



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

E.L.C APPEAL NO 123 OF 2011

JOEL NTURIBI.....APPELLANT

VS

DOMISIANO MURURU.....RESPONDENT

JUDGMENT

1. The appeal arises out of the judgment of Chief Magistrate's Court in Meru Civil case No. 597 of 2009 in which judgement was delivered on 30/9/11.
2. This is a 1st appeal before this Court and the Court is entitled to evaluate the evidence pleadings and proceedings of the lower Court in matters of law and evidence. Upon such evaluation the Court is entitled to make its own conclusions and a decision thereon.
3. The Proceedings were commenced by a plaint dated 16/11/09. In the Plaint the Appellant states that he is the owner of Land Parcel No. 1426 Kainjai Adjudication section (suit land) and that the Respondent has unlawfully and without justification trespassed on the said land and committed various acts of destruction occasioning loss and damage to the Plaintiff.
4. Consequently, the Appellant sought the following orders;
 - a) A declaration that the Appellant is the owner of land parcel No. 1426 Kianjai Adjudication Section and is entitled to peaceful occupation and possession without interference.
 - b) An order of eviction against the Respondent requiring him to vacate the Appellant parcel of land No. 1426 Kianjai Adjudication Section forthwith.
 - c) Cost and interest.
 - d) Any other relief that this Honourable Court may deem fit and just to grant.
5. On 15/2/2010 the Respondent filed a statement of defence and denies the Plaintiff's claim. In addition, the Respondent alleged that the Appellant intends to deprive the Respondent of his ancestral land by a changing the names registered against the land and replacing the same with false numbers. There are no particulars set out to support this allegation.
6. The case was heard whereupon the Appellant gave evidence and the Respondent did so and called 2 defence witnesses. The Chief Magistrate delivered his judgement on 30/9/11 in which he dismissed the Plaintiffs suit with costs.
7. The Appellant being dissatisfied with the said judgment filed a Memo of Appeal dated 27/10/11 and a supplementary record of appeal with leave of the Court dated 13/6/17.
8. The grounds of appeal set out by the Appellant for determination are as disclosed in the Memorandum of Appeal are that the learned trial Magistrate erred in law and fact in;
 - a) Unduly relying on the provisions of the Law of Contract Act, Cap. 23, Laws of Kenya, yet the primary suit was not hinged on breach of a contract.
 - b) Finding that the Appellant bought the subject land from the Respondent's father, contrary to the evidence on record.

c) Disregarding the Appellant's oral and documentary evidence confirming the Appellant's ownership of the subject land, and conviction of the Respondent for trespassing there onto.

d) Finding that the Appellant had not obtained consent of the Land Control Board to have the subject land transferred to him, yet the land was and is still in an adjudication area, and not registered under the Registered Land Act, Cap 300, to warrant adherence to the procedure laid out in the Land Control Act, Cap. 301, Laws of Kenya.

e) Finding the Respondent's evidence plausible, yet he did not tender any documentary evidence to prove ownership of his alleged P/No. 3749 or any other, and his witnesses could not tell the number of the Respondent's alleged land.

9. On the 28/6/17 the parties appeared and agreed to prosecute their case further by written submissions which have been carefully considered.

10. The Court has read the proceedings, their pleadings and the judgement contained in the lower Court record. The Court has also read and considered the record of appeal and the submissions made by the parties.

11. It is appropriate to consider each ground of appeal separately.

Grounds 1 & 2.

12. In the evidence of the Appellant, he stated that he was the owner of the suit land and produced a letter from the Ministry of Lands dated 13/10/2003 confirming that he was the owner. It is Ex. No. 1. That the Respondent had been charged with and convicted in 3 criminal offences in respect of trespassing to the Plaintiffs land.

13. Going by the evidence on record the suit land was at the material time under adjudication. This procedure is Government centered where the Government through its officers demarcates and allocates land to a person without it necessarily being by way of purchase. The procedure indeed allocates land and confirms ownership in the record in form of a land Register. In most cases the allottees are already settled on the land and the role of the Officer is to ascertain the rights and interests on the ground.

