



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 71 OF 2015

SAMWEL NYAMONGO AUMA.....APPELLANT

VERSUS

OROKO BOSIRE.....RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment and Decree of Hon. K. Sambu,

PM issued in Kisii CMCC No. 209 of 2010 dated on 7th May, 2015)

1. This is an appeal by Samwel Nyomongo Asuma the original defendant in Kisii CMCC No. 209 of 2010. The appeal is against the judgment of Hon. K. Sambu, Principal Magistrate dated 7th May 2015. By the judgment the learned trial magistrate entered judgment in favour of the respondent, Oroko Bosire who was the original plaintiff in the lower court. The learned trial magistrate declared the respondent as the legal and beneficial owner of Plot No. 12 Bumburia Market, granted a permanent injunction against the appellant and ordered for the eviction of the appellant from the said plot and awarded the costs of the suit to the respondent.

2. Aggrieved by the said decision the appellant has preferred the present appeal against the whole judgment of the learned trial magistrate and has set out the following grounds of appeal:-

1. The learned magistrate erred in finding that the respondent owns the suit plot whereas there was no evidence to support such finding.

2. The learned magistrate erred in finding that one co-owner of a plot cannot transfer her interest or share in the plot without involving other co-owners.

3. The learned magistrate erred in law and fact in failing to appreciate the fact co-owners of the suit plot each held separate and distinct shares in the plot and each was capable of selling or transferring her/his share without involving other co-owners thereby arriving at a wrong decision.

4. The learned magistrate erred in relying on misleading and falsified documents tendered by the respondent in evidence thereby arriving at a wrong decision.

5. The learned magistrate failed to properly consider and evaluate the evidence on record

thereby arriving at findings that were wrong and against the weight of evidence.

6. The respondent did not prove his case hence did not deserve judgment in his favour.

7. The learned magistrate erred in law by shifting the burden of proving the respondent's case to the appellant thereby arriving at wrong findings.

8. The evidence on record showed that the appellant owned part of the suit plot.

The appellant sought that the appeal be allowed with costs and that the judgment and decree of the subordinate court be set aside and be substituted with an order dismissing the suit with costs.

3. To contextualize the appeal it is essential to set out briefly what the case before the subordinate court was and the evidence adduced before the said court. In the plaint dated 7th May 2010 filed before the Kisii Chief Magistrate's Court the respondent averred that he was the registered owner and/or allottee of Plot No. 12 Bumburia Market. He claimed that the appellant had without any colour or right trespassed onto the said plot and set up a slaughter house on the plot thereby denying the respondent access to the property. The respondent's claim was effectively captured under paragraph 7 of the plant which was in the following terms:-

7. The plaintiff's claim against the defendant is for an order declaring the plaintiff as the legal and beneficial owner of the suit property, an order for defendant's eviction from the parcel of land and a permanent injunction against the defendant restraining him from interfering and/or trespassing in the suit property."

4. The appellant by his written statement of defence dated 2nd June 2010 denied the respondent's averments in the plaint and denied Plot No. 12 Bumburia Market existed. The respondent stated that he had been in actual possession of his plot since 1997 which he claimed to have purchased from one, Esther Kemunto Bisieri. The appellant's defence to the respondent's claim was aptly captured under paragraph 5 of the statement of defence which was in the following terms:-

5. The defendant avers that he purchased his plot originally comprised of Bomburia Plot No. 12 from Esther Kemunto Bisieri measuring 25ft by 100ft and leaving the rest to the plaintiff and shall crave at the hearing to rely on the said agreement.

5. The respondent testified as PW1 before the subordinate court. He stated that in 1957 he together with Kemunto Bisieri and Samuel Ogamba were allocated Plot No. 12 Bumburia Market by the Gusii County Council for them to carry on business thereon. He stated that in 1967 he constructed a shop on the plot which he handed over to Samuel Ogamba who was his uncle to operate a butchery business. He stated the plot measured 25feet by 100feet. The witness gave evidence that he paid land rent to the Gusii County Council after demand was made through their advocates M/s Okemwa Elijah & Co. Advocates (PEX.1). The demand was made in 2007 and he paid the plot rates aggregating kshs. 22,340 as per the payment receipts (PEX.2). The witness further testified that he received a report after his uncle and Kemunto Bisieri had died that the appellant was occupying his shop and that when he asked the appellant, the appellant claimed the shop belonged to him.

6. The respondent stated that he referred the dispute respecting the ownership of the shop to the Bumburia Market committee for adjudication but stated that the appellant refused to attend before the market committee when he was invited. He testified that the market committee after considering the matter resolved that plot no. 12 Bumburia Market belonged to him (the respondent).

7. The respondent further testified that Esther Kemunto Bisieri could not sell Plot No. 12 Bumburia since the same did not belong to her. The respondent further denied the existence of Plot No. 12A at Bumburia Market and stated Esther Kemunto Bisieri alleged sale of Plot No. 12A could not relate to his Plot No. 12 Bumburia. The respondent was emphatic that his Plot No. 12 Bumburia is within Kisii County Council and that he paid the rates for the plot to Kisii County Council and not Nyamira County Council. PW1

further denied being aware that Esther Kemunto Bisieri sold her share of Plot No. 12 Bumburia Market.

8. PW2 Patrick Ngare Ogamba testified in support of the respondent's claim before the lower court. He stated that Plot No. 12 Bumburia Market is situated within Kisii County and that the same was co-owned by his father Ogamba Mongare, Kemunto Bieseri and Oroko Bosire who were allocated the plot by the Gusii County Council. He stated that when his father passed on Kemunto Bisieri took charge of the plot as the plaintiff was staying away. He affirmed that at some point the appellant occupied the suit plot stating that he had purchased the same from Kemunto Bisieri. The witness further stated that he participated during the arbitration of the dispute by the market committee which the appellant snubbed.

9. Henry Ogeto an administrative officer with Kisii County Government testified as PW3. The witness testified that he was the custodian of the records of the County Council and affirmed that as per the records held by the council Plot No. 12 is owned by Ogamba Mongare, Oroko Bosire and Kemunto Bisieri. The witness produced a certified copy of the muster roll and plot card. He confirmed that the plot had not been transferred to anybody and was still in the name of the original allottees. The witness confirmed that rates for the plot had been paid upto 2014 and that the receipts produced by the respondent as evidence of payment were issued by the county government. He confirmed the size of the plot as 25feet by 100feet which he stated was the standard measurement for county plots. The witness in cross examination reiterated that Plot No. 12 Bumburia Market fell within Kisii County and was emphatic that a seller and the buyer have to appear before the council for their transaction to be processed and such transaction would require to be sanctioned by the council through a minute.

10. PW4 Charles Bibao Ogari was the chairman of Bumburia Market Committee and his evidence was that Plot No. 12 Bumburia Market was owned by three persons, Kemunto Bieseri, Orogo Bosire and Mongare Ogamba. He produced the minutes of the committee when they arbitrated over the dispute. In cross examination he admitted Bumburia Market falls on the boundary of Kisii and Nyamira Counties. He maintained Plot 12A does not exist in Bumburia Market and that Plot No. 12 fell under Kisii County and not Nyamira County.

11. The appellant testified as DW1 and it was his evidence that he purchased the Plot No. 12 Bumburia Market from Kemunto Bisieri on 25th February 1997 for the consideration of kshs. 33,000/=. The appellant stated that it was Gusii County Council who referred him to Nyamira County where the plot he had purchased was processed and given number 12A. The appellant produced a plot card and minutes from Nyamira County sanctioning the transaction. The appellant produced payment receipts to Nyamira County Council showing he was paying for Plot No. 12A Bumburia Market. The appellant testified that Kemunto Bisieri sold him a portion of Plot No. 12 and that the portion he purchased was given Plot No. 12A and he asserted that he was the rightful owner of Plot No. 12 Bumburia Market.

12. Under cross examination the witness stated Plot No. 12 used to be under Kisii County but was changed to Nyamira. The witness further admitted he occupied Plot No. 12 in 1996 as a tenant before he bought the same from Kemunto Bisieri in February 1997. The appellant further stated he purchased the Plot No. 12 which measured 50feet by 100feet together with all the developments although he further stated that the plot was subdivided and his portion was 25feet by 100feet which comprised Kemunto Bisieri's portion of Plot No. 12.

13. The parties argued the appeal by way of written submissions. The respondent filed his submissions on 19th May 2017 and the appellant filed his on 20th June 2017. I have considered the memorandum of appeal, the pleadings before the lower court and the evidence adduced by the parties and the submissions made herein on behalf of the parties. The memorandum of appeal sets out 8 grounds which broadly challenge the trial magistrate's findings of fact and the law. The appellant contends that the trial magistrate's findings are not supported by the evidence and aver that the same are against the weight of the evidence. In determining this appeal, I will collectively consider the grounds and will not deal with each ground separately.

14. An appellate court of first instance has a duty, indeed obligation to re-evaluate the evidence adduced before the lower court to satisfy itself that the court arrived at the correct decision based on the evidence.

The appellate court will usually not interfere with the lower court's findings of fact and/or exercise of discretion unless it is evident that the trial court was clearly wrong having regard to the facts and the evidence or if it is apparent that the trial court misdirected itself in the exercise of its discretion. In the case of **Mbogo & Another –vs- Shah [1968] E.A 93** the court held thus:-

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

15. In the case of **United India Insurance Co. Ltd –vs- East African Underwriters [Kenya] Ltd [1985] E.A 898**. Madan, JA (as he then was) put the role of an appellate court more succinctly thus:-

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established. First, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

16. The respondent's evidence before the lower court to the effect that he and Samuel Ogamba Mongare and Kemunto Busieri were jointly allocated Plot No. 12 Bumburia was corroborated in material particulars by PW3, Henry Ogeto an officer of the County Government of Kisii. PW3 testified that as per the records held by the County Government of Kisii the proprietors of Plot No. 12 Bumburia Market are Ogamba Mongare, Oroko Bosire and Kemunto Bisieri. PW3 produced a certified copy of the muster roll and the plot card and it was his evidence that the plot has never been transferred to any other person and the ownership still remains in the names of the three allottees. The undisputed evidence is that at some point, Kemunto Bisieri was left incharge of the joint property but there was no evidence tendered to the effect that she had the authority of her co-owners to sell and transfer the joint property.

17. The appellant testified that he purchased the property Plot No. 12 Bumburia Market from Kemunto Bisieri and it was his evidence that it was transferred to her not by Kisii County Council but by Nyamira County Council and was issued with Plot card No. 12A Bumburia Market and that he was paying land rates thereof to Nyamira County Council.

18. The learned trial magistrate after evaluating and considering the evidence made the following observation/findings:-

“There is abundant or sufficient evidence on record given the plaintiff's adduced evidence and that of the rest of the witnesses and particularly (PW3) an administrative assistant seconded to the Kisii County Government that the suit property Bumburia Plot No. 12 is co-owned by three people namely Ogamba Mongare, Esther Kemunto Bisieri (both deceased) and Naftali Oroko Bosire, which property I further hold has not been transferred to any other person, given the records produced and admitted in evidence by (PW3).

In this regard find that the alleged transfer of the suit property by one Esther Kemunto Bisieri was not minuted or sanctioned by the defunct Gusii County Council as per procedure such a transfer or transaction I further hold as stated by (PW3) could not have effected in the absence of the rest of the co-owner, whose consent, ought to have been sought in the first instance. The defendant in evidence conceded that he was unable to ascertain whether the plaintiff herein had extinguished his rights in respect of the purported purchased property as

at the time of sale...”

19. I have, as I am required to do, as an appellate court reevaluated the evidence adduced before the trial magistrate and I see no basis on which I could interfere with the said trial magistrate’s findings on the facts. The trial magistrate was in my view entitled to come to the findings that he did upon the evaluation of the evidence. For instance the appellant stated that the plot he purchased from Kemunto Bisieri was her portion of the Plot No. 12 which she owned together with Ogamba Mongare and Naftali Oroko Bosire. There was no evidence that each of the three co-owners owned distinct portions of the plot capable of being sold separately. Besides, there was no evidence Plot 12 Bumburia Market was subdivided to create plot 12A Bumburia which the appellant claims. The appellant claims his plot 12A Bumburia Market measures 25ft by 100ft yet the entire plot allotted to the three co-owners was 25ft by 100ft. PW3 stated that standard size of County Council plots was 25feet by 100feet as was allocated to the three co-owners.

20. The learned trial magistrate properly held that Esther Kemunto Bisieri could not sell the plot which was co-owned without the consent and/or authority of the other co-owners. The three co-owners were joint owners and/or could have been tenants in common of undivided shares of the plot and consequently none of them could have transacted any dealings respecting the plot without the sanction of the other co-owners. Therefore Esther Kemunto Bisieri could not purport to sell her share of the plot without the sanction and/or approval of the other co-owners.

21. The respondent in his evidence stated that he is the one who constructed the building where the butchery was being operated by the appellant. The appellant stated that he purchased the plot together with all the developments. There was no evidence tendered to the effect that Esther Kemunto Bisieri constructed any building on Plot 12 and the assertion by the appellant he purchased her share of the plot was not backed by any evidence.

22. The trial magistrate in my view was properly entitled to reject the appellant’s claims of ownership based on the documents issued to the appellant by Nyamira County Council in the form of the plot card for Plot No. 12A. DW5 Bumburia Market because there was no proper nexus demonstrated as to how the Nyamira County Council came to issue the card given the history of ownership of Plot No. 12 Bumburia market. The plot having initially been allotted to three persons, it is unclear how the Nyamira County Council allowed only one of the owners to deal with the plot to the exclusion of the other co-owners.

23. In the submissions filed by the appellant, the appellant has submitted that the trial court lacked the jurisdiction to hear and determine the case arguing that since the Environment and Land Court had been established by the time the suit was heard and determined, it is the Environment and Land Court that had jurisdiction to hear the matter. The appellant refers to Section 50 of Land Act, 2012 which provided that it is the Environment and Land Court that had exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act. Further the appellant places reliance under Section 101 of the Land Registration Act, 2012 which provides that it is the Environment and Land Court that has jurisdiction to hear and determine actions and proceedings concerning land under the said Act.

24. While it is true that after the establishment of the Environment and Land Court all disputes and/or matters relating to land were to be handled by the Environment and Land Court, matters that had been commenced before the establishment of the Environment and Land Court were to continue being heard before the court where they had been instituted as per Section 30(1) of the Environment and Land Court Act 2011 and directions to this effect were issued by the Hon. Chief Justice. Section 30(1) of the Environment and Land Court Act provides:-

30(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

25. The Hon. Chief Justice issued Practice Directions following the establishment of the court pursuant to Sections 24 and Section 30(1) and (2) of the Environment and Land Court Act as per Gazette Notice No. 5178 published on 28th July, 2014 to the effect that where cases were part heard the courts before whom the hearing was started would continue hearing the cases until finalization. Practice direction 8 was in the following terms:-

“Magistrates courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.”

In the premises, the suit before the trial court started before the Environment and Land Court was established, the court had the jurisdiction to hear and determine the case before it.

26. For all the foregoing reasons, I find no merit in the instant appeal and the same is dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 29th day of September, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the appellant

N/A for the respondent

Ruth court assistant

J. M. MUTUNGI

JUDGE