Mohamed v Sheikh (Civil Appeal 14 of 2019)
[2024] KECA 1211 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1211 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 14 OF 2019

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

MAAILIM IBRAHIM MOHAMED ..... APPELLANT

AND

MADHEY AHMED SHEIKH ..... RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Garissa (Cherono J.) dated 24th July 2018 in Garissa ELC Appeal No.5 of 2017 formerly Embu HCCA No. 14 Of 2011)

JUDGMENT

1. The facts of the dispute leading to this appeal as discerned from the record of appeal are fairly simple, clear, and straightforward. Maalim Ibrahim Mohamed, ("the appellant"), filed suit in the Senior Resident Magistrate's Court at Wajir seeking, inter alia, injunctive orders against Madhey Ahmed Sheikh ("the respondent"), and other co-defendants from encroaching, erecting any building or shanties and or causing any acts of waste on land parcel LR. No. 13607/209 "the suit property" situate in Wajir town; and an order against the respondent and co-defendants to remove themselves voluntarily from the suit property or they be forcefully removed therefrom. The basis of the appellant's suit was that he was the registered proprietor of the suit property. However, on diverse dates, the respondent and the co- defendants had, without any colour of right or consent of the appellant, trespassed on the suit property and remained thereon and had refused to vacate despite several entreaties by the appellant. Served with the suit papers, the respondent and the co-defendants filed a joint statement of defence denying the claims and allegations by the appellant. Indeed, their case was that they were in lawful occupation of the suit property.

2. Following a full hearing on merit, the trial court returned a verdict in favour of the appellant and granted the prayers sought in the plaint.

3. Aggrieved by the decision, the respondent filed an appeal in the Environment and Land Court, "ELC" at Garissa on grounds that the trial court erred in law and fact in: finding that the appellant was the registered proprietor of the suit property; disregarding the respondent's defence and especially that he also had title to the suit property; failing to make a determination on the authenticity of the letters of allotment; disregarding the respondent's defence of adverse possession; failing to concisely state the issues for determination and the determination thereof; failing to consider that the respondent had substantially developed the suit property; and finally, crafting a judgment that was unsupported by material before the court.

4. In its judgment delivered on 24th July 2018, the ELC allowed the appeal and set aside the judgment and decree of the trial court on the basis that the respondent had demonstrated that he had acquired the suit property by way of adverse possession. The appellant was aggrieved by the judgment and decree of the ELC and hence filed this second, and, perhaps, last appeal.

5. The grounds of appeal raised were that the learned Judge erred in law and misdirected himself: when he considered new issue of adverse possession that had not been pleaded by the appellant or the respondent; failed to analyze, contextualize and appreciate the evidence adduced; failed to address the issues raised holistically; failed to consider the evidence on record as regards the registered proprietor of the suit property; invalidating and cancelling the appellant's title to the suit property without following the provisions of the law; and in failing to consider at all the submissions of the appellant. The appellant thus sought that the judgment and decree of the ELC be set aside in its entirety, and the judgment and decree of the trial court be reinstated.

6. At the hearing of the appeal, the appellant was represented by Mr.Amanya, learned counsel, but there was no representation from the respondent though served with the hearing notice. Similarly, no written submissions were filed by the respondent. Counsel for the appellant opted to rely entirely on his written submissions. He submitted that the issue of adverse possession was never pleaded or raised in the respondent's defence, nor was it raised in the trial court and evidence led in support thereof. Counsel relied on the cases of Galaxy Paints Company Limited vs. Falcon Guards Limited (1999) eKLR and Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3, to submit that a court cannot entertain an issue outside the pleadings. That the respondent never pleaded that he acquired the suit property by way of adverse possession in the trial Court. Therefore, any evidence that did not flow from the pleadings ought to have been disregarded by the ELC. That as per the provisions of section 38(1) of the *Limitation of Actions Act*, the respondent ought to have filed a claim for adverse possession in the ELC and or a counterclaim in the suit.

7. That as a first appellate court, the jurisdiction of the ELC was to revisit the evidence on record from the trial court, re-evaluate it and reach its own conclusion on the issues in contention. Counsel submitted that the ELC completely failed in this task. That in the trial court, the respondent had claimed that he was allocated the suit property in 1994 by Wajir County Council. The appellant however was registered as the proprietor of the suit property in 1993. That the appellant produced several correspondence with the concerned authorities culminating in the transfer and registration of the suit property in his name on a leasehold for a term of 99 years from 1st August 1993. On the other hand, the respondent did not tender any evidence in support of his purported ownership of the suit property. In the premises therefore, it was submitted, the court, in considering the appeal before it, should have properly re-examined and re-evaluated the evidence before the trial magistrate to determine whether or not the learned trial magistrate arrived at the correct decision taking into account the totality of the evidence. Had the ELC done so, it would have arrived at no conclusion other than upholding the trial court's decision, counsel submitted.

8. It was counsel's further submission that the ELC erred in not appreciating the sanctity of title considering that there was no evidence to suggest that it was fraudulently acquired. Reliance was placed on the case of Gitwany Investment Limited vs. Tajmal Limited & 3 Others [2006] eKLR, for the submission that ownership of property is not proved by mere word of mouth; it can only be demonstrated through documentation, which the appellant adduced before the trial court.

9. Relying on the case of Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR, the appellant submitted that the respondent willfully misled the first appellate court into making a finding that he was entitled to the suit property by way of adverse possession yet the law was clear on how property can be acquired through adverse possession, which threshold the respondent did not meet. Mr. Amanya went on to submit that the ELC erred when it invalidated the appellant's title without the respondent laying the basis or tendering any evidence to justify the invalidation. Counsel submitted that the law is protective of titles and provides for two instances under section 26 of the *Land Registration Act* where titles can be challenged and which is on the grounds of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. He relied on the cases of Esther Ndegi Njiru & Another vs. Leornard Gatei [2014] eKLR and Gichinga Kibutha vs. Caroline Nduku [2018] eKLR to submit that none of the above scenarios were demonstrated. Ultimately, counsel urged that the appeal be allowed with costs.

10. This is a second appeal and we are alive to our mandate as a second appellate court to confine ourselves to matters of law only, unless it is shown that the two courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See Kenya Breweries Ltd vs. Godfrey Odoyo [2010] eKLR and Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR.

11. Going by the foregoing remit, we have to determine whether the ELC erred in law in overturning the decision of the trial court solely on the basis of adverse possession. The appellant has faulted the said court for introducing the doctrine of adverse possession on appeal, and that the defence in the trial court never raised that issue at all. Instead, the joint defence was a mere denial of the appellant's claims. This defence according to the appellant, did not allude at all to adverse possession. That had the respondent intended to pursue that line of defence, he ought to have raised it once served with the suit papers. We entirely and totally agree with the above submissions.

12. The short and precise statement of defence filed by the respondent and his co-defendants was in these terms:

Defendant Written Statement Of Defence

1. Save What Is Expressly Admitted in the plaint, the defendants jointly and severally deny each and every allegation contained in the plaint as though the same was set out and traversed seriatim.

2. The 1st defendants admits the descriptive parts of paragraphs one (1) and two (2) of the plaint save for address of service for the purposes of this suit which shall hence forth be care Maryan Osman Warfa post office Box number 319 Wajir.

3. The defendant avers that the contents in paragraph *3*. 4,9 and 10 of the plaint are admitted.

4. The 2nd and 3rd defendants admits the descriptive parts of paragraphs 1, 2, 3, 4, 9 and 10 of the plaint save for address of service which shall henceforth be care o! post office Box number 273, Wajir.

5. The defendants jointly and severally deny each and every allegation contained in paragraphs 5, 6, 7 and 8 of the plaint and puts the plaintiff into a strict proof thereof.

6. The defendants jointly and severally pray this Honourable Court to dismiss the plaintiff's suit with costs.

13. We note that the defence was never amended nor is there any counterclaim which raises or speaks to adverse possession.

14. It is trite law that the court will not grant a remedy which has not been pleaded and prayed for, and that it will not determine issues which the parties have not pleaded. See Alba Petroleum Limited vs. Total Marketing Kenya Limited [2019] eKLR. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. It is for this purpose that each party is bound by its own pleadings. For this very reason, a party cannot be allowed to raise a different case from that which it had pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial, as each knows the other's case as pleaded.

15. The court, too, is bound by the pleadings of the parties. It's duty is to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. The court would be out of order were it to pronounce on any claim or defence not made out by the parties as that would be tantamount to descending into the realm of the dispute and ceasing to be an independent arbiter. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and would amount to denial of justice.

16. The need for the parties and the court to stick to the pleadings and not meander outside them was succinctly expressed as follows by the former Court of Appeal for Eastern Africa in Gandy vs. Caspar Air Charters Ltd [1956] 23 EACA, 139:

> " [T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"

17. In Galaxy Paints Co Ltd vs.Falcon Guards Ltd (supra), this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

18. The exception to the rule, however, arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. In the case of Odd Jobs vs. Mubia [1970] EA 476, the principle was stated thus:

> " [A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision." (See also Vyas Industries Ltd vs. Diocese of Meru [1982] KLR 114)."

In this appeal, the record shows that the issue of adverse possession was never pleaded or raised, nor was evidence led in that regard by the parties and left to the court for determination. The issue was

therefore never before the trial court. It only popped up in the grounds of appeal in the ELC and in the respondent's written submissions thereat. Surprisingly, the entire judgment of the ELC solely turned on this aspect, which was an error on the part of the ELC. The issue having not been raised and canvassed in the trial court, it could not have formed a ground of appeal at all, nor could it have been the basis of the respondent's extensive submissions.

19. Having said as much, we are satisfied that the ELC erred by turning to the issue of adverse possession, which was neither raised, pleaded nor evidence led in support thereof, to found its judgment upon.

20. In allowing the appellant's claim, the trial court stated thus:

> " I have fully considered the evidence herein together with the documents placed before me. The evidence tendered by the plaintiff clearly shows that the plot in question was allocated to him in 1993 and that the allocation was subsequently ratified by a grant of lease for 99 years by the commissioner of lands. This was way back in 1996.
>
> It is clear to my mind that the plaintiff's title to the suit property remains unshaken....
>
> In the upshot, I find that the plaintiff proved his claim against all the defendants on a balance of probabilities ....."
>
> We entirely agree with and endorse the above finding and conclusion. It is abundantly clear from the record that the appellant was the registered proprietor of the suit property and had all title documents to it, which had not been impugned. The respondent and his co-defendants were therefore trespassers on the suit property, as correctly found by the trial court.

21. Ultimately, we find that this appeal has considerable merit and we accordingly allow it. The consequence is that we set aside the judgment and decree of the ELC dated 24th July 2018 and substitute therefor an order dismissing the respondent's appeal in the ELC with costs. The appellant will also have costs of this appeal.

22. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR