



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL APPEAL NO. 28 OF 2015

CHRISTINE NAFULA JUMA.....APPELLANT

-VERSUS-

BEATRICE CHIRINDO TSUMA.....RESPONDENT

JUDGEMENT

1. This arises from the decision made in Voi SPMCC Case no 165 of 2013 by Hon S. M WAHOME SPM on 21st April 2015. The appellant who was the defendant in the subordinate court is dissatisfied with the whole of the decision. Accordingly, she filed a memorandum of appeal on 19th May 2015 in the High Court at Voi. The file was subsequently transferred to this court on 27th October 2016 pursuant to the order of justice Kamau. In the memorandum of appeal, the appellant raised 8 grounds of appeal as set hereunder:

- i) That the Trial Magistrate erred in law and in fact by finding that the suit property belonged to the plaintiff.**
- ii) That the Trial Magistrate erred in law and in fact by failing to consider the evidence of the defendant's witnesses and especially the neighbours and the contractor who put up the building.**
- iii) That the Trial Magistrate erred in law and in fact by relying on the evidence on record to arrive at his verdict without considering the defendant's evidence and her counter – claim.**
- iv) That the Trial Magistrate erred in law and in fact by failing to consider the defendant's submissions and yet there were on record at the time he delivered the judgment.**
- v) That the Trial Magistrate erred in both law and fact by failing to give reason for his judgment.**
- vi) That the Trial Magistrate erred both in law and in fact by failing to analyze the evidence before him so as to arrive at a decision in favour of the defendant.**
- vii) That the Trial Magistrate erred in law and in fact by failing to find that the evidence on record did not support his findings.**
- viii) That the Trial Magistrate erred in both law and fact by failing to consider the evidence before him to arrive at a decision in favour of the defendant.**

2. The brief background of the case is that the Respondent herein sued the appellant seeing orders that she be declared as the owner of the suit plot no 432, Bomani Phase II Settlement Scheme. She also asked for an order permanently barring the Appellant from laying claim to the plot. The Appellant denied this claim and proceeded to also file a counter-claim in which she pleaded that the Respondent has never owned the suit plot. Instead the Appellant pleaded that the plot and the development on it belonged to Xaviour Wandera Juma. The Appellant prayed for orders that the Respondent be evicted from the suit plot and that she-the appellant be paid mesne profits from the date of filing until vacant possession is surrendered.

3. After complying with the provisions of order 11, the matter proceeded to hearing with the Respondent calling five witnesses while the Appellant called four. The trial magistrate after analysing the evidence presented by both sides came to the conclusion that the respondent had proved her case. He granted her the prayers sought in her plaint while dismissing the Appellant's counter-claim with costs.

4. This is a first appeal therefore the law permits me to analyse the evidence on recording but forewarning myself that I did not see the witnesses testify. The summary of the evidence as given by both parties is as follows. The Respondent gave evidence that she bought the suit

plot from Daniel Mwanja Kilungu on 14th November 2007 for a sum of Kshs 55000. The said Daniel testified as PW5. The Respondent went further to say that after buying the plot, she developed it with four rooms two of which she rented out. That one of her tenants was Xaviour Wandera Juma-deceased. In support of her claim, the Respondent called five witnesses who corroborated her evidence. She also produced a sale agreement signed between her and PW5, copies of rents receipts issued to the deceased and a letter from Ighonyi Enterprises Ltd asking her to vacate the suit premises.

5. The Appellant on her part also testified and also called three witnesses who testified that they were neighbours to the Appellant's son. From the evidence on record, the Appellant relied on the evidence of her witnesses as she was not present during the transaction. DW1 said he was contracted by Juma-deceased to build for him a house on the plot. DW2 Simon Nduguya said that Juma told him that he had bought the plot from PW5. In cross-exam, he said that PW5 himself never told him that he had sold the plot to Xaviour Juma. DW3 Esther Mohamed also said that she knew Juma had bought the plot but she did not see him making the payment. She also said she saw the Respondent living on the plot but thought she was a tenant.

6. The evidence on record demonstrates that previously the plot No 432 was owned by Daniel Kilungu who later sold it. The dispute is did he sell it to the Respondent or to Xaviour Juma- deceased, the Appellant's son? The Appellant challenged the judgement in her grounds of appeal stating that the trial magistrate erred in law and in fact by reaching a finding that the suit property belonged to the Respondent. Secondly, that the trial magistrate erred in failing to consider the evidence and submission given by the Appellant. Lastly, that the trial magistrate did not give the reason for his judgement.

7. At page 5 of the judgement, the trial court stated thus;

“I have carefully considered the evidence on record from both parties. The court is of the view that the issue for determination since both the plaintiff and the defendant are seeking to be declared as the rightful owner of the plot 432 Mabomani Settlement Scheme.”

He continued, “The evidence on record was balancing until PW5 came to court and testified. If the said PW5 had not given evidence in court, I would have made a finding that the plot belonged to Xaviour Wandera Juma. However PW 5 told the court that he sold the plot to the plaintiff and this brought an end to any other suggestion or allegation.”

8. On the pleading that the trial magistrate did not give a reason for his judgment, the phrase I have quoted above explains his reason behind making a finding in favour of the Respondent. Before reaching his conclusion, the trial magistrate gave a summary of the evidence as given by the witnesses. He was almost convinced to find for the appellant until PW5 testified. I cannot fault him that he did not consider the evidence adduced by the Appellant and her witnesses. However I agree that he did not mention the issue of submissions rendered by the Appellant. This was not fatal to the Appellant's case as courts are not bound by submissions of parties.

9. On the merits of this appeal, I find the evidence of PW3 & PW5 very useful. PW3 said she is the one who introduced the Respondent to PW5. PW3 was a village elder from 2005 to 2008. She knew some of the witnesses called by the Appellant. PW5 was the owner of the suit plot before selling it. PW3 also said that he had been asked by PW5 to get him someone to buy his plot. The evidence in support of the Appellant's case went thus; DW1 said he was contracted and paid by Xaviour Juma. Simon Wairia (DW 2) knew Juma before he bought the plot. He recalled Juma doing construction and storing cement at his place. He completed the house and moved in with the plaintiff. Esther Mohamed DW 3 stated that she was present when Juma bought the land and then she saw him start building.

10. Esther did not see the Respondent. Stephen Kiago also stated that he was present when Juma bought the land and saw the process going on. He stated that he saw Juma bring building materials on the land and denied that the plot was bought by the Respondent. However none of these witnesses stated the place and date when the sale transaction took place or amount the plot was sold for. Being present and signing a document as a witness are two different things. I find the evidence adduced by the Appellant's witnesses as more of hearsay. It seems that the Respondent and the deceased knew each other, whether it is true or not that the deceased deposited building materials on the suit plot cannot be translated to conferment of ownership.

11. Further none of the Appellant's witnesses denied that this plot belonged to Daniel Kilungu- PW5. Once he confirmed to the trial court that he sold the suit plot to the Respondent, he resolved the issue of ownership. PW 5 admitted executing a sale agreement between the Respondent and he therefore the magistrate had no reason to doubt him. I have analysed the evidence on record and the exhibits produced. I also come to the same conclusion that the Respondent had a stronger case which she proved based on the evidence of PW5 and was thus entitled to be granted the prayers in her plaint. The consequence of this is that the Appellant's counter-claim failed. Accordingly, I find no fault with the judgement reached by Hon S.W Wahome, esq SPM. For the reasons given herein above, this appeal fails and is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Mombasa this 9th day of May 2017.

A. OMOLLO

JUDGE