



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MERU
ELC APPEAL CASE NO.100 OF 2010

KALUMA M'MIKWA KATHERU.....APELLANT

VERSUS

FRANKLIN MUGAMBI RUGOJI.....RESPONDENT

JUDGMENT OF THE COURT

(An Appeal from the Judgment of the learned Senior Resident Magistrate Hon. M.T. Kariuki in SRM CC No.144 of 2009 in Tigania Law Courts dated 10th August, 2010)

Introduction

The Appeal before me arises from the Judgment of the Senior Resident Magistrate on 10th August 2010 in Tigania Law Courts. The plaintiff in that case Mr. Kaluma M'Mikwa Muthuru who is also the Appellant herein had filed a plait dated 7th December 2009 seeking the following orders:-

- a) A declaration that the plaintiff is the rightful owner of that entire parcel formerly marked F/No.4134 measuring 0.04 acres in Atuamburi Adj. Section.**
- b) A permanent injunction restraining the defendant, their agents, employees servants and/or anybody else acting in their instructions or at their behalf from anyway interfering with the plaintiff's land.**
- c) Costs and interest of this suit.**
- d) Any other or better relief this Honourable Court may deem fit o grant.**

At paragraph 3 thereof, the plaintiff avers that at all time material to that suit, he has been the rightful owner of all that parcel of land marked F.No.4134 Atuamburi Adj. Section measuring 0.04 acres.

In a statement of defence dated 18th January, 2010, the defendant/respondent denies the plaintiff's claim and contends that that suit is frivolous and an abuse of court process for lack of requisite consent obtainable from the land adjudication and settlement officer prior to filing of suit pursuant to Section 30 which is also similar to Section 8 of the Land Adjudication Act and the Land Consolidation Act Chapters 284 and 283 Laws of Kenya respectively.

During the hearing of that case both the plaintiff and the defendant testified alone and never called witnesses. In his brief testimony the plaintiff/appellant staled that he has sued the defendant who is his immediate neighbour because he refused to vacate from his land which he bought in 1992. He staled that the defendant fenced his land and when he protested at the lands office, the land officers visited the

scene. He then put up his fence but the defendant's wife removed the fence and he reported to the police where she was charged and sentenced to six (6) months imprisonment. He sent the defendant a court order to vacate from his land to no avail.

The defendant in his defence stated that he is the owner of land parcel Number 4066 Antuamburi Adjudication Section measuring 0.30 acres which he bought in 1987 and constructed a house in 1990. He also fenced round the land and developed it. He was also issued with a sketch map after officers from the lands office visited the scene. The map indicates that he does not share a common boundary with land parcel No.4134 Antuamburi Adjudication Section. The defendant further stated that no consent was issued to the plaintiff to sue pursuant to Section 30 of the Land Adjudication Act Cap 284 and Section 8 of the Land Consolidation Act Cap 283 Laws of Kenya.

The grounds of this Appeal are as follows:-

(1) THAT the learned Senior Resident Magistrate erred in Law and in fact in dismissing the appellant's suit on the evidence before him.

(2) THAT the learned Senior Resident Magistrate erred in Law and in fact in holding that the Appellant had not satisfied the requirements of Section 8(1) of Cap 283 and Section 30 of the Land Adjudication Act Cap 284 Laws of Kenya.

(3) THAT the learned Senior Resident Magistrate erred in Law and in facts in holding that the Appellant was not the rightful owner of Land Folio No.3134 Antuamburi Adjudication Section.

(4) THAT the judgment of the Senior Resident Magistrate is against the weight of the evidence and the Law.

APPELLANT'S SUBMISSIONS

The Appellant through the firm B.G. Kariuki & Co. Advocates submitted that in the case before the learned Senior Resident Magistrate Hon. M.T. Kariuki, the defendant in his defence had raised the issue of consent of the Land Adjudication Officer.

In that regard, the defendant did not specify which particular Act applied in respect to the suit land. He submitted that it was the responsibility of the defendant to specify the applicable Act and that failure to do so was fatal to the defendant's case. The defendant further submitted that the learned Resident Magistrate erred in Law in holding that the Appellants suit was Res judicata and sought to have the Appeal allowed with costs.

RESPONDENT'S SUBMISSIONS

The counsel for the respondent failed to file written submissions within the agreed period.

I have considered the analysis and evaluation of the issue in controversy by the trial magistrate in the judgment. I have also considered the submissions by counsel for the appellant. As an appellate court, my jurisdiction is limited to review the evidence in order to determine whether the conclusion reached upon by the trial court should stand. My jurisdiction is not to substitute my own judicial findings for that of a trial court unless there is no evidence to support the finding or unless the trial court can be said to be plainly wrong. Looking at ground No.2 of the Memorandum of Appeal, the Appellant is complaining that, trial court erred in holding that the Appellant did not seek and obtain consent to file suit pursuant to Sections 8(1) and 30 of the Land Consolidation Act and the Land Adjudication Act Chapters 283 and 284 of the Laws of Kenya respectively. The learned magistrate at page 7 of his judgment reproduced the two sections of the law which are Couched in mandatory terms. I find the interpretation by the learned trial magistrate on the requirement of a consent by a party before filing a suit in respect of the parcel of land within an adjudication section to be correct. On ground number 3 of the Memorandum of Appeal, the

learned trial magistrate was correct in dismissing the Appellant's suit for failing to satisfy the court's requirement of proof in civil cases. The Appellant's suit was not one that the trial court was seized with the requisite jurisdiction to determine issues on merit as that was the function of the Adjudication officer. Issues of ownership of land situated within an adjudication section can only be determined by an adjudication officer within such area. I wish to combine ground number 1 & 4 of the Memorandum of Appeal and state that the learned trial magistrate properly evaluated and analyzed the evidence and the testimony of the witnesses and correctly directed his mind to the applicable law. In my view, this appeal lacks merit and the same is hereby dismissed with costs to the respondent.

SIGNED AT GARISSA ELC COURT BY

JUDGE E.C. CHERONO

DATED AND DELIVERED AT MERU ELC COURT THIS 7TH DAY OF DECEMBER, 2017

IN THE PRESENCE OF:-

Janet-Court Assistant

Gichuki for Appellant

K. Muriuki H/B for Mbogo for Respondent

HON. L. N. MBUGUA

ELC JUDGE