Munene v Konje & 4 others (Civil Appeal 123 of 2017)
[2024] KECA 1066 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 1066 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 123 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

FEBRUARY 2, 2024

BETWEEN

UMESH MUNENE ..... APPELLANT

AND

ROSE EVERYLNE KONJE ..... 1ST RESPONDENT

COMMISSIONER OF LANDS ..... 2ND RESPONDENT

DIRECTOR PHYSICAL PLANNING ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

MUNICIPAL COUNCIL OF MERU ..... 5TH RESPONDENT

(Being an appeal against the decree and judgment of the Environment and Land Court at Meru (E.C. Cherono, J.) dated 27th June, 2017 in ELC Appeal No. 23 of 2001)

JUDGMENT

1. This is a second appeal emanating from the judgment of the Environment and Land Court (ELC) Meru in Appeal No. 23 of 2001 which was an appeal from the judgment of the Chief Magistrate's court (Hon. R.M. Mutitu CM) in Meru CMCC No. 269 of 1997 delivered on 26th January, 2001. It was the appellant's claim as pleaded in the amended plaint dated 31st October, 1997 that he was the legal proprietor of residential plot number T.202 situated at Sheikh Saidi Estate in Meru township and that he had done extensive development on the property, including building three residential houses.

2. He claimed that the 5th respondent had colluded with the other respondents to relocate plot T.436 to his Plot No. T202. It was his prayer that he be granted an order directing the 2nd respondent to return and or relocate his plot on the ground where his residential house and other developments were situated; an order requiring the director of physical planning (third respondent) to survey his Plot No.

T.202 according to the boundaries and developments and a permanent injunction restraining the 1st respondent from interfering with his plot.

3. Judgment in the trial court was entered in favour of the 1st respondent against the appellant herein. Aggrieved by this decision he filed an appeal to the ELC. The appeal as contained in the memorandum of appeal dated 15th February, 2001 was premised on 10 grounds. In summary, the appellant contended, inter alia, that: the learned Judge erred in law and fact in dismissing his case; failed to take into account his evidence by not considering his witnesses' evidence and exhibits produced in court; failed to analyse and properly evaluate the evidence hence arriving at the wrong decision; failing to interpret the correct position of Plot No. T. 202 as per its development; failing to consider that the Commissioner of Lands failed to testify in the case; dismissing the claim when the Physical Planner supported his case.

4. Upon considering the appeal which was canvassed by way of written submissions, the learned Judge held that the appellant had not produced evidence that indeed he was the owner of the disputed plot. The appeal was dismissed with costs.

5. Aggrieved by this decision, the appellant moved to this Court on second appeal raising the following grounds: That the learned Judge erred in law;

   a) In the manner he evaluated the evidence and therefore arrived at the wrong decision.

   b. In misconstruing and misapprehending evidence by proceeding on wrong principles and therefore arriving at the wrong finding.

   c. Dismissing the appeal which had merits and therefore occasioned a miscarriage of justice."

   The appeal was canvassed by way of written submissions and minimal oral highlighting on the 31st October, 2022. Learned counsel Mr. Muia appeared for the appellant, while Ms. Nelima and Mr. Ringera appeared for the 1st respondent and the 5th respondent respectively. There was no appearance by the Attorney General (4th Respondent).

6. The appellant submitted that the superior court failed to evaluate the evidence of the 3rd respondent's witness, Dan Kiambi Kiara, the District Physical Planner of Meru Central District, tendered on 23rd November, 1999. It was his evidence that Plot No. 202 was indicated on a different site on the ground and the same was required to be amended. Further, that the occupation of the land has been since the colonial period and they have all resided on the land. Had the court evaluated this evidence, it could not have arrived at the impugned decision. Counsel referred to the decision in Mwangi –vs- Mwangi 1986 KLR 328 in support of his assertion that the rights of the appellant were clear since he had been in possession and occupation of the land. He urged that the appeal be allowed.

7. On her part, Miss Nelima submitted that Dan Kiambi Kiara the District Physical Planner Meru Central District was in- charge and had custody of all documents and maps. He produced a physical development plan for Plot No. T 202 and a map dated 14th July, 1973. It was his evidence that the larger map showed Plots Nos. T. 202 and 436 and between the two plots was a road. Plot No. T. 202 was on the right side of the road on the northern side while Plot No. 436 was on the southern part of the road. The two plots were opposite one another. He pointed out that Plot No. 202 was where it was supposed to be on the records but had been developed in a different place on the ground from where it was on the map. She urged the Court to find that the evidence of the Physical Planner was not to be taken in isolation. Further that the appellant had not produced any evidence in support of his ownership of the plot other than minutes on how the land was transferred from his mother to himself. Counsel urged that the learned Judge analysed the evidence in its totality and reached the correct verdict and therefore the appeal should be dismissed with costs.

8. Mr. Ringera on the other hand informed the Court that the Municipal Council of Meru would not file any written submissions since the dispute was between the appellant and the 1st respondent.

9. This being a second appeal we are alive to the duty of this Court which is to determine matters of law, and not to interfere with the findings of fact by the two courts below, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered. See *Stanley N. Muriithi & another –vs- Bernard Munene Ithiga (2016)*eKLR and Kenya Breweries Limited –vs- Godfrey Odoyo (2010)eKLR.

10. We have carefully considered the record, the grounds of appeal, both oral and written submissions by the parties and the relevant law. The point of law that arises is whether the ELC failed to properly carry out its duty as a first appellate court. In carrying out its duty, the ELC had a duty to be guided by the principles set out in the case of *Abok James Odera t/a A.J Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates (2013)* eKLR as;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely; to re-evaluate, re-assess and re-analyze 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. See the case of Kenya Ports Authority v. Kustron (Kenya) Limited (2009) 2EA 212"

11. We need to determine whether the ELC followed the principles set out above in considering the appeal before it. The appellant faults the learned Judge for failing to properly re-analyse and re-consider the evidence on record in its entirety hence arriving at the "misconstrued" finding that the 1st appellant had not produced evidence that he was the owner of the disputed plot and that the learned Magistrate had properly evaluated the evidence adduced by the witnesses and arrived at a proper assessment and decision.

12. We have perused the record of appeal. We have observed that the learned Judge re-analysed all the evidence adduced before the trial court and meticulously went through the evidence of each witness before arriving at his conclusion. The learned Judge agreed with the trial court and gave reasons for so doing. We cannot reopen the concurrent findings of fact by the two courts below and start our own analysis unless, as stated earlier, we have good reason to do so.

13. As found by both courts below, the two plots, Nos. T. 202 and T. 436 were two separate plots, both on paper and on the ground. The trial Magistrate made a site visit and confirmed the position of the plots on the ground, which position was also confirmed by a Mr. Muthomi, the representative of the Physical Planner who visited the site. The trial Magistrate and the learned Judge held that the appellant's allegations that Plot No. T.436 was imposed on Plot No. T. 202 was incorrect. The Physical Planner confirmed that what the appellant claimed to be Plot No. T.202 on the ground was actually Plot No. T.436 which belongs to the 1st respondent.

14. The two courts below also found that the appellant had failed to prove how the plot in question was allocated to his mother, who had allegedly gifted it to him. All he had were the receipts issued for rent payments and minutes from the Municipal Council. It was also an observation by the trial magistrate that there was a possibility that since the appellant and his mother never had the plot surveyed, then they could have developed the wrong plot on the ground.

15. On the other hand, the 1st respondent who bought her plot at a public auction had it surveyed. She was issued with a certificate of lease on 13th December, 1996 for her plot, which has since been renumbered as Meru Municipality/Block 11/343.

16. From the foregoing, we find no basis for interfering with the concurrent findings of facts from the two courts below. We also find that there are no other issues of law arising for our determination. Accordingly, we find this appeal devoid of merit and dismiss it with costs to the 1st respondent.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL