



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL 7 OF 2017

FORMERLY MACHAKOS MISC. APPLICATION NO. 148 OF 2011

FORMERLY MACHAKOS HCCA 217 OF 2014

1. MULI MUSEMBI.....1ST APPLICANT

2. MRS. PAULINA.....2ND APPLICANT

VERSUS

JUDGMENT

1. This appeal emanates from the decision of the Honourable B. Ochieng delivered on the 27th January, 2011. In his judgement, the learned magistrate entered judgment in favour of the Respondent and against the Appellants herein.

2. Aggrieved by the court's judgement; the Appellants filed memorandum of appeal where they raised five grounds of appeal. Those grounds were:-

1. That the learned Magistrate erred in law and fact by not finding that the Plaintiff's/Respondent's plot was distinct from those of the Defendants/Applicants.

2. That the learned Magistrate erred in law and fact in not establishing the fact on the ground.

3. That learned Magistrate erred in law and fact in holding that the allottees who sold the Appellant had no good title to convey.

4. That the learned Magistrate erred in law and fact in finding that the Respondent had established her claim against the Appellants.

5. That the learned Magistrate erred in law and fact in failing to point out issues for determination.

3. On the 10th October, 2017, the court directed, with the consent of the parties that the appeal do proceed by way of written submissions.

4. In his submissions dated 17th October, 2017 and filed in court on the 18th October, 2017 the appellant's counsel submitted that the trial court misapprehended the case before it and created its own case. The counsel added that what was before the subordinate court was the issue of whether or not the Appellants had trespassed into plot number 676. The counsel further submitted that instead of determining the aforementioned issue, the subordinate court went on to decide on the validity of plot numbers 208 and 236. The counsel added that the pleadings before the trial court were clear in that the Respondent owns plot number 676 which lies in an adjudication section while the first and the second Appellants own plot numbers 208 and 236 that were from the Local Government Authority. The counsel submitted that the immediate approach was for the court to determine the location of each plot through an expert opinion of a surveyor. Having failed to do so, the appellants counsel submitted that on that ground alone, the appeal should succeed.

5. The counsel further submitted that the issue of consent from the Land Adjudication Officer was not addressed conclusively by the court.

6. On his part, the Respondent's counsel submitted that the five grounds of appeal can be summarized as follows;

a. Whether the appellants Plot No. 208 and 236 are distinct on the ground from Plot No. 676 belonging to the respondent.

b. Whether the original allottees who sold the plots to the appellants had good titles capable of being conveyed.

c. Whether the court framed issues for determination and if respondent established her claim on a balance of probabilities.

7. The counsel went on to submit that in pages 48 to 50 of the record of appeal, the Respondent testified before the trial magistrate that she is the owner of plot number 676. The counsel pointed out that the Respondent produced the letter dated 19th July, 2007 marked as Exh.6 from the Land Adjudication Officer confirming that the said plot number 676 Mukuyu Adjudication Section belongs to her. He added that the Respondent produced the land map for the area as Exh 12 which clearly shows that the Appellants plot number 208 and 236 do not exist and cannot be located on the ground. The counsel went on to submit that the trial court was right in arriving at the conclusion that the Appellants' plot number 208 and 236 are actually comprised in the Respondent's plot number 676 and were illegally excised there from.

8. The Respondent's counsel further submitted that in pages 51 to 52 of the record of appeal, the first Appellant testified before the trial court that he bought plot number 208 from one Meki Mbai Kingoto. The counsel submitted that the first Appellant had an allotment letter marked DMFI-2 in respect of plot number 812. The counsel added that in cross-examination, the first Appellant did not have document to show that the plot was transferred to her and that though it is in Kumbe area along Kibwezi - Kitui road, it does not appear in the map (Exh. 12). Regarding the second Appellant, the Respondent's counsel submitted that in her evidence in chief as it appears in pages 54 to 55 of the record of appeal, she told the court that she bought plot number 236 from one Lucas Musumbi. The counsel pointed out that she confirmed it is the same plot that the Respondent claims while alleging that it is plot number 676. The counsel surmised that this clearly confirms that the second Appellant's plot number 236 is comprised in the Respondents plot number 676.

9. The Respondents' counsel further submitted that in cross-examination the second Appellant admitted that the sale agreement between her and one Lucas Musumbi does not indicate the plot number but shows that it measures 40 feet by 100 feet. She added that the latter of allotment (DExh. 6) issued to the said Lucas Musumbi shows the size of the plot to be 50 feet by 100 feet which the counsel said was a serious discrepancy which the second Appellant never explained and besides, the counsel added, plot number 236 was never transferred into her names and nor was beacon certificate issued to her as well as to the first Appellant.
10. The counsel submitted that the letters of allotment issued to Meki Mbai Kingoto and Lucas Musumbi for plot numbers 208 and 236 were illegal, null and void since they were not accompanied by deed plan showing exactly where they were situated as well their sizes. The counsel added that failure by the Appellants to produce the deed plans for their respective plots meant that the plots in question did not exist on the ground.
11. The counsel further submitted that the trial court framed the issue for determination, analyzed rival evidence tendered by the parties and reached the conclusion that the Respondent had proved her case on a balance of probabilities against the Appellants. The counsel added that the court did not misdirect itself in arriving at its judgement.
12. Regarding the issue of consent from the Land Adjudication Officer, the Respondent's counsel submitted that the Appellants are estopped from raising it in their submissions since they did not raise it in their memorandum of appeal and in any case, the counsel pointed out preliminary objection was raised and same was dismissed. The counsel added that the Appellants did not appeal once the preliminary objection was dismissed.
13. This being a first appeal, this court is bound to look at pleadings and the evidence that were placed before the subordinate court.
14. In her plaint dated 11th September, 2007 and filed in court on the 12th September, 2007 the Respondent averred in paragraphs 3 and 4 that on or about 1992, she purchased land parcel number 676 bordering Kibwezi town from one Ramadhan Katungi Kaune and the agreed purchase price was paid in full. That upon the aforesaid purchase, the necessary change of name was effected with the Ministry of Lands and as of to date, the plaintiff is lawful owner of the said land. She went on to aver in paragraph 5 of the plaint that between late 2006 and 2007, the Appellants have without colour of right, reasonable and justifiable cause illegally entered into the Respondent's land and began interfering with it by clearing the natural vegetation, causing wanton destruction thereon by depositing building materials and putting up illegal structures and/or houses on the said land.
15. In their joint statement of defence dated the 25th September, 2007 and filed in court on even date, the Appellants averred in paragraph 4 that they have not trespassed into plot number 676 Mukuyuni Adjudication Section and nor have they invaded, grabbed or in any way interfered with the same as pleaded in the plaint or at all. They further averred in paragraph 5 that the first Appellant is the owner of plot number 208 in Kibwezi township measuring 36 feet by 100 feet while the second Appellant is the owner of plot number 236 Kibwezi township measuring 50 feet by 100 feet. They have also averred in paragraph 6 that they did thorough investigations of the title to the plots and established authenticity of the same, the boundaries and abuttal of the same from the relevant authorities before they purchased their respective plots from their original owners.
16. In her evidence in chief, the Respondent told the court that she bought plot number 676 Kikoo Village Kibwezi from one Ramadhan Asman in 1992 at Kshs. 80,000. She said that she wasn't issued with the title since it was still under adjudication. She said that the plot was however transferred to her name on 9th January, 1995. She produced the transfer letter as Exh. 1. It was also her evidence that she took possession of the plot and cultivated on it up to the time when she was testifying in court. She said that between 2006 and 2007 the first Appellant trespassed into her land and started developing it. She added that she lodged the complaint with the relevant organs leading to the Appellants being summoned by the clerk to Makeni County Council who ruled in her favour.
17. She said that both Appellants trespassed into her land and started construction without her consent or authority. She produced a certified copy of the area map as Exh. 12 . She said that plots numbers 313 and 872 which were excised from plot numbers 236 and 208 do not appear on the map.
18. Her evidence in cross-examination was that she did not obtain consent. She said that she wasn't given a map showing where plot numbers 208 and 236 are.
19. She went on to say that she lodged objection with the Land Adjudication Officer as well as the clerk to the county council but the two offices refused to assist her.
20. On the other hand, the first Appellant in his evidence in chief denied having ever trespassed into the Respondent's plot number 676. He said that he has constructed on plot number 208 in Kibwezi township area. According to him, the plot is commercial which he bought from Mike Mbai Kingoto at a price of Kshs. 75,000 vide sale agreement (DExh. 1(a)) dated 8th April, 2004. He went on to add that he conducted official search at Makeni County Council. He had a letter of allotment from Makeni County Council for plot number 812 as DMFI -2. The allotment letter was never produced in evidence. He produced a bundle of receipts being payment of annual rates as DExh 3(a) to (e).
21. Regarding his construction, the first Appellant told the trial court that he presented his building plan (Dexh. 4) for approval to the relevant authority and the same was duly approved. He said that when he began constructing a building on the plot, the Respondent alleged that he had encroached into her plot. He said that he proceeded to the land adjudication office where he and the Respondent were shown the boundary and it was confirmed that his plot was not in Mikuyuni Adjudication Section.
22. His evidence in cross-examination was that Mike Mbai whom he referred to as a house wife showed him the beacons when he bought the plot number 208. He went on to say that she did not produce beacon certificate but all the same she effected transfer even though he had no document to show how transfer was effected to him. He said that the plot does not appear in the map marked as Exh. 12.

23. The evidence in chief of the second Appellant was that her plot is 236 in Kibwezi township and that it was the same plot that the Respondent was also claiming as 676. She said that she bought the plot from one Lucas Musumbi, vide a transaction (Dexh. 5) of 3rd September, 2003 which was reduced into writing. Like the first Appellant, the second Appellant told the court that she too carried out a search at the county council offices in Makueni. She produced an allotment letter and 5 receipts for payment of fees as DExh. 6(a), (b) to (f) respectively.

24. Her evidence in cross-examination was that the plot that she bought from Lucas Musumbi does not indicate the plot number that was allotted to him but it showed its size as 40 feet by 100 feet. She went on to say that its size is 50 feet by 100 feet and denied having encroached into the next plot by 10 feet. She said that she was yet to effect transfer of the plot into her name.

25. In his judgement, the learned trial magistrate held that the Respondent had established her claim against the two Appellants jointly and severally and proceeded to enter judgement in her favour in terms of the prayers in the plaint. The learned trial magistrate had this to say regarding the two plots said to belong to the Appellants, “ ***the two allottees who subsequently purported to sell the plots to the 1st and 2nd Defendant Respectively had no good title to the plots which they could convey to the defendants and consequently the purported sale agreement between them over the plot was null and void ab initio***”

26. I have read the record of appeal and I do note that only the Respondent produced a map marked as Exh. 12 said to be from the Land Adjudication Office. Although the appellants had allotment letters marked as DMFI – 1 and DExh.6(a) respectively, the letters themselves were not accompanied by part development plans or what the Respondent’s counsel referred to as deed plan to show where the two plots were situated on the ground. The two Appellants had evidentiary burden of prove to disprove the map(Exh. 12) that the Respondent produced. They failed to discharge that burden. Besides, the two Appellants told the trial court that they carried out official search to ascertain the authenticity of the plots that they were buying. The second Respondent admitted that her plot number 236 was the same one that the Respondent was claiming. The later plot is not reflected in the map marked as Exh. 12. There is nothing on record to identify plot number 208 from which plot number 812 that the first appellant claims on the ground.

27. From the foregoing, the learned trial magistrate cannot be faulted for arriving at the decision that he made on the 27th January, 2011. **I find the appeal unmeritorious and in the circumstances, I hereby proceed to dismiss it with costs to the Respondent.**

Signed, dated and delivered at Makueni on 14th day of February, 2018.

MBOGO C.G

JUDGE

In the presence of:

Mr. Tamata for the Appellants

No appearance for the Respondent

Both Appellants present

Respondent present

Mr. Munyai Court Assistant.

MBOGO C.G

JUDGE

14/2/2018