



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A NO. 17 OF 2014

AUGUSTINE KINYUA ITA.....APPELLANT

VERSUS

NDII MUBOTHI.....1ST RESPONDENT

JOHN IRERI MUBOTHI.....2ND RESPONDENT

JAMES NJERU MUBOTHI.....3RD RESPONDENT

(Being an appeal from the judgement and decree in Siakago CMCC No. 23 of 2009 delivered on 6th February 2012 by Hon S.M. Mokuia – Senior Principal Magistrate)

JUDGEMENT

1. This is an appeal against the judgement and decree of Hon S.M. Mokuia (SPM) dated 6th February 2012 in Siakago CMCC No. 23 of 2009. By the said judgement, the trial court had allowed the suit by the 1st Respondent who was the Plaintiff and dismissed the counterclaim by the Appellant who was the Defendant.

2. The brief facts of the said proceedings are that the Plaintiff, being the registered owner of Title No. MBEERE/KIRIMA/3004 (hereinafter known as the “suit property”) sued the Appellant for illegal occupation and use of the suit property without his consent vide a plaint dated 24th April 2009. It was pleaded that the Appellant had cultivated, constructed upon, used the suit property to the exclusion of the 1st Respondent and failed to give the latter vacant possession thereof. The 1st Respondent, therefore, sought an order for removal or eviction of the Appellant and his family members from the suit property, damages for illegal occupation and costs of the suit.

3. Vide a plaint amended on 25th November 2010, the 1st Respondent amended his pleading to remove reference to the Appellant’s illegal occupation, cultivation and failure to give vacant possession of the suit property. Instead, he pleaded that the Appellant was merely “interfering” with the suit property and had “commenced” construction of an illegal structure. He, therefore, sought a permanent injunction to restrain the Appellant from interfering with the suit property and general damages for destruction of private property.

4. By his amended defence and counterclaim, the Appellant denied the 1st Respondent’s claim. He pleaded that the 1st Respondent’s registration as proprietor of the suit property was invalid and a nullity since it was done in violation of orders of stay issued in *Judicial Review Case No. 12 of 2007*, *Judicial Review cause No. 5 of 2009* and *Judicial Review Cause No. 38 of 2008*, barring all dealings with the suit property.

5. It was further pleaded that the Appellant was lawfully in occupation of the suit property by virtue of the same being family property; that the Appellant’s family had been in occupation since the 1970s and 1980s and that the Appellant was born and brought up on the suit property and that he married whilst living there.

6. The Appellant also pleaded that had the 1st Respondent inquired on the status of the suit property prior to its acquisition, he would have discovered that the Appellant and his family were in actual possession thereof and had a recognizable interest thereon.

7. By his counterclaim, the Appellant pleaded that at all material times the suit property was part and parcel of Title No. MBEERE/KIRIMA/2244 (hereinafter known simply as parcel No. “2244”) which was trust land or community land held by Mbeere County Council on behalf of the local communities. It was pleaded that the adjudication process in respect thereof was flawed and had been challenged in the 3 suits mentioned in paragraph 4 hereof in which stay orders had been granted. It was averred that the 1st respondent had irregularly acquired the suit property during the pendency of the said suits.

8. The Appellant therefore contended that he was the *possessory owner* of the suit property and sought orders to restrain the Respondents

from harassing or evicting him from the portion of the suit property in the actual occupation of his family; an order restraining the Respondents from the blocking access to the Appellant's homestead on the suit property; an injunction to compel the Respondents to remove any structures they have erected on the suit property, general damages; and costs.

9. The said suit was heard before the Hon. S.M. Mokuia (SPM) on various dates between 6th October 2011 and 15th December 2011. Judgement was delivered on 6th February 2012 in which the court entered judgement for the 1st Respondent in the main suit and dismissed the Appellant's said counterclaim. It is against the said judgement and decree that the Appellant has appealed.

10. In his memorandum of appeal dated 10th February 2012, the Appellant appealed against the whole of the said judgement and raised twenty (20) grounds of appeal. However, when the Appellant filed his written submissions, he framed the following three (3) issues for determination in this appeal;

- a. Whether *Title No. Mbeere/Kirima/3004* was lawfully and procedurally acquired.
- b. Whether the Appellant had acquired possessory rights.
- c. Whether the Magistrate's Court had jurisdiction to hear and determine the case.

11. The court has noted that about one half of the grounds of appeal deal with the legality of the adjudication process and consequently whether the title to the suit property was properly and procedurally acquired. The rest of the grounds of appeal which were not argued in the Appellant's submissions are deemed to have been abandoned hence the court shall only consider and determine the grounds or issues which were argued.

12. The court is aware that as the first appellate court it is obligated to re-look at the entire evidence before the trial court, make its own evaluation and draw its own conclusions thereon. The principles guiding a first appellate court were summarized in the case of *Sielle Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page 126* as follows;

“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. The Appellant contends that the title to the suit property was not lawfully and procedurally acquired. In support of his submission, the Appellant relied on various provisions of the former Constitution of Kenya, the Trust Land Act (now repealed), the Land Adjudication Act (Cap 284), the Land (Group Representatives) Act, (Cap 287) (repealed) and some case law. It was contented that parcel No. 2244 from which the suit property was derived was Trust Land within the meaning of section 115 and 116 of the former Constitution of Kenya.

14. It was further submitted that when parcel No. 2244 was brought under the regime of land adjudication, the provisions of the Land (Group Representatives) Act (Cap 287) were never complied with in that no group representatives were elected and incorporated in accordance with the said Act. It was further submitted that the 1st Respondent had failed to table evidence before the trial court to demonstrate compliance with all the cited statutory provisions in the acquisition of the suit property.

15. In the judgement, the learned trial magistrate held that he was satisfied that the title to the suit property was obtained after an adjudication process was undertaken. He found no evidence of illegality or irregularity in the acquisition of the title. He was of the view that if the Appellant was aggrieved as a result of such adjudication, it was upon him to follow the redress mechanisms provided for under the law.

16. The court has perused the pleadings of the Appellant before the Magistrate's court. He was not contending that there was a violation of the former constitution and the various statutes which have been cited in the appeal. In his amended defence, he was quite clear that the 1st Respondent's title to the suit property was “invalid” and a “nullity” because it was issued whilst there were 3 pending judicial review cases in which orders had been granted prohibiting further dealings with parcel No. 2244. In this amended counterclaim, the gist of his claim was the same; that the adjudication process was subject to 3 pending suits in which interim orders preventing further dealings with parcel No. 2244 were in force.

17. All that the trial court was required to inquire into was whether, in deed, there were interim orders in force at the material time forbidding further dealings with parcel No. 2244. It was not required to examine and determine the legality and constitutionality of the entire adjudication process. That was clearly a matter which was said to be pending before the judicial review courts in the 3 suits referred to in paragraph 4 hereof. Moreover, no evidence was tendered to establish the violation of the various laws cited in the Appellant's written submissions. The burden of proof lay upon the Appellant to establish the violations and not upon the Respondents to prove compliance with the cited laws.

18. The court has also perused the record of proceedings during the hearing before the trial court. The Appellant did not adduce any evidence that those 3 judicial review matters were pending at the material time and that there were interim orders forbidding further dealings with parcel No. 2244. He did not produce any documents as exhibits. In fact, the Appellant was recorded as saying that he was not aware if adjudication was ever carried out with respect to parcel No 2244. He did not produce the stay or prohibitory orders relating to any of the 3 suits which were said to be pending. In those circumstances, it could not be said that the trial magistrate erred in upholding the validity and legality of the 1st Respondent's title to the suit property.

19. The court agrees with the submissions by the Respondents' counsel, that the Appellant is trying to expand the scope of litigation by

sneaking the legality and validity of the adjudication process which was not one of the issues raised in the pleadings of the parties for determination by the trial court. Parties are bound by their pleadings and they cannot expand the scope of the issues for determination through their evidence or submissions. See *Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda and Others [2014] eKLR*. The court, therefore, finds no merit in the grounds of appeal relating to the first issue.

20. The 2nd issue relates to the Appellant's possessory rights under *section 30 of the Registered Land Act (Cap 300)* (now repealed) which was applicable at the material time. It was submitted that the learned trial magistrate erred by disregarding the overriding interest of the Appellant which was expressly provided for under *section 30 (g) of the Registered Land Act*. The Appellant relied on the cases of *Wensley Barasa Vs Immaculate Awino Abongo [2017] eKLR* and *David Ogutu Onda Vs Walter Ndede Owino [2016] eKLR*.

21. The material provisions of *section 30 of the Registered Land Act* provided that;

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the land, without their being noted on the register-

g. The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

22. The court has perused the evidence tendered by the Appellant on the issue of possession. The Appellant testified that he had resided on the suit property for 23 years or so. He attended a local primary school within the area. It was his case that he moved into the suit property in 1987 when he was about 7 years and so he moved there with his parents.

23. The Appellant's evidence was corroborated by that of Michael Njeru who was the Chief of Mavuria Location. The Chief testified that it was the Appellant's grandparents who first moved into the suit property in 1980s and later were followed by the Appellant's parents. At the time the land was a block known as parcel No. 2244. The Appellant and his family resided there peacefully without interference until 2008 when the 1st Respondent came to claim the suit property. The Appellant's grandmother is said to have been buried on the suit property when she died.

24. In the case of *Wensley Baraza Vs Immaculate Awino Abongo* (supra) cited by the Appellant, the Court of Appeal held, *inter alia*, that;

“This court has variously stated that possession and occupation of land can create an overriding interest to which a proprietor's rights and interest were subject. In *Obiero Vs Opiyo [1972] EA 227* it was stated thus;

“The Respondent has rights against the Appellant stemming from possession and occupation of part of the land, which amounted to an overriding interest not required to be noted on the register and the Appellants' proprietorship was subject to it, section 30 (g).”

25. Although the 1st Respondent denied that the Appellant had been in possession for a considerable period of time, the court believes the evidence of the Appellant and the Chief of Mavuria Location on the matter of occupation. The court noted in paragraph 2 hereof that the 1st Respondent had in his original plaint pleaded that the Appellant had been in illegal occupation and use of the suit property and that he had erected a building thereon. It was more than one year later that the 1st Respondent amended his plaint to recant the averment of illegal occupation, cultivation and use of the suit property. He even withdrew his earlier pleading that the Appellant had a put up buildings on the suit property. In my view, that amendment was an afterthought contrived by the 1st Respondent in a bid to counter the Appellant's pleading of lengthy occupation and use of the suit property.

26. In the circumstances of this case, the court finds that the Appellant had adequately established his right of possession and occupation within the meaning of *section 30 (g) of the Registered Land Act* (now repealed). The learned trial magistrate, therefore, erred in failing to accord that right due recognition as an overriding interest on the 1st Respondent's title with respect to the portion of land in actual occupation of the Appellant. The court, therefore, finds merit in this ground of appeal.

27. The 3rd issue which was argued by the Appellant was whether the Magistrate's court had jurisdiction to entertain the case. It was contended that the suit was within the jurisdiction of the Land Disputes Tribunal and not the Magistrate's court. The Appellant contended that the 1st Respondent's suit was based on trespass to land and a claim to occupy land hence the Magistrate's court lacked jurisdiction by virtue of *section 9 (1) of the Magistrate's Court's Act (Cap 10)*.

28. The court record shows that the Appellant had raised a preliminary objection before the trial court on 20th January, 2011 which was argued in the presence of counsels for the parties. The court deferred a ruling thereon to 24th February 2011. The record further shows that the ruling was ultimately delivered on 10th March 2011 whereby the court dismissed the said preliminary objection. There is no indication of any appeal having been filed against the said ruling of 10th March 2011.

29. The court agrees with the submissions by the Respondent that having failed to appeal against the ruling of 10th March 2011 dismissing the preliminary objection the Appellant is not at liberty to raise the same issue in this appeal. This ground of appeal is accordingly rejected.

30. The upshot of the foregoing is that all the Appellant's grounds of appeal are dismissed except the ground on overriding interest under *section 30 (g) of the Registered Land Act* (now repealed). Accordingly, the Appellant's appeal is hereby allowed. Consequently, in view of the Appellant's right of occupation and possession, the court makes the following orders:

- a. The judgement and decree of Hon S.M. Mokuia (SPM) dated 6th February 2012 is hereby set aside.
- b. The 1st Respondents' suit before the Magistrate's court is hereby dismissed with costs.
- c. The Appellant's amended counterclaim before the Magistrate's court is hereby allowed in terms of prayers (a) (b) and (c).
- d. Prayer (d) of the amended counterclaim is allowed only to the extent that the Appellant is declared to be in lawful occupation of the part of the suit property in actual occupation of the Appellant and his family.
- e. The 1st Respondent shall bear the costs of the appeal.

31. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **12th** day of **APRIL, 2018**

In the presence of Ms Muriithi holding brief for Mr Gachuba for the Appellant and Mr Okwaro for the Respondents.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

12.04.18