14. In the circumstances the Court finds that the lower Court was in error in its finding that the allocation or ownership of the suit land to the Appellant ought to have been subject to the provisions to the law of Contract Act.

15. Did the Appellant purchase land from Defendant's father and did not produce such evidence at the trial? This is not a matter validly available for introduction in evidence or consideration by the Court in view of the matters set out in Para 13.

Ground 3

16. The Court has seen in the proceedings that Exhibit No. 1 is the documentary evidence issued by the Ministry of Lands confirming that the Appellant is the owner of the suit land. Indeed, in the evidence of the Respondent, two maps relating to the suit land and another allegedly belonging to the Respondent were produced as Exhibit No "DEX 5'B' & 5'A". The two parcels of land (1426 & 3479) are separately delineated marked and given separate Numbers. The Appellant in his Supplementary record and in oral evidence stated that the Respondent was charged separately in 3 criminal cases for trespassing onto the Plaintiffs suit land. The Proceedings and conviction of the Respondent are on record of appeal and admitted by the Respondent in his evidence. Under section 47A of the Evidence Act, therefore the said record of prosecution and conviction of the Respondent in respect to trespass to the suit land is taken as conclusive evidence of the Plaintiff's being owners of the suit land and the Respondent having trespassed thereon.

The Court finds that the trial Court fell in error in disregarding such conclusions based on oral and documentary evidence on matters settled by the law.

Ground 4.

17. This ground is almost disposed of by reason of the findings in grounds Nos 1 & 2. In the Court's view the suit land having been still an adjudication area had not been conclusively registered and identified distinctly so as make the provisions of the Land Control Act applicable to it. Again, the suit land having been under adjudication the land Control Board Act did not specifically apply to it.

The Court finds that the lower Court fell in error which he made in finding that the Land Control Board Act applies to the suit land.

Ground 5.

18. The evidence of the Respondent is that he is the owner of the land Parcel No. 3479. This land by way of documentary evidence lies in Map sheet No. 4 whereas land No. 1426 lies in map sheet No 6. A perusal of the land maps does not indicate on the face of it that they share a boundary anywhere. Nevertheless, there is an evidence on page 23 of the Memorandum of appeal a letter dated the 6.12.2005 from the Ministry of Lands & Housing marked "DME16" produced by the Respondent where the District Land Adjudication Settlement Officer states that the two parcels of land are adjacent and he was then in the process of settling the dispute between the Appellant and Defendant. In respect to land being under adjudication, any dispute would legitimately be handled by District Land Adjudication Settlement Officer. The Respondent much as he relied on the said letter did not lead other evidence to show the outcome of the alleged dispute with the Appellant. The Appellant in his evidence did not advert to such a dispute. The Court finds that there was no evidence on record oral or written that led the trial Court to the conclusion that the Respondent was indeed the owner of LR Parcel No. 3749 or that the same implicitly may have been sharing a boundary or that the suit land had overlapped into the alleged Respondent's land. It is irresistible for the Court to conclude that the

Learned Trial Magistrate fell in error in that regard.

19. Having addressed each of the grounds of appeal, and made a finding thereon this Court makes the following orders;

- a) The appeal be and is hereby allowed.
- b) The Judgement of the Chief Magistrates' Court delivered on 30/9/11 be and is hereby set aside.
- c) The Judgement be and is hereby entered for the Appellant/Plaintiff as prayed in the Plaint dated 16/11/09.
- d) The Respondent /Defendant shall pay the Appellant/Plaintiff the costs of the case in the lower Court and this appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 28TH DAY OF JUNE, 2018.

J.G. KEMEI

JUDGE

In the presence of:

C/A Mutua

Gikonyo holding brief for Calpeters Mbaabu for Appellant

Respondent present in person