



IN THE COURT OF APEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.

CIVIL APPEAL NO. 2 OF 2015

BETWEEN

ABDALLA ALI ABDALLA.....APPELLANT

AND

JUMWA JAMES BAYA.....RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Malindi, (Angote, J.) dated 11th July 2014

in

E & L C C No. 36 of 2011)

JUDGMENT OF THE COURT

This appeal concerns the disputed ownership of the property known as ***Title No. Kilifi/Vipingo/1*** (the suit property), measuring approximately 1.8 Hectares. At all material times the suit property was registered in the name of ***James Baya*** (deceased) under the repealed ***Registered Land Act***. In these proceedings, the respondent, ***Jumwa James Baya*** who is the widow and administratrix, represents the estate of the deceased. The appellant, ***Abdalla Ali Abdalla*** stakes claim to the suit property contending that it is part of his property known as ***Title No. LT 37 Folio 112 File 3293*** measuring 4.6862 acres and registered in his name under the repealed ***Land Title Act***.

By a judgment dated 11th July 2014, ***Angote, J.*** held that there was no evidence to show that the suit property was part of the appellant's property. Accordingly, the learned judge ordered the eviction of the appellant from the suit property and issued a permanent injunction restraining him from interfering with the suit property. Aggrieved by that decision, the appellant filed the present appeal.

In her suit in the superior court below, the respondent pleaded that the suit property belonged to the estate of the deceased by virtue of its registration in the name of the deceased on 29th August 2006. She further pleaded that in the year 2000 the appellant, purporting to be the registered owner of the suit property, mobilized officers of the then Ministry of Lands as well as the police who purported to evict the

respondent and her family therefrom. It was contended that the purported eviction was unlawful, illegal and forceful. Accordingly the respondent prayed for the revocation of the appellant's title, his eviction from the suit property, a permanent injunction restraining the appellant from interfering with her possession and occupation of the suit property and costs of the suit.

In a defence and counterclaim dated 30th June 2011 the appellant pleaded that the suit property was part of his property **Title No. LT 37 Folio 112 File 3293**, (which he described as **Plot No 1/Takaungu Group**). He further pleaded that he was registered as the owner of his property in the year 2000 following purchase from a seller who had been its registered owner since 1968. As regards the respondent's title to the suit property, the appellant averred that the same was illegal, null and void for duplicity. In his view the respondent's property was part of a settlement scheme, which did not and could not be carved out of his private property. Finally the appellant pleaded that in the year 2001, the deceased conceded that he had trespassed on the appellant's property and upon being paid compensation, vacated the suit property. Accordingly he denied that he was illegally or unlawfully in occupation of the suit property.

As regards the counter-claim, the same was not properly pleaded, but it is clear enough that the appellant was claiming in paragraph 9 of the defence that he had, in the alternative acquired title to the suit property by adverse possession. He accordingly prayed for dismissal of the respondent's suit and an order directing the District Lands Registrar, Kilifi to revoke the respondent's title to the suit property. To the defence and counterclaim, the respondent duly filed a reply to defence and counterclaim on 20th July 2011.

The evidence in support of the respondent's case was given by 3 witnesses, namely two sons of the deceased, (**PW1, Kahome James Baya** and **PW2, Kahindi James Baya**) as well as **PW3, Ismael Balawi Ibrahim**, a neighbour of the deceased and proprietor of the parcel of land known as **Kilifi/Vipingo/6** which borders the suit property. The substance of that evidence was that the deceased and his family had occupied the suit property as squatters for a long time. In the evidence of PW2 the family of the deceased had lived on the suit property since 1933, while the evidence of PW1 was that the family was living on the suit property when he was born in 1964.

In 1974 the Government of Kenya allocated the suit property to the deceased who continued to live thereon with his family. In 1978 the Government created **Vipingo Settlement Scheme** to settle landless Kenya. The deceased died on 21st June 1997 but the suit property was ultimately registered in his name under the repealed Registered Land Act on 29th August 2006. A few years before then, the appellant had, purporting to be the owner of the suit property, invaded the same with the support of the local administration and the police and unlawfully and forcefully evicted the deceased's family. While some of the sons of the deceased moved out, their mother, the respondent, had continued to live and as of the date of trial was still living on the suit property.

The evidence of PW3 was to confirm that he was the registered owner of Kilifi/Vipingo/6, adjoining the suit property. Like the respondent's, his evidence was that he had all along lived on his land and that his father was born on it. However the appellant had previously claimed part of his Kilifi/Vipingo/6 as his land and had paid the witness Kshs 6,000, which he understood to be compensation for his trees, which the appellant had cut in the process of installing his beacons. According to the evidence of this witness, the effect of the appellant's claim was to place the entire suit property within the appellant's land.

On the other hand the substance of the evidence adduced by the appellant and his witness was that the suit property was part of private land since 1913 and that no settlement scheme could be legally established on it because it was not unalienated Government land. At all material time, the suit property was part of **Title No. LT 37 Folio 112 File 3293** registered in the name of **Suleiman Bin Ali** who died on 11th August 1987. By a conveyance dated 14th December 2000, he purchased the said property from **Mohamed Suleiman Ali** and **Ali Suleiman Ali**, the sons and executors of the estate of Suleiman Bin Ali for **Kshs 100,000.00**. He duly obtained the consent from the Bahari Land Control Board and the property was registered in his name. Thereafter he paid a surveyor to install the beacons marking the boundaries of his land. It was then that he found that some people, among them PW2 and PW3 had settled on his land. He paid them for the houses they had built and the trees they had planted and they moved out of the land. He

accordingly prayed for the cancellation of the titles of the people who had settled on his said land.

DW2, Felix Mwawasi Kiteto, was the District Land Adjudication Officer, Kilifi. He testified on the establishment of Vipingo Settlement Scheme, which he said did not include the appellant's private land. In his evidence the suit property and PW3's land were outside the appellant's land, though it was later realized that there was an "anomaly" and that some neighbours had encroached on the appellant's private land. Those people had subsequently been removed and taken into Vipingo Settlement Scheme. The witness however could not tell who had encroached on the appellant's land, as he did not have a surveyor's report.

It was on the basis of the above evidence that Angote, J. found for the respondent, leading to this appeal. With the consent of the parties, it was directed that the appeal be heard and determined through written submissions with limited oral summation.

For the appellant, **Mr. Hamsa**, learned counsel assailed the judgment of the High Court for setting out four issues for determination and failing to determine all of them; for ignoring the fact that the appellant's title to the suit property ante-dated the respondent's title; for failing to hold that no settlement scheme could be created over private property; for dispossessing the appellant of his property through the order for eviction; for overlooking the fact that the respondent's family had voluntarily moved out of the suit property after receiving compensation from the appellant for their developments; for shifting the burden of proof upon the appellant; and for dismissing the counterclaim without valid basis.

Opposing the appeal, **Mr. Sharia**, learned counsel for the respondent submitted that the appellant had not proved ownership of the suit property; that the consent allegedly obtained by the appellant from the Bahari Land Control Board was fraudulent as it purported to show Suleimani Bin Ali appearing before the Board on date when he was already deceased for almost 13 years; that by reason thereof any registration of the appellant as owner of the suit property was founded on an illegality; that no court ought to enforce or recognize a transaction tainted by illegality; that the appellant had not proved encroachment on his land by the respondent; that the estate of the deceased had not obtained any compensation from the appellant and had not voluntarily agreed to vacate the suit property; that the respondent's title to the suit property was indefeasible; and that the counter claim was properly dismissed for lack of merit

Although the memorandum of appeal sets forth 8 rounds of appeal, in our assessment all the grounds boil down to whether on the basis of the pleadings and evidence adduced by the parties, the learned judge erred by finding in favour of the respondent and granting an order for the eviction of the plaintiff from the suit property, as well as an injunction restraining him from interfering with the plaintiff's possession of the suit property.

As this is a first appeal, we shall reconsider the evidence, evaluate it and draw our own conclusions but make allowance for the fact that we do not have the advantage that the trial judge had of seeing and hearing the witnesses. (See **SEASCAPES LTD V. DEVELOPMENT FINANCE COMPANY OF KENYA LTD. (2009) KLR 384**). The real dispute in this appeal is whether the suit property borders the appellant's land, **Title No. LT 37 Folio 112 File 3293** or whether it is subsumed within the latter and is therefore part and parcel of it. The plans that were produced in evidence are not consistent. The survey plan (**FR/No.103/68** dated 12th January 1965), which was produced by the appellant, indicates that his land crosses the Malindi-Mombasa Road and covers the suit property (Kilifi/Vipingo/1) as well as Kilifi/Vipingo/6 owned by PW3.

On the other hand the subdivision scheme of Vipingo Settlement Scheme (Plaintiff Exhibit No 6), which gave rise to the suit property and Kilifi/Vipingo/6, among hundreds of other parcels of land, indicates that the respondent's property ends along the Malindi-Mombasa Road and does not cross over the road. According to that plan the suit property and Kilifi/Vipingo/6 lie opposite the appellant's land fronting the Malindi-Mombasa road. In effect therefore, both the suit property and Kilifi/Vipingo/6 end at the Malindi-Mombasa Road and are separated by that road from the appellant's land. As found by Angote, J., according to the subdivision scheme, the part of land that the appellant was claiming simply does not exist.

The evidence that was adduced confirmed that the respondent's and PW3's titles were genuine. There is no credible evidence to suggest that the respondent or PW3 ever interfered with the boundaries of their properties as set out in the subdivision scheme so as to encroach on the appellant's property. The boundaries of their properties remain as they are shown in the subdivision scheme, ending along the Malindi-Mombasa Road, without crossing over to the appellant's land.

In our view, the evidence of DW2 and the correspondence that he produced from the then **Ministry of Lands and Settlement** give some good idea about what could have happened, though rather mischievously and unconvincingly, the Ministry attempted to shift blame to the deceased James Baya and PW3 for allegedly encroaching on the appellant's land. According to DW2, the appellant's land was not included within Vipingo Settlement Scheme because it was private land. The suit property and Kilifi/Vipingo/6 were outside the appellant's private land and merely bordered it. Subsequently it was realized that there was "an anomaly." He did not explain the true nature of the so-called anomaly but he conveniently tried to blame the respondent and PW3 for encroaching on the appellant's land.

We are in full agreement with the trial judge that there was absolutely no evidence that the respondent had trespassed or encroached on the respondent's land or otherwise altered the boundaries of the suit property. The boundaries are still as indicated in the subdivision plan, and if at all there was any "anomaly" (and we make no finding in that regard), it lay in the subdivision plan, which the respondent was not responsible for. To that extent the appellant's remedy, if any, lies against the implementers of the Vipingo Settlement Scheme, who incidentally were not parties to the suit giving rise to this appeal, rather than against the respondent.

Further indication of the extent and magnitude of the boundary problem, which again loudly absolves the respondent from blame, is found in the evidence of the appellant himself. When he was cross-examined on 26th September 2013, he readily admitted that some of the beacons marking the boundaries of his land were located within Mukwajuni Polytechnic. How the boundary of his private land could extend into a public facility is not easy to fathom. In our view, as regards the charge of encroachment and interference with the boundary between the suit property and the appellant's land, the respondent is blameless. Shorn of all flip-flopping and pretences, this appears to be a classical case of people who are supposed to be professionals doing a shoddy job and shifting blame to innocent and weaker parties to escape responsibility and accountability.

We are satisfied that the trial court did not err in finding that the respondent had not encroached on the appellant's land and that instead it was the appellant who had trespassed into the respondent's land. In those circumstances, the learned judge too cannot be faulted for issuing an order for the eviction of the appellant from the suit property and for an injunction restraining him from interfering with the respondent's possession and occupation of the same.

As regards all the other issues raised by the appellant in this appeal, we do not deem it necessary to address them at length, save to state briefly as follows.

There was no evidence adduced to show that the estate of the deceased had voluntarily agreed to move out of the suit property. By the time the appellant was invading the suit property in the year 2000, James Baya was dead. The evidence shows that the appellant paid Kshs 4,000 to PW2. But PW2 is not and never was the administrator of the estate of the deceased. The administratrix is the respondent. PW2 could not, in the absence of being the holder of a grant of representation of the estate of the deceased, purport to act on behalf of and bind the estate of the deceased. (**See TROUISTIK UNION INTERNATIONAL & ANOTHER V. MBEYU & ANOTHER (2008) 1 KLR (G&F) 730.**)

There is no basis for the argument that the learned judge dispossessed the appellant of his property or that he nullified the appellant's title. All that the learned judge held was that the suit property was not part of the appellant's land. In other words the appellant's property does not extend across the Malindi-Mombasa Road into the suit property. Subject to that finding, the appellant's title to his property remains.

As regards the counterclaim, the appellant adduced no evidence to prove it and we are satisfied that there

was no basis upon which the learned judge could have held that the appellant had acquired title to the suit property by adverse possession. On the basis of the evidence on record, there was no peaceful occupation of the suit premises by the appellant. In addition there was no satisfactory evidence of occupation of the suit property by the appellant who admitted that he lives in Kisauni Mwandoni. Though he claimed to have people taking care of the suit property, the precise nature of his occupation and possession was not given. On the other hand the respondent's evidence was that she was still living on the suit property. Even assuming that all the above questions were to be resolved in favour of the appellant, there was no evidence of continuous occupation of the suit property for at least 12 years as is required under the **Limitation of Actions Act**. If it is assumed that the appellant took possession of the suit property in the year 2000, 12 years of open, peaceful and as of right occupation had not expired as the suit for the appellant's eviction was filed in 1st July 2011. (See **WAMBUGU V. NJUGUNA [1983] KLR 172**).

As regards the failure of the learned judge to address all the issues that were framed, this was not a ground of appeal. It was belatedly and surreptitiously introduced in the appellant's submission.

For all the foregoing reasons, we find this appeal bereft of merit and the same is dismissed with costs to the respondent.

Dated and delivered at Malindi this 30th day of October, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR