



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 155 OF 2006

CECILIA NJOKI MAINAAPPELLANT

VERSUS

**BETH MARY KIMANI (as a personal representative of the
Estate of SAMWEL KANGETHE KIMANI) (deceased).....RESPONDENT**

JUDGMENT ON APPEAL

(Being an appeal against the judgment of the Hon. G.A. MMASI delivered on 20th September 2003 in Nyahururu PMCC No. 90 of 2003;).

(Original suit by plaintiff seeking to stop appellant from interfering with his land; appellant arguing that plaintiff acquired land by fraud; plaintiff having purchased it; judgement entered for plaintiff; appeal; clear evidence that plaintiff held title; no evidence of fraud; clear evidence that plaintiff's title exists; appellant holding title to other land; appeal dismissed with costs).

1. This is an appeal against the judgment of the Honourable G.A MMasi delivered on 20 September 2003. This being a first appeal, I have the duty to evaluate the pleadings and the evidence and assess whether the trial court arrived at the correct finding.

2. The plaintiff in the original suit was Samwel Kangethe Kimani. He died in the course of this appeal and he is represented by Beth Mary Kimani, the personal Representative of his estate. He filed suit through plaint, on 16 April 2003, which was later amended on 19 May 2003. He pleaded that he is the registered proprietor of the land parcel Nyandarua/Ol Joro Orok/Salient/2712 (the suit land or parcel No.2712). He averred that he purchased this land from one Samuel Wahogo in the year 1996. Samuel Wahogo was the original allottee of this land having purchased it from the Settlement Fund Trustees (SFT). It was pleaded that initially, Mr. Wahogo had purchased from the SFT the land parcel Nyandarua/Ol Joro Orok/Salient/2031(parcel No. 2031) and was meant to get 15 acres. However, this land fell short of the required acreage as a parcel No. 2712 had been wrongfully excised from it. In the year 1992, the SFT amended the title documents to include the land parcel No. 2712 and issued a title to Mr. Wahogo for the parcel No. 2712 for 5 acres. It is this parcel that the plaintiff purchased. His complaint in the suit was that the appellant, who it was pleaded owns owned the parcel No.Nyandarua/Ol Joro Orok/Salient/2260 (parcel No.2260), sometimes in August 2002, invaded the plaintiff's parcel No. 2712 and cut down trees. In the suit, the plaintiff sought for orders that he be declared owner of the suit land and for an injunction to restrain the appellant from the same.

3. The appellant filed defence vide which she contested the allocation and sale of the suit land. She pleaded that if such allocation and sale took place, then it was perpetrated by mistake or fraud. Among the particulars pleaded were, applying for the suit land when the same was already in occupation of the defendant; purchasing a plot which was not vacant on the ground; and causing subdivision of the original land parcel No. 2031 and causing its subdivision into the parcel numbers 2712, 2713 and 2714 to conceal an illegal allocation; and causing the original land parcel No. 2031 to be shifted on the relevant Registry Index Map to a different position to conceal the fraud. It was pleaded that the appellant had been in exclusive possession of the suit land since 1984 and has therefore acquired title by way of adverse possession. It was pleaded that the suit is time barred.

4. In his evidence, the plaintiff testified inter alia that he purchased the suit land, measuring 5 acres, from Mr. Wahogo in the year 1996 at the consideration of Kshs. 750,000/=. The Sale Agreement was produced as an exhibit. He also produced the Green Card to the land parcel No. 2712. Upon sale, the property was transferred to the plaintiff on 17 January 1996. He also testified that Mr. Wahogo owned the parcel No. 2031 and got title from the SFT in the year 1992. In the year 1999, this parcel No. 2031 was subdivided into the parcel numbers 11036 to 11069. He testified that the land parcel No. 2712 was not part of the land parcel No. 2030. He testified that the land parcel No. 2712 bordered a land parcel No. 2713 which was 10 acres and which was under the SFT. He testified that the appellant owned a land parcel No. 2260 measuring 13 acres which land is about 20 kilometres away from the suit land. He produced the title deed which showed that the appellant got title on 18 September 2001. He refuted the claim that the appellant had been on the suit land since the year 1984. According to him, the appellant had earlier been residing in a land parcel No. 2799 from the year 1987. The then District Commissioner (D.C) sought to help her get land and wrote some letters which were produced in evidence. She was offered the land parcel No. 2713 and was to pay for it but she did not. He testified that when the appellant trespassed into his land, he reported to the Land Registrar and someone was sent from the SFT to verify. A report was made that the appellant stays in the land parcel No. 2713 and that there was a fence. He stated that the appellant pulled down this fence and then ploughed his land parcel No.2712 and has now put up some structures.

5. In cross-examination, he inter alia testified that he never cultivated the land after purchase as he lived in Kisumu. He had however seen the land before purchasing it and it was vacant. He would visit the land from time to time. He testified that the land was not being used until April 2002 when he was informed by a friend that his land had been invaded. He went to the land and found one Ibrahim Kingori, a son of the appellant, burning charcoal. He stated that he was not aware that this land had been allocated to one Mereka.

6. PW-2 was Simon Wahogo. He testified that in 1983, he was allotted 10 acres of land by the SFT and he paid for the same. In 1990, he got title to the land parcel No. 2031 but it was only for 5 acres and he complained. He was informed that by an error his land had been subdivided to produce the parcels No. 2031 and 2712 each of five acres. No one had been allocated the land parcel No. 2712 and he was asked to pay for it as well. He paid for it and was issued title. He thus ended up with two titles to parcels No. 2031 and 2712. In 1996, he sold the land parcel No. 2712 to the plaintiff. As to the parcel No. 2031 he subdivided the same into 40 plots of 1/8th of an acre and sold them. He testified that the land parcel No. 2713 belonged to the appellant and that she had settled there in the year 1990. He stated that there was always a fence separating this land with the parcel No. 2712.

7. PW-3 was Zavenio Kinyua Gitonga. He was the District Surveyor, Nyandarua. He had earlier been directed to visit the site and he gave evidence of his visit. He testified that the defendant had a semi permanent house in the land parcel No. 2713. She was cultivating wheat in both parcels No. 2713 and 2712. She however held title to a land parcel No. 2260.

8. PW- 4 was one Joseph Kanyugia Muthiga. He was the Deputy Land Adjudication Officer attached to the SFT. He testified that the appellant is allottee of the parcel No. 2713 having been allotted the same in September 1991. He testified that the plot numbers 2712 and 2031 were allocated to Simon Wahogo. He also mentioned Mr. Mereka as having the Plot No. 2661. The Plot No. 2260 was allotted to one John P.M. Muthamia. He was surprised that the appellant had title to this latter plot. He did clarify that the latter two are different plots in separate Sheet numbers. He stated that the plot No. 2713 measures 10 acres.

9. In her evidence, the appellant inter alia testified that she stays in Plot No. 2713 which according to her measures 15.5 acres. She testified that she was given the land in the year 1982 and started living on it. She stated that the land was initially 20 acres but later the D.C subdivided it into three portions namely 2712, 2713 and 2714. She stated that the original number was No. 2031 which was changed to No. 2799. She complained about the subdivision but she was charged with creating disturbance. She testified that she was issued with an allotment letter to the parcel No. 2031. She did not agree with the subdivisions and continued occupying the whole land. According to her, the parcel No. 2712 was given to David Mukii Mereka and not Simon Wahogo. She stated that she resides in the parcel No. 2713 which has a new number 2660 and she was issued with the title deed showing 15.5 acres. In cross-examination, she stated that she had been issued with an allotment letter to Plot No. 2031 but this was taken away by the D.C and she no longer had it. She agreed that she did not hold any papers in respect of parcel No. 2712.

10. In her judgment, the learned trial Magistrate found that it is the plaintiff who was the registered proprietor of the suit land. She held that the appellant had not shown that the plaintiff had procured registration by fraud as he had purchased it from Simon Wahogo. She also found that the appellant had no counterclaim for the land parcel No. 2712. She found that the defendant has been allocated the land parcel No. 2713, and not the land parcel No. 2712, and had no right to occupy the latter parcel of land.

11. In her Memorandum of Appeal, the appellant has raised 6 grounds as follows :-

- i. *That the learned trial Magistrate erred in law and fact by finding that the plaintiff had proved his case on a balance of probabilities while in fact he had not.*
- ii. *That the learned trial Magistrate erred in law and fact by failing to find that the evidence of the prosecution (sic) was sinister in nature.*
- iii. *That the learned trial Magistrate erred in law and fact by failing to find that the plaintiff's suit was bad in law.*
- iv. *That the learned trial Magistrate erred in law and fact by failing to consider the defence evidence.*
- v. *That the learned trial Magistrate erred in law and fact by finding that parcels No. 2712 and 2713 are two different and distinct parcels on the ground without such evidence.*
- vi. *That the learned trial Magistrate erred in law and fact by making a wrong evaluation of the evidence before him.*

12. I have considered the submissions of both appellant, who was acting in person, and Mrs. Ithondeka for the respondent.

13. It will be observed that in the subordinate court the plaintiff therein sought judgment for possession of the land parcel No. 2712. Although in her grounds of appeal, the appellant has stated that the trial Magistrate was wrong in holding that this parcel is different from the parcel No. 2713, on my part I see no such error. Ample evidence in the form of the Registry Index Map and Green Cards for the two land parcels was tendered, that the land parcels No. 2712 and 2713 are two distinct parcels of land. The former parcel of land was observed to be in the name of the plaintiff whereas the latter parcel of land in the name of the SFT, although the expert witnesses did state that the appellant was allotted this latter parcel of land. It is clear beyond peradventure that the two parcels of land, that is parcels No.2712 and No.2713, are separate and distinct, and that they have separate titles. Although the appellant argued in her case that the parcel No. 2713 is 15.5 acres, there is no such evidence. The Green Cards show that this land is 4.1 hectares which is just about 10 acres. The appellant asserted that she occupies 15.5 acres. If this is the case, then it is apparent that she occupies an additional 5 acres. The land of the plaintiff was shown to be 5 acres and I have no doubt in my mind that the appellant's occupation of 15 acres includes the 5 acres owned by the plaintiff. The appellant did not demonstrate any right over the plaintiff's parcel of land No. 2712. She did not show that the same was ever allotted to her or that she ever held title to it. Evidence was tendered that the two parcel numbers 2712 and 2713 had been separated by a fence and I am not convinced that the appellant was ever in occupation since the year 1984 as claimed. In any event she could not claim adverse possession in the case before the magistrate's court as such suit can only be heard in the High Court.

14. I am unable to fault the trial Magistrate in her finding that the plaintiff was entitled to occupation of

his land parcel No. 2712. That judgment in all respects was correct and I am unable to set it aside.

15. Mrs. Ithondeka raised some fairly technical matters in her submissions but I find it completely unnecessary to address them as to me this is a straight forward matter that fails on merits.

16. Whichever way I look at it, there is no substance in this appeal and it is hereby dismissed with costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

The appellant acting in person present.

No appearance on part of Ms. Morara Moindi & co. for respondent

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU