the 2nd Respondent, one, Jack K. Wachira (DW2). The Appellant told the court that jointly with another person, they purchased a parcel of land from the 2nd Defendant in 1980's. When they purchased the said parcel of land, they were issued with share certificate No. 5150. He stated that subsequently he purchased four (4) more parcels of land from the 2nd Respondent known as Plot Numbers MA 155, MA 156, MA 157 and MA 158 ("the Appellant's properties"). These parcels of land were allocated to him on 17th July, 1993. He stated that he had earlier been allocated two (2) parcels of land namely, Plot Number 2049 and Plot Number2049 B and that the purchase of additional four (4) parcels of land brought the number of his parcels of land to six (6). He stated that the six (6) parcels of land were in the same area and that he had fenced the same. He stated that he had initially put up a temporary house on the said parcels of land buthe later built a permanent house in the year 2000. He stated that in the year 2005, someone fenced Plot Number MA 156 and Plot Number MA 157. He reported the matter to the 2nd Respondent who gave him a letter to take to the area chief. Subsequently, he received a letter of demand from the 1st Respondent's advocates and later a court order. He denied trespassing on the suit properties. In cross-examination, he stated that the plots he purchased were quarry plots and were in not in a marshy area. He stated that he was not aware of the suit properties. The 2nd Respondent's witness, Jack K. Wachira (DW2) told the court that he was a surveyor working with the 2nd Respondent. He explained to the court the standard procedure which the 2nd Respondent used to followwhen allocating land. He stated that the 2nd Respondent had different land allocation maps which had different plot numbers. He told the court that the 1st Respondent had four (4) bonus plots for which he should have paid Kshs.24,000/=. He stated that the Appellant owned Plot Numbers MA 155, MA 156, MA 157 and MA 158(the Appellant's properties). He stated that he was working under another surveyor and that he did not do the allocation of the said parcels of land to the Appellant.

After the close of evidence in the lower court, the parties filed written submissions. In its judgment, the lower court found that the 1st Respondent had proved his claim against the Appellant and the 2nd Respondent on a balance of probabilities and issued the orders which are the subject of this appeal. In arriving at its decision, the lower court noted that the Appellant had admitted that the 1st Respondent was in possession of the suit properties. The court also observed that the Appellant was allocated land that was in a marshy area which was abbreviated as "MA" the meaning of which the Appellant did not understand. The court noted that the 1st Respondent had proved that; the suit properties were allocated to him; he was in possession of the same and that the properties were not owned by the Appellant. The lower court disagreed with the Appellant that the Appellant's properties were in the same position on the ground as the suit properties. The court stated that that fact was not proved.

In his appeal before this court, the Appellant has challenged the decision of the lower court on fourteen (14) grounds which are set out in the amended memorandum of appeal dated 3rd July, 2014 that was filed in court on 4th July, 2014. The appeal was heard by way of written submissions. I have perused the proceedings of the lower court which is contained in the record and supplementary record of appeal filed by the parties. I have considered the pleadings which were filed in the lower court, the evidence on record, the judgment of the court and the grounds of appeal put forward by the Appellant. I have also considered the detailed submissions which were filed herein by the parties and the authorities in support thereof. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, the case of Verani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle vs. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court. An appellate court will however not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter vs. Sunday Post Ltd. [1958] E.A 424 and Makube vs. Nyamuro[1983] KLR 403.

Having carefully reviewed the case that was presented to the lower court for determination, the defence and the evidence that was tendered, I am unable to fault the lower court's decision. I must say that the court was not well served by both parties and what the court did was the best it could do in the circumstances. I believe that the Appellant's advocates acknowledged this fact when they cited the decision of Denning J. in Miller vs. Minister of Pensions[1947] 2 All ER 372, where the court stated that:

> *"Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained".*

The dispute before the lower court was not over the ownership of the suit properties which were owned by the 1st Respondent or the properties which were owned by the Appellant. There was no dispute that the 2nd Respondent allocated to the 1st Respondent the suit properties as bonus plots and that it also allocated to the Appellant, the Appellant's properties after he purchased the same. In his affidavit sworn on 18thJanuary, 2006 in opposition to the 1st Respondent's application for interlocutory injunction (See page 25 of the record of appeal), the 2nd Defendant's director Samuel Mwangi Thuita stated on oath that the 1st Respondent was allocated the suit properties while the Appellant was allocated the Appellant's properties and that the said parcels of land were located at different places and as such "the issue of double allocation" did not arise. I have referred to this affidavit of Samuel Mwangi Thuita because I have found the evidence of Jack K. Wachira (DW2) who gave evidence on behalf of the 2nd Respondent difficult to comprehend. The parcels of land in dispute have no formal titles. The evidence of ownership that was placed before the court was share certificates and certificates of ownership issued by the 2nd Respondent. There were no formal survey maps delineating the various parcels of land presented before the lower court. The dispute before the court was over the physical location of the suit properties and the Appellant's properties. The party who should have assisted the court immensely in determining this issue was the 2nd Respondent. As I have already observed above, the 2nd Respondent's witness (DW2) made a very poor show of himself. Instead of bringing to court the allocation maps showing the location of both the suit properties and the Appellant's properties, he only brought to court a portion of allocation map showing the existence of the Appellants properties. Due to the confused nature of the evidence that he gave, it is not even possible to comprehend whether the map that he produced was "Map B", Map C – Kinyanjui area" or "allocation map No. 6 Phase" which he all mentioned in his brief evidence. I am of the view that after the lower court had made a finding that there was no dispute over the ownership of the 1st Respondent's and the Appellant's properties and that the dispute revolved around the location of the said properties, in view of the informal nature of the titles held by the parties, the court was entitled to determine the location of the various parcels of land on the basis of possession.

The1st Respondent and the Appellant had both contended that they fenced their respective parcels of land as soon as the same were allocated to them. From the evidence on record, the parcels of land in question appear to have been allocated to the parties at the same time between 1991 and 1993. Both parties claimed to be in possession of their respective parcels of land. I am unable to fault the lower court's finding that it was the 1st Respondent who was in possession of the parcels of land in dispute. In paragraph 6 of the plaint, the 1st Respondent averred that the Appellant had wrongfully and unlawfully entered the suit properties and destroyed part of the fence he had put up around the said properties and had threatened to bring down the entire fence. In a letter dated 22nd June, 2005 at page 16 of the record of appeal that was written to the Appellant when he allegedly brought down the 1st Respondents' fence on the suit properties, the Appellant wrote by hand among others that " (2) The plots were allocated to me in 1993. (4) We are proceeding to remove all fences....." What this means is that the 1st Respondent had fenced the suit properties otherwise there would have been no fence to be removed by the Appellant.

I am also of the view that if the properties had been fenced earlier by the Appellant it would not have been necessary for the 1st Respondent to fence the same again. There is no evidence that the 1st Respondent fenced the suit properties after the Appellant had fenced the same. The Appellant who claims to be residing next to the suit properties could have raised an objection to that move. The Appellant did not plead and led no evidence that the 1st Respondent had demolished or destroyed his fence. It is the 1st Respondent who came to court when his fence was brought down by the Appellant. The Appellant did not file any counter-claim against the 1st Respondent. On this issue, there was also the evidence of PW2, Patrick Mwaki Njuki who testified that he was using the suit properties with the permission of the 1st Respondent from 2000 until the appellant laid a claim to the same in 2005. The evidence of this witness was not challenged in cross-examination. If this witness was using the suit properties for about 5 years prior to 2005 when the dispute herein arose, how comes that the Appellant did not raise any objection for all those years. The other evidence that was presented to court that points to the fact that the location of the Appellant's properties were not at the same place as the suit properties related to the nature of the properties that were allocated to the Appellant. The evidence before the court shows that the Appellant applied to purchase quarry land and was allocated land in a marshy area. See the exhibits at pages 20, 21, 23 and 24 of the record of appeal. In his evidence in cross-examination, the Appellant told the court that his parcels of land were not on a marshy area. This evidence is contrary to the contents of the exhibits I have referred to earlier and lends credence to the 1st Respondent's claim that the Appellants' parcels of land were elsewhere.

I am in agreement with the Appellant that the 1st Respondent had the burden of proof. I am satisfied that the 1st Respondent discharged this burden on a balance of probabilities. He proved that he was the owner of the suit properties and that he was in possession of the same. He also proved that he had fenced the properties and that the Appellant had destroyed a portion of his fence and had threatened to bring down the whole fence. The Appellant has contended that the lower court ignored the corroborative evidence of Jack K. Wachira (DW2). I have already commented on the evidence of this witness. In my view the evidence of this witness was not helpful at all to the Appellant. A part from confirming a fact that was not in dispute that the Appellant was allocated the Appellants' properties, DW2 placed nothing more of value before the court on the dispute. The Appellant has amplified DW2's statement that "the plots are the same on the ground" to mean that the Appellant's properties as they appeared on the map that DW2 produced were as they were on the ground. The issue that the witness did not answer was, which ground? DW 2 did not answer this critical question which only he could answer. I find the case of Gitwany Investments Ltd. vs. Jajmal Limited and others (2006)2 E.A 76(HCK) that was cited by the appellant distinguishable. That was a case of double allocation of land. As I have mentioned earlier in this judgment the dispute here was not about double allocation of land but the physical location of the various parcels of land claimed by the Appellant and the 1st Respondent.

In conclusion, I find no merit in the appeal before me. I uphold the decision of the lower court. The appeal is dismissed with costs to the 1st Respondent.

Delivered and Dated at Nairobi this 19thday of January, 2018

S. OKONG'O

JUDGE

Judgment read in open court in presence of:

Mr. Ochieng for the Appellant

Mr. Muriithi for 1st Respondent

N/A for 2nd Respondent

Catherine Court Assistant