Boit v Ali & another (Civil Appeal 50 of 2015)
[2021] KECA 270 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 270 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 50 OF 2015

PO KIAGE, K M'INOTI & M NGUGI, JJA

DECEMBER 3, 2021

BETWEEN

JAMES C. BOIT ..... APPELLANT

AND

JABER MOHSEN ALI ..... 1ST RESPONDENT

CHELUGOI MOHSEN ALI ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the Environment and Land Court at Eldoret (Munyao, J.) dated 31st July 2014 in E.L.C.C. NO. 200 OF 2012)

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court at Eldoret (Munyao, J.) dated 31st July 2013 in which the learned judge allowed, with costs, a claim by the respondents, Jeber Monsin Ali and Chelugoi Mohsen Ali, for eviction of the appellant, James C. Boit, and his mother, Priscilla Boit, from the parcel of land known as Uasin Gishu/Sosiani/28 measuring approximately 19.5 hectares (the suit property). The learned judge also restrained the appellant from entering into the suit property.

2. By their plaint dated 24th February 2004, the respondents pleaded that they were the registered proprietors of the suit property, and that on or about 13th January 2004, the appellant and his mother, without any colour of right, invaded the suit property and unlawfully took possession. By way of remedy they prayed for the orders which the learned judge granted.

3. The appellant and his co-defendant filed an amended defence and counterclaim on 27th March 2007 in which they pleaded that the respondents' mother, Aziza Chepkemboi, then the registered owner of the suit property, sold the same in 1972 to the appellant's late father, Paul Boit, who paid the agreed purchase price, took possession, and developed the suit property. They further pleaded that the registration of the respondents as proprietors of the suit property was fraudulent and illegal, the

particulars being secret registration of the suit property in the respondents' name whilst they were aware of the sale to the deceased. By way of counterclaim the appellant and his mother prayed for dismissal of the respondents' claim, a declaration that they were entitled to be registered as owners of the suit property by adverse possession, and rectification of the register by cancelling the respondents' registration and substituting it with registration in their names.

4. At the hearing of the suit, both respondents testified as the only witnesses. The thrust of their evidence was that they were registered as proprietors of the suit property on 5th June 2003 after the death of their mother in 1982 and after payment of all the moneys due to the Settlement Fund Trustee (SFT), in whose name the suit property was registered before 2003. They denied that the suit property was ever sold to the deceased or that any member of the deceased's family was in possession, contending that the appellant entered into the land only in 2004.

5. On their part, the appellant and his mother called three witnesses, namely the appellant, Elkana Keino (DW3) who claimed to have witnessed the agreement for sale, and Amos Ruto (DW4), a settlement officer. The thrust of the evidence for the appellant was that his father purchased the suit property from the respondents' mother for Kshs 20,068 and they entered into an agreement on 11th August 1972. The purchaser paid a deposit of Kshs 15,000 and subsequently the balance of Kshs 5,068. After the sale the respondents' mother and her family vacated the suit premises and the appellant's family took possession, paid the loan to the SFT and developed the suit property. The appellant's family was shocked when the respondents came into the suit property after secretly registering the same in their names.

6. According to DW4, the SFT allocated the suit property to the respondents' mother in 1964 and the same was charged in favour of SFT. While conceding that there was an agreement for sale between the appellant's father and the respondents' mother in the SFT's records, the witness stated that there was nothing in their records to show the transaction was ever completed and according to their records the respondent's mother was the owner and that it was she who continued to pay the SFT loan. He however added that when SFT visited the suit premises in 1998, it was the appellant's family which was utilising the suit property. It was common ground that there was no consent from the Land Control Board as regards the sale agreement between the appellant's father and the respondents' mother.

7. Only the respondents filed their submissions as directed by the Court. The Court noted that even after being granted additional time, the appellant did not file his submissions. After considering the matter, the learned judge found that the sale of the suit property to the appellant's father was not proved because the document produced in evidence (defence exhibit 6) was not the agreement dated 11th August 1972, but a different document dated 31st August 1972, which was significantly different from the alleged agreement in the appellant's list of documents and the copy in the SFT file. In other words, the document that the appellant relied on in his list of documents was totally different from the one that he produced at the trial to prove the sale. The learned judge also found the evidence of DW3 regarding the signing of the agreement utterly contradictory. In addition, the learned judge expressed the view that even if there was indeed a sale agreement, the same was null and void and unenforceable because there was no consent from the Land Control Board under the *Land Control Act*.

8. As regards possession of the suit property, the learned judge found the evidence by the parties contradictory and accepted the independent evidence by SFT which showed that as of 10th June 1989, it was the appellant's family which was on the suit property. The learned judge accepted that the appellant's family was in possession from the 1980s and that they were in open, peaceful and uninterrupted possession for more than 12 years by the time the respondents filed the suit on 24th February 2005. However, the learned judge also found that between 19th May 1979 and 5th June 2003, the suit property was registered in the name of the SFT and therefore by dint of section 41(a) (i) of the

Limitation of Actions Act and section 175 of the *Agriculture Act*, cap 318 (repealed), adverse possession did not apply to the suit property.

9. Accordingly, the learned judge allowed the respondents' claim with costs and dismissed the appellant's counterclaim, thus provoking this appeal. The appellant raised 11 grounds of appeal, which at the hearing, he compressed into three broad grounds, faulting the learned judge on his findings on the agreement for sale, lack of consent from the Land Control Board, and failure to follow the prescribed procedure upon the death of the appellant's mother, who was the 2nd respondent in the trial court.

10. On the first broad ground of appeal, the appellant submitted that the learned judge erred by falling to consider the totality of the evidence adduced by his witnesses that the respondents' mother sold the suit property to the late Paul Boit and that it was the latter who paid the SFT loan. He added that having sold the suit property to Boit, the respondents' mother did not have any interest in the suit property that she could transfer to the respondents. The appellant also faulted the learned judge for making conclusions on the authenticity of the two different agreements for sale without the benefit of the opinion of an expert witness.

11. The appellant further submitted that the learned judge erred by relying on section 3(3) of the *Law of Contract Act*, contending that the subsection that made a contract for the sale of land unenforceable unless it was in writing was introduced on 1st June 2003 and therefore did not apply to the suit property. He relied on *Peter Mbiri Michuki v. Peter Mugo Michui* [2014] eKLR and submitted that prior to the amendment, an oral contract followed by possession in part performance was enforceable.

12. Turning to the second broad ground of appeal, the appellant submitted that the learned judge misdirected himself as regards the requirement of consent from the Land Control Board because, as long as the suit property was registered in the name of SFT, it was not subject to the provisions of the *Land Control Act*. In support of that contention the appellant relied on section 6(3) (b) of the *Land Control Act* and Arumba v. *Mbega & another* [1988] KLR 121.

13. Still under the second ground of appeal, the appellant submitted that the learned judge erred by failing to disregard procedural technicalities when he considered only the respondent's submissions. It was contended that although the appellant did not file submissions as directed, he filed them before delivery of the judgment and the learned judge should have considered them, so as not to penalise a party because of lapses on the part of his advocate. The appellant cited Article 159 of the *Constitution* and *Maina v. Mugira* [1983] eKLR and submitted that the learned judge should have deferred the delivery of judgment to consider the appellant's submissions.

14. Lastly the appellant submitted that the learned judge erred by failing to comply with Order 24 Rule 2 of the *Civil Procedure Rules* after the death of his mother, the 2nd respondent before the trial court. It was contended that the learned judge was obliged to make a record of the death of the appellant's mother and thereafter to direct the trial to proceed. Having failed to do so, it was submitted that the proceedings were a nullity.

For the above reasons the appellant urged us to allow the appeal with costs.

15. The respondents opposed the appeal. They defended the finding by the learned judge that the appellant did not prove sale of the suit property, adding that the appellant did not produce in evidence the agreement allegedly dated 18th August 1972, but instead produced in evidence a different document dated 31st August 1972, which was fundamentally different. The respondents added that under section 107 (2) of the *Evidence Act*, it was the duty of the appellant to prove his case, not for the learned judge to go out of his way to look for the evidence in favour of the appellant.

16. On the second ground of appeal, the respondents relied on section 6 of the *Land Control Act* and supported the finding by the learned judge that the alleged transaction between Paul Boit and the appellant's mother was null and void for lack of consent from the Land Control Board. They also supported the conclusion that adverse possession was inapplicable because at the material time the suit property was registered in the name of the SFT. The respondents relied on *Gitu v. Ndungu* [2001] 2 EA 379 in support of that proposition.

17. Regarding compliance with Order 24 Rule 2, the respondents submitted that the issue of the death of the appellant's mother was never raised before the trial court by the appellant who was a surviving defendant to the claim and a serving plaintiff in the counterclaim. In their view, the matter therefore could not be an issue in this appeal. The respondents added that indeed the learned judge did in fact note on the record that the appellant's mother had died and that the appellant was to continue with the matter. Finally, the respondents contended that the appellant and his mother were participating in the suit in their capacity as administrators of the estate of Paul Boit, and not in their personal capacities, and therefore the appellant's complaint had no merit. Accordingly, the respondents urged us to dismiss the appeal with costs.

18. We have carefully considered this appeal and the respective submissions by the parties. We shall straightaway consider the grounds of appeal as raised and addressed by the parties.

19. The first issue is whether the learned judge erred by holding that the appellant did not prove sale of the suit property to his father by the respondents' mother. In their Amended Statement of Defence and Counterclaim dated 27th March 2007, the appellant and his mother pleaded that the respondent's mother sold the suit property to Paul Boit in 1972. When the appellant testified in court on 17th July 2013, he was specific that the sale was pursuant to an agreement dated 11th August 1972. Indeed, when the appellant filed his list of documents before trial on 20th September 2006, that agreement was indicated as one of the documents the appellant would be producing and relying on. The agreement of 11th August 1972 was marked for identification as DMFI-1 but the respondents subsequently objected to its production because it was a copy. The Court sustained the objection and, despite several adjournments for the appellant to produce the original, it was never produced. Instead the appellant presented DMF1-2, a document dated 30th August 1972 which was produced as Defence Exhibit 6. Subsequently the appellant produced the SFT file which contained another copy of the document dated 30th August 1972, which the court found to be fundamentally different from Defence Exhibit 6.

20. It is obvious to us that the appellant was relying on the agreement dated 11th August 1972 to prove the alleged sale of the suit property. That agreement was not produced in evidence despite the court's indulgence for the appellant to do so. What was produced instead was the document dated 30th August 1972 which the court found to have major discrepancies with the copy of the same document in the SFT file. The trial court was best suited and duty bound to resolve any conflicts in the evidence before it and having considered Defence Exhibit 6 against the document in the SFT file, it concluded that it was not a reliable document. The Court also noted contradictions in the evidence of the appellant's witnesses regarding the circumstances under which Defence Exhibit 6 was authored and signed.

21. In these circumstances, we do not see how the trial court can be faulted for its conclusions. It had the opportunity to hear and see the witnesses testify and was clearly not impressed by the evidence adduced by the appellant on the alleged agreement for sale. This Court will not readily interfere with the findings of the trial court on credibility of witnesses, unless it is demonstrated that the court misapprehended or overlooked the evidence. This is simply because we lack the opportunity to evaluate those witnesses, which the trial court had. (See *Muiruri v. Kimemia* [2002] 2 KLR 677). In these circumstances, we cannot fathom how the appellant expected the trial court to get out of its way to find the evidence to

support his case. The onus was on the appellant to prove his case, and if any party was obliged to call an expert witness, it was none other than the appellant.

22. Even if we grant the appellant's argument on the applicability of section 3(3) of the *Law of Contract Act* in this appeal, the fact that having considered the evidence the learned judge expressly found the appellant's witnesses on the alleged sale were not credible, cannot allow us to interfere so as to find that there was a sale, coupled with part performance in the form of possession, as urged by the appellant.

23. Turning to the second ground of appeal on adverse possession, it is common ground between the parties that the suit property was registered in the name of the SFT between 19th May 1979 to 5th June 2003 when it was transferred and registered in the name of the respondents. Section 41(a)(i) of the Limitations of Actions Act, expressly excludes Government Land and land enjoyed by the Government from adverse possession claims. This Court reiterated that position in Gitu v. Ndungu [2001] 2 EA 379 where it held that interests of the SFT are not extinguishable under the *Limitation of Actions Act*. Additionally, as the learned judge correctly found, section 175 of the Agriculture Act, which was then applicable, expressly excluded the SFT from provisions of the *Limitation of Actions Act* relating to adverse possession. In light of this conclusion, it is moot, academic and unnecessary to venture into the issue of lack of consent from the Land Control Board.

24. The appellant also faults the learned judge for relying on technicalities when he refused to consider the appellant's submissions. On this issue, we can only say that it cannot, in good conscience, fall from the mouth of the appellant to complain. The record shows that the hearing concluded on 27th February 2014 when the appellant closed his defence. The court directed the parties to file and exchange submissions within 21 days and set the matter down for mention on 25th March 2014. Come 25th March 2014, it was only the respondents who had complied and filed their submissions. The appellant applied for more time to file his submissions. As the respondents did not object, the court allowed the appellant time to file his submissions, and set a new mention date on 4th June 2014. On that date, again the appellant had not filed his submissions and the court set the date for judgment on 31st July 2014.

25. The appellant made no effort to file the submissions until the date of delivery of judgment, when the appellant applied for leave to file his submissions. Those submissions were date-stamped that very day, 31st July 2014. The learned judge indicated that the application was coming too late in the day when the judgment was due and ready for delivery. Accordingly, he dismissed the application and rendered his judgment.

26. The court indulged the appellant twice to file his written submissions. No reason was given for non-compliance. The purported submissions were filed on the day when judgment was scheduled for delivery. The appellant was aware all along of the order to file his submissions and of the date set for delivery of judgment. In these circumstances the appellant cannot be heard to accuse the court of relying on technicalities. The court has an equally compelling constitutional obligation to ensure that justice is administered without undue delay. The appellate was plainly slothful and dilatory, and cannot blame the court for what befell him.

27. The last issue is the court's alleged error of proceeding with the trial on the death of the appellant's mother contrary to order Order 24 Rule 2 of the Civil Procedure Rules . That provision requires the court, where there are more defendants than one and any one of them dies, and the cause of action survives, to make an entry to that effect on the record and to proceed with the suit. The record shows that the court was informed of the death of the appellant's mother which is reflected on the record. There is no prescribed format in which that information should be recorded. But more compelling, we agree with the respondents that the appellant and his late mother were sued and were counterclaiming in their capacity as administrators of the estate of the late Paul Boit, not in their individual capacities.

By dint of section 81 of the *Law of Succession Act* , upon the death of one of the joint administrators, all the powers and duties of the administrators become vested in the surviving administrator. We think this ground is clearly an afterthought.

28. Having considered all the grounds of appeal, we do not find merit in any of them. In the circumstances, this appeal is dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF DECEMBER 2021

P. O. KIAGE

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