Wambua v Joseph (Civil Appeal 109 of 2019)
[2023] KECA 1208 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1208 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 109 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

OCTOBER 6, 2023

BETWEEN

ROSE ODHIAMBO WAMBUA ..... APPELLANT

AND

MACKENZIE JOSEPH ..... RESPONDENT

(An appeal from the judgement and decree of the court of the High Court Kitale, (Njoroge. J) delivered on 3rd December 2018 in ELC No. 12 of 2010)

JUDGMENT

1. Rose Odhiambo Wambuta the appellant, brought this appeal against the judgment and decree of Njoroge. J, delivered on 3rd December 2018. Mackenzie Joseph is the respondent.

2. To contextualize this appeal, we give a brief background of the proceedings that led up to it.

3. The appellant filed a plaint dated 23rd March 2017 in the Environment and Labour Court superior court seeking the following substantive orders:

> "(a) A declaration that the plaintiff is the sole beneficial owner of five (5) acres of land duly demarcated and being within the parcel of land registered as L.R Number 6193/2 plot no 72 and which was originally owned by Meteitei Farm co ltd (now in liquidation).
>
> (b) An order of eviction against the defendant, his agents and/ or servants from the said five (5) land parcel LR Number 6193/2 plot no.72 and which was originally owned by Meteitei Farm Co. ltd (now in liquidation)."

4. The appellant's case is that Meteitei Farm Co. Ltd owned the parcel of land known as LR 6193/2 before the company was dissolved. It allotted plot No. 72 measuring 5 acres to one Petro Mengech

and its assets distributed to the shareholders. Petro Mengech sold the 5 acres to one Galcano Canny Mulaku, who later sold it to the appellant. The appellant took possession in 2001 and remained in possession till the 12th of October 2009 when the respondent unlawfully trespassed on to the suit land and deprived her of the beneficial use of her land.

5. In rebuttal, the respondent filed a defence dated 3rd July 2014 and averred that he purchased 0.8 acres of land on 20th June 2005 from one Stanley Kiprotich Kipsaro, a son to Kipsaro Maiyo, a member of Meteitei Farm Co Ltd. That during the survey of the Company land, it was found that the appellant occupied extra land which was subsequently hived off. Consequently, the appellant lodged a complaint before the committee of the Meteitei Farm Co Ltd. The committee considered the complaint and ruled that the respondent had not trespassed. The respondent occupied the land and developed it.

6. The appellant (PW1), Galcano Canny Mulaku (PW2), and the respondent (DW1) testified during the hearing in the ELC.

7. The appellant testified that she bought the suit land at Kshs. 270,000 from Gulcano Canny Mulaku, who had purchased it from Petro Mengech. She produced in evidence, the sale agreement between herself and Gulcano and the sale agreement between Gulcano and Petro. On cross examination, the appellant conceded that both agreements did not indicate the plot number to which they referred.

8. PW2, Galcano Canny Mulaku confirmed that the sale agreements produced in court were legitimate. He testified that he took possession of the land after purchasing it, farmed on it, and later sold it to the appellant in 2001. Also, that the land had been surveyed by the time he sold it. He further stated that his name as well as the acreage that he was entitled to in the company farm appeared in the proceedings in Kitale Misc Number 92 of 1999. On cross-examination he conceded that he did not carry out a survey of the land before he sold it to the appellant and that a survey of Meteitei farm was carried out in 1988.

9. In rebuttal the respondent testified that he bought his parcel of land measuring 0.8 acres, being plot Number 554, from Stanley Kiprotich Kipsaro at Kshs 72,000. When he went to take possession, he was informed that he should move to another plot which had been bought by the appellant at another location, but he declined. The Meteitei Farm Committee heard the dispute and resolved that each person remains where they were, on their respective plots. He produced in evidence the sale agreement, and Minutes of the Committee Meeting.

10. Upon consideration of the evidence, the learned judge found that the appellant had not proved her claim against the respondent. He dismissed the suit and ordered each party to bear their costs.

11. Aggrieved by the judgement the appellant filed the instant appeal, stating that the learned trial judge erred in law and in fact on twelve grounds. She alleges that the learned judge:

> " a) Failed to consider or give proper attention to the evidence adduced in court by the appellant and her witnesses.
>
> b) Failed to evaluate, analyse, consider, and determine all the three issues raised during the trial, hence arrived at an erroneous judgment.
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> c) Misdirected himself and decided this matter on extraneous issues which were neither pleaded nor proved.
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> d) Arrived at a decision that was against the weight of the evidence adduced in court.
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> e) Failed to find that the appellant was the lawful owner of the subject matter, and that the respondent was a trespasser thereto.

f) Held that the judgment in Kitale HCC MISC NO92 of 1999 was of no help yet the same demonstrated ownership of the suit land by the appellant.

g) Made his decision in total disregard of order 21 of the Civil Procedure Rules 2010.

h) Failed to declare the plaintiff as the sole beneficial owner of five acres of land duly demarcated and being within the parcel of land registered on L.R. NO. 6193/2 as Plot No. 72 originally owned by Meteitei Farm Co. Ltd yet evidence to that effect had been adduced.

i) Failed to analyse the Appellant's submissions and authorities on the issues.

j) Failed to give any or, any proper attention to the evidence of the Appellant and his witnesses and ignored the Appellant's evidence as adduced before court.

k) Failed to note that the land in issue had been properly identified by both documentary and oral evidence given by the Appellant and no doubt at all existed to the court or the parties as to the identity of the land where the trespass was situated.

l) Misdirected himself as to the subject matter or real dispute before him and that the evidence produced and/or adduced before the court was completely sufficient to prove and did in fact prove beneficial ownership and trespass to the Appellant's land by the respondent."

12. The firm of M/S Onyinkwa & Co. Advocates filed submissions dated 4th of July 2022 on behalf of the appellant and submitted on two issues to wit, whether the appellant is the lawful and beneficial owner of five acres of land LR.NO. 6193/2 Plot no.72 and whether the respondent trespassed in the suit property.

13. It was submitted that the appellant has demonstrated proof of ownership of the subject parcel of land, and tendered documentary evidence which shows an unbroken chain of how she acquired the suit property. That the evidence of PW1 and PW2 remains unchallenged and it points to the fact that indeed,the appellant bought 5 acres of land, being LR. No. 6193/2, plot 72.

14. Further, that without justifiable cause, the respondent entered onto a portion of the suit land on 12th October 2009 and ploughed it and erected his hut and structures thereon. She urged that the respondent's entry and occupation of the suit property without her authority, consent and/or permission constitutes trespass.

15. In conclusion, it was submitted that the failure of the trial judge to find in favour of the appellant was against the appellant's right to property as enshrined in Article 40 of *the Constitution*. As a result, she has suffered loss and damage and been denied the quiet enjoyment of her property through the unwarranted interference of the said property by the respondent.

16. In opposition, the firm of M/S Risper Arunga & Co. Advocates filed submissions dated 11th August 2022, on behalf of the respondent and urged that the respondent did explain to the superior court how he acquired the 0.8 acres in issue. He submitted that the appellant's reason for filing this suit was to force him to move to a different parcel of land which she had purchased for him, but he refused. Further, that the matter was referred to the farm committee but the appellant refused to attend when she was summoned. In the end the Committee resolved that both parties remain on their respective parcels of land.

17. We have given consideration to the record of appeal, the submissions of the parties and the law. This is the first appeal and our duty is to reconsider and re-evaluate the evidence before us to reach our conclusion, whilst bearing in mind that we did not see or hear the witnesses, and to make due allowance in that respect. This duty was well elaborated by the Court of Appeal for East Africa, a Predecessor of this Court, in *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.
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> > " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

18. In the present appeal the issues for consideration are as were submitted by the appellant. That is, whether the superior court erred in finding that the appellant did not prove her case on a balance of probability, and if so, whether the respondent is trespassing on her parcel of land.

19. To prove that she is the owner of the suit property measuring 5 acres, the appellant produced in evidence 2 sale agreements, a petty cash voucher, an area list of Meteitei Farm and a survey map. Further, PW2 testified in support of her claim to confirm that he indeed, sold the suit property to her, which he had bought from one Petro Mengech and that the land was surveyed before he sold it to the appellant. On the contrary, the respondent asserted that he is the owner of a portion of the

suit property measuring 0.8 acres. He equally presented in evidence a sale agreement, two area lists of Meteitei Farm and Minutes of the Meteitei Farm Company Committee deliberations.

20. The ELC considered the evidence tendered and noted that the suit property was unregistered and none of the parties to the suit had presented title documents. The judge held as follows:

> " 13. Though this was unregistered land, no survey report was produced by the plaintiff showing that her land was 5 acres, and that the defendant has trespassed on any part of the 5 acres owned by the plaintiff...
>
> 16. The plaintiff never addressed adequately the defendant's claim that her land was found to be in excess of 5 acres and that the excess portion was hived off upon survey.
>
> 17. In the premises I do not find any evidence on the record to persuade me that the land occupied by the defendant belongs to the plaintiff, or is part of any land purchased by the plaintiff from Galcano Mulaku"

21. The basis for the legal burden of proof is in Section 107 (1) of the *Evidence Act* which provides as follows:

> "(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."

Therefore, in the case before us, the onus was on the appellant to prove that her land measured 5 acres and that the respondent's portion measuring 0.8 acres was within her land and that therefore, the defendant had trespassed on to the part of land owned by the appellant.

22. None of the sale agreements presented in evidence by either party indicated the plot numbers of the plots in dispute and the appellant did not provide the court with the survey report to demonstrate the encroachment on her land. All she produced in evidence was an area list for Meteitei Farm LR 6193/2, which indicated that the appellant owned a plot measuring 4.8 acres while the respondent was the owner of a plot measuring 0.8 acres.

23. The respondent also produced two Area lists for Meteitei Farm in evidence, in a bid to prove that the portion of the suit land measuring 0.8 acres was his. The first list showed the previous owners of Meteitei Farm, and the second list showed the subsequent owners of the said land. In the first list Kipsaro Maiyo was indicated as the owner of plot number 255 measuring 2.8 acres, and Gulcano Canny Mulaku was in possession of plot no. 385 measuring 4.9 acres. The second list indicated that the appellant and the respondent are the owners of parcels of land measuring 4.8 acres and 0.8 acres respectively

24. The record therefore, indicates that the list produced by each of the parties confirms that the appellant's portion of land measures 4.8 acres, and that of the respondent measures 0.8 acres. However, from the evidence before us it is not possible determine where the acreage of the appellant's land begins and where it ends without a survey report.

25. Ultimately, we are of the view that the appellant has not proved that she is the owner of the portion of the suit land occupied by the respondent. As such, the issue of trespassing does not arise. We therefore dismiss this appeal in its entirety and award the costs to the respondent.

DATED AND DELIVERED IN ELDORET THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR