



REPUBLIC OF KENYA



KENYA LAW
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**Kibet v Chelimo (Environment and Land Appeal E016 of 2022)
[2024] KEELC 186 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E016 OF 2022**

**L WAITHAKA, J
JANUARY 26, 2024**

BETWEEN

JOHN KISANG KIBET APPELLANT

AND

PAUL KIMUTAI CHELIMO RESPONDENT

*(Being an Appeal from the judgment of Hon. Charles Kutwa
delivered on 14.09.2022 in Iten SPM ELC Case No. E006 of 2020)*

JUDGMENT

Background

1. By a Plaint dated 5th November 2020, the plaintiff (now respondent) instituted a suit in the lower court to wit Iten PMC ELC Case No. E006 of 2020 seeking judgment against the defendant (now appellant) for;
 - a. A declaration that the entire plot centre No.2 located in Koitilial Shopping Centre, measuring 50 by 100 feet, rightly belongs to him (plaintiff);
 - b. An order of eviction expressly directed at the O.C.S Kapsowar Police Station to carry out eviction process against the defendant;
 - c. A permanent injunction to restrain the defendant his agents and representatives from trespassing, encroaching and/or interfering with the plaintiff's quiet possession and occupation of Plot Centre No. 2 located in Koitilial Shopping Centre, measuring 50 by 100 feet;
 - d. Damages for trespass;
 - e. Costs of the suit.



2. The suit was premised on the grounds that at all times relevant to the suit, the plaintiff was the beneficial owner of the suit property; that the defendant had encroached on the suit property and began developing it thereby prejudicing the plaintiff; that the defendant had not bought the suit property from his father but had only been allowed by his father to use the plot as a storage facility for his hides and skins business. The plaintiff also claimed that the defendant had illegally altered boundaries to the suit property.
3. The defendant filed a statement of defence and counterclaim, on 17th February 2021, denying the plaintiff's contention that he (the plaintiff) is the beneficial owner of the suit property. The defendant explained that he began developing the suit property after purchasing it from the plaintiff's father, deceased.
4. Terming the plaintiff's claim that the suit property was never sold false, the defendant denied the plaintiff's allegation that he altered the boundaries to the suit property and contended that the plaintiff is not entitled to the reliefs sought.
5. By way of counterclaim, the defendant sought judgment against the plaintiff for:-
 - a. A declaration that the suit property belongs to him (defendant);
 - b. An order of eviction against the plaintiff or any member of the plaintiff's family, his agents and/or servants who may trespass on the suit land to be carried out by the O.C.S Kapsowar Police Station;
 - c. A permanent injunction to restrain the plaintiff his agents and/or representatives from trespassing, encroaching and/or interfering with his (defendant's) quiet possession and use of the suit property;
 - d. Damages for mental anguish and annoyance;
 - e. Costs of the defence as well as the counterclaim.
6. The plaintiff filed a reply to defence and defence to counterclaim, on 26th August 2021, reiterating the averments in his plaint and contending that the suit property was subject to succession proceedings which proceedings the defendant did not question. The plaintiff also contended that the sale agreement relied on by the defendant was obtained through misrepresentation as the original owner signed it thinking that it was a lease agreement for storage of hides and skins as had been agreed by them.
7. Terming the sale agreement relied on by the defendant null and void for want of consideration, the plaintiff contended that he had a good title to the suit property having acquired it through succession.

Evidence

8. When the matter came up for hearing, the plaintiff who testified as P.W.1 relied on his statement dated 5th November, 2020 after it was adopted as his evidence in chief (the statement is basically a restatement of the averments in the plaint).
9. The plaintiff informed the court that the suit property belongs to his father and that they had done a succession case in respect of the estate of their father comprised in the suit property. He produced the grant of letters of administration issued to him as Pexbt 1 and a sketch of the suit property as Pexbt 4. He maintained that their father had not sold the suit property to the defendant but had only leased it to him.



10. In cross examination, the plaintiff acknowledged that the agreement dated 29th April, 1990 was signed by his father and his brother Thomas.
11. In re-examination, the plaintiff stated that he got to know about the agreement signed between his father and the defendant when he went to pay rent at the County Government offices. He reiterated that the succession proceedings in respect of the estate of the deceased were not objected to.
12. The defendant who testified as D.W.1, relied on his witness statement dated 6th September, 2021 after it was adopted as his evidence in chief. He produced the documents contained in his list of documents dated 8th December, 2020 as Dexbt 1 to 9. These are:-
 - i. Sale agreement, dated 29.4.1990;
 - ii. Assistant Town Administrator's letter, dated 12.5.2020;
 - iii. Chief's letter dated, 18.05.2020;
 - iv. Receipt No. 261939, dated 20.3.2020;
 - v. Receipt No.409331, dated10.3.2020;
 - vi. Receipt No.12585, dated 24.9.2019;
 - vii. Clearance certificate No. 253, dated 20.3.2020;
 - viii. Application for transfer of the plot;
 - ix. minutes dated 19.6.2020.
13. He maintained that he bought the suit property from the plaintiff's late father. He stated that they entered into an agreement for the sale of the suit property which was witnessed by Thomas, the plaintiff brother.
14. In cross examination, the defendant admitted that he never transferred the suit property to himself.
15. Concerning the succession proceedings undertaken by the plaintiff, he stated that he was not privy to them.
16. In re-examination, the defendant stated that he had not been paying rates.
17. D.W.2, John Cheruwon, relied on his witness statement, dated 6th September, 2021 after it was admitted as his evidence in chief. He informed the court that he knows the parties to the suit and that the suit property belongs to the defendant.
18. In cross examination, he admitted that he did not witness the agreement relied on by the defendant.
19. In re-examination, he stated that he was not aware of succession proceedings filed by the plaintiff in respect of his father's estate.
20. It is on the basis of the foregoing pleadings and evidence that the learned trial magistrate entered judgment in favour of the plaintiff and dismissed the defendant's defence and counterclaim. In doing so, the learned trial magistrate inter alia observed/held:-

“The plaintiff in his evidence has produced rent receipts for the suit property. These are payment of rent/rates pursuant to conditions ordinarily spelt out in a letter of allotment. The county government in the letter dated 12th May 2020 confirms that the land in dispute is in the name of the deceased. The plaintiff later filed succession proceedings and after



confirmation of the grant he was given the suit land. The defendant alleged that he bought the suit land from the deceased. He produced a copy of an agreement dated 29th April, 1990. From the agreement he bought the land at Kshs.10,001. However from the application to transfer a plot shows that the plot was bought for Kshs.1000. This contradiction has not been explained by the defendant.

Further, the deceased died on 5th May, 1999. The application for transfer was done on 8th January 2020, twenty (20) years after the death of the deceased. The said transfer was not acted upon by the county Government. This clearly shows that the defendant is being economical with the truth and he was using the death of the deceased to defraud the plaintiff of the suit land.

Having considered the evidence on record am satisfied the plaintiff proved his case on a balance of probabilities. The suit land belongs to the plaintiff and I allow his claim in terms of paragraph 12 of the plaint and dismiss the defendant's counter claim with costs."

Appeal

21. Aggrieved by the decision of the learned trial magistrate, the defendant appealed to this court on the grounds that the learned trial magistrate erred by:-
 1. Dwelling on issues that were not in dispute before him, that is extraneous matters;
 2. Holding that the respondent produced rent receipts for the suit property while ignoring exhibits 4, 5, 6 and 7 which were also rent payment receipts by the appellant;
 3. Holding that the appellant bought the suit land from the deceased for Kshs.10,000/- when in fact the sale agreement states that it was bought for 1000/-;
 4. Holding that there was contradiction in the appellant's testimony that had not been explained when in fact there was none;
 5. Holding that the appellant was being economical with the truth when it is a matter of judicial notice that nothing can be done in the absence of a deceased owner when letters of administration have not been taken out in respect of the deceased person's estate;
 6. Totally disregarding the sale agreement date 29th April, 1990 as well as the minutes of the meeting held on 19th June, 2020 which was in favour of the appellant in respect of the suit property;
 7. Holding that the appellant was using the death of the deceased to defraud the respondent of the suit land when there was no such suggestion from the respondent or from the evidence adduced in court;
 8. Holding that the respondent proved his case on a balance of probabilities and entering judgment in plaintiff's favour while dismissing the appellant's counterclaim with costs;
 9. Displaying open bias by delving into issues not raised by the parties so as to justify a judgment in favour of the respondent;
 10. Arriving at a decision that is contrary to law and depicting open display of failure to grasp the issues at hand.
22. Pursuant to directions given on 7th June 2023, the Appeal was disposed off by way of written submissions.



Submissions

Appellant's Submissions

23. In the Appellant's submissions filed on 5th July, 2023 an overview of case urged by the parties is given and with regard to grounds of Appeal Nos. 1, 9 and 10, it is submitted that the learned trial magistrate delved into and dwelled on issues that were not in dispute thereby revealing elements of bias and/or failure to grasp the issues at hand and placed before him for determination. The learned trial magistrate is said to have casually dealt with the defence case in his judgment thereby prejudicing the defendant/appellant;
24. On ground number 2, the learned trial magistrate is said to have ignored the defendant's evidence, particularly Dexbt 4, 5, 6, 7 and 9.
25. On grounds 3, 4 and 6, the learned trial magistrate is faulted for determining that there was discrepancy in the price given in the sale agreement and the application for transfer of the plot when none existed. It is the appellant's case that the court record is not a true reflection of the proceedings before the learned trial magistrate.
26. On ground 5 and 7, it is submitted that there was no basis for the trial magistrate's conclusion or holding that the defendant/appellant was using the death of the deceased to defraud the respondent as no evidence or suggestion was given to that effect by the plaintiff.
27. On ground 8, it is submitted that the learned trial magistrate erred by holding that the respondent had proved his case on a balance of probabilities. This court is urged to find that the Appeal has merit and to enter judgment in favour of the appellant in terms of the Memorandum of Appeal.

Respondent's Submissions

28. In the respondent's submissions filed on 26th September 2023, two issues are framed for the court's determination. These are:-
 - i. Who is the bona fide owner of Plot Centre No.2 located in Koitilial Shopping Centre, measuring 50 by 100 feet; and
 - ii. Whether the respondent has a right to the suit property.
29. The respondent submitted that the suit property belonged to the respondent's father; that the sale agreement being relied on by the defendant/appellant was obtained through misrepresentation; that the original sale agreement was not produced in evidence; that the defendant neither transferred the plot to himself nor paid rent in respect thereof and that no plausible reason was given why the defendant did not transfer the suit property to himself.
30. As to whether the respondent has a right to the suit property, it is pointed out that the suit property was subject to succession proceedings which proceedings the appellant did not question and submitted that the respondent is the rightful owner of the suit property.
31. Arising from the foregoing reasons, this court is urged to uphold the decision of the lower court.

Analysis and determination

32. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have also reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court



unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see the case of *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.

33. From the Memorandum of Appeal and the submissions filed, I find the sole issue for the courts determination to be whether the appellant has made up a case for interference with the decision of the trial court.
34. Upon carefully evaluating the cases pleaded by the parties, the evidence and the submissions, it is the considered view of this court that the case turns on Dexbt 1 and 9 and the conduct of the parties to the dispute.
35. The evidence adduced in the case before the lower court shows that by the time the plaintiff filed the suit before the lower court, he knew about the sale agreement said to have been signed between his father and the defendant. It is noteworthy, that he did not challenge the said agreement as having been a forged document. Instead, he claimed that it was a lease agreement.
36. One of the persons indicated in the sale agreement as a witness is the plaintiff's own brother, Thomas K. Chelimo. That person was not called as a witness to explain the circumstances upon which he signed the said agreement. No evidence whatsoever was adduced by the plaintiff capable of showing that the agreement was for lease and not sell of the suit property. It is telling that the plaintiff did not avail his brother to testify on the circumstances upon which he witnessed the agreement produced in evidence by the defendant.
37. I note that in the minutes produced by the defendant in evidence (Dexbt 9), the plaintiff's brother, Thomas K. Chelimo, acknowledges having signed the agreement but claims that he signed it without reading it. He further claims that his father had been cheated by the defendant. It is noteworthy, that the account offered by the plaintiff's brother in the minutes, which were produced in evidence, is not in tandem or consistent with the case advanced by the plaintiff.
38. It is the view of this court that had the learned trial magistrate considered the totality of the evidence adduced before him, comprised in the oral evidence of the defendant and his witness, the documentary evidence produced by the defendant, particularly the sale agreement (Dexbt 1) and the minutes (Dexbt 9) and the conduct of the parties; defendant had been in use and occupation of the suit property for a long period of time, from 1990 to 2020, without any dispute/claim by the plaintiff/his family members; he would have arrived at a different decision.
39. Clearly, the learned trial magistrate misdirected himself on the nature of the dispute presented before him and failed to properly analyze the evidence produced by the parties. As a result, he arrived at a decision not aligned with the pleadings and the evidence adduced by the parties.
40. The upshot of the foregoing is that the appeal has merit. Consequently, I allow it as prayed in the Memorandum of Appeal dated 3rd October, 2022.
41. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 26TH DAY OF JANUARY, 2024.

L. N. WAITHAKA

JUDGE



Judgment delivered virtually in the presence of:-

Mr. Corey Francis Otieno for the appellant

Mr. Barmao for the respondent

Christine Towett – Court Assistant

