Marenga v Boit (Suing as the administrator of the Estate of Francis Boit Boiyo Kirong) (Environment and Land Appeal E030 of 2022) [2024] KEELC 4815 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4815 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL E030 OF 2022

EC CHERONO, J

JUNE 20, 2024

BETWEEN

DAVID MUKWANA MARENGA ..... APPELLANT

AND

ROSE CHEROP BOIT (SUING AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS BOIT BOIYO KIRONG) ..... RESPONDENT

(Being an appeal arising from the judgment and or decree of Hon.T.M.Olando (SPM) delivered on 19th October, 2022 in Bungoma MC ELC Case no. E010 of 2021)

JUDGMENT

1. This appeal arises from the judgment of the Senior Principal Magistrate Hon. Hon. T.M.olando delivered on 19th October, 2022 in Bungoma MC ELC Case No.E010 OF 2021.

2. The brief background of this case is that the respondent herein vide an amended plaint dated 1ST March, 2021 sought for the following reliefs;

    a. A declaration order to the effect that the plaintiff is properly in occupation of the portion measuring 91/2 acres comprised in the parcel No.E.Bukusu/W.Sang'alo/76 which is being held in trust on behalf of the Plaintiff and the Defendant do execute all the relevant documents to effect transfer of the 91/2 acres into the names of Rose Cherop Boit (Administrator) or the executive Officer of the Court sign on behalf.

    b. Costs of the suit.

    c. Interest

    d. Any other relief this honourable Court shall deem fit and just to grant.

3. It was the Respondent's case that the Appellant herein was at all material times to this suit the registered owner of land parcel No.E.Bukusu/W.Sang'alo/76(the 'suit land') measuring 29.7 acres. He averred that vide several agreements between 5th May, 1968 to 9th October, 1988, the Appellant's father one Marenga Nato sold 9 ½ acres to one Francis Boit Boiyo Kirong now deceased. He stated that at the time of the sale, the said Marenga Nato was the registered owner of the suit land and that the Respondent's family have settled on the said 9 ½ acres having fenced it off, planted trees and put up permanent structures to date. That the Appellant became the registered owner of the suit land on 1st October, 2016 and has been holding the 9 ½ acres in trust for the Respondent.

4. The Appellant in her response filed a statement of defence dated 3rd April, 2021 denying the Appellant's claim. It was her case that the Respondent's case was time barred and also null and void for want of consent from the Land Control Board.

5. Upon hearing both parties on various dates, the trial court rendered its judgment on 19th October, 2021 allowing the respondents claim with costs.

6. Being aggrieved by the trial court's judgment, the Appellants herein preferred an appeal vide a memorandum of appeal dated 23rd January, 2023 on the following grounds;

    a. That the learned trial magistrate erred in law and in fact in finding the appellant liable to transfer the land parcel No. E. Bukusu/W.Sangalo/76 measuring 9 ½ acres where there was no burden of proof.

    b. That the learned trial magistrate erred in holding that the Plaintiff/Respondent had proved his case on a balance of probabilities.

    c. That the learned trial magistrate erred in law and in fact in awarding interest and costs(damages) which were inordinately high by excessive all circumstances considered.

    d. That the learned trial magistrate erred in law and in fact in failing to find the credibility of the features and instruments of the agreements which were null and void for want of consent from the relevant land control board and breach of the agreement.

    e. That the learned trial magistrate erred in law and in fact in disregarding the Defendant/ Applicants defence.

    f. That the learned trial magistrate erred in law and in fact when he overlooked the Defendant/ Appellants submissions which outlined the limit of actions and held the Defendant/ Respondents liable before determination of the entire suit.

    g. That the learned trial magistrate erred in law and in fact when he failed to establish whether the Plaintiff's claim was time barred and prayers sought not granted.

7. The appellant sought to have the appeal allowed, the judgment and decree of the subordinate Court set aside and the Plaintiff/Respondents suit dismissed and the Defendant/Appellants counter-claim allowed.

8. Directions were taken to have the appeal canvassed by way of written submissions.

9. The Appellant filed his submissions dated 28th March, 2024 whereby he submitted on grounds 1,2,3 and 5 of the memorandum of appeal. It was the Appellant case that the burden of proof lies with the Respondent to prove that her husband purchased 9 ½ acres and not 6 acres which the Appellant admits. In support of this argument, the Appellant submitted on the various sale agreement. It was his argument that the agreement dated 20th May, 1998 had no bearing to this suit and that one of the

relevant agreements is the one dated 5th May, 1968 where it is said 178 yards against 78 yards which translates to 3.434 acres. It was however his contention that the agreement dated 5th May, 1968 fails in law since it does not describe the land being sold, the parties involved and their respective witnesses. As for the agreement dated 3rd July, 1972, 1acre was sold for a consideration of Kshs.380/=. The agreement dated 17th July,1976 was for the sale of 1 ½ acres. The Appellant argued that the Respondent declined to be involved in an out of court settlement and that if at all she was entitled to part of the suit land, her entitlement is for 6 acres and not more than 7. In conclusion, the appellant urged the court to reconsider the issue of the acreage sold to the Respondent.

10. The Respondent filed submissions dated 27th March, 2024 whereby she submitted on one ground of appeal which seems to have been abandoned by the Appellant. She submitted that the Appellant's appeal lack merit and urged the Court to dismiss the same with costs.

Legal Analysis And Decision

11. I have carefully considered the extract of the appeal and pleadings, the proceedings and the evidence adduced before the trial as well as the submissions by the parties and authorities as cited. In my considered view, the singular issue for determination in this appeal is whether the Appellant has a merited appeal.

12. This court as a first appellate court can therefore examine the evidence afresh and make a determination on the Appellants' claim on its merits, as was held in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

13. A summary of the evidence tendered is that; the Respondent asserted her facts as pleaded in the plaint and produced her National Identity card, letters of administration for the estate of Francis Boit, various agreements dated 05/05/1968, 05/05/1971, 5/05/ 17/07/1976, 03/ 8/1986, 15/10/1986 and 07/12/1987, a copy of a certificate of search for the suit land and the death certificate of Francis Boit as PExhibit 1-5. The Appellant on the other hand confirmed that his father, Marenga Nato sold land to the Respondent's husband-Francis Boit and that the Respondent and her family live on the suit land to date. He testified that when he filed for succession of his late fathers' estate, he knew the Respondent was in occupation of a portion of the suit land. His testimony was that the Respondent's husband did not settle the entire consideration as contemplated in the various agreements and that the outstanding balance was for Kshs.935/=. He referred to a title deed for the suit land and various sale agreements and a demand letter dated 23/10/2022 which he produced as D-Exhibit 1-7.

14. I have carefully re-evaluated and re-examined the pleadings and the evidence by both the Appellant and the Respondent. According to the Appellant, his father did not sell land to the Respondent's husband. However, he stated in his testimony that his father did sell land to the Respondent's husband and at the same time refuted the acreage claimed by the Respondent and alleged that the full consideration for the sell was not settled. Further in his memorandum of appeal, he urged the court to allow a non-existent counter-claim.

15. From the foregoing analysis and evaluation of the factual testimony and evidence, it emerges that the Appellant admits to the sell of a portion of the suit land by his father to the Respondent's husband and that the major issue in contention is what portion was sold and if the consideration was paid in full. My analysis of the numerous agreements is as follows; on 05/05/1968, six (6) acres of land was sold for a consideration of Kshs.320/=, on 05/05/1971 one (1) acre was sold for a consideration of Kshs. 380/=, on 17/07/1976 One and a half (1 ½) acres was sold for Kshs.930/=, on .03/08/1986 one acre was again sold for Kshs. 7,000/=. The total acreage sold as can be seen from all the agreements is nine and a half (9 ½) acres.

16. The Appellant submitted that the entire purchase price was not paid and that a balance of Kshs.935 is outstanding. It is noteworthy that no material has been placed before the trial court or this Honourable Court in support of this assertion. It is equally unclear from which of the four transactions the alleged balance emanates from.It is trite law that he who alleges must prove. In civil matters, the burden of proof is on he who alleges. Sections 107 and 108 of the *Evidence Act* provide as follows:

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    (1) 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.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

    108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    "See *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR.

17. It is also trite that the standard of proof in civil cases is proof on a balance of probabilities. See *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR.

18. Guided by the above principles, it is my finding that the impugned Judgment by the trial court is informed by factual evidence and the law and that the trial Magistrate did not misdirect his mind in arriving at the impugned judgment. Consequently, I find this appeal lacking merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JUNE, 2024.

HON.E.C CHERONO

JUDGE

In the presence of;

1, Respondent-present

2. Appellant/Advocate-absent

3. Bett C/A