



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

E.L.C.A CASE NO. 16 OF 2013

JACINTA GAKII.....APPELLANT

VERSUS

ELIAS MURUNGI.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF TRIAL SENIOR RESIDENT MAGISTRATE HON. D.W. MBURU ISSUED ON THE 1ST FEBRUARY 2013 IN THE C.M.C.C NO. 352 OF 2008)

JUDGMENT

BACKGROUND

This appeal arises from the judgment of the Senior Resident Magistrate Hon. D.W. Mburu in C.M.C.C No. 352 of 2008. In that case, the plaintiff who is also the Appellant in this appeal had sued the defendant who is also the Respondent in this appeal, for an order of permanent injunction restraining him, his agents or employees or members of his family from entering in any other way interfering with the plaintiff's use of parcel No. 2612 and 2666 Athiru Rujine Ndoledi Adjudication Section.

At paragraph 3 of the plaint dated 29th August 2008, the Plaintiff/Appellant averred that she is the absolute registered owner of parcel No. 2612 and 2666 Athiru Rujine Ndoledi Adjudication Section. In his statement of defence dated 22nd September 2008, the defendant by way of rejoinder denied the plaintiff's claim and put her to strict proof thereof.

Upon hearing the parties and their witnesses and upon considering the evidence and materials placed before him, the trial magistrate rendered the Court's decision on 1st February 2013 dismissing the plaintiff's suit with costs to the defendant. Aggrieved by that decision, the Plaintiff/Appellant filed Memorandum of Appeal setting out the following five (5) grounds:

- (1) THAT the learned magistrate erred both in law and in fact by applying the wrong principles of the law in arriving at the judgment herein.***
- (2) THAT the learned magistrate erred both in law and in fact by failing to consider that the lower Court case was not about ownership of the suit land but was purely for injunctive orders.***
- (3) THAT the learned magistrate erred both in law and in fact by failing to consider the Appellant's evidence on record.***
- (4) THAT the learned magistrate erred both in law and in fact by delivering a judgment against the weight of evidence.***
- (5) THAT the learned magistrate erred both in law and in fact by holding there is no definite ownership of land that is still under the adjudication process.***

When this case came up for directions on 13th June 2018, the parties through their legal representatives agreed to dispose of the appeal by way of written submissions.

APPELLANT'S SUBMISSIONS

The Appellant through the firm of Carlpeters Mbaabu & Co. Advocates filed their submissions in support of this appeal submitted that the Appellant established a prima facie case before the trial magistrate and that the learned magistrate erred both in law and in fact by dismissing the suit. The learned counsel referred to page 76 of the record of appeal where the Appellant in her testimony before the trial magistrate had stated that the suit land belonged to her after she was allocated by the Athiru Rujine Clan. The learned counsel cited **Article 40 (1) (b) of the Constitution of Kenya** where any person has the right to acquire and own property in any part of Kenya.

The Appellant's counsel also referred this Court to page 81 of the record of appeal where she stated on cross-examination that the Respondent/Defendant destroyed her acacia trees she planted in 1986. The Appellant also stated that she had cultivated the land and her house was burnt down. Thirdly, the learned counsel referred to a letter dated 18th September 2002 produced as Plaintiff's Exhibit No. 1 which confirmed the plaintiff as the owner of the two parcels of land. The Appellant submitted that there was sufficient evidence that the Appellant was the owner of the suit property and therefore deserved the injunction sought.

RESPONDENT'S SUBMISSIONS

Despite the directions given by the Court directing the parties to file their respective submissions within 30 days from the date of service by the opposite party, the Respondent did not file and serve any submissions.

EVALUATION AND DECISION

I have looked at the record of appeal and the supplementary record of appeal filed on 9th March 2018 and 19th March 2018 respectively. I have also considered the submissions by counsel for the Appellant and the applicable law. The issues for determination in this appeal are fairly simple. An order of permanent injunction was declined by the trial Court on grounds that the plaintiff had not established a prima facie case. The trial magistrate in his analysis relied heavily on the case of **Isaac Kaberia Etirikia Vs Ntika Munoru & Another HCCA No. 157 of 2001 (Meru)** where Justice Isaac Lenaola held as follows:

“I have carefully read and evaluated the evidence on record and I should begin by setting out the facts that cannot be disputed regarding the suit land; it is not registered land but land held under the provisions of the Land Adjudication Act. This is the reason why Plaintiff's Exhibit 3 was issued, it being a consent to the Respondents to institute civil proceedings pursuant to Section 30 and Section 8 (1) of the Land Adjudication Act, Cap 284. So far as I know, no title can be said to be conferred by that Act as it is purely a transitory legislation where import is the ascertainment of interests in trust land and the registration thereof is done pursuant to other laws. No interest can be ascertained within a section until the provisions of Section 27 (3) have been involved”.

In his judgment, the learned magistrate held as follows:

“..... this is the exact situation obtaining in the instant case where the suit land is still under adjudication. The defendant has filed an appeal which is yet to be determined. The plaintiff's claim that she is the absolute registered owner cannot stand. She has not established any lawful interest in the land and no prima facie case has been made out to allow the granting of an order of injunction. The plaintiff has not pursued her case on a balance of probability and the same is hereby dismissed with costs to the defendant”.

I find the analysis and interpretation of the law by the learned trial magistrate to be sound and proper.

From his evidence on record, the Respondent stated that the Appellant got registered in the Adjudication register after an appeal to the Arbitration Board found in her favour. He stated that he has appealed to the Minister and that the appeal was still pending determination. I truly associate with the reasoning of my learned brother Hon. Justice Isaac Lenaola (As he then was) in **HCCA No. 157 of 2001** (supra) to the effect that the ***Land Consolidation Act*** and the ***Land Adjudication Act Cap 283 and 284*** respectively do not confer any title to persons claiming any interest and rights in an Adjudication Section as they are merely transitory legislations. Until all appeals have been heard and determined, no interests can be ascertained within an Adjudication Section as provided for under ***Section 27 (3) of the Land Adjudication Act Cap 284*** Laws of Kenya. ***Section 26 of the Land Registration Act*** provides as follows:

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(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenging, except”

It is clear from the provisions of that section that ***Land Consolidation Act*** and the ***Land Adjudication Act Cap 283 and 284*** and transitory legislation whose mandate is to ascertain interest and rights of persons within a trust and while registration is done under the ***Land Registration Act***. The Courts have also been enjoined to take judicial notice that only certificate of title issued by the Registrar upon registration shall be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

The Appellant/Plaintiff in this case did not present in her evidence before the trial magistrate a certificate of title as proprietor of the suit property.

The trial Court was therefore in order to dismiss the suit as the plaintiff had not proved it on the required standard. I have no reason to fault the learned magistrate for dismissing the suit. In the upshot, I find this appeal lacking merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE – KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C.P Mbaabu for appellant

Muthamia H/B for H. Gitonga for respondent

Appellant

C/A: Janet/Galgalo