IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CIVIL APPEAL NO. 24 OF 2016

BETWEEN

JAMES KITERIE ALFAYO ……..……...…....…….…… APPELLANT

AND

MARGARET C. WAMBETE ……..……. RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Kitale ***(E. Obaga J.)*** *dated 15th September, 2015*

in

ENVIRONMENT & LAND CASE NO. 78 OF 2003)

****

JUDGMENT OF THE COURT

[1] Litigation leading to this appeal was initiated through a plaint dated 16th December, 2003 in which James Kiterie Alfayo who is now the appellant before us sued Margaret C. Wambete who is now the respondent. The appellant who claimed to be the lawful allottee of Plot No. 38 that was previously Plot No. 80 Kitalale Settlement Scheme, sought a declaration that he is the rightful allottee of Plot No. 38 Kitalale Settlement Scheme; and permanent injunctive orders restraining the respondent from trespassing onto or disturbing the appellant's peaceful occupation of Plot No. 38 previously Plot No. 80 Kitalale Settlement Scheme Phase I.

[2] By an amended defence and counter-claim amended on 20th April, 2005, the respondent denied the appellant's claim and maintained that she is the sole *bona fide* allottee of Plot No. 38 Kitalale Settlement Scheme having been issued with a letter on 18th August, 2000; that she had taken possession of the plot, but the appellant has continued interfering with her quiet possession by committing acts of trespass on the property; that the appellant had made improper gain from the acts of trespass and the respondent therefore counter-claimed for Kshs.100,000/= per annum as *mesne* profits from 18th August, 2000. The respondent also sought to have the appellant evicted from the suit property.

[3] During the hearing, the appellant testified and also called one witness. He maintained that he was the owner of Plot No. 38 at Kitalale Settlement; that this plot was formerly Plot No. 80 and was initially allotted to one Philip Eyanai; that Philip sold the plot to Patrick Towett; and that he (i.e. appellant) purchased the plot from Patrick. The appellant produced the letter of allotment in Philip Eyanai's name, the sale agreement between Patrick and Eyanai; and a sale agreement between himself and Patrick.

[4] He stated that he took possession of the Plot No. 38 in 2000 and has since put up a house and planted trees. He enjoyed quiet possession until August, 2002, when the respondent started claiming Plot No. 38 and harassing him using police officers. He produced the area map for Plot No. 38. The appellant's witness Samuel Kisolo Moiben, a former nominated Member of Parliament, testified that he was involved in the Kitalale Settlement Scheme and the allocation of the plots. He testified that Philip Eyanai Lobehi was one of the allottees of the plot and that he subsequently sold his plot to Towett who in turn sold it to the appellant. The witness did not however, know the plot number of the plot which was sold.

[5] The respondent who is based in England testified through her sister, Redempta Wekesa, to whom she had donated a Power of Attorney.

Redempta produced a letter of allotment showing that the respondent was allocated Plot No. 38, and a receipt for Kshs.3,000/= which is the amount she paid upon allotment. However, when the respondent went to take possession of Plot No. 38 she found the appellant on the land. The appellant refused to move claiming that he was the owner of the plot. She maintained that the appellant's property was plot No. 80 which has no relationship with Plot No. 38.

[6] Francis Obiria Oseko, who is the County Land Adjudication and Settlement Officer, Trans Nzoia County, testified on behalf of the respondent. He confirmed that according to their records, Plot No. 38 Kitalale Settlement Scheme was allocated to the respondent on 18th August, 2000 and that she duly paid the required amount. He explained that Plot No. 80 no longer exists as Plot No. 80 was amalgamated with Plot No. 30 to form Plot No. 36 which is about 400 metres away from Plot No. 38.

[7] In his judgment, the trial judge summed up the issues before him as to whether Plot No. 80 existed at Kitalale Settlement Scheme and if so whether it is the one that came to be known as Plot No. 38. Secondly, whether the suit land is the one known as Plot No. 38 and finally who is the rightful owner of the suit land.

[8] The trial judge came to the conclusion that Plot No. 38 is distinct from Plot No. 80; that the respondent was the rightful owner of Plot No. 38; and that the appellant was illegally occupying Plot No. 38. The trial judge therefore, gave the appellant upto 31st December, 2015 to move out of Plot No. 38 failing which an eviction order was to issue. The trial judge found no evidence in support of the respondent's counter-claim for *mesne* profits and therefore, dismissed that part of the counter-claim.

[9] In his memorandum of appeal, the appellant has raised 4 grounds contending that the trial judge erred in finding that Plot No. 80 was not the one which became Plot No. 38 Kitalale Settlement Scheme; misinterpreting the report of the Deputy Registrar who visited the suit land, failing to appreciate the evidence of the appellant's witness Samuel Moiben; and finding that the respondent had proved her counter-claim.

[10] In support of the appeal, written submissions were duly filed and this is what was relied upon during the hearing. In a nutshell, the appellant maintained that the trial judge failed to give due regard to the appellant's evidence, which confirmed that Plot No. 38 and Plot No. 80 were the same Plot, No. 38 being the new number and No. 80 being the old number; that the appellant has been in possession of the property since 1999; and that the Settlement Fund Trustees who were the allocating authority not having faulted the appellant's occupation the respondent had no *locus standi* to challenge the appellant's occupation.

[11] Further, counsel for the appellant submitted that the appellant being in possession and his letter having been issued before that of the respondent there were two equities, and the first in time being that of the appellant took precedence; that in her amended statement of defence, the respondent did not pray for any orders from the court and the court could not grant that which was not prayed for; and that the respondent's pleading was fatally defective for failure to comply with the provisions of **Order VI A Rule 8** of the **Civil Procedure Rules** that requires every amended pleading to be endorsed with the date of amendment.

[12] In opposition to the appeal, the respondent's counsel, Mr. Wanyama, argued that the issue of failure to comply with order VIII Rule 7 of the Civil Procedure Rules was not raised as a ground of appeal; that in any case the record of appeal showed that there was compliance; that the finding of the trial judge that Plot No. 38 was distinct from Plot No. 80 was supported by the evidence that was adduced before him; and that the appellant failed to establish his alleged ownership of Plot No. 38. Counsel pointed out that the judgment of the trial court had been executed and the appellant evicted from Plot No. 38, and that the respondent has since taken possession of plot No. 38.

[13] We have re-considered and evaluated the evidence as we are expected to do in this first appeal. The appellant has raised an issue regarding the propriety of the respondent's pleadings on the ground that the amended defence and counter-claim was not endorsed with the date of the amendment as required under Order VI A Rule 8 (now Order VIII Rule 7) of the Civil Procedure Rules. A perusal of the record of the trial court reveals that this issue was never raised in that court nor was it included in the memorandum of appeal as a ground of appeal before this Court. It is therefore, an issue that is not open to this Court to address.

[14] Besides, it is evident that no prejudice has been caused to the appellant by the alleged omission. In our view, it is the kind of technicality or irregularity that this Court can safely overlook in the promotion of the constitutional principle of administering substantial justice as provided under **Article 159(2)(d)** of the **Constitution**. We would therefore reject the appellant's submissions in this regard.

[15] As regards the substantive appeal, the appellant being the one who initiated the litigation alleging that he was the owner of Plot No. 38, the burden of proof rested upon him in accordance with **section 107** of the **Evidence Act** to prove that he was the lawful owner of Plot No. 38. The appellant adduced evidence that he bought Plot No. 38 from Patrick Towett who in turn had purchased it from the original allottee, Philip Eyanai Lobelu. However, the allotment letter to Philip Eyanai and the agreement of sale between Philip Eyanai and Patrick Towett which he produced in court as evidence were all in respect of Plot No. 80.

[16] The appellant maintained that Plot No. 80 was the old number and that plot No. 80 had been given Plot No. 38 as the new number, but conceded that he had nothing to show that the number of the plot had changed from Plot No. 80 to Plot No. 38. On the other hand, the respondent, not only produced the letter of allotment in her name for Plot No. 38 together with the receipt for payment of Kshs.3,000/=, but also had her evidence supported by the County Land Adjudication and Settlement Officer who explained that Plot No. 80 did not exist as it was amalgamated with Plot No. 30 and renumbered as Plot No. 36.

[17] The evidence of the respondent was consistent with the sketch-plan prepared by the District Land Adjudication and Settlement Officer following a site visit together with the Deputy Registrar of the High Court on 6th September, 2004. The sketch plan showed Plot No. 38 on its own and Plot No. 36 about 4 plots away and indicated as (30 & 80). The trial judge cannot therefore, be faulted for dismissing the appellant's claim as there was no evidence in support of the claim. Moreover, the appellant cannot at this late stage purport to challenge the respondent's *locus standi* to challenge the appellant's claim when it is indeed the appellant who in the first place sued the respondent.

[18] We find no substance in this appeal and do therefore dismiss it with costs to the respondent.

Dated and delivered at Eldoret this 19th day of April, 2018.

E. M. GITHINJI

……...……...

JUDGE OF APPEAL

HANNAH OKWENGU

……...…...

JUDGE OF APPEAL

J. MOHAMMED

…….….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.