



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, J.J.A)

CIVIL APPEAL NO. 136 OF 2018

BETWEEN

STEPHEN MUTUKU MULINGE.....1ST APPELLANT

BENEDATA KATHINI.....2ND APPELLANT

AND

DICKSON M. MUTUKU.....1ST RESPONDENT

JOHN KARANJA MIRITU.....2ND RESPONDENT

(An appeal from the Judgment of the Environment and Land Court

at Mombasa (Omollo, J.) dated 2nd August, 2018

in

E.L.C No. 232B of 2013.)

JUDGMENT OF THE COURT

1. By an amended plaint, the appellants herein filed a suit in the Environment and Land Court (ELC) being E.L.C No. 232B of 2013 against the respondents seeking:

a) A declaration that the plaintiffs are the proprietors of all that parcel of land known as plot number MN/VI/121 measuring approximately 0.418 Ha situated at Aldina Area in Jomvu within Mombasa County.

b) An order of permanent injunction restraining the defendants by themselves, their servants and/or agents or otherwise howsoever from entering, trespassing into or continuing to trespass into, alienating, disposing of, constructing, developing or in any way interfering with the plaintiffs' quiet possession of Plot No MN/VI/121 measuring approximately 0.418 Ha situated within Aldina Area.

c) Damages for trespass and an order directing the defendants to put back the plaintiffs' beacons.

d) Costs of the suit.

2. The appellants' cause of action was anchored on the ground that they are the legal proprietors of unadjudicated portion of land measuring 0.418 Ha (suit parcel) from Plot No. MN/VI/121 situated at Aldina area in Jomvu within Mombasa County. They had purchased the same from Mzee Jela Mudzombo (deceased) vide a sale agreement dated 14th August, 2012 at a consideration of Kshs.600,000. Thereafter, they erected beacons and commenced developing the suit parcel.

3. On or about 6th October, 2013 they discovered that the respondents had encroached on sections of the suit parcel, removed beacons, and fenced off the said sections. The appellants tried without any success to get the respondents to stop the trespass and even went as far as

lodging a complaint with the police. Eventually, they filed the above mentioned suit contending that the respondents had no right over the suit parcel and that their conduct had occasioned them loss.

4. On their part, the respondents denied the allegations of trespass with each one of them maintaining to be a bonafide purchaser of the respective portions they occupied. As per the 1st respondent, he purchased his portion measuring 88 feet x 200 feet with the developments thereon from Angus Hamisi Swedi and Bernadeta Shali Mwakisha on 8th August, 2012 at Kshs.1,400,000. Angus and Bernadeta had bought the portion from Salim Ngoro Kalama (DW1), the deceased's eldest son.

5. To him, it was the appellants who had invaded his portion in August, 2013 and erected beacons and committed other acts of waste thereon. He reported the issue to a headman and the matter was considered by a council of elders who found in his favour. Pursuant to that decision, the 1st respondent together with the village elders, moved onto suit parcel, measured his portion, removed the beacons thereon and fenced it off. Later on, he was called to attend a meeting with a certain headman on account of his portion of land. The headman threatened him to keep off the suit parcel but he declined. He was then served with the summons in respect of the suit filed by the appellants.

6. The 2nd respondent's version of events was that by an agreement dated 20th August, 2012, he too purchased a portion of Plot No. MN/VI/121 which is 110 feet x 200 feet in size from Abdalla Charo Kalama and Yusuf Ngoro Kalama (both of whom were the deceased's sons) at Kshs.1,100,000. Like the 1st respondent, he took possession of his portion and fenced it.

7. At the trial, each of the parties called witnesses in support of their respective cases. In the end, the trial court (**Omollo, J.**) by a judgment dated 2nd December, 2018 held that the appellants had not proved their case to the required standard of proof. It is that decision that has instigated the appeal herein predicated on 9 grounds of appeal. In a nutshell, the appellants fault the learned Judge for misconstruing the evidence tendered on their behalf *vis- a- vis* that of the respondents and the weight to be attached thereto.

8. At the hearing of this appeal, only learned counsel Mr. Ngonze was present for the appellants and there was no appearance for the respondents. The hearing date having been taken by consent, we proceeded with the matter by considering the written submissions filed on behalf of the parties herein as well as the oral highlights by Mr. Ngonze.

9. Mr. Ngonze argued that the learned Judge misapprehended the totality of the appellants' evidence and overlooked the glaring inconsistencies in the respondents' evidence. By way of illustration, it was submitted that unlike the appellants, the sale agreements relied on by the respondents had not been witnessed by a village elder as was required. All the statements which were recorded at the police station with respect to the suit parcel acknowledged the appellants as the proprietors. In point of fact, Salim testified that upon learning of the sale he lodged a complaint with the village elders.

Conversely, the alleged purchase by the respondents was not alluded to in any of the statements.

10. He continued by stating that it was rather interesting that the respondents' evidence was to the effect that the original plot from which the suit parcel emerged was distributed to the deceased's children on 14th August, 2013 after his demise on 23rd July, 2013. What's more, by that time the appellants had already purchased the suit parcel on 14th August, 2012.

11. Further, as per the 1st respondent's evidence, he purchased a portion measuring 80 feet x 200 feet at Kshs.1,400,000 while the 2nd respondent, who supposedly purchased a larger portion of 110 feet x 200 feet did so at a lower price of Kshs.1,100,000. The 2nd respondent, in his testimony, claimed that at the time he purchased his portion of land the deceased had passed on. Yet the deceased died on 23rd July, 2013 and the sale agreement in that respect is dated 20th August, 2012. Salim's evidence on the measurements of the portions allegedly allocated to his brothers and himself by the deceased was also inconsistent.

12. All in all, the appellants' evidence substantiated their case to the required standard whereas the respondents' evidence called into question their claim over the suit parcel.

13. In the respondents' view, the appellants' claim turned on the size of the parcel they had purchased. Towards, that end, there was no evidence to support the appellants' claim over the suit parcel for the reason that the relevant sale agreement did not disclose the size of the land they had purchased. Be that as it may, it was crystal clear from the evidence tendered on behalf of the respondents, how, firstly, the original parcel was distributed amongst the deceased's sons and thereafter, sold to the parties herein. There was nothing to impeach the decision made by the learned Judge. In conclusion, we were urged to dismiss the appeal on that basis.

14. We have taken into account the record, submissions by counsel and the law. This is a first appeal and as such, our mandate is to re-appraise the evidence on record and make our own conclusions bearing in mind that we never had the privilege of observing the witnesses as they testified. See **Rule 29(1)** of the **Court of Appeal Rules**.

15. The appellants' case as noted in the preceding paragraphs of this judgment was based on the tort of trespass. Trespass under the **Black's Law Dictionary** is defined as:

“An unlawful act committed against the person or property of another esp., wrongful entry on another's rea; property.”

This Court also described trespass in the case of **Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR** in the following manner:

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury's Laws of England

16. Therefore, by virtue of **Section 107 & 108** of the **Evidence Act**, the onus was on the appellants to establish first, proprietorship of the suit parcel and more particularly, the sections alleged to have been encroached by the respondents. Secondly, that the respondents had intruded on the same. Did the appellants establish the foregoing?

17. On the first issue, the appellants' evidence was that they purchased the suit parcel from the deceased prior to his death. However, as noted by the trial court the sale agreement they relied on was between themselves and Kalama Juma Charo who happens to be the deceased's son. The appellants' explanation for this was that the deceased gave the said Juma authority to conduct the transaction on his behalf. We cannot help but note that there was no evidence of such authority and in any event, Juma never gave evidence to that effect.

