



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO.277 OF 2016

DONALD MAGANGA MWACHOFI.....APPELLANT

-VERSUS-

RUTH SHAMBO SHUMA.....RESPONDENT

JUDGEMENT

1. The appellant herein Maimuna Ibrahim was the defendant in the suit Voi SPMCC No 80 of 2013. He had been sued by the Respondent vide a plaint dated 26th July 2013 in which the Respondent prayed for orders;

- a) Eviction from and vacant possession of L. R No 1956/357 and demolition of the structures thereon.**
- b) An order of permanent injunction restraining the defendant and his agents from entering on or remaining in possession of the suit property.**
- c) Costs of and incidentals to the suit.**

2. In response to this claim, the appellant filed a defence and counter – claim dated 28th August 2013. He denied the Respondent’s claim and urged the Court to enter judgement for him for Orders;

- a) A declaration that the Defendant is in lawful possession and use of the parcel of land as Plot No. L.R. 1956/357 Voi Municipality and hence entitled to obtain Title Deed for the said plot.**
- b) A declaration that the allocation of the suit property/title document issued to the said Elias Shuma Mwakireti was wrong, unlawful, defective, and inconsistent with the procedures and without due regard of the facts on the ground hence invalid, illegal, null and void.**
- c) Orders or permanent injunction restraining the plaintiff either by herself, her servants and/or agents from trespassing and/or otherwise interfering with the plaintiff’s quiet possession and enjoyment of the suit property.**
- d) A declaration that the late Elias Shuma Mwakireti and/or his legal representatives holds**

the title deed to the suit property illegally and compulsory orders to issue against the plaintiff and Commissioner of Lands compelling them to surrender back the suit property to the Defendant and the said title issued to the late Elias Shuma Mwakireti be cancelled and nullified.

e) General damages for trespass and fraudulent misrepresentation and interest thereon at the prevailing Court rates from time to time.

f) Such further and other relief that this Honourable Court shall deem fit so to grant in the interest of justice.

3. After hearing the parties, the trial Court gave his judgement on 22nd April 2015. In the judgement, the trial Court dismissed the defendant's (now appellant) counter claim and entered judgement as prayed in the plaint with costs.

4. The Appellant was unhappy with the whole of the said decision and filed an appeal contesting it on 49 grounds. I have read the 49 grounds and wish to condense them to the following:

i) That the trial magistrate erred in law and fact by proceeding to write a judgement and delivering it when there was in existence an order staying the submissions.

ii) That the learned magistrate acted inequitable and his decision was biased since he considered the plaintiff's submissions which were on record while the defendant had none.

iii) The trial magistrate misinterpreted the evidence adduced and did not fully evaluate them.

iv) That the trial magistrate erred on focusing on the dismissed Originating Summons No 205 of 2009 and ignored the principles of law applicable thus prejudicing the appellant.

v) That the trial Court allowed his opinion & views to overrule the provisions of law and legal precedence.

vi) That the trial Court did not have jurisdiction to hear and determine this matter.

5. The Appellant also sought the reliefs contained in the memo of appeal to wit ;

1. The Appeal be allowed

2. The entire judgement of Honourable S.M. Wahome delivered on 22nd April in Voi SPMCC No. 80 of 2013 be set aside;

3. A declaration that this Honourable Court is the rightful Court, mandated with jurisdiction to hear and determine the matter herein;

4. A declaration that the Appellant has acquired title to the suit property (L.R. 1956/357) by way of adverse possession/for reason of his long stay therein without any interruptions whatsoever;

5. The Honourable Court so Order cancellation of title No. L.R No. 1956/357 in the name of the Respondent

6. An Order directed in the alternative a new title to the said parcel: L.R. 1956/357 be issued and granted in the Appellant's name herein as the true rightful owner of the suit property, having acquired the same by way of adverse possession;

7. All in all, this Honourable Court do allow the Appellant's Amended Counterclaim as

Amended on the 30/10/2014 7 filed in Court on 31/10/2014 with costs.

8. The Appellant be awarded the costs of this Appeal and the entire matter from its inception.

6. This matter being an appeal, I am alive to the fact that I did not see the witnesses when they testified. However this being a first appeal the law allows me to re-evaluate the evidence that was adduced before the trial magistrate and draw my own conclusions bearing in mind that I did not see the witnesses. This is the position held by the Court of Appeal in **Selle vs Associated Motor Boat Co. Ltd (1968) E. A 123**.

7. Each of the parties herein gave evidence without calling any additional evidence. According to the Respondent, the plot in dispute No 1956/357 was registered in her husband's name. The husband is deceased and PW 1 produced letters of grant giving her powers to file this suit. PW 1 told the trial Court that the defendant entered her plot and is refusing to leave. The matter was reported to the D. O Voi and proceedings recorded on 16th June 1999 as per the document produced as Pex. 4. The Appellant was ordered to leave but he never left.

8. The witness continued that the Appellant filed a case in Mombasa HCCC No 205 of 2009 claiming the land but the case was dismissed. She produced the order as Pex. 5. That she wanted to build a godown in the suit premises but the Appellant was threatening her workers. She caused his arrest and he was charged. The Respondent produced documents to show the on-going construction and a search to confirm that the suit plot was still registered in her deceased husband's name.

9. During cross – examination, the Respondent stated the Appellant entered her land in 1984. That the Appellant was given two months to move out and that he had been charged with the offence of forcible detainer. The Respondent denied she was given the plot because her father was a councillor. That the photographs she has produced have no dates or plot numbers. In Re-examination, she said the allotment was given in 1977. The offer was accepted by her husband who then wrote to the Commissioner of Lands. That the Appellant started construction in 2009 and she went to Court to stop him.

10. The Appellant on his part testified that he was the owner of the plot. He got into possession in 1984 after being given by Mzee Juma who was a village elder. The plot was bushy & full of stones. He applied to extend his house in 1986 (Dex 1). In 1996, the Respondent's husband started breaking stones and the Appellant decided to go to the D. O & the clerk of Voi Municipal Council.

11. At the Council, the Appellant learnt the deceased had been allocated the plot. The D. O wrote a letter giving him six months to stay on the suit plot and then move out (Dex 2). The Wazee also wrote a letter saying the Appellant was the owner of the plot – Dex 3. The Appellant stated the deceased had dug a ditch next to his house. The Appellant said the deceased went quiet until 2003 when they caused his arrest. He also produced correspondences Dex – 6, 7, 10, 11 & 12 to get title documents and also raising complaints.

12. The Appellant confirmed that he had sued the Respondent's husband in MSA HCC 205 of 2009 which was dismissed. He said he had been paying rates from 2006 to date as per receipts produced as Dex 14. The appellant admitted the plaintiff excavated rocks from the plot. He urged the trial Court to recognize him as owner of the plot, give him costs & damages.

13. In cross – examination, the Appellant said he knew the Respondent's husband was given the plot in 1977 and later title deed in 1978 & he was not on the plot at this dates. The permission was given to him to stay on the land by the elders. The Appellant stated that when the Respondent excavated rocks they did not demolish his house. That he was not given an alternative plot by Voi Municipality as per Dex. 2. In Pex. 4 the Appellant signed to vacate after two months. In Re – examination, the Appellant said he met the Respondent in 1996 and learnt in 2003 when he was charged in Court that they had a title deed. That he was forced to sign Pex 2. He also did not know if his suit in Mombasa was dismissed.

14. From the records of the Court, the matter was adjourned for further defence on 1.12.14. Subsequently, the Appellant filed a notice of motion application dated 30.10.14 seeking to amend the

counter-claim. This application was allowed by consent on 10.11.2014. The case was fixed for hearing on 2.3.2015 by consent. Mr Mwinzi holding brief for Salma for the Appellant applied for adjournment. The same was opposed but the Court granted the adjournment because the Appellant was in Court & the Magistrate rescheduled the matter to 30.3.2015. On this date the Appellant again sought adjournment but the same was refused and the trial Court gave the reasons for refusal. The defence case was thus closed.

15. With this background, the learned trial magistrate took out three questions he sought to answer in order to determine the case. The questions were:

- i) Whether the defendant was in lawful possession of plot No L. R 1956/357**
- ii) Whether the defendant is entitled to rely on the doctrine of adverse possession**
- iii) Whether the plaintiff had proved her case.**

16. The trial Court came to the conclusion which the Appellant was unhappy with hence his appeal. In arguing the appeal both parties filed written submissions. The appellant has narrated the facts I have set out above and I do not wish to repeat them. I will pick out her analysis on some of the answers they have given. Equally the Respondent gave a summary of the evidence in their submissions and picked out a few issues of law. I shall make references where necessary.

17. The Respondent has submitted that this appeal is incompetent. It is therefore a key point to be determined first. The Respondent cited the provisions of section 79 G of the Civil Procedure Act which requires that an appeal must be filed within 30 days from the date of the decree or order appealed against. In this appeal, judgement was delivered on **22.4.2015** while the appeal was filed on **10th July 2015** thus it was filed out of time. Consequently the appeal should be struck out. The Respondent supported her submissions with the findings in cases; **Gregory Kiema Kyuma vs Marietta Syokau Kiema (1988) eKLR** and **Ndegwa Kamau t/a Side view Garage vs Fredrick Isika Kahumbo (2016) eKLR**.

18. I have perused the record at page 155, I have noted that the judgement was delivered on 22nd April 2015 in the absence of parties and their advocates. The memorandum of appeal is dated 9th July 2015 and filed in Court on 10th July 2015. There is nothing on the record filed seeking for extension of time to file the appeal out of time. I have also perused the proceedings before the Judge in Voi High Court when the matter came up before her and note that there was no oral application made or otherwise to have the appeal filed out of time be deemed as duly filed.

19. Section 79 G is couched in mandatory terms. It states that, *“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as requisite for preparation and delivery to the appellant a copy of the decree or order.”* In this record of appeal, I have also not seen a certificate issued by the lower Court to say there was delay in preparing the decree or order. The appellant did not render the submissions about this probably assuming the appeal is regularly before this Court.

20. In light of the fact that this appeal was filed more than two months after the judgement was read and without leave of the Court it follows that same is incompetent and should be struck out on this account. There is no reason for me to consider it on its merits. Consequently I do hereby strike it out with ½ costs awarded to the Respondent.

Dated and delivered in Mombasa this 21st day of February 2017

A. OMOLLO

JUDGE