



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 5 OF 2015

JAMES NGIRINE MUKUARI.....APPELLANT

VERSUS

MICHAEL KILEMI.....1ST RESPONDENT

LAND ADJUDICATION OFFICER MERU NORTH.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from judgment of Hon. E.W. Wambugu RM

in CMCC no. 852 OF 1998 delivered on the 16th January, 2015)

Between

JAMES NGIRINE MUKUARI.....PLAINTIFF

VERSUS

MICHAEL KILEMI.....1ST DEFENDANT

LAND ADJUDICATION OFFICER MERU NORTH.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

The Appellant's Case

1. The plaintiff filed a plaint dated 24/9/1998 and subsequently filed an amended plaint dated 27/7/2000 in *Meru Chief Magistrate's Court Civil Suit No. 852 of 1998* in which he sought the following orders against the defendants therein (who are now named as the respondents herein) :-

- (a) A declaration that the ½ acre excised by the 1st defendant and 2nd defendant from Plot No. 2020 AKITHI 111 Adjudication Section belongs to the plaintiff and that the plaintiff be granted vacant possession.
- (b) An order of permanent injunction estopping the 1st, 2nd and 3rd defendants from alienating, disposing and/or interfering with the said plot
- (c) Damages for lost of user
- (d) Costs of suit and interest.

2. The 1st defendant filed a defence dated 22/10/1998 and an amended defence dated 4/10/2000 denying the plaintiff's claim and praying

that the plaintiff's be dismissed with costs to the 1st defendant.

3. The 2nd and 3rd defendant filed their defence dated **6/2/2001** on **12/2/2001**.
4. It is the judgment of the court dated **16/1/2015** that the appellant is aggrieved by.
5. In the appellant's Memorandum of Appeal dated **20/1/2015** he listed **8** grounds.
6. The appellant has sought in his prayers that the order dismissing the case be substituted with the order that the appellant has proved his case on a balance of probabilities as was prayed in **Chief Magistrates' Court Case Number 852 of 1998** with costs of lower court and this appeal.
7. From the amended plaint the appellant's case filed in the lower court is that the appellant was the registered proprietor of the **Plot No 2020 Akithi III Adjudication Section** measuring **1.0 acres** which he had purchased from one Maitai in **1984** and taken possession of; that he extensively developed the said land and that the 1st and 2nd defendants colluded and had a half acre portion excised from the said plot and added to the 1st defendant's plot. The particulars of fraud were particularized in the pleading.
8. In his amended defence dated **4/10/2000** the 1st defendant denied the plaintiff's claim. In particular he denied that the plaintiff bought the suit land or that he ever took possession thereof and developed it as alleged.
9. In their defence dated **6/2/2001** the 2nd and 3rd defendants denied the claim and raised a preliminary point of law against the suit to the effect that the plaintiff did not comply with the mandatory provisions of **Section 13A** of the **Government Proceedings Act**.

Submissions of the Parties

10. The appellant filed his submissions on this appeal on the **3/11/2016**. The 1st respondent filed their submissions on the **16/8/2018** and the 2nd and 3rd respondents on **19/10/2016**.

Determination

11. The main issues before the trial court were as follows:

- a. **Whether the appellant had purchased the land, taken possession of the same and developed the same;**
- b. **Whether the 1st and 2nd respondents colluded to fraudulently have a half acre portion hived off from the said land and annexed to the 1st respondent's land.**

12. The grounds in this appeal thus may be summarized into one ground as follows:

Whether the magistrate's decision is against the weight of the evidence available on the record;

13. This is a first appeal. The court has to revisit the evidence of the parties to determine if the decision was made against the weight of the evidence on the record.

14. The plaintiff testified on the **24th April 2003**. His evidence was in accord with the contents of the amended plaint. The further details that came out in his evidence are as follows: that he is from the same clan as the 1st respondent; that the land parcel was originally **number 1569**; that the person who sold him the land was his cousin; that the seller had occupied one portion of the suit land and leased the rest; that there were 56 miraa plants and indigenous trees; that the appellant paid consideration of **ksh 3000/-** and an agreement (**PExh 1**) was written down and witnessed by some persons; that the parties went to the lands office and the appellant was registered as owner in **1984**; that however while in Kisumu his wife called him in **1992** and informed him that his land had been demarcated to the 1st respondent who claimed that the land had been sold to him in **1972**; that however when Maitai was contacted he denied it and stated that he had sold the 1st respondent some land elsewhere; that when he went to the lands office he met the same officer who had registered him and he advised the appellant to file an objection; that the objection he filed was determined in favour of the 1st respondent, that the appellant was not satisfied with the decision partly because he had not been given time to bring all his witnesses and the land officer was in his opinion a friend to the 1st respondent. On cross examination by Mr Gituma the appellant admitted he never produced the sale agreement before the objection panel. He however averred that he never knew that what was before the panel was a hearing of a dispute and that he requested to be allowed to go home for his documents but that that request was not recorded in the proceedings.

15. **PW2 Isaiah M'Richini M'Maitai** testified on **23/2/12**. He testified that he sold the suit land to the appellant in **1984** and he took possession; that he never sold the same to the 1st respondent, though he admitted having sold the 1st respondent some other land elsewhere. Upon cross examination he admitted that there was a dispute lodged at the Land Disputes Tribunal which was determined in the 1st respondent's favour. He stated that the 1st respondent took possession of a plot that he had not shown him.

16. **PW3, Zakayo Karanja** testified that he worked at the lands office as a committee member when the appellant bought the land, and that he witnessed the transaction as a member of the committee for that area. He knew that land as it was in his village called Kioroni; he knew

both the seller and the appellant. His evidence was that the appellant and the 1st respondent purchased different portions from the same seller.

17. PW4 Joseph Mwirigi testified on **29/1/2003**. His evidence was that he had leased the land from one **Ntorinjori Maitai** in September **1984** for one year and paid him the rent. However the lessor came one day and told him that he had sold the land to the appellant. Upon cross examination he stated that the lease agreement was unwritten, that the Board had ruled in favour of the 1st respondent; that the 1st respondent purchased another piece of land from M'Maitai and not the one named in the instant case. He further stated that M'Maitai had lived on the land since his childhood.

18. DW1, the 1st respondent testified on **19/3/2013**. He produced an agreement dated **26/11/1972**; he stated that he purchased land measuring 1.90 acres from Maitai who immediately left for a scheme in Mwerondu and that the transfer was confirmed by the committee on **20/3/1975**. He also produced a letter to the lands department dated **29/11/1972**. He further produced a separate agreement for the sale of the fruit trees and the house on the land. According to him the seller had gathered five parcels. Ntua: 0.34 acres, Kathinge- 1.084 hectares; Nairiri -0.24 acres; Manthe-0.30 acres and Kiolone- 1.18ha. They were living together in Kiolone. He sold the 1st respondent 1.90 acres out of the total of 3.90 acres and he was left with 2 acres. He produced a letter from the demarcation officer in evidence to that effect as **DExh 4**. In **1984** the plaintiff came and informed the 1st respondent that he was intent on buying the land that the 1st respondent had bought earlier. He informed the chief who called a gathering of elders who deliberated on the dispute and awarded the 1st respondent the land.

19. DW1's further evidence was that on **18/11/84** Maitai's mother admitted before the chief that the land was the 1st respondent's whereupon the chief wrote **DExh 6**. However the appellant trespassed on the land after that prompting the chief to write to the OCS Tigania whereupon the appellant stopped his acts of trespass. He also testified that there was an objection lodged by the appellant which was determined in his favour. He produced the proceedings as **DExh 10**. The appellant never filed an appeal against that award in the objection proceedings but he filed a suit in the High Court which was later transferred to the subordinate court. According to him the appellant should have first lodged an appeal. According to his evidence also the appellant's wife was convicted for damaging the crops on the suit land in the **Criminal Case Number 133 of 1985**. Since **1972**, he stated, he has lived on the suit land and the appellant has been his neighbour and their land is separated by a road. According to the 1st respondent by the time the appellant purported to purchase the land the 1st respondent had lived on it for **12** years.

20. DW2 Lawrence Mataya testified on **30/4/2013**. His evidence is that he knew the appellant and the 1st respondent; that M'Rinchuni Maitai is his elder brother; that in **1972** he informed him while in the company of his sister and his mother that he wished to sell land to the 1st respondent. The 1st respondent bought the land and paid for the land the house and the fruit trees. The land bought was family land which his elder brother had been left in charge of by his late father. **DW2** and his mother and sister were left in occupation of only **2 acres** after the sale. He testified to having been on good terms with his brother.

21. DW3 Janerosa Karimi testified on **30/4/2013**. She testified that she is the 1st respondent's sister-in-law whereas the seller of the land is his brother. According to her Maitai sold the 1st respondent land in **1972** after informing the family and the agreement was drawn in her presence. Thereafter Maitai and the 1st respondent went to the lands office. Maitai then left and went to reside in another place. At no other time did Maitai call on them to inform them again of any intention to sell land after that.

22. DW4 Domiano Thurinira testified on **30/6/2013**. His evidence was that he has known both the plaintiff and the defendant over a long time; that he was a committee member of the Akithi adjudication committee; that the appellant lodged a dispute in 1984 claiming to have bought the land which borders the 1st respondent's land from Maitai; that the 1st respondent was summoned, that before hearing the dispute the committee visited the land in the presence of the 1st respondent, the appellant and Maitai; that the 1st respondent showed them his land; that the appellant's land is across the road and is fenced with wire and is the same land claimed by the 1st respondent; that the 1st respondent was awarded the land by the committee; that the 1st respondent resides on the land. When cross examined the witness said that the committee sat over the dispute for one day in 1984 and the 1st respondent called witnesses. Maitai was also present and he informed the committee that he had sold the land to both the appellant and the 1st respondent. However he never showed the committee the land that he had sold to the appellant.

23. DW5 Joseph Mworira Chokera testified on **30/7/2013**. His evidence is that he is a retired assistant chief; that he knew the appellant and the 1st respondent who were under his jurisdiction; that in **1984** the 1st respondent reported to him that the appellant had destroyed his fence and invaded his land whereupon he summoned the appellant; that he visited the land with Njuri Ncheke Elders who used to assist him in resolving disputes; that they confirmed that the fence had been damaged; that Maitai was also present; that Maitai said that he had sold the appellant land in another area; that at the end of the visit he informed Maitai to show the appellant the land that he had sold him; that the 1st respondent has been on the land since then. Under cross examination the witness stated that the 1st respondent did not produce ownership documents as at that visit; but after investigations he ascertained that he owned the land. Maitai however had his gathering book at the time and that was the only evidence required.

24. DW6, Japhet Muthaka Muchai, Land Adjudication Officer Tigania testified on **16/1/2014**. His evidence is that the appellant lodged an **AR Objection No 403 of 4/3/1998** against the 1st respondent, claiming displacement and the same was dismissed; that subsequently the appellant applied for a consent and filed this suit; that the appellant was to claim from the seller and not the 1st respondent; that the 1st respondent purchased 1.90 acres while the appellant purchased 1.00 acre from the same person; that the seller however had 5 fragments of land located in different places; that he sold **1.90 acres** in **1972** to the 1st respondent; that he later sold one acre in **1984** to the appellant leaving a balance of one acre from the land in Kiolone; that as at demarcation time the 1st respondent had developed the land; that all his land parcels were demarcated together in that area; that the appellant also had other land in the same area; that the plot in dispute was demarcated under the 1st respondent; that the **objection 403 of 4/3/1998** was dismissed because the land adjudication officer considered that the land had been sold to the 1st respondent; that his view was that since the plaintiff was not shown any land at the Kiolone area, he ought to have been shown a different parcel of land by the seller.

25. On the issue as to whether the appellant had purchased the land, taken possession of the same and developed the same this court's analysis of the evidence shows that by 1984 the 1st respondent was in occupation of the suit land. There is evidence on record that the land committee ruled in favour of the 1st respondent in its proceedings because it was convinced that the 1st respondent had purchased the land. It is the evidence of the Land Adjudication officer that the 1st respondent's began utilizing his land parcel in 1972.

26. The evidence of PW2 is that he sold the land in dispute to the appellant and not to the 1st respondent. Most of the 1st respondent's witnesses at the trial were related to both the seller and the 1st respondent in one way or another.

27. However I note that DW 5's evidence is that when he was attending to the dispute between the 1st respondent and the appellant the seller was present and that he (Maitai) said that he had sold the appellant land in another area and not at Kiolone and that at the end of the visit he informed Maitai to show the appellant the land that he had sold him; He also testified that the 1st respondent has been on the land since that time (1984).

28. I find that the sworn evidence of the then area chief is credible. Though evidence of the appellant on the record admits that the 1st respondent is still in possession of the land, it does not show whether the appellant was ever in the land parcel in the first place so that he could be deemed to have been evicted therefrom.

29. I am inclined to believe the cumulative evidence of the defence witnesses that the 1st respondent bought the land and occupied it before the appellant did so and that by the time the appellant purported to purchase the land in 1984, Maitai did not have any more land to sell.

30. I do not find any credible evidence on the part of the appellant showing that the 1st respondent colluded with the 2nd respondent to illegally hive off land belonging to him to include it in the 1st respondent's entitlement, otherwise even the implementation process would have been quite evident in the record of the appellant's evidence.

31. It is also significant that the earlier cases between the 1st respondent and the appellant which were determined in respect of the land all ended in favour of the 1st respondent.

32. It is also on the record that the appellant's wife was convicted of a criminal offence connected with damage to the 1st respondent's crops on the land.

33. I have read the judgment of the magistrate in the court below. It is clearly reasoned. He considered the evidence of all the parties.

34. The Magistrate specifically considered the evidence given by DW6 to the effect that the committee decision gave reasons for awarding the land to the 1st respondent.

35. The magistrate found that there was no evidence of friendship between the 1st defendant and the demarcation officer. I also find none from the record. I also find that there is no evidence on the record of collusion between the 1st respondent and the appellant.

36. Lastly I find that the magistrate properly analysed the inconsistencies in the plaintiff's evidence, including the discrepancies in the consideration and came up with the correct findings.

37. It is the observation of this court that the appellant was in a position to demand land or a refund from the seller when it was revealed that the land that was purported to be sold to him was already in the 1st respondent's hands. He never did so; instead he called the same seller as a witness, who gave evidence that contradicted what he had informed the chief earlier. That evidence is unreliable. Even PExh 4 is further evidence that the land had been sold, for it states in the ruling verbatim that

“... John...was defrauded of his money by the land vendor since he had sold the same land to Michael twelve years and again there is nothing that John has on the disputed land and further to this, they are all clan members and I doubt how one would not have known, when buying the same land that it had been bought by the other, so I have dismissed the application as I can only read vendetta in it as such the land to remain under the name Michael Kilemi.” That is the appellant's own exhibit.

38. Consequently, I find that this appeal has no merits. I do not find any need to disturb the findings and judgment of the Magistrate's court. The judgment of that court dated 16/1/2015 is hereby upheld. This appeal is hereby dismissed with costs.

Dated and signed and Delivered at Meru on this 20th day of DECEMBER, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE