



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL APPEAL NO. 11 OF 2011

KENGA KASHURU.....APPELLANT

=VERSUS=

**SOLOMON MAGANA KAMITI *Suing as father and administrator of the estate of* DAVID
GIKONYO KAMITI.....RESPONDENT**

J U D G M E N T

1. What is before me is the Appeal from the Judgment of the Chief Magistrate Honourable Lucy Gitari delivered on 13th April, 2011 in Malindi CMCC No. 169 of 2009.
2. The Appellant was the Defendant in the lower court. The Appellant relies on four grounds in support of his appeal, to wit;
 - a. ***THAT the learned Honourable Chief Magistrate erred in law and fact in granting the Respondent Judgment without sufficient evidence.***
 - b. ***THAT the learned Honourable Chief Magistrate erred in law by failing to appreciate the fact that the property in issue was not and did not form part of the Estate of the deceased.***
 - c. ***THAT the learned Honourable Chief Magistrate erred in failing to appreciate the fact that the Appellant who was an original squatter had been allocated the property by Maisha Mapya Self Help Group prior to the purported purchase by the deceased.***
3. After hearing the parties and their witnesses, the learned magistrate found and held that the plot in dispute was lawfully bought by the deceased's son. The court also awarded the Plaintiff Kshs.100,000 general damages for trespass.

BACKGROUND

4. The suit in the lower court was commenced by way of a Plaint.
5. In the Plaint, the Plaintiff/Respondent averred that at all material times, the Plaintiff was the owner of the plot number 10719/120 Malindi having obtained the grant of letters of administration intestate for the Estate of the late David Gikonyo Kamiti.
6. According to the Plaintiff, the Defendant owns a plot adjacent to the suit premises known a Plot number 10719/119 and that in August 2008, the Defendant wrongfully entered into the suit premises and demolished a semi-permanent structure constructed by the late David Gikonyo.

7. The Defendant/Appellant denied the Plaintiff's/Respondent's averments in his statement of Defence.
8. The Defendant averred in his defence that he had lived on the suit plot all his life and further that he was born there and he did not know the Plaintiff or his deceased son.
9. The Plaintiff/Respondent called one witness during the trial. The Defendant/Appellant also called one witness.
10. Mr. Mouko, counsel for the Appellant and Mr. Ole Kina, counsel for the Respondent appeared before me on 30th May, 2013 and made oral submissions.
11. Mr. Mouko, counsel for the Petitioner submitted that the Plaintiff did not prove his case to the required standards in the lower court.
12. According to counsel, the Respondent filed the suit in the lower court as the Administrator of the Estate of his son, David Gikonyo Kamiti. Consequently, it was upon the Plaintiff to prove that the suit property formed part of the Estate of the deceased.
13. Counsel submitted that the property described in paragraph 4 of the Plaintiff does not appear on the certificate of confirmation of grant and the claim should have failed on that basis.
14. The Appellant's counsel further submitted that the Plaintiff did not prove that the plot described in the Plaintiff is the same as plot number 101 and that his son purchased the same from somebody who had the lawful capacity to sell.
15. Counsel submitted that the Plaintiff produced in evidence an agreement showing that his late son purchased the plot in issue on undated day but while testifying, he stated that the plot was purchased by his son in 1998.
16. However, it was submitted, that according to the evidence on record, Kaingu Kombe, the chairman of Maisha Mapya Self Help Group applied to be allocated plot number 101 in 1999 and consequently, he could not have sold the plot in 1998.
17. The Appellant's counsel submitted that the suit property was allocated to his client in 1995 by the same group which purported to allocate the land to the Respondent. Indeed, it was submitted, Mr. Kombe, the chair of the group, was one of the signatories of the consent that was granted to the Appellant to develop the suit property. The chairman had already consented to the sale of the property to the appellant and could not purport to sell the same property to the Respondent.
18. DW2, it was submitted, testified that the plot in issue had been sold to him by Kaingu Kombe, the chairman, which necessitated Maisha Mapya Self Help Group to call for a meeting and the meeting found that the plot indeed belonged to the Appellant and DW2 was given another plot being number 100. Even after this finding by Maisha Mapya, Kaingu Kombe, it was submitted, seems to have sold the same plot to the Plaintiff's son.
19. It was the Appellant's advocate's submissions that according to the evidence that was tendered, the Appellant owns another plot which is next to plot number 101 and he paid PW2 Kshs.5,000 to vacate the land though she had demanded for Kshs.10,000/-.
20. Counsel finally submitted that the Plaintiff/Respondent should have enjoined Maisha Mapya Self Help Group in the suit for a proper determination of the issues and that there was no basis for the court to have granted the Plaintiff/Respondent general damages of Kshs.100,000 for trespass.
21. Mr. Ole Kina, counsel for the Respondent submitted that the Agreement that the Respondent relied on in the lower court is undated and that the vendor was seized of the undivided shares in Maisha Mapya Self Help Group.
22. According to the Respondent's counsel, what was being sold by the vendor, Kaingu Kombe, was an interest within a portion known as 101 which was a sub-division of 1734. It was not possible, it was submitted, to describe the property in other way.
23. The Respondent's counsel further submitted that according to the agreement of sale, the purchaser was to obtain the deed plan before the property could be transferred to him and that is why the Respondent paid Kshs.20,000 for the deed plan to Maisha Mapya Self Help Group.
24. Counsel submitted that the Plaintiff only saw the documents after his son passed on in a road accident although the deceased had shown him the plot; that before the deceased died, he fenced the land and put up a mabati structure and that the property was well defined and capable of identification.
25. Counsel took the court through the evidence of PW2, Mama Nora. Counsel submitted that PW2 had testified that the Plaintiff's son went to the suit property with some people from the Maisha Mapya Self Help Group and fenced the plot and put up a structure which she was allowed to use.

- She was also allowed to continue cultivating the plot but she was evicted by the Appellant when the Plaintiff's son died.
26. Counsel further submitted that according to the evidence of the Appellant in the lower court, he recognised that the Plaintiff's late son had a plot in the neighbourhood.
 27. In her Judgment, the learned Magistrate raised three issues for determination, firstly, whether the Plaintiff owns plot number 10719/120 Malindi Municipality; secondly, whether the Defendant trespassed on the disputed plot and lastly whether the Plaintiff was entitled to damages.
 28. The learned Magistrate evaluated the testimony of the Plaintiff. The Magistrate found that indeed plot number 719/120 Malindi Municipality is listed as one of the properties of the deceased David Gikonyo Kamiti in the Certificate of Confirmation that was produced in evidence.
 29. I have looked at the Grant of Letters of Administration and the Certificate of Confirmation of a Grant which were produced as Plaintiff's exhibits 1a and 1b.
 30. The Certificate of Confirmation of a Grant shows, among other properties of the deceased, plot number Malindi/Municipality/719/120.
 31. In the Plaintiff, the Plaintiff pleaded that he was the registered owner of plot number 10719/120 Malindi/Municipality while the Defendant's plot was 10719/119. No evidence was led by either party to show that plot number 719/120 as indicated in the certificate of confirmation was different from plot number 10719/120 as pleaded in the Plaintiff and that the two are different plots on the ground. The omission of the first two digits in the number appearing on the certificate of confirmation can only lead to one conclusion, that it was typographical error. What was to be indicated in the Certificate of Confirmation was 10719/120 and not 719/120.
 32. Even if the property in dispute was not part of the properties listed in the Certificate of Confirmation of a Grant, I am of the view that the Plaintiff would still be entitled to file a suit in respect to such a property. It is possible as it always happens, for the administrator of the Estate of a deceased person to discover the properties of a deceased person after confirmation of a Grant. In such a situation, he will still be entitled to recover such properties. All he requires is a letter of administration for him to file a suit for the recovery of the deceased's assets.
 33. The learned Magistrate analysed the Plaintiff's exhibit number 2, which is a receipt by Maisha Mapya Self Help Group dated 19th June 1999 showing the payment of Kshs.25,000 by Kaingu Kombe being payment for the purchase/allocation of plot number 101.
 34. The Magistrate also analysed another receipt which was produced as Plaintiff's exhibit 2b by Maisha Mapya Self Help Group dated 13th April 2006. The receipt was issued to the Plaintiff's son, David Kamiti for Kshs.20,000 being the payment for the processing of a deed plan.
 35. The Magistrate also considered the consent which was granted to Mr. David G. Kamiti to construct residential/commercial premises on portion number 1734/101 by Maisha Mapya dated 19th June 1999. She also considered Plaintiff exhibit 2(d) which is the form from Maisha Mapya addressed to Kaingu Kombe showing his agreement to purchase land measuring 50 by 100 square meters for Kshs25,000 and Plaintiff exhibit 2e which is an undated agreement between the Plaintiff's late son and the late Kaingu Kombe for land measuring approximately 100 X 50 Square meters known as Plot number 101.
 36. On the basis of those documents, the learned Magistrate found and held that the Plaintiff had shown on a balance of probabilities that his deceased son had bought the undivided share of Kaingu Kombe in plot number 101.
 37. According to the Magistrate, Plot number 1734/101 was given a new number 10719/120 after survey.
 38. Although the learned Magistrate held that the agreement between David Gikonyo and Kaingu Kombe was entered into in 1998, there was no evidence that that was the year that the two entered into the agreement for the sale of plot number 101 measuring 50 X 100 square meters.
 39. If that was the position, then it would have been true, as argued by the Appellant that Mr. Kaingu had not obtained an interest in plot number 101 to pass to David Gikonyo. All the exhibits indicated that Kaingu Kombe obtained the proprietary interest in plot number 101 in 1999.
 40. According to the undated Agreement of Sale produced as Plaintiff exhibit number 2e, Kaingu Kombe sold to the Plaintiff's son plot number 101 being a sub-division of portion number 1734.
 41. The description of the land seems to be similar to the land that Kaingu Kombe paid for on 19th June 1999, as shown in Plaintiff exhibits 2a and 2d.
 42. The Agreement for Sale further provides that the consideration for the plot was Kshs.120,000 and

- the amount was to be paid in installments.
43. The vendor, Kaingu Kombe, was to cause the name of the purchaser, David Gikonyo, to be substituted for his name in the records of Maisha Mapya Self Help Group upon full payment of the purchase price. David Gikonyo was to take delivery of the deed plan and the title of the property.
 44. The annexures on the undated Agreement of Sale shows the payment that were made by the Plaintiff's son, the final payment being Ksh. 35,000 which was made on 22nd June 1999. The Plaintiff's son made a payment of Kshs.20,000 for the Deed Plan to Maisha Mapya on 13th April 2006.
 45. After analysing the documents which were produced by the Plaintiff, the learned magistrate considered the parole evidence.
 46. The Magistrate in her judgment stated that the Plaintiff testified that when he was taken to the plot by his deceased son, he found it was fenced and that there was an iron sheet house. Later, when he went to the plot in the month of July 2008, he found that the Defendant had invaded the plot and uprooted the fence.
 47. According to the witnesses' testimony which the Magistrate considered, the plot in question borders that of the Defendant and he has blocked the gate and claimed both plots.
 48. The learned Magistrate further observed, and correctly so, that the evidence by the Plaintiff proved that the deceased bought the plot in dispute in his life time and took possession by putting a fence and building a small house on it. The plaintiff's son obtained the consent to develop the plot and there was no evidence to prove that anybody else, including the Appellant, claimed the plot during the life time of the deceased.
 49. The learned Magistrate agreed with the testimony of PW2, Leonola Ajiambo Ogutu, who stated that she had lived in the area since 1979 and she was utilizing the plot all along.
 50. She testified that Mr. Kombe had at one time informed her that the plot was his and later on she saw the Plaintiff's son and Mr. Kombe on the plot. The plot was subsequently fenced and she was allowed to continue using it. She was however evicted by the Appellant upon the demise of the Plaintiff's son and the Defendant brought down the fence and the structure which was on the land.
 51. After summarizing PW2 evidence, the Magistrate observed that while PW2 was using the plot, the Defendant had not claimed ownership and had not lived on the plot nor used it.
 52. The Magistrate found PW2 to be a credible witness. The Magistrate further found that the Defendant had admitted that he had a plot that neighbours that of the Plaintiff's son.
 53. The analysis by the Magistrate of the Plaintiff's evidence is correct. The Magistrate correctly interpreted the exhibits that were produced by the Plaintiff which I have summarised above.
 54. The Magistrate also arrived at the correct conclusion that indeed the plot in question belonged first to Mr. Kombe and then to the Plaintiff's son after hearing PW1 evidence. PW2 was categorical that the fence and the house on the suit property was put up by her son on the instructions of David Gikonyo.
 55. The learned magistrate also considered the evidence by the Defendant/Appellant. The Magistrate correctly observed that the receipts which were produced by the Defendant/Appellant of buying a plot did not have a plot number. None of the receipts, it was observed showed that they were for buying the plot in dispute.
 56. The Defendant stated in his testimony that he was living on the plot in 1999. The Magistrate, correctly so, observed that that evidence was disapproved by the testimony of PW2 who had been using the plot in dispute even after the same was fenced by Mr. Kombe and the Plaintiff's son.
 57. That position was confirmed by the Defendant/Appellant's evidence when he said that he paid PW2 Kshs.5,000 to vacate the plot which she had been utilising before and after the demise of the Plaintiff's son.
 58. The Magistrate finally observed, and correctly so, that the Defendant, in cross examination, admitted that the exhibits produced by the Plaintiff were properly signed by officials of Maisha Mapya; that after completion of payment, one paid for the Deed Plan and that the Defendant relied on two receipts in which one did not have a plot number.
 59. I have looked at the receipts which were produced by the Defendant/Appellant and I agree with the learned Magistrate's findings.
 60. The first receipt, Defence exhibit 1, shows that the Defendant/Appellant paid Kshs.1000 for a plot on 4th May 1991. It does not indicate the plot that he was buying. Defence exhibit number 3 is another receipt which was issued to the Defendant showing that he was purchasing a plot whose

- number is not indicated. The amount he paid was Kshs.24,000/-
61. In any event, the Defendant/Appellant has a plot neighbouring Mr. Kombe's plot, which, according to the Plaintiff, is plot number 10719/119. That should be the plot that he was paying for.
 62. The Appellant did not produce receipts to show that he paid for two plots and cannot purport to combine his plot and the plot that Mr. Kombe purchased for Kshs.25,000 and which he later sold to the Plaintiff's son. Both of them paid a total of Kshs.25,000 and that amount must have been for one plot and not for two.
 63. Indeed, it may be true that Mr. Kombe and the Appellant/Defendant bought plot number 101, which according to the evidence that emerged, comprised two or more plots whose numbers changed upon sub-division. The defendant's plot was known to him and he had been staying on it.
 64. Indeed, the Defendant testified that the original number of the plot in dispute in 1995 was 1734/101. After sub-division, his plot was given number 1734/104. He then contradicted himself by saying that he was given another plot whose number is 1734/101 which the Plaintiff/Respondent was claiming.
 65. The Appellant/Defendant further stated in his evidence in chief that each member of Maisha Mapya had to pay to be able to get a plot. According to his testimony, each member was paying Kshs.25,000 which he paid and received a consent to develop it. This is the plot he was living in as at 1999 and there is no evidence that he acquired a second plot. He never acquired the plot that PW2 was using and the learned Magistrate was right in finding and holding that there was no other plot the Plaintiff was claiming other than the one which the Defendant is claiming to be his.
 66. The learned Magistrate was also right in holding that a suit cannot be defeated for non-joinder of a party, and in this case, Maisha Mapya Self Help Group. Order 1 Rule 9 of the Civil Procedure Rules clearly provides that a suit shall not be defeated by reasons of mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interest of the parties actually before it.
 67. In any event, the Magistrate correctly found and held that the Plaintiff's son bought the plot from Kaingu Kombe and not from Maisha Mapya Self Help Group. The Plaintiff did not therefore need to join Maisha Mapya as a party to the suit.
 68. The Magistrate also found as a fact, and correctly so, that the Plaintiff had proved that the Defendant/Appellant trespassed on the suit property and destroyed his structure and the fence. She was right in awarding Kshs.100,000 as damages for trespass.
 69. In the circumstances, and for the reasons I have given above, I find and hold that the learned Magistrate, on the material placed before her arrived at a sound and just decision. She analysed all the evidence that was before her and correctly observed the demeanor of the witnesses.
 70. I therefore dismiss the Appellant's Appeal dated 17th April 2013 with costs to the Respondent.

Dated and Delivered in Malindi this 26th day of July, 2013

O. A. Angote

Judge