18. It was also the appellants' case that prior to the sale they were taken round the deceased's original plot together with Stephen Charo Ziro (PW3) and Noah Mwangi (PW4) both of whom witnessed the sale agreement. They were shown the extent of the parcel they were to purchase which included the sections intruded by the respondents. Nonetheless, it is not in dispute that the appellants as well as their witnesses did admit that the said parcel was never measured. Likewise, the sale agreement in question does not disclose the size of the said parcel. So how did the appellants come to the conclusion that the respondents had encroached on sections of their parcel or that the parcel they purchased measured 0.418Ha?

19. In light of the foregoing, we do not think that the appellants established that the respondents had trespassed onto their land. Further, Salim's evidence with respect to the original plot which belonged to the deceased displaced the appellants' allegations. To begin with Salim testified that he was the deceased's eldest son; prior to his death he distributed identifiable portions of the original plot amongst his four sons namely, Salim N. Kalama, Juma C. Kalama, Abdalla C. Kalama and Yusuf Kalama. This was reinforced by the testimony of Omar Masud Wanje (DW4) who was present when the deceased allocated the said portions to his sons. Salim stated that it was after the demise of the deceased that the family held a meeting on 14th August, 2013 in the presence of elders and confirmed the said distribution.

20. He was the first to sell his portion measuring 80 feet x 200 feet to Angus and Bernandeta who commenced construction of a permanent house. This piece of evidence was confirmed by the appellants and their witnesses who admitted that the said Angus was in occupation of a portion which was adjacent to their parcel. Salim went on to corroborate the 1st respondent's evidence that Angus and Bernandeta sold their portion and the house to him.

21. In addition, the 2nd respondent evidence was to the effect that he purchased his portion measuring 110 feet x 200 feet from Abdalla and Yusuf, the deceased's sons. This was also confirmed by Salim who was a witness to the said agreement. Moreover, when the trial court went for a site visit, Abdalla, Yusuf and Juma were present and as per the record, they admitted to selling portions of the original plot to the appellants and the 2nd respondent. Consequently, this meant that the parties herein were entitled to portions of the original plot.

22. Accordingly, we, like the trial court, find that as it stood, the evidence adduced by the appellants did not establish their claims on a balance of probabilities. Our position is fortified by the sentiments of Lord Denning J. in **Miller vs. Minister Of Pensions 2 [1947] AII ER 373**:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

23. Based on the foregoing, we concur with the following finding of the trial court:

“In the sale agreements to the defendants, the sizes of the sold plot is given unlike the plaintiffs' agreement. Since the persons who sold were all sons of the late mzee Jela, I will go by the evidence of DW 1 and DW 5 that their father gave each of them a share of the disputed plot. The sizes distributed as given by defence witnesses is slightly contradictive in width. DW 1 stated he was given 88 by 200 and in his statement to the police he said Swedi got 83 by 200. DW 4 & DW 5 maintained Salim was given 88 by 200 while Juma, Abdalla & Yusuf each got 55 by 200.

The burden was however heavier on the plaintiffs to prove the size of the land sold to them. Having conceded that measurements were not done before the sale, this Court can only reach a conclusion that they are only entitled to the shares of the person who sold to them i.e. Kalama Juma Charo which is estimated to be 55 feet by 200 feet. If they paid more based on what they were shown, their claim for compensation can only lie as against Kalama Juma Charo and not to claim the portions other people who bought from the sons that were equally entitled to sell their shares.

I am thus unable to make a finding that the plaintiffs are entitled to 0.418 ha of land comprising part of title plot No MN/V/121 as contained in prayer (a) of their plaint. Neither can I issue an order of injunction against the defendants for trespassing on part of the portion measuring 0.418 ha as they are also entitled to their shares. Consequently, no damages accrues since there is no trespass. Since the misfortune of the plaintiffs was occasioned to parties not joined to this suit and in the interest of good neighbourliness, I order each party to bear their respective costs of the suit. The plaintiffs' suit is thus dismissed for not having been proved with no order as to costs.”

24. Accordingly, the appeal herein lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR