Mbogo v Settlement Land Trustees (Civil Appeal 17 of 2019)
[2025] KECA 561 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 561 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 17 OF 2019

MA WARSAME, JM MATIVO & JM MATIVO, JJA

MARCH 28, 2025

BETWEEN

KAMAU MBOGO ..... APPELLANT

AND

SETTLEMENT LAND TRUSTEES ..... RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Nyahururu (M. C. Oundo, J.) dated 11th February 2019 in ELC Case No. 323 of 2017)

JUDGMENT

1. The question to be answered in this appeal is straightforward: Did the appellant prove in the formal proof that the suit land lawfully belonged to him in the absence of any defence by the respondent? Put differently, does the standard of proof remain the same in a defended and undefended suit?

2. To contextualize the appeal, we shall give the background giving rise to this appeal. In a plaint dated 3rd March 2017, the appellant stated that in 1963, he was allotted plot no. 215 Ol Aragwai Scheme by the respondent and that boundaries of the plot were pointed out to him by its officers. Soon after the adjudication of the scheme was done, the registry index map was prepared tallying with the boundaries that were shown to him. It was averred that later, the respondent hived off a portion from the parcel of land measuring 4.4 acres and was given a new number namely plot no. 613 Ol Aragwai Scheme. The appellant's contention was that the 4.4 acres were unlawfully hived from his plot. Consequently, he sought the following prayers:

    a. A declaration that the excision of 4.4 acres out of L.R Nyandarua/Ol Aragwai/215 and subsequent creation of plot L.R Nyandarua/Ol Aragwai/613 and its transfer to the defendant was illegal and unlawful.

    b. An order directing the defendant to transfer L.R Nyandarua/Ol Aragwai/613 to the plaintiff.

3. Upon service of the plaint and the summons to enter appearance, the respondent did not enter appearance or file a defence. Consequently, an interlocutory judgment was entered against the respondent and the suit was set down for formal proof. Upon hearing the appellant and one Robert Kiprotich Kimei, a surveyor in the Ministry of Lands, the learned judge held that the appellant had failed to discharge his burden of proof to the required standard. The suit was dismissed in the following terms:

> 29. It is not in dispute that the suit property No. Nyandarua/Ol Aragwai/215 was registered on 25th November 1974 in the name of the Settlement Fund Trustees. According to the copy of the register that was produced by the Plaintiff, the suit property was transferred to the Plaintiff by the Settlement Fund Trustees on 30th April 1975 and charged. The Settlement Fund Trustees thus discharged the suit property on 9th December 1982 and transferred it to the Plaintiff wherein on the 30th April 1983, Nyandarua/Ol Aragwai/215 ceased being in existence as the same was subdivided by the Plaintiff giving rise to parcels No. 591 and 592. Up to this point, there is no argument that the Plaintiff was the proprietor of Nyandarua/Ol Aragwai/215.
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> 30. According to the Plaintiff, the Defendant excised LR No. Nyandarua/Ol Aragwai/613 measuring 4.4 acres from Nyandarua/Ol Aragwai/215. This was done in the year 1984 going by the evidence of the Plaintiff's witness PW2.
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> 31. I have however gained sight of the green card and/or register of parcel No. Nyandarua/Ol Aragwai/613 herein produced as Pf exhibit 5 by the Plaintiff and note that the first entry in the said card was that land parcel No. Nyandarua/Ol Aragwai/613 was registered in favour of the Settlement Fund Trustee on the 11th November 2015. That it was registered as an independent parcel of land and that at no time had it been excised from Nyandarua/Ol Aragwai/215 otherwise the same would have reflected on the green card to parcel No. Nyandarua/Ol Aragwai/215.
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> 32. In view of the above observation, I am of the considered view that land registered in favour of the Settlement Fund Trustees with a view of allocating it to allotees and then charging it is and remains public land until a title deed is issued to an allotee.
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> 33. The record is clear that the file in relation to parcel No. Nyandarua/Ol Aragwai/613 was opened in the year 1985, yet the documents relied upon by the Plaintiff being Pf exh 1(a-c) and Pf Exh 8 relate to the years 1963 and 1974 respectively.
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> 34. The first entry in 1985 as per the green card Pf Exh.5, was in respect of the Settlement Fund Trustee, the Defendant herein, which means, according to the evidence and/or submission of the Plaintiff, that before the interest of the Settlement Fund Trustee was registered in 1985, the Plaintiff had already been allotted Nyandarua/Ol Aragwai/613 the suit property. I find this piece of evidence inconceivable. Indeed from the documents produced as evidence, it is clear that by the time the Settlement Fund Trustee was being registered as proprietor to Nyandarua/Ol Aragwai/613, the Plaintiff had already been registered as proprietor to Nyandarua/Ol Aragwai/215.
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> 36. As it may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

37. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un- procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

38. As it now stands, the Defendant is the holder of a title deed in respect to Nyandarua/Ol Aragwai/613 having been registered as the proprietor on the 11th November 1985. Going by the provisions of Section 26 (1) of the *Land Registration Act* and in comparison to the evidence adduced herein, the said title has not been impeached and/or challenged."

4. The appellant is aggrieved by the said judgement. He filed a notice of appeal dated 25th February 2019. He also filed a memorandum of appeal dated 23rd April 2019 raising 7 grounds disputing those findings. We take the liberty to summarize them as follows: that the portion of land L.R. No. Nyandarua/Ol Aragwai/613, measuring 4.4 acres was unlawfully excised from L.R. No. Nyandarua/Ol Aragwai/215; that the register for L.R. No. Nyandarua/ Ol Aragwai/613 was unlawfully opened; and that the learned judge erred in dismissing the appellant's suit. In the premised circumstances, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court. He further prayed for costs at trial and in this appeal.

5. When this appeal was heard virtually on 3rd February 2025, learned counsel Mr. Komu Nderitu appeared for the appellant while the respondent was unrepresented. As stated earlier, the respondent did not participate in the trial at the ELC.

6. We have considered the submissions by the appellant, examined the record of appeal and analyzed the law. As a first appellate court, an appeal 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 and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

7. It is also trite law that an appellate court will only interfere with findings of fact only if it is demonstrated that such findings are based on no evidence or the court considered irrelevant considerations or omitted to consider relevant considerations.

8. As earlier stated in this judgment, in our view, the only issue for determination is whether parcel of land L.R. No. Nyandarua/Ol Aragwai/613 measuring 1.80 hectares (4.4. acres) was illegally excised from the appellant's land parcel L.R. No. Nyandarua/ Ol Aragwai/ 215. This a factual issue that will be disposed of by a reevaluation of the evidence that was adduced by the appellant.

9. It is common ground that the suit in the trial court was undefended and proceeded by way of formal proof. In the end the learned judge was not satisfied that the appellant had proved its case to the required standard of proof. It is necessary for parties to know that even in an undefended suit, the burden of proof is not lowered. The only advantage to a party in such a suit is that the evidence remains uncontroverted but it must nevertheless prove that claim as pleaded. Hancox, JA. in the Court of Appeal case of Karugi & another vs. Kabiya & 3 others [1983] KECA 38 (KLR), enunciated himself as follows on the standard of proof in matters undefended:

> "I wholly agree with Chesoni Ag JA (whose judgment I have had the advantage of reading in draft), that there was not a shred of admissible evidence to connect the respondents with that which was done by the authorities concerned. I agree with the trial judge that, on the

available material, it was they who should have been sued. Neither can I agree with Mr. Waweru that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge."

Plat Ag. JA. held:

> " The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be."

10. Halsburys Laws of England, Vol. 17 at paragraph 260 defines proof as follows:

> " Proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

11. We now turn to the evidence that was adduced by the appellant.

The appellant's evidence was that in 1963, he was allocated plot No. 215 by the respondent. A letter of allotment was issued on 7th December 1963. He was then shown the beacons for his plot and started utilizing the land. He asserted that there was a road in between his plot and produced a map showing that plot no. 613 did not exist at the time. He added that he was surprised to learn that the respondent had subdivided the land and created parcel no. 613 that was not in the original scheme. His contention was that a new map had been created by the respondent to cover up the illegal hiving off of his land.

12. The appellant's second witness was one Robert Kiprotich Kimei, a surveyor with the Ministry of Lands. His evidence was that parcel no. 613 was created in 1984, whereas the title for plot no. 215 was issued to the appellant on 30th April 1975. However, in his evidence, he did expressly confirm that plot no. 613 was hived off plot no. 215.

13. We have carefully reevaluated the analysis of the evidence by the learned judge. We agree with the learned judge. The only evidence that was adduced by the appellant is that he was shown the physical boundaries of plot no. 215 in 1963. The appellant indeed produced a map that shows that has no plot no. 613. However, that alone is not enough to show that the land that he claims was hived off from his plot no. 215.

14. It is common ground that a green card is a very crucial document under the *Land Registration Act*. The green card for parcel no. 613 shows that the title was issued on 11th November 1985. The appellant asserts that that title was illegally created. However, we note that the first demand letter that the appellant wrote to the respondent claiming that parcel of land is dated 3rd August 2016. The demand letter states that plot no. 613 was created out of plot no. 215 which the appellant was shown in 1963. As already stated, the title for plot no. 613 was issued in the name of the respondent in 1985. The pertinent question is why the appellant never complained from 1985 and only awoke from his slumber in 2016. Further, save for a bare allegation that he was in occupation of the land, there was nothing to support this allegation. We note that his undated written statement in support of the claim contains 4 scanty paragraphs. It only reiterates what is contained in the demand letter and concludes as follows...

"I obtained the official search for LR Nyandarua /Ol Aragwai/613 and found that though the same is registered in the name of the defendant, it is indicated that it has been reserved for Muruguru Primary School. The said school has never been in possession of the said plot no. 613 and to the best of my knowledge it possesses another distinct parcel of land that is far from the said plot."

15. It is clear that the appellant's claim to the land is not supported by any credible evidence. Accordingly, we agree with the learned judge that there is no basis for cancelling the title in the name of the respondent. The evidence that was adduced is so weak and shaky and is easily blown away by the slightest wind. None of the grounds cited have met the threshold for this court to interfere with the learned judge's findings of fact as well as the law.

16. In conclusion, we find that this appeal has no merit. We dismiss it in its entirety with no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF MARCH 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR