REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 14 OF 2013

PATRICK WASIKE MWASAME.....1ST APPELLANT

STEPHEN BOIYO MISOI.....2ND APPELLANT

VERSUS

STANLEY WAFULA WECHULI.....RESPONDENT

JUDGMENT

This is an appeal from the judgment of Hon. Innocent Maisiba, Resident Magistrate, in Eldoret Chief Magistrate Civil Case No. 383 of 2005 delivered on 2.3.2011. The respondent approached the court by way of plaint against the appellants claiming that he was the owner of parcel of land known as PLOT NO. 350 Ex-Jabali farm in Moi's Bridge having been allocated the same by Agricultural Development Corporation under settlement scheme. The respondent's claim against the appellant was based on alleged trespass on plot NO. 350 Ex-Jabali farm. It is alleged that the appellants did an illegal transaction of sale in respect of the said plot. The 1st appellant sold the plot to the second appellant who fenced off the plot despite Notice of intention to sue.

In their defence the appellants denied the allegations in the plaint and stated that the respondent was not the legal owner of the land in issue. They claimed to occupy plot NO. 281 Ex-Jabali farm, previously 257 Ex-Jabali farm.

In his evidence, the respondent stated that he was given plot 350 Ex-Jabali farm whilst the 1st appellant was given Plot No.257 Ex-Jabali farm. The respondent produced the letter of allocation of land at Agricultural Development Corporation Jabali Farm. PW2; Nicholas Kamukuyu, PW3; Stephen Kamuki Mungo, PW4; Samuel K. Lagat and PW5; Kipyego Arap Too reiterated the statement of the respondent in his evidence in chief that he was allocated plot No. 350 Jabali.

On his part, the 2nd appellant testified that he bought plot NO. 257 Ex-Jabali farm from Patrick Wasike Mwasame at the consideration of Kshs 135,000. The plot later became Plot no 281 Ex-Jabali farm and borders plot No. 350 Ex-Jabali farm.

Dw2; John Kipngetich Cheserem an Assistant Chief at Moi Bridge sub location, witnessed the agreement between the 2nd appellant and the 1st appellant. The property that was being sold was plot No. 257 Ex-Jabali farm converted to 281 Ex-Jabali farm

DW3; Apollo Dlonde Ojode, who worked with Agricultural Development Corporation, though it is not disclosed the nature of duties, confirmed that the plaintiff was allocated Plot No. 350 Ex-Jabali farm whilst the 1st defendant plot No. 257 Ex-Jabali farm that became 281 Ex-Jabali farm. The two plots are neighbouring each other. He doubted the allocation letter produced by the respondent alleging that the signature was not Dr. Kilele's.

The Hon Magistrate considered the evidence and found that the respondent proved that he owned plot No. 380 and that the 1st appellant had no legally recognized rights in the respondent's land and that a survey map is not and cannot be proof of ownership.

The appellants appealed on ground, ***inter alia,*** that the learned trial magistrate erred in law and fact in failing to find that the respondent had not proved his case on a balance of probability.

This court's duty as an appellate court is grounded in Section 78 of the Civil Procedure Act is to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to its own conclusion, but in doing so, it must give an allowance of the fact that it neither saw nor heard the witnesses as they testified.

The appellate court can only interfere with the lower court's judgment if the same is founded on wrong principles of fact and or law as guided by the court of Appeal decision in **Nkube – Vs – Nyamiro [1983] KLR 403** that

"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

Per **Law JA Kneller & Hannox Ag JJA.**

In the above cited decision, the court also held that the above position of non-interference with the trial court's finding of fact notwithstanding, the appellate court is however not bound by the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

In another decision by the Court of Appeal of **Ndiritu _ Vs – Ropkoi & Another EALR 334 O'Kubasu, Githinji & Waki JJA**, the Court held that the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did.

I have considered the pleadings, evidence on record, the grounds of Appeal and ***submissions of both appellant and respondent,*** and, being alive to the above said principles, do find that the grounds of appeal can be collapsed in one ground thus that the respondent did not prove his case on a balance of probability.

The evidence on record is that both the 1st appellant and the respondent were allocated land by Agricultural Development Corporation. The respondent was allocated plot No. 350 Ex-Jabali farm whilst the 1st appellant was allocated 257 Ex-Jabali farm that was converted to 281 Ex-Jabali farm. The respondent was allocated 3.5 acres whilst the 1st appellant was allocated 2.5 acres. The 1st appellant sold his said plot No. 281 Ex-Jabali farm to the 2nd appellant. The 2nd appellant claimed to be in occupation of the said plot. The two plots were allocated on the same date and they do neighbor each other. There is no evidence that the 2nd appellant is occupying more than the 2.5 acres he was allocated by Agricultural Development Corporation. There is no evidence that the respondent is occupying less than the 3.5 acres allocated. There is no evidence that the 2nd appellant had encroached to the respondent's plot by more than 1 ½ acres.

Section 107(1) of the Evidence Act Cap 80 laws of Kenya provides that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. Thus, the legal adage that he who asserts must prove. ***Section 107(1) of the Evidence Act Cap 80 laws of Kenya*** provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

It is my considered view that the respondent did not discharge the burden of proof in accordance with section 108 of the Evidence Act Cap 80, Laws of Kenya and therefore the Honourable Magistrate erred in finding that the respondent had proved his case on a balance of probabilities as the evidence on record was insufficient. In this case the probabilities are equal and therefore he ought to have dismissed the suit. The upshot of the above is that the appeal is allowed. Judgment in the Magistrates' court is set aside and the respondent's claim is dismissed with costs. Orders accordingly.

Dated, delivered and signed at Eldoret this 7th day of September, 2018

A. OMBWAYO

JUDGE