Matende & another v Ogendo (Civil Appeal 509 of 2019)
[2022] KECA 124 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 124 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 509 OF 2019

W KARANJA, HA OMONDI & KI LAIBUTA, JJA

FEBRUARY 18, 2022

BETWEEN

DAVID ROWLAND MATENDE ..... 1ST APPELLANT

NAIROBI CITY COUNTY ..... 2ND APPELLANT

AND

JOSHUA AYEKO OGENDO ..... RESPONDENT

(An Appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (S. Okong'o, J.) dated 29th September, 2017 in ELC Cause No. 72 of 2014An Appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (S. Okong'o, J.) dated 29th September, 2017 in ELC Cause No. 72 of 2014)

JUDGMENT

1. David Rowland Matende, the appellant herein, was the 1st respondent in the Environment and Land Court at Nairobi, and he has preferred this appeal against the Judgment and Decree delivered by Hon. Justice Okong'o on 29th September, 2017, in ELCA 72 of 2014.

2. Joshua Okeyo, the respondent herein, had instituted a suit in Nairobi Milimani CMCC No.5172 of 2011, against the appellants seeking a permanent injunction restraining them from entering, using, repossessing, or interfering with his possession, occupation and ownership of Plot No.D7904 Dandora Phase 2 Area 4(the suit property) and a declaration that the respondent was the lawful owner of the suit property. In the alternative the respondent sought compensation from City Council of Nairobi, the second appellant, for the loss of the suit property at the market rate.

3. By an amended plaint dated 15th June, 2012, the respondent stated that on 24th December, 1987, he purchased the suit property from one Isaac Waithaka Mugo to whom the 2nd appellant had allotted the

suit property on 3rd May, 1982, thereby becoming the beneficial owner and at all times was in possession and occupation thereof.

4. That in the year 2005, the 1st appellant entered the suit property without the respondent's consent and laid claim to the property. Following the dispute, the 2nd appellant carried out an investigation to verify the validity of the respondent's claim over the suit property, which investigation found the 1st appellant's claim to be without basis, yet despite this finding, the 1st appellant re-entered the suit property and dug trenches blocking the respondent's access to the suit property.

5. In the Magistrate's Court the 1st appellant herein, denied the respondent's claim in its entirety, contending that the suit property was lawfully allotted to him by the 2nd appellant, a claim he reiterated at the 1st appeal.

6. In its judgment, the trial court found that the respondent had failed to prove his claim and dismissed the claim with costs to the appellants. The trial court was persuaded that the 1st appellant who had produced his letter of allotment to the suit property had better title compared to the respondent. The trial court was also persuaded that the original allottee to the suit property had defaulted in payment of rates to the 2nd appellant, which led to the repossession of the property by the 2nd appellant and re-allocation to the 1st appellant in 2002. The trial court held that the agreement for sale which the respondent had relied on related to a different property and, further, that the respondent did not adduce any evidence to show the relationship between that property and the suit property.

7. The trial court further held that the receipts produced by the respondent were in the name of a third party implying that it was this third party that had made the rates payment. The court further held that the respondent had failed to produce a letter of allotment which could have conclusively established his claim over the suit property thereby failing to establish legal ownership over the suit property. It dismissed the respondent's claim.

8. Aggrieved by the judgment of the trial court, the respondent appealed to the Environment and Land Court (1st appellate court) on the grounds that the trial magistrate gravely erred in law by:- delivering tendering a ruling instead of a judgment pursuant to after hearing of the a substantive suit lodged; and in holding that; the appellant lacked proprietary interests over Plot No.D7904 Dandora phase 2 Area 4; holding that the plot No.D7904 Dandora Phase 2 Area 4 differed from Plot No.D047904; holding that the 2nd appellant had repossessed Plot No.D7904 Dandora phase 2 Area 4; failing to appreciate the law and principles governing repossession of plots by the then local authorities, and (now, County Governments); and by holding that 2nd appellant repossessed Plot No.D79A4 Dandora Phase 2 Area 4 despite overwhelming evidence of uninterrupted issuance of rates demand notices by the 2nd appellant over the suit plot, and uninterrupted payment of the rates by the respondent in the name of the original allottee of the land, (Isaac Waithaka Mugo), from whom the appellant acquired the suit plot; holding that the 1st appellant had legitimate proprietary interests over Plot No. D7904 Dandora Phase 2 Area 4; and by holding that the receipts for payment of land rates over the suit property issued in the name of the original allottee of the land, did not relate to the respondent.

9. In its judgment the first appellate court was in agreement with the respondent's submission that the issue as to whether the suit property and Plot No. D047904 mentioned in the sale agreement being one and the same parcel of land was not raised in the pleadings, and therefore, was not before the trial court for determination. The dispute was over the same parcel Plot No.D7904 Dandora Phase 2 Area 4 (the suit property).

10. The court further held that the allotment letter showed that the suit property is what was allocated to the original allottee (Mugo), and when he sold the plot to the respondent, he could not have possibly

sold any other plot. The first appellate court also held in agreement with the respondent that once the suit property was allocated to Mugo, the property was not available for allotment to any other person unless Mugo breached the terms of allotment leading to forfeiture of the property. The court agreed with the respondent's evidence which was not controverted in the trial court that from 1987 when he purchased the property from Mugo he faithfully paid to the 2nd appellant the rent and rates for the suit property, which payment the 2nd appellant never contested. In as much as the payments were made in the name of Mugo, the respondent led evidence to the fact that the property was yet to be transferred to him and accordingly, he was making payments in the name of Mugo whose name was still reflected in the 2nd appellant's records.

11. The first appellate court further stated that, in as much as the onus was on the respondent to prove his case in the lower court, that obligation did not extend to matters within the appellant's knowledge; that the appellants adduced no evidence showing that Mugo either breached terms of allotment or had defaulted on payment of rent/rates; that there was also no evidence that the 2nd appellant had taken steps provided for in law in the alleged repossession of the suit property, and therefore there was no basis for the trial court to find that the suit property had been repossessed and lawfully allotted to the 1st appellant. The Court further held that in the absence of evidence that the allotment of the suit property was lawfully terminated, the suit property was not available for allotment to the 1st appellant, and that the 1st appellant could not acquire valid title over a property which had already been allotted to another person whose allotment had not been revoked. Accordingly, the interest of the respondent who derived his title to the suit property from the first allottee prevailed over the 1st appellant's interest therein.

12. The first appellate court found that the appeal was merited, and that the respondent had proved his case on a balance of probabilities. The first appellate court allowed the appeal by setting aside the judgment and decree of the lower court, and entering judgment for the respondent against the appellants for;

    i. a permanent injunction restraining the appellants herein and anyone claiming under them, from entering into, using or interfering with the respondent's possession and occupation of the suit property;

    ii. a declaration that the respondent was the lawful beneficial owner of the suit property; and

    iii. costs in the appeal and in the lower court were awarded to the respondent.

13. The heading of the decision made by the trial court was amended from a ruling to judgment, as a decision was rendered pursuant to hearing of a substantive suit.

14. The appellant challenges the judgment of the 1st appellate court on the grounds of errors in learned Judge's findings that: the initial allotment could not be revoked, and that the appellant did not have any proprietary interest in the suit property; that Plot No. D047904 mentioned in the sale agreement and Plot No. D7907 was one and the same parcel of land; that the 1st respondent was the beneficial owner of Plot No. D7904 Dandora phase 2 Area 4; that an allocated plot could not be repossessed and allocated to another person. The appellant prays that;

    i. the appeal be allowed,

    ii. the judgment of Hon. S. Okong'o J. of the Environment and Land Court at Nairobi delivered on 29th September, 2017, in the Environment and Land Court Cause No. ELC. No. 72 of 2014 be set aside,

iii. the Judgment of the Subordinate Court be upheld and the respondent be ordered to bear the cost of this appeal.

15. The appeal was canvassed by way of written submissions, and the 1st appellant argues that the learned Judge erred in holding that the respondent placed no evidence showing that Mugo had either breached terms of the allotment or had defaulted in payment of rates to the 2nd appellant, and in affirming that there was evidence before the subordinate court showing that Mugo being the first allottee had breached terms of the allotment; and that the consequences of the breach were to the effect that the suit property would be made available for allocation to the appellant.

16. It is the appellant's contention a notice dated 31st March, 1993, had been issued to the original allottee on the breach and repossession in consequence of default; that there was no response from the original allotee to the notice after 30 days, and therefore, repossession and allocation of the suit property to the 1st appellant was in order.

17. On the issue of legality of title, the 1st appellant submits that the letter of allotment issued to the him is a certificate of title in respect to the suit property, and that there cannot be any other proof of ownership; that the burden was on the respondent to disprove the notion that the 1st appellant did not acquire good title as he is in possession of the suit property. In addition, that the respondent's complaint to the Nairobi City Council (the 2nd appellant), regarding the 1st appellant's possession of the suit property was determined in favour of the 1st appellant.

18. The 1st appellant also submits that the allegations made by the respondent on the issue of the allotment to the appellant borders on fraud, which was not pleaded in the trial court, and in the absence of proof of fraud, there was no basis upon which the court could direct cancellation of the letter of allotment issued to the 1st appellant.

19. On his part, the respondent points out that the core of the appeal is who between the 1st appellant and respondent is the legitimate owner of the suit property. On the issue of whether or not Plot No. D047904 was one and the same as Plot No. D79904, it is the respondent's submission that this was not in issue raised in the trial court, but was only raised by way of submissions in proceedings in the 1st appellate court. In the circumstances, the same cannot now be raised in the 2nd appeal, (which observation the first appellate court also made). In addition to the foregoing, the 1st appellant had testified before the trial court that the description of the suit property by him and the respondent referred to the same plot.

20. It is the respondent's contention that he is the legal beneficial owner of the suit property. In addition, that one of the issues which arose in the trial court was as to whether the 2nd appellant repossessed the suit property on account of default in land rate payment by the original allottee, to warrant the allotment to the 1st appellant.

21. The respondent argues that evidence showed how he continued to pay rates in the name of the original allottee, and so he could not have been in default. In this regard, he referred to receipts issued by the City Council showing that rates had been paid from 1987 to 2011, and to demonstrate that the appellant's claim that he was allocated the suit property in 2002 was not correct, since there was no default in payment. He maintains that the allotment letter was duly issued to him upon compliance with the terms of the same, and that the same was proof of bona fide ownership of the suit property.

22. In view of the foregoing, the respondent prays that the appeal be dismissed with costs. This being a second appeal this Court's mandate has been enunciated in a long line of decisions by this *Court, see Maina v Mugiria [1983] KLR 78*, and *Stanley N. Muriithi & Another v Bernard Munene Ithiga*

[2016] eKLR for the holding that on a second appeal, the court confines itself to matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered, or that looking at the entire decision, it is perverse.

23. In our considered view, the main issue in this second appeal is who is the legal beneficial owner of the suit property?

    In its judgment, the first appellate court held that the trial court erred in finding that the appellant, (now the respondent in this appeal), had no proprietary interest in the suit property, and that the property that the respondent purchased was different from the suit property, and further that the suit property had been repossessed by the 2nd appellant and lawfully allocated to the 1st appellant.

24. The first appellate court further found that it wasn't disputed that the original allottee was one Mugo who was allocated the property on 3rd May, 1982, by the 2nd appellant; that there was no dispute that the allottee paid the requisite fees and charges; and that the original allottee had sold his interest in the suit property to the respondent, and a copy of the agreement was produced as an exhibit. The respondent herein led evidence that he paid to the 2nd appellant rent and rates and produced receipts in the name of Mugo, the original allottee and explained that the rates were paid in Mugo's name as the property was yet to be transferred to him by the 2nd appellant and Mugo's name was thus reflected in the 2nd appellant's records.

25. The first appellate court was also of the view that the 1st respondent having shown that the suit property was sold to him, that rent, and that the rates were up to date the onus was now on the appellant to show the legality of his title to the suit property over that of the 1st respondent, which was not done. The 1st appellant was not able to show any default on the part of the respondent nor any breach on the terms of the allotment letter by the original allottee, to warrant any repossession and re-allocation of the suit property to the 1st appellant.

26. We echo and paraphrase the sentiments expressed in the case of *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others [2014) eKLR* where this Court pointed out that on a second appeal, we are enjoined to deal with points of law only and cannot interfere with the findings of the 1st appellate court unless we are satisfied and convinced that there was misdirection on a point of law or an error in considering a matter which ought not to have been considered or a failure to take into account a matter which ought to have been considered.

27. According to Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to proceedings, the burden of proving or disapproving that fact is upon him. The question as to how title to the suit property was acquired is a fact within the personal knowledge of the appellant, who had the burden of proving that the respondent did not acquire a good title. [See *Ann Wambui Ndiritu v Joseph Kiprono Ropkol & Another, Nyeri Civil Appeal No. 345 of 2000*). Likewise, Section 116 of the Evidence Act stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. In our considered view, this, is an issue of fact, and not a point of law to warrant this Court to delve into.

28. For this Court to find that the 1st appellant is the legal and beneficial holder of the suit property, the burden rested on the 1st appellant to rebut the notion that the property was not free from encumbrances. We find that the respondent went beyond the letter of allotment to prove the legality of how he acquired the plot in issue. He demonstrated that his acquisition of the plot was formal and free from any encumbrances. Accordingly, we cannot fault the finding of the 1st appellate court on this

aspect court, which took into consideration all the relevant issues. From the foregoing, we note that in arriving at its decision, the 1st appellate court took into consideration all the relevant issues.

29. We also note that no evidence was presented to show that the respondent had breached any terms of the agreement /allotment, or that he had fallen in arrears with regard to rent and rate payment, to justify the City Council to repossess the suit property. The 1st appellant could not in any way have acquired legitimate title to the suit property, which had already been allotted to another person whose allotment had not yet been revoked. In our view, proprietary interest, findings on the plot number, revocation and repossession, as well as payment of rates were all issues of fact, whose lid we cannot reopen at this stage. There was really no issue of law raised by the appellant, and the interest of the respondent, who derived his title from the first original allottee therefore must prevail.

30. We agree entirely with the judgment of the first appellate court and find no reason to interfere with the well-reasoned judgment. Consequently, we hold that this appeal has no merit and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR