REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL APPEAL NO. 6 OF 2016

MOHAMED SHEIKH ABUBAKAR…….....APPELLANT

-VERSUS-

ZAKARIUS M. MBAYA….…….....RESPONDENT

JUDGEMENT

1. This appeal arises from the judgement and decree of Hon. SRM Mr S. S Mushele delivered on 6th December 2001 in Mombasa CMCC 1432 of 1998. The appeal was filed by the plaintiff in the Court below. The appellant raised six grounds in his appeal to wit:

> ***1. "That the Learned Magistrate erred in law in making order which were not prayed for by either party.***
>
> ***2. That the Learned Magistrate erred in law in ordering the sub-division of the Appellant's parcel of land known as plot No. 5054/1463 Kilifi.***
>
> ***3. That the Learned Magistrate erred in law in law ordering that the Respondent be immediately be put in possession of the parcel of land.***
>
> ***4. That the Learned Magistrate erred in refusing to enter judgement for the Appellant.***
>
> ***5. That the Learned Trial Magistrate erred in law and on facts on his evaluation of evidence and coming to wrong conclusions.***
>
> ***6. That the Learned Trial Magistrate erred in law in failing to award costs to the suit to the Appellant."***

2. The appellant in his plaint pleaded that he was the allottee of plot No L. R 5054/1463 in Kilifi Town measuring 0.3994 Ha or there abouts. The Respondent sometime on 25th February 1998 entered on this land began construction without the appellant's consent and or approval from the Council. That as a result of the Respondent's said action the appellant suffered loss for which he sought for orders of permanent injunction, vacant possession and general damages.

3. The Respondent in his statement of defence admitted that he had entered the suit land as averred in paragraph 4 of the plaint and constructed a house therein but pleaded that he bought the portion from Jackson Nzaro on 8th September 1996. The Respondent denied the geographical jurisdiction of the Court,

denied any demand was issued. He asked the suit be dismissed.

4. At the time the Appellant gave his evidence on 27th September 2001, he already had obtained a title which he produced as Pex 1 and letter allotment dated 8th November 1996 as Pex 2. He also produced receipts for land rates payments as Pex 5 and PDP as Pex 6. The witness said he had marked the boundaries with pillars which he stated the Respondent demolished when he started construction. The appellant stated that prior to his allotment, nobody was living on the plot and that the plot was marked for industrial development and he had intended to build a maize and coffee miller. In cross – examination, the appellant said he applied for a plot and was issued with the allotment by the Commissioner of Lands. That he kept reminding the Respondent hat he was trespassing but he refused to listen. He did not know a person called Jackson Nzaro.

5. The appellant called the Kilifi Town Chief Mr Athman Tawfiq as his second witness. He confirmed receiving a complaint from the appellant regarding the suit plot in 1998. Acting on this complaint, he summoned the Respondent to his office. The Respondent attended the meeting but no consent was reached. The witness stated that the Respondent never showed him any documents of his ownership of the plot.

6. The Respondent in denying the claim testified that he built on his plot he purchased from Jackson Nzaro. That by the time he met the appellant, the construction of his house was complete. He produced in evidence correspondence from the District Physical Planning office authorizing him to resurvey the plot. Later on 23rd April 2001 he was also issued with a letter of allotment and he was now waiting for a title deed. He also denied demolishing the plaintiff's pillars. In cross – examination, he stated that he started putting up his house in September 1997.

7. The Respondent also called the evidence of Charo Kilongo and Jackson Nzaro. Both confirmed they sold the land to the Respondent. Mr Charo also claimed the plot in dispute is their ancestral land where they had planted cashew nut and coconut trees. The parties advocates rendered their submissions and the learned trial magistrate reserved his judgement for 30th January 2001.

8. In his judgement, the subject of this appeal the trial magistrate after analysing the evidence had this to say***: "It is clear that at the time this problem started, none had valid documents. The plaintiff was the first to claim a right on that portion (large portion)."*** The trial Court also found that each of the two was fighting for his rights. The trial Court further noted that the same office which gave the plaintiff the letter of allotment is the same one who ordered for re-survey. He therefore came to the conclusion that the Respondent be allotted his portion on which his house stands and secure documents of title to it. He also ordered that the appellant be allotted the remaining portion and secure title to it.

9. The appellant being unhappy filed this appeal. This Court is alive to the provisions of the law in the decision of the Court of Appeal in **Selle vs Associated Motor Bike Boat Co. (1968) EA 123 that** not having seen the witnesses during their testimony I should not vary the findings of the trial magistrates on matters of fact unless it is shown that the finding was not based on evidence adduced or is a misapprehension of the law. The same sentiments were expressed in the case of **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 -88) IKAR** 278. The findings of the Court of Appeal gives me the liberty to analyse the evidence adduced and make a finding whether the trial Court reached the correct conclusion on the issues before him.

10. The appeal proceeded by way of filing of written submissions which were highlighted on 13th April 2017. The appellant merged the grounds of the appeal into three sub-titles of want of jurisdiction by the trial Court, Acting ultra vires his powers by granting orders not sought and there being an admission of trespass, the appellant's claim ought to have been allowed. The Respondent on his part defended the judgement that the trial magistrate acted within his mandate. The Respondent submitted that since it is the plaintiff who submitted to the magistrate's Court's jurisdiction, he cannot now object. Secondly that the issue for determination was on trespass which the subordinate Court had jurisdiction to determine.

11. The Respondent also submitted on the abuse of Court process in regard to the aspect of the appellant prosecuting both this appeal and HCC No 7 of 2004. I will however not delve into this limb since the appeal exists independently of the mentioned suit and it was filed first. On the merits of this appeal, I will deal first with the issue of jurisdiction that has been taken up by the appellant.

12. It is the appellant who commenced the suit before the magistrate's Court. The Appellant contends that the trial Court ought to have downed its tools by virtue of the provisions of Section 23 of the Registration of Titles Act Cap 281 (repealed) which defined a Court to mean High Court. When the suit was filed on 27th March 1998 vide a plaint, the appellant did not have a title in respect of the suit property. The appellant described himself in paragraph 3 of the plaint thus;

> ***"At all material times herein the plaintiff is the legal allottee and beneficial owner of all that piece of land known as L. R 5054/1463, Kilifi Town."***

13. The appellant also produced as Pex 2 the letter of allotment dated 8th November 1996. The letter is referenced as **uns light industrial plot – Kilifi.** The appellant never amended the plaint before or during the trial of the suit. On the Respondent's part, the only document of ownership was a sale agreement. The Respondent said he bought the plot at Kshs 10,000=. Taking the pleadings and evidence presented to the Court upto the time he gave his testimony, the trial Court was clothed with jurisdiction. Did the production of the certificate of title during the evidence of the appellant oust the jurisdiction of the learned trial magistrate? At the time this case proceeded, the provisions of the Order 11 of the Civil Procedure Act requiring parties to file documents was unavailable to the parties. The certificate of title was produced as an exhibit without the pleadings having been amended. Further the title was acquired during the pendency of the suit.

14. In the circumstances of this case I hold that the Court could not down its tools based on evidence adduced and not supported by amendments. The appellant became the registered owner on 24th January 2001 after some proceedings had been undertaken in the file. Therefore if he felt the Court lacked jurisdiction by virtue of him having obtained the title, then he ought to have brought this to the attention of the trial Court either by filing a formal application to transfer the suit or orally expressed such intentions. There is nothing in the proceedings showing the Court was made aware. In any event Courts usually analyse evidence at the conclusion of a hearing hence a Court shown a title as an exhibit cannot prima facie down its tools. Consequently having had jurisdiction when the suit was commenced and no amendments having been done, I find no reason to fault the learned magistrate in proceeding to determine the matter. Further the issue of jurisdiction was not even raised in the grounds of appeal filed. As correctly put by the Respondent, it seems to be an afterthought on the appellant's part.

15. The second issue is whether the learned magistrate erred in refusing to enter judgement in favour of the appellant and instead restoring the defendant into possession. In the suit before the learned magistrate, the burden of proof was on the appellant to prove his case. In cases of land allocation, an allottee can only be allocated land that is confirmed as free and available. In the allotment letter dated 8th November 1996, there is no plot number given. The plot is referred to as unsurveyed. The survey exercise was therefore to follow before a number and title could be given. The beacons were placed as per beacon certificate dated 7th March 1997. There is also a letter dated 15th August 1997 stating that a PDP map has been amended to suit the survey on the ground. The defendant on his part alleged that he purchased the suit property in 1996 from people who claimed it was their ancestral land. Thereafter he began developing it on September 1997. He went further to call evidence to corroborate his averments.

16. Given the competing interests, was it safe to conclude that this plot was available for allocation? The Respondent's witnesses told the Court that this was their ancestral land. As at the time the land was given to the appellant it was unsurveyed and the letter said at page 2, had a rider stating thus: ***"The government shall not accept any liability whatsoever in the event of prior commitment or otherwise."*** In my view the fact that DW 2 and DW 3 laid a claim to the same was sufficient evidence of prior commitment of the land. This is also visible from the confusion shown by correspondence exhibited that required the land to be re-surveyed again. Further the defendant registered his complaint with the ministry of Lands &

Settlement vide his letter dated 30th April 1998 (Dex) and the Commissioner of Lands letter dated 9th October 1998 (Dex 2) which required the P.D.P to be amended to excise the portion occupied by the Respondent. It was a question of competing equitable interests by both parties

17. The appellant was made aware of the Respondent's interest before he obtained his title. He cannot therefore claim a better title merely because he has obtained a certificate of title which he did during the pendency of this suit. This went against the doctrine of lis pendens and doctrines of equity. In the case of **Maivji vs US International University & Another (1976) KLR 185, Madan JA** stated thus:-

> "***The doctrine of lis pendens under section 52 of the TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of lis pendens is necessary for final adjudication of the matters before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to property in dispute so as to prejudice the other…"***

The doctrine though not stated by the parties was called into play by the virtue of evidence adduced when the appellant obtained the title pending hearing & determination of the dispute.

18. The trial magistrate observed this in his judgement when he analysed the evidence of both sides that as at 1996, none of the parties had title. As at 1998 when the construction the subject of this dispute began still no one had title to the suit propeerty. The trial Court therefore reached the right conclusion based on the evidence presented to him especially Dex 2 & 3. In light of these letters, it would have been unfair to enter judgement in favour of the plaintiff/appellant. The result of dismissing the appellant's suit is that there was nothing stopping the defendant from taking possession of his portion of the plot. The magistrate merely stated the resulting position with the dismissal of the suit therefore there is nothing wrong in ordering the defendant being restored to possession. The only mistake he did was to direct for sub-division of the property.

19. This order on subdivision did not however change the findings that the Respondent was entitled to the portion he was occupying. I have analysed the evidence presented by both sides and I also come to the same conclusion that the Respondent is entitled to his portion of the land he occupies being a purchaser for value without notice therefore a prayer for vacant possession or trespass could not issue. Accordingly I find no merit in this appeal and hereby dismiss it with costs to the Respondent.

Dated, signed & delivered at Mombasa this 18th day of July 2017.

A. OMOLLO

JUDGE