Mavumba v Wainaina (Civil Appeal E001 of 2022)
[2024] KECA 1804 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1804 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E001 OF 2022

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

DECEMBER 20, 2024

BETWEEN

RAMADHAN MASHUA MAVUMBA ..... APPELLANT

AND

GEORGE KAMAU WAINAINA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (Yano, J.) dated 2nd June 2021) in ELC Case No. 185 OF 2012)

JUDGMENT

1. The main dispute in this appeal revolves around the ownership of residential Plot No. K PDP 140 KWL 17.2007 also known as Kwale Township, Golini, measuring 40 by 60 feet (the suit property).

2. A synopsis of the facts leading to the dispute is that the appellant, Ramadhan Mashua Mavumba, commenced suit against the respondent, George Kamau Wainaina, by way of a plaint dated 4th September 2012, which was later amended on 21st December 2013 before the Environment and Land Court (the ELC). The appellant sought orders that: a permanent injunction do issue restraining the respondent by himself, his servants or agents, or otherwise whosoever from entering or using the suit property; a declaration do issue that the respondent unlawfully and wrongfully entered and trespassed into the suit property; damages be awarded for wrongful entry into, occupation and possession of, and trespass on, the suit property; the respondent do vacate the suit property; costs of the suit and interest thereon be awarded at court rates; and any other relief the court deemed fit to grant.

3. The appellant pleaded that he was the registered allottee and/or beneficial owner of the suit property, having purchased it from one Rachael Taabu Kauli on 3rd July 2010 by way of a sale agreement. He stated that a transfer was signed by the Clerk of the then Kwale Town Council as required by Traders and Market By-Laws, 2003, and that he paid Kshs. 4,000/= as transfer fees to the defunct Kwale Town Council.

4. The appellant claims to have applied for the development of the suit property on 2nd August 2010 and paid Kshs. 5,000/= on 19th August 2010 for the building plan, and a further Kshs. 3,700/= on 23rd August 2010 for the approval of the building plan. He further averred that he had been paying the land rates for the suit property.

5. The appellant went on to plead that, notwithstanding the aforementioned payments, the respondent wrongfully entered the suit property, took possession thereof and brought building materials thereon and started construction. He particularised the loss and damage occasioned by the respondent's actions as being denied/deprived of the usage of the suit premises despite having obtained the requisite approvals in preparation to start building. To further reinforce and/or rubberstamp his assertion over the ownership of the suit property, the appellant instructed the Kwale Town Clerk and Surveyor on 3rd August 2012 to conduct a survey over it and, pursuant thereto, it was concluded that, according to Plan Ref. No. 444 140 KWL 17.2007, the suit property allegedly belongs to him (the appellant).

6. Opposing the suit, the respondent filed a defence and counterclaim as a single pleading. We have noted that the amended defence and counterclaim running from pages 212 - 213 of the record of appeal is incomplete. We are unable to pick out the date of the amendment. However, from the judgment of the trial court, it was noted that the defence and counterclaim was filed on 3rd October 2012 and later amended on 20th March 2014.

7. The respondent stated that he is the lawful and/or beneficial owner of Plot No. K 140 KWL 10.2002/K, having been allotted to him by the then Town Council of Kwale on 1st March 2005. According to the respondent, the appellant had acquired the suit property through fraud, which fraud he particularised to constitute: change of documents and records so as to assume ownership of the suit property; illegal transfer of the suit property to himself with the intention of dispossessing him (the respondent); and illegal re-survey of the suit property without his knowledge and authority.

8. In his amended counterclaim, the respondent reiterated that he was the owner of the suit property; that he had never transferred it to anyone; and that he has been enjoying quiet possession thereof since the year 2005. He prayed for an order of permanent injunction against the appellant and any other person acting under his instructions from dealing with the suit property in any manner; a declaration that the appellant unlawfully entered, occupied, possessed and trespassed on to the suit property; and damages for wrongful entry into, occupation and possession of, and trespass onto, the suit property by the appellant.

9. In support of his case, the appellant testified as PW1 and called two other witnesses. He testified that he is the owner of the suit property, having purchased it from one Rachael Taabu Kauli pursuant to a sale agreement executed on 3rd July 2010; that the suit property was allocated to him by the then Kwale Town Council through a letter dated 6th July 2010 and a transfer subsequently effected; and that he proceeded to pay the necessary charges, being Kshs. 400/= for the transfer letter, Kshs. 3,700/= for plan approval and Kshs. 5,000/= for approval of building plans. He adduced in evidence receipts for the rates which he had allegedly been paying for three years.

10. It was the appellant's testimony that, upon the suit property being surveyed on 3rd August 2012, it was affirmed that it belonged to him; and that the respondent's allocation letter dated 22nd February 2005 was for PDP No. 140 KWL 10. 2002K at Block 4 measuring 0.044 Ha for which he paid Kshs. 15,500/=, while his plot is 140/KWL/005K Block 5 measuring 40ft by 60ft, for which he paid Kshs. 10,700/=. In cross-examination, he maintained the assertion that his property and that of the respondent were different; and that he paid rates for his property from the year 2006 - 2021. In re-examination, he stated that the suit property was allotted to him in the year 2005, and that, at that time, it was vacant.

11. The appellant's witnesses were: Hussein Said Garishi, a businessman who testified as PW2, and Joel Odhiambo, a Land Surveyor, who testified as PW3. We further note that both the written statements of PW2 and PW3 are not on record.

12. PW2 adopted his witness statement dated 4th September 2012 and filed in court on 2nd October 2012 as his evidence in chief. In cross-examination, he stated that the plot measures 50 by 50 metres, and that he had never lived on it.

13. PW3 testified that he is a Land Surveyor by profession, and that he had worked with the Survey of Kenya for 20 years since 1988; that he was the Provincial Surveyor, Coast Province, from 2003 to 2005; and that he resigned in the year 2008 at the position of Assistant Director of Survey, after which he went into private practice.

14. PW3 testified that, in June 2018, the appellant instructed him to visit a site in Kwale following a court order, and that he was required to survey the site and find out how it related to plot on PDP 140/KWL/17/2008K in Block 5 and plot on PDP 140/KWL/10/2002K in Block 4; that he did the survey as instructed; that he based his survey on a survey of Huduma Centre and another on an adjacent plot owned by Kenya National Library Services (KNLS), both of which were surveyed in 1997; that he concluded that the two plots were distinct and not adjacent to each other; and that they were separated by three plots in between.

15. In cross examination, he stated that Block 5 had been surveyed prior to his visit since he found beacons on it; that there were developments thereon; that the plot measured 0.027 Ha; and that he did not survey the second plot, which looked bigger than the one he surveyed. In re-examination, he stated that a Part Development Plan (PDP) is a whole piece of land which is earmarked for subdivision at a later stage; that a plot is what results from the breaking down of blocks through sub-division of blocks and transfer; that the PDP of 2002 was not drawn into the blocks so that what is being referred to as Block 4 thereon is only a part of that block, and that some other areas of the same block had been left out.

16. On his part, the respondent testified as DW1. His testimony was that he was allocated the suit property by Kwale Town Council on 22nd February 2005, and that it was vacant at that time. He stated that he was shown the beacons that demarcated the property; that he intended to fence off the plot and, in preparation, he deposited flush stones for the construction of a perimeter wall; that, unfortunately, the stones were stolen; that the appellant claimed that he also owned the plot; that the appellant accused him of trespass on the plot and, as a result, a criminal complaint was filed with the police and he was charged with the offence of trespass; that he had all the documents showing how he was allocated the land and paid all necessary fees; and that he did not know a person by the name of Rachael Taabu from whom the appellant claimed to have bought the plot.

17. In cross-examination, DW1 stated that the allocation letter dated 22nd February 2005 referred to Plot No. 140 KWL/10/2002/K; that there are two plots with letter 'K' as their title and two others with letters 'L' and 'M' on their title; that, after allocation, he immediately took possession of the suit property and, in about a year, he deposited some stones for purposes of development, but that they were stolen; and that his plot measures 0.044 Ha.

18. In re-examination, he stated that he prepared a survey report but could not recall where it was; that it was not true as claimed by the appellant that there were two different plots on 'K'; and that, in fact, the appellant did not own the suit property, which belonged to him (the respondent).

19. After considering the evidence and the case put forth by each party, the learned Judge (Yano, J.) rendered his judgement on 2nd June 2016. He observed that, from the evidence on record, there are two

letters of offer for the suit property: one was issued to Rachael Taabu Kali dated 29th December 2005 and the other to the respondent dated 22nd February 2005; that Rachael's letter of offer came about 9 months after the respondent had paid for the suit property; and that, therefore, the suit property ceased to be available for allocation to Rachael once the same was paid for.

20. The learned Judge further noted that, according to the letter of offer, when the suit property was purportedly allocated to Rachael, she was required to accept the offer by making some payments within 30 days, that is on or about 29th January 2006. Instead, the property was paid for some 4 years later. According to the learned Judge, therefore, this was a case of double allocation of the suit property; that much as the appellant produced documents showing allocation to the person he later purchased from, it was evident that the suit property had already been allocated to the respondent, and that it was doubtful that it was thereafter available for allocation to another person.

21. In view of the foregoing, the learned Judge was not satisfied that the appellant had proved his case on a balance of probabilities and accordingly dismissed the suit with costs. The respondent's counterclaim was upheld, save that damages were not awarded in the circumstances of the case.

22. Dissatisfied with the judgment of the ELC, the appellant proffered the instant appeal which is premised on four grounds, which we replicate as hereunder:

    a. that the learned Judge erred in law and in fact in dismissing the plaintiff's suit;

    b. that the learned Judge erred in law and in fact in ignoring the evidence of the plaintiff, his witnesses and submissions;

    c. that the learned Judge erred in law and in fact by ignoring the findings of the survey report which had established the fact that there were two distinct parcels of land with its own dimensions and acreage; and

    d. that the learned Judge erred in law and in fact in holding that there was double allocation of the suit property when the evidence adduced showed the existence of two distinct parcels of land and not one parcel of land.

23. The appellant is thus urging us to set aside the judgement and decree of the trial court delivered on 2nd June 2021; dismiss the respondent's counterclaim; and award him the orders as prayed in the plaint.

24. We heard this appeal virtually on 16th September 2024. Learned counsel Mr. Shujaa appeared for the appellant, while learned counsel Miss Waithera Kimani holding brief for Mr. Njiru appeared for the respondent. Both counsel opted to rely on their respective submissions without highlighting them. The appellant's submissions are dated 23rd January 2023, while those of the respondent are dated 14th July 2023.

25. The appellant condensed all the four grounds of appeal and addressed them as one, which is that: the learned Judge failed to properly evaluate, and ignored, the evidence adduced by the parties thereby arriving at an erroneous decision. It was submitted that the appellant adduced evidence to demonstrate that he purchased the plot from the original allottee, one Rachael Taabu Kauli; and that, in proof thereof, he adduced the original letter of allotment issued to Rachael Taabu Kauli and a letter showing transfer of the plot to himself by the Town Council of Kwale, revenue receipts paid to the Town Council on account of the allotment and the development plans.

26. It was further submitted that the land surveyor produced a survey report showing the location of each of the parties' plots; and that the finding by the trial court that the suit property was not available for allocation to Rachael was a misapprehension of evidence by the learned Judge, more so, on the

assumption that the appellant's plot was one and the same plot owned by the respondent contrary to the evidence on record.

27. The appellant contended that, according to the evidence on record, his plot is known as Plot No. K PDP 140 KWL 17.2007 measuring 0.027 Ha, while the respondent's plot is known as 140.KWL.10.2002/K measuring 0.044 Ha. He emphasised that the two plots are situated at different locations, being that his is in Block 5 while of the respondent is in Block 4, and that the two are not adjacent to each other; and that the learned Judge erroneously assumed that the plots were one and the same property and that, therefore, his finding that this was a case of double allocation had no basis.

28. On the part of the respondent, it was submitted that he applied to Kwale Town Council to be allocated the plot in 2004 and that, by a letter dated 22nd February 2005, the plot was allocated to him; and that, as a consequence, it ceased to be available for subsequent allocation to any other person.

29. The respondent contended that the plot was subjected to double allocation; and that, the fact that the appellant purchased the plot from one Franciso Kauli, a former Town Clerk and a relative to Rachael Kauli, smacks of fraud and abuse of office.

30. The respondent further contented that there was no evidence that Rachael accepted the letter of offer dated 29th December 2005 by paying Kshs.10,700 within 30 days as required; and that it is suspect that the sale agreement was entered into on 3rd July 2010, 3 days before payment of the allotment fees as a form of acceptance of the offer made on 29th December 2005.

31. According to the respondent, Blocks 4 and 5 were introduced by the County Surveyor; that the Surveyor stated that Plot K owned by the respondent refers to a different plot, and not the one claimed by the appellant; that the appellant failed to demonstrate how the plot was allocated to the party whom he alleges sold to him; that it was clear that he (the respondent) was the first owner of the plot as allottee in the year 2005; and that the appellant's alleged ownership is tainted with fraud and illegality.

32. We have considered the grounds of appeal, the submissions by the respective counsel, the authorities relied upon and the law. This being a first appeal, our mandate is to analyze and re-assess the evidence on record and reach our own conclusions. In doing so, we must bear in mind that we did not have the benefit of seeing and hearing the witnesses testifying and therefore have the advantage of assessing their demeanour for which we must give due allowance.

33. On the mandate of a first appellate court, this Court in Highway Developers Limited vs. West End Butchery Limited & 6 Others (2015) eKLR, while citing the case of Selle vs. Associated Motor Boat Co. (1968) EA p.123, held that:

> ... this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

34. Further, the predecessor of this Court, the then Eastern Africa Court of Appeal, in stated as follows:

> A court should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice"

35. Mindful of our mandate as spelt out above, and having re- appraised ourselves with the evidence tendered before the trial court, we have deduced that the main issue falling for determination is whether

the suit property was lawfully allotted and transferred to the appellant. The answer to this question lies in the history of the original allocation of the suit property. It is common ground that the suit property was allotted by the defunct Kwale Town Council in the 2000s.

36. There are two competing claims over the suit property. One is by the appellant, who alleges to have purchased it from one Rachael Taabu Kauli by way of a sale agreement dated 3rd July 2010. The appellant asserted that Rachael was allocated the suit property by the defunct Kwale Town Council on 29th December 2005. The second claim is by the respondent, who claims that he was first in time to acquire the suit property, having likewise been allotted the same by Kwale Town Council by way of a letter dated 22nd February 2005, pursuant to which he paid the rates as required.

37. In that regard, the decision of M'Ikiara M'Mukanya & Another vs. Gilbert Kabere M'Mbijiwe (1983) KECA 121 KLR by this Court is instructive and relevant to the circumstances of this case. The Court held that where there exists a double allocation of land, the first allocation prevails, and that there is no subsequent power to allot the same property. The Court pronounced itself thus:

> " Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property."

38. The respondent hinges his proprietorship to the suit property on the letter dated 22nd February 2005 from the then Kwale Town Council addressed to him. He was offered a grant over Plot No. 140.KWL.10.2002/K, which occupies an area of 0.044 Hectares. The terms and conditions therein were the payment of Kshs.12,000 as the stand premium and annual rent of Kshs.3,500, making a total of Kshs.15,500 within 30 days from the date of the letter, failure to which the allocation would be deemed to have lapsed. The respondent further produced receipts confirming that he paid the amount demanded by the Council on 1st March 2005.

39. On the other hand, the appellant traced his ownership of the suit property to Rachael, who was supposedly the original owner. Rachael is said to have paid a total of Kshs.14,700 on 6th July 2020 to the Council as allotment, survey, planning, application and transfer fees for Plot No. K. We once again observe that the letter dated 29th December 2005 by which it is asserted that Rachael was allocated the plot did not make its way into the record of appeal. We are unable to examine it and come to our own conclusion.

40. However, taking cue from the findings of the learned Judge concerning the two letters of offer, he made a critical observation that the letter of offer to Rachael came 9 months after the respondent had paid for the property. And this cannot be disputed as there are a whole 9 months between 1st March 2005 and 29th December 2005. In the circumstances, we are unable to upset the findings of the trial court that the suit property was therefore not available for allocation to Rachael as at 29th December 2005.

41. The next question we must ask ourselves is whether the findings of the surveyor (PW3) from his report can salvage the appellant's case. The conclusion by PW3 was that Plot No. 140/KWL/17/2007 K Block 5 and Plot No. 140/KWL/10/2002 K Block 4 were distinct. It is noteworthy that the numbers in the offer letters are just but allotment numbers which can vary at any time depending on when the allotment was done. The surveyor basically referred to the allotment numbers whilst allegedly distinguishing 'the two plots'. That is how he arrived at the conclusion that plot No. K on PDP No. 140/KWL.10/2007 Block 4 belonged to the appellant and was distinct and separate from plot No. K on PDP No. 140/KWL.10/2007 Block 4 belonging to the respondent.

42. Of paramount importance to note is that PW3 did not in actual fact re-survey the land on which he asserted that the two plots stood, so that the two numbers would have been said to be as a result of official surveying of land. We do not say this in vain as, in his evidence, he was categorical that he found beacons on one of the plots and never bothered to survey the second plot. This is what he said in cross examination:

> " Block 5 had been surveyed because I found beacons on the ground. The developments on page 17 are on Block 5. The acreage of the plot I surveyed is 0.027 Ha approximately. I went to both plots but I did not survey both..... The other plot looked bigger than the one I surveyed but they are separate..."

43. Ultimately, the fact that the appellant's plot measures 0.044 Ha. is a testament that PW3 did not visit or survey the land on which it stood. This is vindicated by his testimony that the other plot was bigger than the one belonging to the appellant, which is what he surveyed. Hence, his reference only to the allocation numbers whilst identifying the respective plots leads us to the inescapable conclusion that the suit property must be declared to belong to the person first in time to be allocated.

44. No doubt then that the findings of the Surveyor vindicate the respondent's assertion that he is the rightful owner of the suit property. There is no valid reason why the appellant laid claim on the respondent's Plot No. 140.KWL.10.2002/K, which was offered to the respondent in the letter dated 22nd February 2005. The two plots are clearly distinct. In fact, the appellant confirmed in his testimony that:

> " from the allocation letter dated 22nd February 2005, it is for PDP No. 140 KWL 10/2002K. This was different from my plot. My reference is 140/KWL/005K.... the defendant's PDP, Plot K is in Block 4. My Plot is in Block 5."

45. That being the case, we concur with the findings of the trial Judge that, if at all there was allocation of the suit property to Rachael, it must have been done erroneously and that, ultimately, it is a case of double allocation. Furthermore, the fact that the rates in respect of the plot the appellant lays a claim to were paid almost 4 years later is an indication that Rachael had no intention of laying a claim to the suit property, but only did so after stumbling on a potential buyer.

46. This Court in Mwangi Mbothu & 9 Others vs. Gachira Waitimu & 9 Others (1986) KECA 68 KLR held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In the instant case, the respondent has been in occupation of the suit property since 2005 to date and, consequently, his rights on the suit property are binding and, even if the appellant had any claim over it, the respondent's possessory rights are overriding.

47. In view of the foregoing, and of the totality of our re- evaluation of the evidence and the relevant law, we arrive at the inescapable conclusion that the learned Judge did not err in dismissing the appellant's suit. We accordingly find that this appeal has no merit and hereby dismissed it in its entirety. The judgment of the trial court dated 2nd June 2021 is hereby upheld. The costs of this appeal shall be borne by the appellant.

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

D. K. MUSINGA (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR