Rai v Mwinzi (Appeal E001 of 2023) [2024] KEELC 3771 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3771 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

APPEAL E001 OF 2023

AE DENA, J

MAY 13, 2024

BETWEEN

RAI GONZI RAI .... APPELLANT

AND

TITUS MWINZI .... RESPONDENT

JUDGMENT

1 This appeal arises from the judgement and decree of Hon. Stephen K. Ngii, Principal Magistrate Mariakani dated 14th December 22, Mariakani Environment & Land Case No. E005 of 2021. The Appellant's suit commenced by Plaint dated 10/2/21 was dismissed with costs. The grounds in the Memorandum of Appeal are that; -

1. That the trial Magistrate erred in law and fact in his failure to take into consideration the evidence, witness and exhibits brought by the Appellant/Plaintiff and dismissing the forma proof.
2. That the trial Magistrate erred in law and fact in his failure to appreciate evidence tendered thereby reaching a wrong conclusion by failing to make a finding that ownership of land could be proved through documentary history.
3. That the trial Magistrate erred in law and fact in setting out issues for determination which never flowed from the pleadings or pleaded by the Respondent/Defendant hence occasioning an injustice as the Appellant/Applicant was never given an opportunity to counter the same.
4. That the trial Magistrate erred in law and fact by making a finding that there was non-compliance whereas no evidence was led by the Respondent/Defendant of non-compliance of terms.

5. That the trial Magistrate erred in law and fact by making a finding that the structures did not provide an iota of evidence that the structures lies within the boundaries of the suit property despite the Appellant/Plaintiff evidence being uncontroverted.

6. That the trial Magistrate erred in law and fact by making a finding based on an in-action for four years despite the existence of the *Limitation of Actions Act* limiting land claims to 12 years and making conclusions based on the in-action.

7. That the trial Magistrate erred in law and fact by making a finding that the Appellant/ Plaintiff was not a credible litigant or witness despite the Appellant/Plaintiff evidence being uncontroverted

8. That the trial Magistrate erred in law and fact by dismissing the formal proof suit despite their having been no evidence led by the Respondent/Defendant that he possessed a superior title.

9. That the Magistrate erred in law and fact in failing to appreciate the Appellant/Plaintiff submissions in the entirety.

2 The gist of the Plaintiff's claim is that he is the registered proprietor as an allottee of Plot No. 75 Zone 512 at Samburu trading Centre. The Defendant trespassed therein about four years ago and continued constructing structures despite the Plaintiff's protestations. The Plaintiff therefore sought for an order of vacant possession and the Plaintiff's quiet and peaceful enjoyment. The suit was not defended.

3 On 20/11/23 the court issued directions on the mode of hearing of the Appeal being written submissions.

4 The Appellant filed submissions on 7/2/24. Two issues were identified, whether the Appellant proved ownership and if he was entitled to an order of eviction. Relying on the dictum in *Festo Ogedo Agutu Vs. Richard Odumbe & Another* (2022) eKLR, it was submitted that the letter of allotment (PEX1) proved ownership supported by the fact that the land was subject to collection of rates to the County Government of Kwale (PEX2). That no evidence was led by the Defendant as to non-compliance with the terms of the allotment letter. That this was not an issue supported by the pleadings and was speculative. That no reasons were given for the finding that the Appellant was not a credible witness despite the evidence having not been controverted. That making conclusions based on the 4 year alleged in-action was an error in law in view of the 12 year Limitation period for land claims.

5 The Respondent appointed the firm of Apollo Muinde Advocates who filed submissions on 7/2/24 in opposition to the appeal. The submissions largely support the lower decision. Citing High Court Civil Appeal No. 15 of 2010 (Nyeri) Hellen Wangari Wangechi Vs Carumera Muthoni Gathua on burden of proof it was submitted that all cases are decided on the legal burden of proof being discharged or not it is the acid test applied when coming to a decision in any particular case. It is submitted that the Appellant's evidence fell short of the standard of proof. There is no evidence before court to warrant interference with the trail magistrates finding. That the Appellant without first establishing the land is his, the Appellant cannot supplicate the intervention of this court in order to have somebody evicted or orders of injunction issued against him. That even where no actual title deed exists the process of paper trail of allotment must be seen to be complete.

Analysis and Determination

6 This court duty as the first appellate Court is as set out in Selle and Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, is to reconsider the evidence, evaluate it and draw my own conclusions of facts and law. This court is to only depart from the findings by the trial Court if they

were not based on the evidence on record, where the said court acted on wrong principles of law or if its discretion was exercised injudiciously as held in *Jabane vs Olenja* [1986] KLR 661 and *Mbogo & Another vs Shah* (1968) E.A respectively.

7 Guided by the above I will proceed to review the Plaintiff's claim and the evidence he led before the learned Magistrate. The Appellant testified on his behalf as PW1. He adopted his witness statement dated 10/2/21. He stated he was the registered owner of Plot No. 75 Zone 512 measuring approximately 0.0023 Ha at Samburu Trading Center but four years ago the Defendant trespassed into the same and continues to construct permanent structures despite the Plaintiff's protestations. He asked the court to compel the Defendant to vacate the property and to ensure the Plaintiff enjoys quiet possession of his land. He produced Letter of Allotment (PEX1), Rates Statement (PEX2), Photographs (PEX3) and Demand letter (PEX4).

8. The case was not defended. Having considered the Record of Appeal, the grounds of appeal raised in the Memorandum of Appeal filed before this court and the submissions filed by both parties and the attendant authorities cited, I find the main issue for determination is whether the Plaintiff proved to the required standard that the defendant was a trespasser in the suit property to warrant the reliefs sought.

9 The Plaintiff claims he is the registered owner of the suit property and the Defendant entered and was constructing permanent structures when the land did not belong to the Defendant. The Defendant is said to be a trespasser. Section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya provides;

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

10 The burden of proof lay on the Plaintiff to first prove that he is the owner of the land to the exclusion of the Defendant and upon proving ownership further prove that the Defendant has actually trespassed therein by constructing the alleged structures. The standard of proof in civil cases is on a balance of probabilities. The Appellant produced in evidence a letter of allotment dated 19/10/2010 addressed to Rai Gonzi by the County Council of Kwale. The letter offers plot 75 Zone 512 conditional upon acceptance and payment of various itemized charges totaling Kshs.8000/=. Both acceptance and payment were to be received by the County Council within 60 days of the date of the letter. The letter states further thereafter a lease title was to be processed in conjunction with the Commissioner of Lands. Also produced was Demand Notice for Rates under the *Rating Act* dated 15/04/2013 to Rai Gonzi in respect of Plot No. 75 Zone 512 Samburu TC.

11 Do the above two documents prove ownership? The Court of Appeal in the case of *Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others* [1997] eKLR stated thus; -

a. '.....Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

12 I noted that Counsel for the appellant cited Onguto J. (as he then was) in *Caroline Awinja Ochieng & Ano. Vs. Jane Mbithe Gitau & 2 Others* (2015) eKLR to buttress the Plaintiff's letter of allotment as a document that proves beneficial interest. The following extract was picked;-

In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment

or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically 'the essential indicia of title to unregistered land": per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al."

13 I'm persuaded by the above dictum. However I note that it must be a compilation of documents that are essential and there must be no break in the chain. While there is no doubt that such proof will be on a balance of probabilities, the court had to be left in no doubt that the holder of the documents proved is the owner to the property. To me therefore guided and persuaded by the above dictum there was need for the Appellant to further support the allotment with the documents that are pertinent in the chain of perfecting the title and which are the documents in proof that the conditions therein were met. The Appellant did not adduce any evidence to show that he accepted the offer and paid the Kshs. 8000/= within the 60 days and that therefore the offer did not lapse. The letter of allotment standing alone did not boost my confidence in this regard.

14 The Appellant in the Memorandum of Appeal herein contends that the above is not supported by the pleadings because the same is not controverted by the Defendant. Indeed the suit was not defended and proceeded for hearing exparte. But the burden of proof remains as required under the provisions of section 107 of the *Evidence Act* whether the suit is defended or not. It is not in doubt that uncontroverted evidence is not automatic evidence and the Plaintiff still has an obligation to prove his claim. To me it is this obligation that requires unliquidated claims to go into hearing as opposed to the entering of judgement in default of appearance. The purpose of a hearing is for the court to interrogate the facts and documents produced in evidence. This is what the trial Magistrate simply applied himself to and found there was noncompliance.

15 The Appellant also had to prove the trespass. It is trite that trespass is an unlawful intrusion into another's land without their permission of justifiable cause See Section 3 of the *trespass Act*. The Appellant produced pictures of a structure which he alleged belonged to the Defendant erected on the plot 75 Zone 512 herein. There was however no corresponding evidence to link this structure to the plot. To me there was need to demonstrate that the same was actually constructed within the said plot. The trial Magistrate stated in his finding "Even if I were to presume that the suit property belongs to the plaintiff, the plaintiff did not adduce even an iota of evidence to show that the structures contained in the photographs produced in evidence lies within the boundaries of the suit property.". I agree with this finding.

16 Based on the foregoing I find no reason to disturb or set aside the finding of the learned Magistrate. The appeal lacks merit and is dismissed with no orders as to costs. The judgement delivered on 14th December 2022 is upheld.

Orders accordingly.

Judgement Dated Signed and Delivered this 13th day of May 2024.

....

A.E DENA

JUDGE

In the presence of: -

Mr. Mwangunya for the Appellant

Mr. Muinde for the Respondent

Mr. Daniel Disii – Court Assistant