Gichuki v Gichuki (Civil Appeal 269 of 2019)
[2024] KECA 54 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 54 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 269 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

FEBRUARY 2, 2024

BETWEEN

JOHN KIARIE GICHUKI ..... APPELLANT

AND

MARY WANGARE GICHUKI ..... RESPONDENT

(Being an appeal arising from the Judgment of the Environment and Land Court at Kitale (M. Njoroge, J.) delivered and dated 24th September 2018inE&LC Case No. 160 of 2006)

JUDGMENT

1. The appellant, John Kiarie Gichuki, is before us dissatisfied with the judgment of M. Njoroge, J in Kitale Environment and Land Court (E&LC) Case No. 160 of 2006 which ordered his eviction from a parcel of land measuring approximately 2 acres in Nyakinyua Mugumo Tree Co. Ltd Farm (hereinafter the suit property). Through a memorandum of appeal dated 15th November 2019, the appellant raises the following grounds of appeal:

    i. That the learned trial Judge erred in law and fact in entering judgment and ordering the eviction of the appellant from plot No. 1426 new share Numbers 677 and 678 on Nyakinyua Mugumo Tree Co. Ltd farm, and yet the respondent did not bring evidence to prove her case;

    ii. That the learned trial Judge erred in law and fact when he entered judgment in favour of the respondent who did not prove her case on the required standard;

    iii. That the learned trial Judge erred in law and fact when he failed to appreciate that the appellant was staying on a different plot from the one the respondent was claiming;

    iv. That the learned trial Judge erred in law and fact when he declared the appellant a trespasser on plot Number 1426 now new share numbers 677 and 678 there was totally no evidence to prove that the 3 plots were the same;

v. That the learned trial Judge erred in law and fact when he relied on the respondent's documents which were not authentic and thus reaching a wrong decision;

2. This matter was originated by a further amended plaint dated 9th December 2017 filed by the respondent, Mary Wangare Gichuki, who claimed that she was member number 1426 (new numbers 677 and 678) in Nyakinyua Mugumo Tree Co. Ltd (hereinafter

> "the company") and was allocated approximately 2 acres of land in the company's farm. Her case was that the appellant was a licensee on the said parcel of land as she had allowed him to till the suit property in the year 2000 but was in breach of the terms of the license. The respondent therefore prayed for a declaration that the defendant was a trespasser; an order of permanent injunction restraining the defendant, his agents/servants or any other person from entering, occupying or tilling the suit property; and, an order evicting the appellant from the suit property.

3. In his defence, the appellant denied the claim and averred that the respondent was his sister and it was their mother and not the respondent who bought shares in the company. He also deposed that the company land had not been sub-divided for the members and therefore there was no way the respondent could have known her acreage. The appellant further averred that the suit property was meant for him and he was the one who had all along been in occupation and not the respondent. Further, that the company being purely made up of women, their deceased mother had bought shares in the names of the respondent. The appellant consequently asserted his claim over the suit property.

4. At the hearing before the E&LC, the respondent called two witnesses in support of her case. She testified as PW1 and told the trial court that the appellant was her younger brother. Her testimony was that the appellant was occupying her 2 acres of land allocated to her by the company in respect of her two shares numbers 677 and 678. She stated that she had bought the 2 shares in the company in 1981 and each share was equivalent to 1 acre. Her testimony was that at the time of purchasing the shares she was taking care of both her mother and the appellant who was young. That in the year 2000, she permitted the appellant to stay on a smaller portion of the suit property who later sent her a letter demanding that she ceases to till the suit property. She stated that the documents the appellant had produced in court were forgeries and she had made a report to the police to that effect. She produced her share certificates, among other documents, as exhibits.

5. Wanjiru Chege Waithaka (PW2) testified that the respondent joined the company after paying KSh. 6,000 which translated to 2 acres and was issued with share certificates. She stated that despite the respondent's share certificates being issued recently, she had joined the company and made the necessary payments earlier. PW2 further testified that she was a director of the company and that other directors had since passed away. She denied knowing the people who signed the documents provided by the appellant.

6. The appellant testified in his defence as DW1 and did not call any witness. His evidence was that the respondent was his elder sister and their late mother came to the suit property in 1982 when they were both young and that he had stayed on the land since then. He stated that the respondent and his other brother ceased living on the suit property from 1987 until the time their mother passed away in 2000. According to the appellant, the suit property belonged to their mother who was a member of the company. He produced a share certificate signed on 14th July 1977 and a search certificate which showed that he was the registered owner of plot number 1803/300. He also produced a beacon certificate for the plot.

7. In a judgment delivered on 24th September 2018, the trial judge found that the share certificate produced by the appellant was in respect of only 1 acre of land hence was not in respect of the land he occupied. The learned Judge also found that the land allegedly owned by the appellant's mother was different from the suit property which belonged to the respondent. Finally, the learned Judge found that the respondent was the owner of shares number 677 and 678 (originally share number 1426) in the company and that the appellant was a trespasser on the suit property. He consequently allowed the respondent's claim.

8. This appeal came up for hearing on the virtual platform on 25th October 2023. Ms Munialo appeared for the appellant while Mr. Kraido represented the respondent. Ms Munialo relied on the submissions dated 24th June 2023 while Mr. Kraido relied on the submissions dated 23rd July 2023. They also undertook brief oral highlights of the filed submissions.

9. Ms Munialo started off by submitting on grounds 1,2,3 and 4 of the appeal and urged that the respondent had not proved her case as required by section 107 of the *Evidence Act*. Counsel submitted that there was no evidence to support the respondent's case that she had allowed or licensed the appellant to occupy her land or that the parcel occupied by the appellant belonged to her. According to counsel, the trial court erred in failing to consider her client's evidence that he was in occupation of a different parcel of land and not the suit property.

10. Moving to the 5th ground of appeal, counsel for the appellant urged that the respondent was under obligation to adduce further evidence to explain how she obtained the unsigned share certificates. Counsel relied on the case of *Munyu Maina v. Hiram Gathiha Maina* [2013] eKLR to submit that since it was the respondent's share certificates that had been challenged, it fell upon her to offer further explanation as to how she acquired ownership of the land. According to counsel, the failure by the respondent to tender an explanation led to the trial court placing reliance on documents whose authenticity was questionable. Counsel submitted that reliance on the unsigned share certificates led to an erroneous decision. She also submitted that the respondent did not prove that she had indeed bought the suit property. Counsel therefore urged us to allow the appeal.

11. Mr. Kraido started off by pointing out that the company was purely a women's affair and men held no shares or leadership roles. Counsel submitted that the respondent proved her case to the required standard of proof through her two witnesses. Counsel submitted that PW2 had clearly testified that the respondent had 2 shares while the mother of the disputants had 1 share hence the order of eviction was merited. Mr. Kraido also argued that if the appellant was occupying their mother's land, as he claimed, he could only have processed the title through a succession cause with the involvement of all the beneficiaries of her estate, the respondent included, but this was not the case.

    Counsel submitted that the appellant was dishonest and this Court should dismiss his appeal with costs and uphold the decision of the superior court.

12. This is a first appeal hence under Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 we are to independently re-appraise the evidence and draw our own conclusions. This mandate was explained in *Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

13. We have given due consideration to the record of appeal and submissions by the advocates for the parties. In our view the main issues for determination are whether the respondent is the lawful and bona fide owner of the suit property, and whether the appellant trespassed upon the suit property. The issue of costs will also be determined.

14. The first issue we consider is whether the respondent is the lawful and bona fide owner of the suit property. From the outset, it is important to appreciate that the only plausible proof of ownership of the suit property is the share certificates issued by the company. In dealing with this issue, we must recall the provision of section 107 of the *Evidence Act* which provides that:

> " 107. Burden of proof.
>
> 1. 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.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

15. The Court in *Antony Francis Wareham t/a AF Wareham & 2 others v. Kenya Post Office Savings Bank* [2004] eKLR addressed the burden of proof in civil cases as follows:

> "And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

16. In instances such as the one before us, proof of ownership will ordinarily be based on both documentary and oral evidence. The respondent must establish, on a balance of probabilities, that the suit property belongs to no one else but her. To support her ownership of the suit property, the respondent testified that she bought two shares from the company which led to her obtaining ownership of plots numbers 677 and 678. She also testified that she acquired each share at a cost of KSh. 3,000, money which she raised while working for her elder sister. In support of her case, she called PW2 who was 85 years old at the time she testified. The evidence of PW2 was that she was an official of company and that all the other officials had since died. She corroborated the respondent's testimony on how she acquired the shares. The appellant on the other hand lay claim on a different parcel of land which he claimed to have belonged to their late mother.

17. In our view, the evidence on record was sufficient to establish that it was, without a doubt, the respondent who owned the suit property. The appellant's main bone of contention is that the share certificates produced by the respondent were unsigned hence the respondent ought to have tendered further explanation on how she acquired unauthenticated documents. In this regard, we refer to the evidence of PW2 whose testimony that she was an official of the company was never challenged. Her evidence in support of the unsigned share certificates in possession of the respondent was not impeached and her evidence therefore erased any doubt as to the genuineness of the certificates.

18. We also find on record a copy of the police abstract as well as a letter from the Chief Kaplamai Location indicating that the respondent's share purchase receipts had been lost.

    Furthermore, there was a letter by one Muthoni Nganga dated 22nd May 2006 detailing the numbers on the receipts issued to the respondent. According to the evidence of PW2, Muthoni Nganga was a

director of the company and had passed away by the time the case was being heard. The directorship of PW2 and one Muthoni Nganga was further proved by the letter dated 12th February 2016 from the Registrar of Companies. This letter corroborates the evidence of PW2 as it confirmed that she was indeed a director of the company. We therefore decline the invitation by the appellant that we should find that the trial court erred in relying on the unsigned share certificates. We therefore agree with the finding of the trial court that the respondent was the bona fide owner of shares number 677 and 678, originally number 1426. On his part, the appellant produced share certificate number 241 in the name of one Wanjiru Gichuki. This certificate which was issued in 1977 was for 1 share. This evidence only served to confirm the testimony of PW2 that this particular share belonged to the mother of the litigants. This is the parcel of land upon which the litigants' mother was buried as per the testimony of the respondent.

19. Our finding above is fortified by the holding in *Chief Land Registrar & 4 others v. Nathan Tirop Koech & 4 others* [2018] eKLR that:

> " 87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are however cognizant that where the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. In a claim for declaration of title, as the instant case, the onus is on the Petitioners to satisfy the Court on the evidence produced by them that they are entitled to the declaratory orders sought."

20. The next issue is whether the appellant trespassed upon the suit property. The appellant's testimony was that he has never set foot on the suit property and that he stays on plot number 1803/300. He produced a land sale agreement dated 24th June 2015 between him and the company which was purportedly signed by James Ngukero, Aaron Miale and Joseph Mwangi Gichuhi as directors of the company. According to the already mentioned letter of the Registrar of Companies, the alleged signatories of the sale agreement produced by the appellant were not the directors or officials of the company. The appellant's assertion that he purchased the land is therefore untenable.

21. Further, the appellant's defence is inconsistent thus rendering his case unbelievable. On one hand he claims that he inherited plot number 1803/300 from their late mother, and on the other, he claims to have purchased it from the company. In his "Reply to Further Amended Plaint" dated 27th November 2017, the appellant, at paragraph 3, opened a third line of defence by stating that:

> " The defendant states that Nyakinywa Mugumo Tree Co. Ltd was purely a woman affair and men were not allowed to have shares and so the plaintiff's mother and who is also the defendant's mother, used the plaintiff's name to get a share for herself and that fact is very well known to the plaintiff."

22. It cannot therefore be stated with certainty what the appellant's defence is. This, notwithstanding, it is evident that the disputants' late mother only owned 1 share which was equivalent to 1 acre and not the 2 acres the respondent is claiming. Indeed, the appellant fails to prove the specific parcel of land on which he resides. When asked by the respondent's counsel why the land he occupied was bigger than one acre, the appellant muttered that he was not aware that 1 share was equivalent to 1 acre. It is therefore apparent that the evidence he tenders raises more questions than answers. We are therefore inclined to believe the respondent's case that the parcel of land on which the appellant resides is indeed her land. This was originally under share certificate number 1426 where later became numbers 677

and 678. Subsequently, and in consonance with our finding on the first issue, we conclude that the appellant is indeed a trespasser on plot numbers 677 and 678.

23. In view of our forgoing findings, this appeal is for dismissal.

The grounds of appeal raised by the appellant are without merit. We do not find any error on the part of the trial Judge and we dismiss the appeal in its entirety.

24. The final issue for determination is the question as to who should bear the costs of this appeal. Much as we appreciate that the appellant and the respondent are siblings, this appeal has been dismissed in its entirety and there is no reason for departing from the rule that costs follow the event. In the circumstances, the costs of this appeal shall be borne by the appellant.

25. In brief, the appeal is dismissed with costs to the respondent.

26. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR