



Bocha & another v Kenya Evangelical Lutheran Church–Hola (Environment and Land Appeal 15 of 2021) [2024] KEELC 815 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEELC 815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 15 OF 2021
FM NJOROGE, J
FEBRUARY 21, 2024**

BETWEEN

SUSAN BOCHA 1ST APPELLANT

HERO DANIEL 2ND APPELLANT

AND

KENYA EVANGELICAL LUTHERAN CHURCH–HOLA RESPONDENT

JUDGMENT

1. By this appeal, the Appellants challenge the judgment and decree of the Senior Principal Magistrate’s court delivered at Garsen on 23rd September 2021 by Hon. P.K Rotich in P.M. ELC Case No. 2 of 2018 wherein judgment was entered in the following terms:
 - a. A declaration that the plaintiff is bona fide owner of plot no. known as PDP No. TRD 312/4 measuring about 1.5 hectares.
 - b. An order of injunction be ordered against the 2nd and 3rd defendant to give vacant possession of the portions they occupy Plot no. PDP No. TRD 312/200/4.
 - c. An order of injunction for restraining the 2nd and 3rd defendants, their agents and or servants from occupying erecting at or anyway trespassing on the suit land.
 - d. The defendants’ counterclaim was dismissed for lack of merit.
2. Aggrieved by the judgment, the appellants brought the instant appeal on the following grounds:
 - a. The learned magistrate erred in law and in fact in finding and holding that the respondent was lawfully allocated the suit property.



- b. The learned magistrate erred in law and fact in finding and holding that the respondents claim was not time barred by the provisions of the Limitations of the Actions Act Chapter 22 of the Laws of Kenya.
- c. The learned magistrate erred in law and fact in finding and holding that the appellants had no proof of ownership of the land they were in occupation.
- d. The learned magistrate erred in law and fact in finding that the appellants were occupying land that had been allocated to the respondent.
- e. The learned magistrate erred in law and fact in dismissing the appellants counterclaim.
- f. The learned magistrate erred in law and fact in finding that the respondent had no locus standi to institute the suit against the appellants.

Evidence at the trial

3. PW1 Tsuma Muriso, an evangelist in Kenya Evangelical Lutheran Church Hola testified that the church building was started in 2005. He testified that the church plot has no title deed but has an allotment letter no. 01981 plot measuring 1.5 ha. Further, that it has a PDP letter number TRD/312/2000/4. He stated that they had applied for a title but the government had not issued as all plots in Hola have no title deeds. He further testified that when he was posted to Hola in 2016 he found squatters on the land and others started coming in the year 2018 thus the suit against them was for trespass. He testified that the suit land has beacons and the church was issued beacons dated 21.8.2012 in the name of the church and they paid Kshs. 3,000 for the certificate. It was his testimony that the church wrote a letter to the Chairman NLC to facilitate issuance of the title. On cross-examination, he conceded that there is no letter to Tana River County Council by the church seeking the allocation of land. Further, he was not aware that there were other people interested in the land.
4. PW2 Bere Jilo Titus, a deacon in Kenya Evangelical Lutheran Church told the court that in 2011-2016 he worked in Hola Tana River County as a deacon. That when he was at Hola, the church was allocated 1.5 ha but squatters moved into the plot and started building both permanent and temporary structures. He told the court that he reported the matter to the police in 2013 and was issued with an OB. No. 11/20/7/2013. He added that he also reported the matter the matter to the area chief and Tana River County council and the squatters were called and the matter was referred to County office for final decision. In addition, a letter was issued by Tana River County Government dated 25.7.2013 to the church stating that the suit land was legally allocated to the church.
5. PW3 Reverend (Rtd) Samson Galgalo Soka a reverend of Kenya Evangelic Lutheran Church told the court that he was posted at Hola in 1993 for 3 years; that he requested the head office in Nairobi to allow him get a plot in Hola for the church and the church gave him a go ahead; that after visiting the Ministry of Lands and given three options, he settled for the suit property and made an application to the Ministry Of Lands and that he left Hola when the application for allocation was being processed.
6. PW4 Manase Marahigo Mkofira, a Reverend at Evangelical Lutheran Church told the court that he served in the church in the year 2000 to 2003 in Hola where they used to fellowship at Lisa Primary school as they did not have a church. He testified that he made efforts to find a plot for the church. That after follow up with Tana River County offices, he was issued with PDP number PDP/TRT/312/2000/4 addressed to him as the pastor in charge of Kenya Evangelical Lutheran Church Hola who at the time was himself. He added that the allocation of the suit land was advertised in the Daily Nation newspaper.



7. DW1 Awadh Doyo Dhida, a former councillor between 1968 to 2007 at the County Council of Tana River told the court that Watta people live in Kalaule where the suit land is situated. He testified that he requested Jillo Fares, the Clerk to the County to issue allotment letters to Watta people but he does not know whether he did so.
8. DW2 the 1st defendant testified that he has lived on Kalaule since 1976 but he is not a Watta but a Monyoyai and his place is Madago. He told the court that the church broke his house and that of his brother and built a church and as such complained to District Officer, Galole vide a letter dated 21.4.2006 but the church continued building. On cross-examination, he admitted that he did not buy the suit land and he has no allotment letter for it.
9. DW3 the 2nd defendant testified that on 7.7.2019 she bought her plot measuring 100 by 100 feet from Hussein Keynan Abaire for Kshs. 80,000. She told the court that she was not aware that the land is owned by anyone else. It was her testimony that she bought the plot from the previous owner who had built and settled on it. On cross-examination she admitted that she did not any documentation to her claim of ownership nor letter from the county authorizing her to build on the land. Additionally, she did not have a plot number.

Analysis and Disposition

10. The court directed that the appeal be canvassed by way of written submissions. At the time of writing this opinion, I do note that the Respondent had not filed their submissions. I have considered the submissions by the Appellants as well as the authorities relied upon.
11. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

12. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.



But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

13. I have coalesced the grounds of the appeal into one issue for determination: who is the owner of the suit land? It is the burden of the Appellants herein to prove that they are owners of the suit property and not the Respondent. Section 107(i) of the *Evidence Act* provides as follows: -

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

14. In the case of *Susan Mumbi Versus Kefala Grebedbin*; (Nairobi HCC NO. 332 OF 1993) Justice Juma it was held that;

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

15. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR the court held that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.

The Plaintiffs claim ownership of plots known as D355, D356, D355B, D356B, E12, E13, E12B and E13B on LR No. 10904/2. A total of eight plots. The plots were allocated to them for a consideration paid to the Defendant. PW1, like PW2, in an endeavor to prove ownership to the plots produced receipts, share certificates and beacon certificates.

Even though PW1 had testified that he purchased and paid for two plots in 1976, he did not produce any evidence to show such payment in 1976. The only receipt availed for payment in 1976 was for the amount of Kshs. 2,200/= . It was not for 7,000/= and there was no other receipt. That receipt which was marked as PEx-2 was dated 13th November, 1976. It was receipt No. 10292 issued by M/s Gatuguta & Manek. It was not issued by the Defendant.

That receipt also had the glaring inscription on its face horizontally reading “cancelled”. In my view, this remark took away the probative value of the receipt. Even then it was not proof that the 1st Plaintiff had paid the Defendant any money in 1976.”

16. Further, in *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] Eklr, the court, in determining the issue as to who between the Plaintiff and the Defendants was the owner of the plot stated thus:

“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 and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoing, confirmations by the title paramount, notices, et al.”

17. I have reviewed the trial court’s record. The Respondent herein produced among others; PEX 20 a beacon certificate dated 21st August 2012 indicating that the suit property belongs to Lutheran Church in Hola. Produced as PEX 21, is a copy of Council’s Letter of Allotment No. 019981 in respect of the suit property and issued to Evangelical Lutheran Church Hola. Produced as PEX 19 is a copy of the Kenya Gazette for the completion of PDP. The Appellants on their part have not produced a scintilla of evidence even through a single documentation to demonstrate their proprietary interest in the suit land.
18. In the circumstance therefore, I am of the view that the Respondent did prove that it was the owner of the suit land and that the trial court was justified in so finding. Consequently, the appeal herein is dismissed in its entirety for want of merit. The appellants shall bear the costs of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 21ST DAY OF FEBRUARY 2024.

MWANGI NJOROGE

.....

JUDGE, ELC MALINDI.

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

