



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO.8 OF 2017

(Formerly Civil Appeal No. 94 of 2014)

ISAAC WAMBUA NZYOKA.....APPELLANT

VERSUS

DAVID KISILU MATIVO.....1ST RESPONDENT

NICHOLAS MUIA MATIVO.....2ND RESPONDENT

BONIFACE MUTUKU MATIVO.....3RD RESPONDENT

TIMOTHY MALINDA MATIVO.....4TH RESPONDENT

AND

THOMAS NZIOKI KIBUA.....APPLICANT/INTERESTED PARTY

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Case No. 1006 of 2008 delivered on 25th April, 2014 by Hon. L. Simiyu, Ag. Senior Resident Magistrate)

RULING

1. The Application before me is the one dated 27th March, 2017 in which the Appellant is seeking for the following orders:

a. That this Honourable Court be pleased to grant leave to the Appellant/Applicant to adduce and/or produce additional/fresh documentary evidence within such time as may be found suitable, at or before the hearing of the Appeal herein.

b. That this Honourable Court do take, provide for the manner of taking down of the proposed additional evidence, which evidence was not produced during the lower court hearing.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Appellant who has deponed that the Respondents instituted the suit in the lower court seeking for the lifting of a caution that was lodged on the suit land on 1st February, 1994; that there had been previous litigation concerning the two parcels of land in Machakos CMCC No. 193 of 1990 and that the District Land Surveyor was directed to mark out the boundaries of plot number 304 and that was not done.

3. The Appellant has deponed that in the Decree that was issued in Machakos HCCC No. 174 of 1994, it was declared that plot number 304 was his property; that during trial in Machakos CMCC No. 1006 of 2008, a file at the land's registry which held vital documents went missing and that this matter was purely decided on the basis of a Surveyor's report that was filed by the Respondents' Surveyor. It is the Appellant's case that the vital documents that were not produced in evidence include mutation forms of the parcels of land the subject of these proceedings, including numerous letters and that the file at the land's registry was found after the filing of the present Appeal.

4. In response, the 1st Respondent deponed that no new evidence has come to the Applicant's knowledge which was not within his knowledge at trial; that the Judgment in the lower court was as a consequence of a consent and that as such, the District Surveyor acted within the law and prepared a valid Report. According to the Respondents, the present Application offends the provision of Section 67(2) of the Civil Procedure Act and should be dismissed.

5. In the Supplementary Affidavit, the Appellant deponed that had the additional evidence been presented to the trial court and to the Surveyor who filed the Report in court, it would have influenced the outcome of the case; that those documents that were not available during trial confirmed the existence of plot number 304 Mua Hills, which is inclusive of plot number 288 and that the only consent in the lower court was to have the Surveyor visit the land and file a Report.

6. The Appellant's advocate submitted that Section 78 of the Civil Procedure Act allows the Appellate Court to take additional evidence or to require the evidence to be taken; that the evidence that the Appellant now seeks to rely on was either deliberately hidden or misplaced and therefore could not have been available to the Appellant and that the said missing documents have now been traced. Counsel relied on several authorities which I have considered.

7. The Respondents' advocate submitted that the parties herein agreed to have the report of the Surveyor dispose of the whole case; that the Surveyor's report clearly pointed out that Plot No. 304 is not inside Plot No. 288 and that this court is bound by the provisions of Section 67(2) of the Civil Procedure Act.

8. The Respondents' counsel submitted that the Surveyor reviewed all the documents in the registry before making the Report and that the present Application was filed three (3) years after the decision of the lower court.

9. The Appeal herein arises from the decision of the Senior Resident Magistrate in Machakos CMCC No. 1006 of 2008. According to the Plaintiff that was filed by the Respondents in the lower court, it was alleged that the Appellant unlawfully lodged a caution over parcel of land known as Machakos/Mua Hills/288. The Respondents sought to have the said caution lifted.

10. In his Statement of Defence, the Appellant claimed that he bought parcel number 304 from one Flora Syokau; that plot number 304 bordered plot number 288 and that the High Court in Machakos HCCC No. 174 of 1994 held that Plot No. 304 belonged to him.

11. In his Judgment, the trial Magistrate held that plot number 304 and 288 are two separate and distinct plots. The court, while arriving at its decision, noted that the parties had agreed that the report of the Surveyor was to be used as the sole evidence in the preparation of the Judgment. That is what the trial Magistrate did. The court held as follows:

“The report by the Surveyor is not contested by the Defendant. Therefore, I find that the two parcels do not border each other and the Defence is unfounded. I proceed to find that in view of the finding in Machakos HCCC No. 174 of 1994, the letter dated 27th March, 1990, the decision in Machakos PMCC No. 193 of 1990, the caution by the Defendant was an illegality.”

12. I have perused the proceedings of the lower court. At page 134 of the Record of Appeal, the parties entered into the following consent:

“By consent the District Land Registrar in conjunction with the District Land Surveyor do visit Mua Hills and identify using the official maps and survey plans the said land Machakos/Mua Hills/288 and 304...”

13. At no point during trial did the Appellant allege that some documents were missing in respect to his claim. Section 78(2) of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules allows the Appellate Court to take additional evidence. However, the taking of additional evidence by the Appellate Court is an exception. That is the position that was taken by the Court of Appeal in the case of *John Kiplangat Barbaret & 8 others vs. Isaiah Kiplagat Arap Cheluget (2016) eKLR*, which quoted with approval the decision of *Ladd vs. Marshall (1954) 1 WLR 1489* which held as follows:

“(i) except on grounds of fraud or surprise, the general rule is that an Appellate Court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it available.”

14. The Appellant has not shown that he made any efforts to acquire the so called public documents from the Registrar, or that indeed the file was missing during trial. Having not shown the efforts he made to have the purported additional evidence availed to him, I find that the Application does not meet the threshold that is required for calling of additional evidence by the Appellate Court. In any event, the Surveyor and the Registrar of Lands must have looked at the documents that were in the registry before preparing their Report. Whether the said Report was factual or not is what this court will determine during the hearing of the Appeal.

15. It is for those reasons that I dismiss with costs the Application dated 27th March, 2017.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE