



REPUBLIC OF KENYA



KENYA LAW
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**Kemoli v Mulemi (Environment and Land Appeal E004 of 2023)
[2024] KEELC 3883 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

E ASATI, J

APRIL 25, 2024

BETWEEN

RICHARD KEMOLI APPELLANT

AND

RODGERS MULEMI RESPONDENT

*(Being an appeal from the judgement the judgement and decree of the
Senior Principal Magistrate in Environment & Land Case No.30 of
2018 (Hon. S.O. Ongeru) given at Vihiga on 22nd February, 2023)*

JUDGMENT

(Being an appeal from the judgement the judgement and decree of the Senior Principal Magistrate in Environment & Land Case No.30 of 2018 (Hon. S.O. Ongeru) given at Vihiga on 22nd February, 2023)

judgement

Introduction

1. Vide the Memorandum of Appeal dated 20th March, 2023 the appellant, Richard Kemoli, challenged the Judgement and decree dated 22nd February 2023 of the SPM's court Vihiga in Vihiga SPMC ELC No.30 of 2018 (the suit).
2. A brief background to the appeal is that the appellant was the Plaintiff in the suit wherein, vide the plaint dated 13th May, 2016, he had sued the Respondent herein for: -
 - a. An order that the Defendant do vacate and give vacant possession of plot no.708/6 Chavakali market to the Plaintiff.
 - b. General damages.



- c. Costs of the suit.
3. The record of appeal shows that the Respondent denied the appellant's claim vide his defence dated 25th November, 2016. The record further shows that the suit was heard by the trial court which, vide its judgement dated 22nd February, 2023 (the judgement), found that the Appellant had failed to prove his case and proceeded to dismiss it with costs to the Respondent.
4. Aggrieved by the judgement, the appellant filed the present appeal and seeks for orders that the appeal be allowed and the judgement and decree made on 22nd February, 2023 dismissing the Appellant's case be set aside, that judgement be given for the Appellant against the Respondent in terms of the plaint dated 13th May, 2016, that in the alternative, the case be remitted for retrial before another Magistrate other than Hon. S. O. Ongeru and that costs of the appeal be awarded to the Appellant.
5. The grounds of appeal as contained in the Memorandum of Appeal are that: -
- a. The learned Magistrate erred and was wrong in holding that the Appellant having given a Power of Attorney to one Kennedy Akidiva Sagala to prosecute the suit on his behalf and the said Power of Attorney having been filed in the proceedings and not having been objected to by the Respondent, and the court having allowed the said Kennedy Akidiva Sagala to give evidence in the suit, the evidence given was of no probative value.
- b. The learned Magistrate erred and was wrong by overlooking the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules.
- c. The Learned Magistrate erred and was wrong in relying on the case of Francis Mugo –vs- David Daman Gachagu [2017]eKLR which had no relevance as it deals with the authority of an agent with a Power of Attorney to deal with land and immovable property and not to testify in courts.
- d. The trial Magistrate erred and was wrong in holding that the Appellant had not proved that he was the owner of the Plot No.6 Chavakali Market and that the Respondent had not trespassed thereon in the light of the evidence and documents tendered in support of the Appellant's case.
- e. The finding by the learned Magistrate was against the weight of the evidence given in support of the Appellant's case.
- f. The learned Magistrate was partial and biased against the Appellant.
6. Directions were given on 11th December, 2023 that the appeal be argued by way of written submissions.

Submissions for the appellant

7. Written submissions dated 8th May, 2024 were filed by S.O. Keyonzo Advocates on behalf of the Appellant. Counsel submitted that the trial court was wrong in dismissing the evidence of one Kennedy Akidiva Sagala on the grounds that since the donor of the Power of Attorney was dealing with immovable property, the Power of Attorney needed to be registered.

That the trial court was wrong in relying on the case of Francis Mwangi Mugo –vs- David Kamau Gachugu [2017]eKLR. That the of the Power of Attorney was not dealing with immovable property but simply giving evidence and pleading on behalf of another person. Counsel relied on the provisions of Order 9 Rule 1 of the Civil Procedure Rules regarding recognized agents and Advocates.

8. Counsel submitted further that the learned Magistrate erred as there was abundant evidence that the Appellant was the owner of the suit plot as evidenced in the documents at pages 17 to 26 of the Record



of Appeal and that there was evidence that it was the same plot No.7 on which the Respondent was carrying out business. That the trial Magistrate should have found that the Respondent had trespassed onto the suit land and ordered the eviction of the Respondent, and award costs. Counsel prayed that the appeal be allowed.

Submissions for the Respondent

9. On behalf of the Respondent, written submissions dated 10th February, 2024 were filed by D. Akwala Advocates. Counsel submitted that the Appellant never testified. That instead one Kennedy Akidiva Sagala testified on behalf of the Appellant on the basis of a Power of Attorney donated to him. That the said Power of Attorney was incompetent as it did not contain the full names and addresses of the donor and the donee as both needed to execute the document but only the donor signed. That the Power of Attorney was never registered. That the trial court rightfully rendered itself on the issue of capacity.
10. Counsel submitted further that from the documents produced by the Appellant, it was clear that they all refer to plot No. 6 and not plot No.7 which the Respondent currently occupied. That no evidence was tendered to prove the claim that plot No.7 was changed to plot No.6. That the Appellant failed to prove that the Respondent was in possession or occupation of plot No.6 and hence failed to prove his case on a balance of probabilities. That the trial court was right in dismissing the suit with costs. Counsel prayed that the appeal be dismissed with costs to the Respondent.

Issues for Determination

11. The ground of appeal raised and contained in the Memorandum of Appeal form the issues for determination herein.

Analysis and Determination

12. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. In *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court. The court stated; -

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

13. The first ground of appeal raises the issue of whether or not the trial court erred in holding that the evidence of one Kennedy Akidiva Sagala was of no probative value. The record shows that Kennedy Akidiva Sagala was a witness who testified as PW1 on behalf of the Appellant. He adopted the contents of his earlier recorded and filed witness statements as his evidence and produced documents as contained in the list of documents dated 13th May, 2016 as exhibits 1 to 22.
14. The basis upon which the said Kennedy Akidiva Salaga testified on behalf of the appellant was a document titled Power of Attorney sworn before a Commissioner of Oaths on 4th May, 2018. It was only signed by the appellant as the donor. The document was not registered. This leads to ground 3 of the appeal on whether or not the trial court erred in relying on the case of *Francis Mugo –vs- Daniel Kamau Gachugu* [2017]eKLR as it deals with the authority of an agent with a power of Attorney to deal with land and immovable property and not to testify in courts. The trial court in its judgement observed that the Defendant (Respondent herein) had relied on the case of *Francis Mwangi Mugo*



to question the legality of the Power of Attorney relied upon by the appellant as the same was not registered. The case of the Appellant is that the trial court ought not have relied on that case as it dealt with power of Attorney to deal with land and immovable property which the case herein dealt with power of Attorney to testify on behalf of the donor. The question that arises is who may testify in court on behalf of or in place of a party. Order 9 Civil Procedure Rules provides the answer to this question.

Order 9 Rule 1 provides;

“ Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made, or done by the party in person or by his recognized agent or by an advocate duly appointed to act on his behalf.”

15. Order 9 Rule 2 provides for recognized agent. The applicable sub-rule is sub-rule 2 (a) which provides that;

“The recognized agents of parties by whom such appearance, application and acts may be made or done are;

- a. Subject to approval by the court in any particular suit persons holding power of attorney or an affidavit sworn by the party authorizing them to make such appearance application and do such acts on behalf of parties”.

16. It is clear from these provisions of the law that a person holding an Affidavit authorizing him to act on behalf of another can do so subject to approval of the court. The documents presented to the court by PW1 as the basis for his authority to testify on behalf of the appellant were the Power of Attorney – which was sworn before a Commissioner for Oaths but not registered and a letter of authority. Although there is no evidence from the proceedings that approval of the court was sought, in view of the provision of Order 9 Rule 2(a) Civil Procedure Rules as amended in 2020, and since the appellant confirms that he donated authority to PW1 to act for him, I find that the witness had capacity to testify on behalf of the Appellant.

17. The next ground of appeal raises the issue of whether or not the trial court was wrong in overlooking the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules. Order 9 Rule 2(c) makes provision in respect of recognized agents. It provides that the recognized agent of parties by whom appearance, application and acts may be made or done are, in respect of a corporation is an officer of the corporation duly authorized under the corporate seal. The response by the Respondent was that this provision of the law relied upon by the Appellant was not applicable as the Appellant (Plaintiff in the lower court) is a natural person yet the provision relates to corporations. That the court was right in not considering that provision of the law.

I agree with the submission by the Respondent as the cited provision clearly relates to corporations which was not the case in the present matter.

18. Ground 4 of appeal raises the issues of whether or not the trial court was wrong in holding that the Appellant had not proved that he was the owner of plot No.6 Chavakali Market and that the Respondent had not trespassed thereon. The Appellant pleaded in paragraph 5 of the plaint that he was, vide Letter of Allotment dated 8th October, 1998 allotted plot No.6 Chavakali Market. In paragraph 6 he pleaded that the Defendant, his servant or agents trespassed onto the said plot and that the Respondent should be evicted. In the prayers in the plaint he sought that the Respondent do vacate and give vacant possession of plot No. 708/6 Chavakali Market. PW2, a Valuer, testified that he did a



valuation of plot No.6 and his report produced as exhibit was in respect of Unsurveyed B. C. R. PLOT NO. 6 Within Chavakali Township.

19. The Respondents' case before the trial court was that the plot he occupied was plot No.7 at Chavakali Market which he, vide the land sale agreement dated 15th August, 2005, had bought from one Mary Isigi.
20. After hearing the parties, the trial court found that although the Plaintiff (appellant herein) had alleged that plot No. 7 was changed to be plot No. 6, he had a duty to prove the change of the plot numbers. That the Plaintiff failed to prove his case on a balance of probabilities.
21. In this appeal, it has been submitted on behalf of the appellant that there was abundant evidence adduced in proof of ownership of the plot. I have keenly perused the 22 documents produced by the appellant as exhibits. Exhibit 15 is a letter of allotment in favour of the Appellant. It is dated 8th October, 1998. The plot allotted to the Appellant vide that Letter of Allotment was plot No.UNS B.C.R. PLOT NO. 6 Chavakali Township. The receipts for payment (exhibit 16) show that the Appellant paid rent and rates for plot No. 6 Chavakali. The demand notice dated 21st March, 2016 (exhibit 22) relates to plot No.6 Chavakali Market.
22. The Defendant's (Respondent's) documents on the other hand related to plot No.7 Chavakali Market. The land sale agreement dated 15th August, 2005 produced by the Respondent for purchase of his plot was for purchase of plot No.7 Chavakali Market.
23. I find no evidence from either the allocating authority or the Municipal Council or County Council of Vihiga or Kakamega or from the Lands office that plot No.7 was at any time changed to plot No. 6 or the vice versa. The burden of proof, as rightly observed by the trial court lay with the appellant. Sections 107, 108 and 109 of the Evidence Act provide that

Section 107(1) of the Evidence Act Cap 80 Laws of Kenya provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

The appellant failed to discharge the burden.

24. The last 2 grounds of appeal are that the findings of the trial court were against the weight of the evidence and that the trial court was partial and biased against the Appellant. I have keenly read the submissions made herein and I find no evidence to demonstrate this. What emerges is that the appellant simply failed to prove his case to the required degree or at all.
25. Regarding the alternative prayer for an order to remit of the case for retrial before a different Magistrate, in Jackson Mwangi Gatama v Kenya Wildlife Services [2018] eKLR the court held that an order for retrial can be made where the appellate court is of the opinion that the trial was not conducted



satisfactorily. In the present case it has not been demonstrated that the trial was not conducted satisfactorily.

26. For the foregoing reasons, I find no reason to interfere with the decision of the trial court. I uphold the judgement of the trial court and dismiss the appeal with costs to the Respondent.

Orders accordingly.

Judgement dated and signed at Vihiga and delivered this 25th day of April, 2024 virtually through Microsoft Teams Online Application.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Keyonzo for the Appellant.

Shiloya for the Respondent.

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