Apua v Ngiru & another (Environment and Land Appeal E002 of 2023)
[2024] KEELC 5884 (KLR) (20 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5884 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT AND LAND APPEAL E002 OF 2023

AK BOR, J

AUGUST 20, 2024

BETWEEN

LOMWA APUA ..... APPELLANT

AND

JENNIFER NGIRU ..... 1ST RESPONDENT

CHARLES LENAIMALDA ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant lodged this appeal against the decision of the Hon. James H.S Wanyanga, Principal Magistrate, in Maralal CM ELC Case No. 3 of 2020 delivered on 11/7/2023. In the Memorandum of appeal field in court on 2/8/2023, the Appellant faulted the Learned Magistrate for failing to appreciate the evidence tendered with regard to ownership of her plot no. 6468; disregarding the evidence of Mr. Jackson Sayanga whose late mother sold her plot no. 468; failing to appreciate that the Appellant had proved her case on a balance of probability and misdirecting himself on the applicable law. The Appellant sought to have the judgment delivered on 11/7/2023 and subsequent orders set aside and to have her claim before the trial court allowed to the extent that she had proved her case to the required standard.

2. The court directed parties to file written submissions on the appeal. The Appellant submitted that Section 107 of the *Evidence Act* should have guided the Learned Magistrate. He submitted that the 1st Respondent filed an Amended Plaint on 15/6/2021, in which the gravamen of the suit was the boundary of the land and that she stated in her written statement dated 31/8/2021 that she visited her plot no. 1019A in 2019 and found that the Appellant had trespassed unto her land. One of the prayers she sought was a declaration that plot no. 1019A Maralal (Loikas Area) measuring 50x50 belonged to her.

3. The Appellant argued that the issue of the existence of plot no. 1019A came out clearly and should have been listed as one of the issues for determination by the trial court. He went on to add that based on the evidence adduced before the trial court, plot no. 1019A did not exist. The Appellant referred the court to her further list of documents dated 26/4/2022 which contained the Minutes of the Plots Allocation Committee Meeting held on 8/7/1994 at the District Commissioner's office in Maralal and pointed out that from those minutes there was no plot known as plot no. 1019A allocated that day. She also relied on the evidence of Jamleck Kinyua Miriti who stated that the extracts of 1994 plan did not have plot no. 1019A on it. She argued that the purpose of Jonathan Lekerio testifying before the court was to interpret a map attached to the minutes dated 2/8/1994 and according to the minutes there was no plot known as no. 1019A.

4. The Appellant challenged the findings by the trial court where it observed that the 1st Respondent had proved her case to the required standard and that plot no. 1019A was situated at the same spot where parcel no. 468 is. She urged that this observation was not supported by the evidence on record since plot no. 1019A did not exist in the map attached to the minutes vide which plots within Loikas area were allocated.

5. The Appellant went on to add that in her evidence and list of documents it, was not disputed that plot no. 468 was allocated to Joseph Lentio vide the Minutes of Plots Allocation Committee Meeting held on 18/7/1994 and that the plot was sold to the Appellant in 2016. She maintained that the trial court did not discredit the evidence of her witnesses and added that the authenticity of the minutes was not challenged by the 1st Respondent nor was the letter of allotment dated 1/3/1996 which allocated plot no. 468 Maralal township.

6. The Appellant contended that the 1st Respondent stated in her evidence that she was born in 1984 which means she was 12 years at the time when the allocation of plots within Loikas area was done in 1996. The Appellant relied on Section 47 of *Land Registration Act* which provides for how minors ought to be registered as proprietors of land.

7. The Appellant submitted that the trial court solely relied on the letter of allotment dated 7/5/2019 and the unapproved map dated 5/3/2019 produced by the 1st Respondent's third witness to conclude that plot no. 468 was the same as plot no. 1019A which was not supported by evidence since on her part, the 1st Respondent had stated that she was allocated plot no. 1019A in 2010 or 2011. Further, that if it were so that plot no. 1019A was allocated to the 1st Respondent in 2010, the letter of allotment would not have been issued 8 years later. She added that there was no proof of application by the 1st Respondent to inform the letter of allotment. She urged the court to allow the appeal.

8. The 1st Respondent submitted that she was the legal owner of plot no. 1019A and that during the trial she produced a letter of allotment to prove ownership as well as the area map to show the exact location of her plot. Additionally, that she called two witnesses being the County Surveyor and the Physical Planner who demonstrated to the trial court the location of the suit property using a map and confirmed to the court that plot no. 1019A sits where the Appellant claims that plot no. 468 is. Further, that the surveyor pointed out that plot no. 468 was located adjacent to the DEB Loikas road several meters away from the suit property. Regarding the existence of plot no. 1019A, the Physical Planner confirmed to the court that it existed and that it was sandwiched between plot numbers 468 and 528. She added that the Physical Planner also confirmed to the trial court that plot no. 1019A was now known as plot no. 562 in the new demarcation regime.

9. The 1st Respondent submitted that the Appellant did not call any expert witness such as a surveyor or physical planner to establish that her plot sat where the suit property is which means the evidence of the

county surveyor and physical planner regarding the location of plot no. 1019A remained unchallenged. She maintained that the Learned Magistrate correctly found that she was the legal owner of the suit property.

10. She maintained that the issue as to whether the Appellant was the owner of plot no. 468 or not was not in dispute but that the suit property being plot no. 562 is what was formerly known as 1019A. She added that the Appellant neither called expert witnesses to ascertain the exact location of her plot nor did she adduce evidence to show the location of her plot. She invited the court to consider the issue whether the suit property sat where the Appellant alleges plot no. 468 sits. She went further to add that that issue was correctly determined by the trial court when the County Surveyor demonstrated that the suit property sits where the Appellant alleges her plot no. 468 was and that plot no. 468 was located adjacent to DEB and Loikas road which was several meters away from the suit property.

11. Regarding the contention that the Learned Magistrate failed to appreciate that the Appellant had proved her case on a balance of probabilities, the 1st Respondent submitted that the trial court had the privilege of visiting the scene and examining the letters of allotment produced by the parties. Further, that the trial court had observed that the area was a settlement area and not commercial yet the allotment issued to the Appellant described the plot as a commercial plot. This in the 1st Respondent's view buttressed her argument that plot no. 468 was not located where the Appellant was alleging. In conclusion, the 1st Respondent submitted that there was no proper basis upon which this court could issue the orders sought by the Appellant. She urged the court to dismiss the appeal and award her costs.

12. The issue for determination is whether the court should set aside the findings of the Learned Magistrate and allow the Appellant's claim before the trial court that she proved her case to the required standard. The court notes that the Appellant who was the 2nd defendant in the suit before the Learned Magistrate only filed a defence denying the claim but did not file a counterclaim. The 2nd Respondent did not participate in this appeal despite the fact that he participated in the trial and had filed a counterclaim against the Appellant. The Appellant's claim is that she purchased Plot No. 468 Loikas Area, measuring 0.0756 ha in 2016 and had been in occupation since then. The 1st Respondent's claim before the trial court was that on 4/10/2011, she was allocated plot number 1019A within Maralal Township, Loikas Area by the Maralal Town Council. She averred that the Appellant had extended the boundary between the two plots by extending the towards her land. She sought a declaration that Plot No. 1019A Maralal, Loikas Area measuring 50 by 100 belonged to her and an injunction to restrain the defendants from trespassing onto the land or interfering with her land.

13. After hearing the evidence adduced by the parties, the Learned Magistrate narrowed down the issues for determination as whether the right of ownership of property was recognized under *the Constitution*; if procurement of a letter of allotment was proof of ownership of land; whether the plaintiff had proved ownership and lastly but more importantly, where plot 1029A was situated vis-à-vis plot numbers 468 and 593. The court noted that the parties had produced letters of allotment for their respective plots but what was in issue was who was the registered owner of the suit property.

14. The trial court noted that the letters of allotment issued to the 1st defendant, that is the Appellant, described their land as a commercial plot yet when the court visited the area it observed that the area was residential and devoid of commercial structures. The trial court relied on Sections 24and 25 of the *Land Registration Act* on the interest and rights conferred on a proprietor of land by registration. The Learned Magistrate was persuaded that the plaintiff had proved her case based on her evidence and that of the County Surveyor and Physical Planner.

15. It is not in dispute that both the Appellant and the 1st Respondent bear letters for the allocation of their respective plots and that the land each of them was allocated has not been surveyed and registered. The

Plot Allocation Letter issued by the Samburu County Government to the Appellant for plot number 468 indicates that it is for a commercial plot while the 1st Respondent's plot number 1019A is shown to be residential. The evidence adduced by the 1st Respondent including that of the County Surveyor and the Physical Planner is what led the Learned Magistrate to find that the 1st Respondent had proved her claim to the suit land.

16. The Appellant did not call any expert witness to confirm the physical location of the land allocated to her. The surveyor's evidence that plot no. 468, belonging to the Appellant, was located adjacent to the DEB Loikas road, which was several meters away from the suit property was not challenged by the Appellant. Based on the evidence tendered at the trial, the Learned Magistrate cannot be faulted for arriving at the conclusion he did.

17. The appeal lacks merit and is dismissed with costs to the 1st Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Onaya Ombere for the Appellant

Court Assistant: Diana Kemboi

No appearance for the Respondent