



REPUBLIC OF KENYA



KENYA LAW
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**Mukhamari v Mamuli & another (Environment and Land Appeal
E001 of 2023) [2024] KEELC 5424 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

EC CHERONO, J

JULY 18, 2024

BETWEEN

MOSES WAMALWA MUKHAMARI APPELLANT

AND

TIMOTHY NATO MAMULI 1ST RESPONDENT

FRED MASIKA WABWILE 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. Munyekenye, at
Webuye SPM-ELC NO. 24 of 2019 delivered on 1st February, 2023)*

JUDGMENT

A. Factual Background

1. The Appellant, Moses Wamalwa Mukhamari initially filed a suit against Timothy Nato Mamuli and Fred Masika Wabwile, the Respondents herein in the Environment and land Court at Bungoma and was registered as ELC Case NO. 68 of 2015. On 28/05/2016, the matter was by consent of the parties transferred to Webuye Magistrate court for hearing and determination. Upon transfer to Webuye Magistrates' court, the case was registered as SPM-ELC Case NO.24 of 2019 (hereinafter referred to as "former suit"). Vide a plaint dated 29th May 2015, the Appellant/plaintiff had sought orders against the respondents/defendants for inter-alia;
 - a. Eviction from Land Parcel Title NO. Ndivisi/Ndivisi/1934
 - b. Costs of this Suit.
 - c. Any other costs that the Court may deem fit.
2. By way of a response, the Respondents filed a joint statement of defence and counterclaim to the Appellant's/Plaintiff's claim dated 13th July, 2015 where they sought for the dismissal of the Appellant/



Plaintiff's suit and for each of them to be awarded land measuring 25ft x 100ft plus costs and interest thereon.

3. At the close of pleadings and after pre-trial conference had been taken, the case was fixed for hearing where the plaintiff referred to his witness statement dated 22/10/2018 which he adopted as his testimony-in-chief. He also referred to a copy of a certificate of official search annexed to the plant which he produced as P-Exhibit No.1. He also referred to a supplementary list of documents containing 4 items which were also produced as P-Exhibit 2,3,4 & 5 respectively. Thereafter, he closed his case.
4. Both the 1st & 2nd Respondents/Defendants were referred their respective witness statements dated 13/07/2015 which they each adopted as his testimony-in-chief. The 1st Respondent/Defendant was referred to his list of documents dated 13/7/2018 which he produced as D-Exhibit NO. 1, 2, 3, 4, 5, 6, 7, 8 & 9 respectively. The 2nd Respondent/Defendant in his testimony affirmed the evidence given by his co-defendant herein. Thereafter, they closed their defence case and prayed that the suit herein be dismissed and judgment entered in their favour in terms of the counterclaim with costs.
5. Directions were thereafter taken where it was agreed that submissions be filed and exchanged within 30 days and a mention date to confirm compliance was fixed for 14/12/2022.

B. Plaintiff's/appellant's Summary Of Facts

6. The plaintiff PW1-Mosses Wamalwa Mukhamali was sworn and referred to his undated witness statement but filed in court on 22/10/2018 which he adopted as his testimony-in-chief. In his evidence, he stated that on 2nd June, 1999, he entered into an agreement with the Defendants/Respondents to sell a portion of land measuring Approximately 0.25Ha from land parcel NO. Ndivisi/Ndivisi/1752 registered in his name. He stated that he later applied for a letter of consent for subdivision of the same. He said that when he went to the DO's Office at Webuye to collect the consent letter, he was surprised that the same had allegedly been collected by the defendants/Respondents who later went to his farm with a Land Surveyor who surveyed his land
7. The Plaintiff/Appellant further stated that he later discovered that the measurements on the mutation could not tally with the ones on the agreement which culminated to his refusal to honour the application for transfer since the alternative measurements were 0.26Ha instead of 0.25Ha as shown on the mutation.
8. The Plaintiff/Appellant further stated that the Defendants/Respondents went ahead and used lawful means for unlawful purposes by falsely reporting him to CID Bungoma for the offence of obtaining by false pretences where he was arrested and charged at Bungoma Law courts but subsequently acquitted for lack of evidence. He stated that later, he subdivided the said land parcel NO. Ndivisi/Ndivisi/1972 into two resultant portions being LR. NO Ndivisi/Ndivisi/1933 and 1934 measuring Approximately 0.74 Ha and 0.05 Ha respectively. He stated that the Defendants/Respondents without any colour of right have unlawfully constructed dwelling houses on Land parcel NO. Ndivisi/Ndivisi/1934 registered in his name and have continued to occupy and utilize the same against his registered interest. He referred to his list of documents dated 29/05/2015 and undated supplementary list of documents containing 4 items which he produced as P-Exhibits 1, 2, 3, 4, & 5 respectively.

C. Defendants'/respondents' Summary Of Facts

9. Timothy Nato Mamuli-DW1 the 1st Respondent/Defendant testified as DW1 and stated that he bought a portion of land measuring Approximately 25x100 Ft from the Appellant/plaintiff which was to be excised from Land parcel NO. Ndivisi/Ndivisi/1752. He produced the sale agreement dated



2/6/1999 as D-Exhibit NO.1. He also stated that they took possession of the portion purchased and applied for consent to subdivide the suit land from the Land Control Board which consent was given on 14/10/1999. He produced the application for consent and the consent itself as D-Exhibit NO.2 and 3 respectively. He stated that after the subdivision, his portion was indicated as NO. 1683. However, the Appellant/Plaintiff refused to transfer the land to him but instead applied to have it transferred to his son. A dispute then arose and they reported to the DCI where the Appellant/Plaintiff was arrested and charged with obtaining by false pretences. He stated that he has been living on the suit land after he purchased and took possession.

10. Fred Masika Wabwile-DW2 The second defence witness was the 2nd Respondent/Defendant herein who gave sworn testimony and stated that he bought a portion of land measuring Approximately 100x25 ft on 2/6/1999 which was to be subdivided from land parcel NO. Ndivisi/Ndivisi/1752. He said that he paid the purchase price in full. He produced the sale agreement as D-Exhibit NO.1. The witness also produced certificates of official search for land parcels NO. Ndivisi/Ndivisi/1934 in the name of Selina Nafula Wamalwa dated 3/8/2021 as D-Exhibit NO.2. He stated that the said Selina Nafula Wamalwa got registered as proprietor on 6/11/2018. Thereafter, the defence case was closed.
11. The parties took direction to have this appeal canvassed by way of written submissions. The Respondent filed his submissions dated 20th May, 2024 and submitted on four issues. The Appellant also filed his submissions dated 15th March, 2024

D. Legal Analysis And Decision

12. I have considered the extract of the record of Appeal, the submissions by the parties and the applicable law. In my considered view the issues for determination are;
 - a. Whether this matter is res judicata.
 - b. Whether the Respondents are entitled to land measuring 25ft by 100ft each.
 - c. Whether the Appellant has made a case for eviction orders as sought.
 - d. Who bears the costs.
13. As the first appellate court, our mandate is to re-evaluate the evidence adduced before the trial Court and its findings and thereafter come to my own conclusion as was succinctly stated by the Court of Appeal in Okeno –Vs– Republic (1972) EA 32 as follows:

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant’s court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”
14. On the first issue for determination, the Respondents in their defence averred that this matter was res judicata having been heard and determined before the Ndivisi Land District Tribunal and Kakamega Provincial Land District Tribunal and the awards thereof adopted. From the evidence presented, it is apparent that the Respondents herein complained against the Appellant before Ndivisi Land Disputes Tribunal in case No. 20 of 2008 wherein an award was issued and subsequently adopted as a judgment



of the Court in Webuye PMCC LDT No. 20 of 2008 vide a decree issued on 21st July, 2010. The Ndivisi Land District Tribunal award was appealed against to the Provincial Appeals Committee at Kakamega (being Appeal no. 87 of 2008) which appeal was dismissed and the award by Ndivisi District Land Disputes Tribunal confirmed adopted as a judgment of the court by the Chief Magistrates Court at Bungoma in LDT no. 24 of 2010 and a decree subsequently issued dated 30th June, 2010 was confirmed. The award of the tribunals was to the effect that the Respondents are each entitled to land measuring 25ft by 100ft and that the Appellant was ordered to sub-divide Parcel Ndivisi/Ndivisi/1934 and transfer the portions adjudged to the Respondents.

15. Section 7 of the Land District Tribunal Act (repealed) gives the Magistrates Court jurisdiction to adopt awards of the tribunal and provides as follows;

“The Chairman of the tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

16. The Magistrates’ Court, having adopted the tribunal's award as its judgment, renders it enforceable and only subject to challenge through an appeal. Notably, no evidence has been presented to this court indicating that the Appellant filed an appeal against the judgment of the Magistrates’ Court. The same issue was the subject of the decision in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil (supra) where the learned Judge stated as follows: -

“..... It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment.

17. On the second and third issue and based on the evidence presented by both parties in the tribunal, it is not in contention that the appellant sold two portions of land each measuring 25ft x100ft to be excised out of Land Parcel NO. Ndivisi/Ndivisi/1752 to the Respondents vide separate agreements for sale dated 2/6/1999. The Appellant received the consideration in full from the Respondents in separate agreements and made an application to the relevant land Control Board and consent was subsequently issued sub-division and transfer of the respective plots to the Respondents. It was at this point that the Appellant alleges that the Respondents surveyed the land without his permission and allocated themselves 0.26ha each instead of 0.25ha which forced him to decline to transfer titles to them.

18. The Appellant further stated that he later sub-divided his land Parcel Ndivisi/Ndivisi/1752 into two portions i.e. Ndivisi/Ndivisi/1933 and 1934 measuring 0.74 ha and 0.05ha respectively. From the evidence presented by the Appellant, it emerges that after the abovementioned subdivision, Parcel No. Ndivisi/Ndivisi/1934 was transferred to one Samwel Kerre Khaoya, a minor said to be the Appellants son and later transferred to the Appellants name. While the said land was registered in the name of Samwel Kerre Khaoya, a restriction was placed pending the determination of a pending dispute before the Provincial Land Appeals Committee. The tribunal’s appeal as earlier mentioned was determined in favour of the Respondents. Further and as discussed above, no appeal was ever preferred after the Provincial Disputes Appeals Committee in Kakamega rendered itself and confirmed the decree issued by the Bungoma Chief Magistrates Court after adopting the tribunals award.

19. Furthermore, the Appellant does not deny selling portions of his land to the Respondents. His only contention is that the Respondents are each entitled to a portion measuring 0.25 ha



which the Respondents claim in their counter-claim. The Appellant in his evidence testified that the Respondents are occupying Parcel no. Ndivisi.Ndivisi/1934 which measures 0.05ha which is equivalent to what he sold to them.

20. Arising from the above analysis of the facts and evidence, I find that the sale of the portions of land by the Appellant to the Respondents became complete and what was remaining was the formal transfer of the land to the Respondents. The Appellant therefore, having received the purchase price in full cannot have the land and the money at the same time as this will amount to unjust enrichment. To avoid unjust enrichment and to serve the interest of justice, this Court finds that the Appellant cannot run away from his contractual obligation which the trial court correctly did in the impugned judgment by enforcing the equitable doctrine of specific performance and granting the prayer of the Respondents
21. In the case of *Gurdev Singh Birdi & Marinder Singh Ghatora Vs. Abubakar Madhubuti, Civil Appeal No. 165 of 1996*, the Court held that the underlying principle in granting the equitable relief of specific performance and stated thus:

“The Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”
22. Having found that the Respondents performed their part of the bargain and there being no proof of recession of the sale agreements and the fact that the Appellant wilfully elected not to perform his contractual obligation, I find that the Appellant did not prove his case on a balance of probabilities against the Respondents. Further, I note that this appeal was filed out of time without leave as can be seen from the memorandum of appeal filed on 17th July, 2023. From the extract, it is apparent that the impugned judgment was delivered on 1st February, 2023.
23. The upshot of my finding is that the Appellants appeal must fail for the reasons explained above. As for the Respondents counter-claim, I have already made my position clear. The totality of the evidence adduced shows beyond peradventure that the defendant/Respondents proved their counter-claim to the required standard. They are therefore each entitled to land measuring 25ft by 100ft.
24. In the end, this appeal therefore lacks merit and the same is dismissed with costs.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 18TH DAY OF JULY, 2024.

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HON.E.C CHERONO

JUDGE

In the presence of;

1. Appellant-present.
2. 1st Respondent-present
3. 2nd Respondent-absent

