Maguta v Mugo (Environment and Land Appeal E051 of 2022)
[2024] KEELC 961 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 961 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E051 OF 2022

JG KEMEI, J

FEBRUARY 22, 2024

BETWEEN

KIMANI MBUGUA MAGUTA ..... APPELLANT

AND

JULIUS MWANGI MUGO ..... RESPONDENT

((Appeal from the Judgment of Hon C K Kisiangani (SRM) in MCL&E No 24 of 2021-Ruiru delivered on the 19/5/22))

JUDGMENT

1. In the trial Court the Plaintiff, who is the Respondent on appeal sued the Appellant (Defendant in the trial Court) seeking orders as follows;

    a. A permanent injunction restraining the Defendant by himself, his servants, employees and or agents or otherwise howsoever from remaining on or continuing in occupation of and or carrying out any construction or developments and or from otherwise interfering or dealing with Title Number Ruiru/Township/895.

    b. Orders of immediate eviction and demolition of the structures illegally constructed on title Number Ruiru/Township/895.

    c. General damages for trespass.

    d. Exemplary damages.

    e. Costs of the suit.

    f. Any other or further relief the Court may deem fit to grant in the interest of justice.

2. The Plaintiff averred that he is the proprietor of the suit land having acquired it through purchase from one Hiram Thuku Muhoro in 2018. That in January 2021 the Defendant trespassed onto the land and erected structures which actions are illegal and aimed at depriving him of his quiet enjoyment of his property.

3. In his defence the Defendant denied the claim of the Plaintiff and stated that he is the registered owner of the suit land having purchased the same from Zacharia Karanja Karugu on the 28/12/2002.That since then he enjoyed quiet possession of the land until 2017 when he discovered that Hiram Thuku Muhoro had caused himself to be registered as owner of the suit land. That in 2018 the Plaintiff sent goons to take over the possession of the land but were repulsed and charged in CR Case No 4306 of 2018. In his counterclaim the Defendant sought the following orders;

    a. That the Plaintiff's suit be dismissed with costs.

    b. That a permanent injunction do issue against the Plaintiff/his servants / agents or anyone acting on his instructions from entering/constructing/selling/transferring or in any other manner interfering with the suit property Ruiru/township/895.

    c. A declaration that the Plaintiff's lease was obtained fraudulently and illegally and the same should be cancelled and the Defendant be declared as the legitimate owner of the parcel of land.

    d. Costs and interest of the suit.

    e. Any other relief that the Court may deem fit.

4. Upon hearing the suit the trial Court pronounced itself in favour of the Plaintiff then as follows;

    a. A permanent injunction is hereby issued restraining the Defendant, his agents, servants, employees or otherwise howsoever from remaining on or continuing in occupation of and or carrying out any construction or developments and or from otherwise interfering or dealing with Title Number Ruiru/Township/895.

    b. Orders of immediate eviction and demolition of the structures illegally constructed on title number Ruiru/Township/895.

    c. Costs of the suit.

    d. Right of Appeal explained.

5. Aggrieved by the decision of the Court, the Appellant proffered this appeal on the following grounds;

    a. That the learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence.

    b. That the learned Magistrate erred in law and in fact by delivering a fatally defective Judgment by failing to consider the issue of the root of the title of the suit property and all the processes and procedures that brought forth the Appellant and Respondent's interests on the suit property.

    c. That the learned Magistrate misdirected herself when she dangled the instrument of title as a proof of ownership despite the root of the title being under challenge.

    d. That the learned Magistrate misdirected herself when she held that the Respondent had proved his case and consequently delivering a Judgment in favour of the Respondent despite there being no previous proprietor of the suit property that was called to testify.

e. That the learned Magistrate misdirected herself when she held that the Appellant's allotment had lapsed when in fact the offer was accepted by the Ministry of Land after payment of the stand premium rent and subsequent survey of the suit property.

f. That the learned Magistrate erred in law and in fact by failing to consider the evidence tendered by the Appellants showing how the suit property (Ruiru/Township/895) transitioned from the Uns. Residential Plot No. "J" – Ruiru Township.

g. That the learned Magistrate misdirected herself when she held that the Appellant failed to produce an official from the Ministry of Land when in fact summons were issued to a land officer from Adhi House but the said official failed to appear and the hearing proceeded without their testimony.

h. In view of the circumstances set out above, the Learned Magistrate totally misdirected herself in delivering a Judgment in favor of the Respondent by failing to consider and appreciate the evidence on record on behalf of the Appellant.

6. The Appellant sought the following orders on appeal:-

a. That the appeal be allowed.

b. That there be a stay of execution of the Judgment of Honourable C. K. Kisiangani dated 19th May 2022 pending the hearing and determination of the instant appeal.

c. That the Judgment and all the consequential orders of the Senior Magistrate's Court at Ruiru dated 19th May, 2022 be set aside.

d. That the Appellant be awarded costs of this Appeal and costs of the proceedings in the trial Court.

7. The Respondent is equally aggrieved by the decision and has filed a cross appeal expressed as follows;

> " That the Learned Magistrate erred in law and in fact by failing to assess and award General damages for trespass and Exemplary damages.

8. The Respondent sought the following orders on the gross appeal;

a. That the Appellant's Memorandum of Appeal dated 8th June 2022 be dismissed.

b. That the Respondent's Cross-Appeal be allowed and this Honourable Court be pleased to:-

a. Assess and award general damages for trespass.

b. Assess and award exemplary damages.

c. The costs of this Appeal and Cross-appeal be awarded to the Respondent."

9. On the 18/5/2023 parties elected to prosecute the appeal by way of written submissions. However, by the time of writing this Judgment only the Respondent had complied. This is despite the Appellant's Counsel undertaking to the Court to ensure that the same were placed on record.

10. Having considered the appeal, the grounds of appeal, the trial Court file, the written submissions and all the material placed before me, the key issues for determination are; whether the appeal is merited; whether the cross appeal has merit; who is the lawful owner of the suit land; whether the Respondent is entitled to damages in the cross appeal; costs of the appeal.

11. This is a case of two persons claiming the same land and the starting point is to analyse the evidence led by both parties in the trial Court with respect to the root of their title. The Court will be guided by a few decisions of the superior Courts which I shall mention for reference on the issue of establishing the root of title.

12. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Othes* [2016]Eklr-

> " A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. .... Every party must show that their title has a good foundation and passed properly to the current title holder."

13. On the issue of unregistered land, the Court in *Caroline Awinja Ochieng & Anor v Jane Anne Mbithe Gitau & 2 Others* (2015)eKLR stated that;

> " In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
>
> The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property ...
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> The Respondents were never the original owners of the suit Plot. It is unclear how the vendor himself obtained ownership of the property. I hold the view that the chain was broken the moment the paper trial ceased.
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> A sale agreement alone in the absence of any other documentation would not and does not proof ownership of an unregistered parcel of land."

14. The Appellant led evidence that he acquired the suit land namely Ruiru/Township/895 from Zachary Karanja Karugu who was the original allotee vide an agreement of sale dated the 28/12/2002. That upon transfer he took over possession and erected a perimeter fence. That the original allotment letter was transferred to him to hold as an absolute proprietor of the land. That in 2017 he discovered that the suit land had been registered in the name of Hiram Thuku Muhoro. He accused the Respondent for having acquired the suit land illegally and fraudulently. In his opinion the documents held by the Respondent are forgeries.

15. The issues of fraud and forgery though pleaded under paras 19 and 20 of the counterclaim, was not particularized. Order 2 Rule 4 *Civil Procedure Rules* provides explicitly the manner in which such matter may be pleaded:-

> " 4 (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment , fraud , inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –
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> (a) Which he alleges makes any claim or defence of the opposite party not maintainable;
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> (b) Which, if not specifically pleaded, might take the opposite party by surprise; or
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> (c) Which raises issues of fact not arising out of the preceding pleading.
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> (2) Without prejudice to subrule (1), a Defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
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> (3) In this rule "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land."

16. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court of Appeal held as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

17. The Supreme Court of Kenya in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings.

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings ..."

18. In closing this argument the Court would like to agree with the Supreme Court of Kenya decision that the Appellant having failed to plead with particularity fraud illegality and forgeries, these issues are non-issues and the trial Magistrate was correct in her holding.

19. I shall now turn to the documents adduced by the Appellant in support of his case. In the agreement of sale dated the 28/12/2002 the subject matter of the sale is described as Uns. Residential Plot No J Ruiru Township by virtue of an allotment letter. Additional terms of the said agreement stated that the vendor shall hand over the original letter of allotment to the purchaser for safe custody and

pending the processing of the title upon execution and that the purchaser shall take over possession of the unsurveyed plot and proceed to make developments pending the survey of the land. The Court was pointed to the Letter of Allotment dated the 18/8/1998 in the name of the Appellant for Uns. residential plot J Ruiru Township. It has not been explained why the Letter of Allotment was backdated and issued to the Appellant. The Appellant did not adduce the Letter of Allotment in the name of the original allotee. The Court finds that the nexus between the suit land and plot No J was not made. This could have been in form of an approved Part Development Plan (PDP) which ties with a Registry Index Map (RIM). The trial Court did not err in holding that the properties are dissimilar.

20. That notwithstanding, the core issue is whether the Appellant acquired any interest by virtue of the allotment letter dated the 18/8/98. The Letter of Allotment contains a provision that if acceptance and payment respectively are not received within a period of 30 days that Letter of Allotment shall be considered to have lapsed. There is no evidence that the terms were met meaning that the Letter of Allotment terminated as at the 18/9/98.

21. In the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) the Supreme Court firmly settled the question of Letter of Allotment or whether it conveys interest as follows;

> " So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 Others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:
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> "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all" [Emphasis added].
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> 59. The pronouncement in Gladys Wanjiru and Dr Joseph N. K. Arap Ng'ok (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; John Elias Kirimi v Martin Maina Nderitu & 4 others, Environment and Land Suit No 320 of 2011; [2021] eKLR; and Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.
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> 60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

22. The Court went further and stated as follows;

> " We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an Allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed."

23. I concur with the decision of the Supreme Court of Kenya and find that the Letter of Allotment did not confer any interest to the Appellant whatsoever.

24. The case of the Respondent was supported by documentary evidence being the agreement of sale, the transfer of land to his name and issuance of title. The Land Registrar adduced the records in the lands office which are in support of his ownership of the land. These documents remained uncontroverted by the Appellant. The Court finds that the Respondent not only established his ownership but the root of his title as well. I see no ground to fault the trial Court on this ground.

25. Having held that the title belongs to the Respondent, any continued occupation of the land by the Appellant amounts to trespass which trespass is actionable perse. The trial Court erred in declining to assess damages on the ground that the Respondent did not produce any evidence. Proof of damages is not required in such a case. The Respondent need not proof that he suffered any damage or loss as a result so as to be awarded damages.

26. In this case the Court finds that in the circumstances of this case the sum of Kshs 500,000/- is a sufficient award for trespass. I also award an amount of Kshs 200,000/- as exemplary damages in favour of the Respondent. The Appellant has been trespassing on the Respondents' land knowing that he holds no title and depriving the rightful owner of the land his rights under Section 24 and 25 of the *Land Registration Act*.

27. With respect to costs the Respondent shall have the costs of the appeal and that of the trial Court.

28. In the upshot the appeal is devoid of merit it is dismissed.

29. The cross appeal succeeds as prayed.

30. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kinyua for Appellant

Respondent – Absent but served

Court Assistants – Phyllis/Oliver