Nyambura & 27 others v Ranalo Foods Limited & 2 others; Postal Coorporation Of Kenya (Interested Party) (Environment and Land Appeal E009 of 2022) [2024] KEELC 1020 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1020 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E009 OF 2022

J OMANGE, J

FEBRUARY 15, 2024

BETWEEN

SALOME NYAMBURA & 27 OTHERS ..... APPELLANT

AND

RANALO FOODS LIMITED ..... 1ST RESPONDENT

ROBINSON GACHUHI ..... 2ND RESPONDENT

NAOMI WAMBUI ..... 3RD RESPONDENT

AND

POSTAL COORPORATION OF KENYA ..... INTERESTED PARTY

JUDGMENT

1. This appeal arises out of a 20 year lease agreement which the 1st Respondent executed with 1st Interested Party over land parcel Nairobi West office plot LR No 37/272/5 hereinafter referred to as the suit property. It was a term of the lease that the 1st Respondent was to be at liberty to evict any trespassers on the land. Pursuant to this clause the 1st Respondent filed Civil Suit 3686 of 2019 seeking permanent injunctive orders restraining the defendants and the 2nd to 27th interested parties from occupying the suit property. The 1st Respondent also sought eviction orders against the Defendants and the 2nd to 27th Interested Parties. Hon D.M Kivuli rendered Judgement in favour of the Plaintiffs now the 1st Respondents.

2. Vide Memorandum of Appeal dated the 24th February 2022 the Appellants who were interested parties in the lower court have appealed against the Judgement delivered on the 11th February 2022 on the following grounds;

a. That the Learned Magistrate erred in law and in fact holding that the Plaintiff has proved its case on a balance of probability when there was No evidence produced.

b. That the learned magistrate erred in law and fact by failing to consider that the transaction between the Plaintiff and the interested party was non-existent and void for lack of consent from the National land commission.

c. ThaT the learned magistrate erred in law and fact in failing to appreciate that the Plaintiff's invoice used to demand payment from the Respondent is for parcel of land LR No 209/14422 Matumbato road upper hill and not for the suit parcel Nairobi West office plot LR No 37/272/5.

d. That the learned magistrate erred in law and fact by implying to validate a transaction touching on land owned by a state corporation without the consent of the National land commission.

e. That the learned magistrate erred in law and fact failing to consider the candid evidence that was adduced by the 2nd to 27th interested parties/Appellants at the time of the hearing.

f. That the learned magistrate erred in law and fact by introducing new evidence to the case a clear departure from the pleadings hence arriving at the wrong judgement.

g. That the learned magistrate failed to appreciate that payment receipts adduced in evidence by the Plaintiff/Respondent were for payment made to the Plaintiff/Respondent to the 1st interested party in 2016 whereas the lease as between them was executed in 2018

h. That the learned magistrate erred in law and fact by relying on extraneous matters, failed to evaluate the evidence hence arriving at the wrong judgement ruling constitutes a grave miscarriage of justice and should be set aside.

i. That the learned magistrate erred in law and fact in failing to consider binding precedent cited by the Appellants in their submissions.

j. That the decision of the magistrate was biased against the Appellants.

3. The appeal was canvassed and disposed of by way of written submissions. The Appellants submitted on each of the grounds raised in the memorandum of appeal. The Appellants submitted that the trial magistrate erred by failing to consider that the documents produced in the lower court relate to a different parcel of land and not the suit property. Further it was submitted the lessor being a state corporation, it should have obtained approval from the National Land Commission before leasing the suit property to the Respondent. The Appellants further argued that due process was not followed citing section 5(1)(a) of the *National Land Commission Act*.

4. It was the contention of the Appellants that they were validly on the land and that their evidence in this regard had not been evaluated by the trial magistrate. It was also argued that the payment receipts issued by the Plaintiff in respect of the suit property were dated 2016 yet the lease as between the Respondent and 1st Interested party commenced in 2018.

5. The Respondent in their submissions submitted that the Appellants had not discredited their documentary evidence on the existence of the lease agreement and as such they had proved that a relationship existed between them and the 1st Interested Party. The Respondent argued that the photos adduced by the 2nd to 27th interested parties did not prove ownership.

6. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions

reached by the trial court are consistent with the evidence and the applicable law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law or where its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] EA 93. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court held that:

> " this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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.

7. An appellate Court would not normally interfere with exercise of the discretion of the lower court unless it has not been exercised judiciously. As to what the term "discretion" means the Court in The Supreme Court of Uganda, in *Kiriisa v Attorney-General and another* [1990-1994] EA 258 stated that:

> " Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances." That discretion being wide, the main issue before this court is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules of procedure. This court should however ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Appellants and the 1st Respondent.

8. Having considered the grounds of appeal, the record of appeal and submissions by the parties, the main issue for determination is whether the grounds cited by the Appellants are sufficient to warrant this court setting aside the Judgement in the lower court. The issues drawn from the grounds of appeal and the submissions by both parties are; whether consent of National Land Commission was required for the lease to be a valid lease; whether the documents produced by the 1st Respondents in the lower court proved they had a valid lease; whether the Appellants who were interested parties in the lower court were validly on the land and lastly whether the 1st Respondent had proved its case on a balance of probabilities.

9. On the question of consent of National Land Commission, it was argued that consent should have been sought on the basis of Article 61(1) of the *Constitution* and Section 5 (1) (a) of the *National Land Commission Act*. Article 62 (1) provides that " Land in Kenya is classified as Public, Community or Private Land' Section 5(1) of the *National Land Commission Act* is on the role of the Commission to manage public land on behalf of the national and county governments. It is important to note that the National Commissions mandate is restricted to managing public land on behalf of national and county governments.

10. The land in question belongs to the Postal Corporation of Kenya which the 1st Respondent submits is a state corporation under the *Postal Corporation of Kenya Act* No 3 of 1998. Section 7 (a) of the Act provides that the Board shall have power to manage, control, and administer the assets of the Corporation in such manner as best promotes the purposes for which the Corporation is established.

11. The *State Corporation Act* at section 3(1) provides "The President may by order establish a state corporation as a body corporate to perform the functions specified in that order. Subsection 2 further provides A State Corporation established under this section shall-

a. Have perpetual succession.

b. In its corporate name be capable of suing and being sued.

c. Subject to this Act, be capable of holding and alienating moveable and immovable property.

12. In view of the provisions of the *Postal Corporation Act* and the *State Corporation Act* it is evident that the Postal Corporation had powers to lease the suit property subject only to complying with procurement regulations. The consent of the National Land Commission was not necessary.

13. The second issue that was strongly argued before the court is whether the 1st Respondent had a valid lease. There was No challenge on the issue on the process that was followed in identifying the 1st Respondent as the leasee after a competitive procurement process. Indeed, if there were illegalities in the procurement process these would have been challenged before the Public Procurement Administrative Review Board.

14. The Appellants submit that the court failed to consider that the documents were inconsistent with the dates and the suit property. I have considered the evidence that was adduced. I also note that while it is true the lease was dated 2018 the letter of offer was issued in 2016 so there is No contradiction with the invoice dated 2016. This was not disputed. In any event, the primary document relied upon by the court was the lease which the process of acquiring as I have indicated above was not challenged. The lease agreement dated 24th January 2018 clearly stipulates that the suit property in question is Nairobi West office plot LR No 37/272/5.

15. On the question of the rights of the Appellants, they argued that they had been allowed by the 1st Interested Party to occupy the suit property, but at the same time seemed to infer adverse possession. There can be No finding of adverse possession if there is consent to occupy. Indeed, even the evidence adduced in this respect was contradictory with Daniel Njau stating on one hand that they got into the land as it was empty but in the next breath stating that they had an agreement. However, even if there was to be such a claim it had to be against the registered owner and not the 1st Respondent herein.

16. It was also cited by the Appellants that the court ought to have considered the principles set out in Mitubell. In this regard the Appellants argued that since they relied on the suit property for their livelihood, the court ought to have considered that their rights should have been protected. Indeed, the court did not give much consideration to this issue in the Judgement. The Mitubell case did indeed acknowledge the right of each individual to housing and the duty of government to protect those who live in informal settlements on public land, if the government has failed to provide housing. This protection cannot be equated to automatic assumption of ownership of such public land. I agree with the finding of the lower court that the Appellants had No valid claim over the suit property. The court should be careful that even in such instances orders are issued that ensure those who are being evicted are evicted in a humane and dignified manner that ensures their rights are protected.

17. Counsel for the Appellants argued that the trial magistrate failed to consider their detailed submissions. On this point, I reiterate the Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. In which the court expressed itself thus;

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is

the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

18. Having considered the foregoing and considering the evidence in totality and the law, I find that in the end the Court correctly found that the 1st Respondent had proved its case on a balance of probabilities. Consequently, the appeal has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF FEBRUARY 2024.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Wachira for the Interested Party

Mr. Mausa for the Respondents

No appearance for the Appellants

Steve - Court Assistant