Kirigha v Mwamburi (Environment and Land Appeal 16 of 2023)
[2024] KEELC 13474 (KLR) (Environment and Land) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13474 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 16 OF 2023

EK WABWOTO, J

NOVEMBER 22, 2024

BETWEEN

ALPHONCE MWADIGHI KIRIGHA .... APPELLANT

AND

GETRUDE MKANYIKA MWAMBURI .... RESPONDENT

(Being an appeal from Judgment delivered by Hon. A. M. Obura (Mrs.) (CM) in ELC Case No. 35 of 2021 on 21st July 2022 at Voi))

JUDGMENT

1. This is an appeal from the judgment of Hon. A. M. Obura (CM) delivered on 21st day of July 2022 in respect to Voi MCELC No. 35 of 2021. In the said judgment the Learned Magistrate issued the following orders:-

    a. The Defendant is hereby directed to withdraw the Caution on the Plaintiff's land No. Taita Taveta Mwachambo Scheme Phase 1/295 within the next fourteen (14) days failing which the Land Registrar Taita Taveta County shall remove it.

    b. The County Surveyor/Land Registrar Taita Taveta County shall cause plot to be subdivided to reflect the Defendant's portion being 0.3068 acres and a title issued accordingly in his name.

    c. In the alternative, the Plaintiff shall refund the Defendant the sum of Kshs. 82,000/= and the Defendant shall relinquish his claim to the said portion of land.

    d. The Defendant is hereby permanently restrained by himself, servants or agents from trespassing into or interfering with the Plaintiff's portion of the suit plot.

    e. Each party shall bear own costs of the suit.

2. This being the first appeal the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that the Court lacks the advantage of the trial Magistrate who saw and heard the witnesses. See, the often-cited case of Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where this Court stated:

> " …this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 …"

The Appeal

3. The Appellant being aggrieved by the judgment of the Learned Magistrate filed the instant appeal vide a Memorandum of Appeal dated 1st August 2022. The following grounds were raised in the Memorandum of Appeal:-

    1. The trial Magistrate erred in law and fact in failing to consider and appreciate the evidence adduced by the Appellant.

    2. The trial Magistrate erred in law and fact in finding that the Appellant is only entitled to 12 x 25 feet.

    3. The trial Magistrate erred in law and fact in failing to take into account that the measurements of the 12 x 25 were taken using 36 feet rope as indicated in the initial Sale Agreement.

    4. The trial Magistrate erred in law and fact in finding that the Appellant is entitled to a further 0.3 acres instead of 6.3 acres as indicated in the Sale Agreement of 15th September 2006.

    5. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's claim before the Court in the face of clear – cut evidence that the subject matter of the dispute is 19 acres.

    6. That the learned trial Magistrate erred in law and in fact in giving Judgment in favour of the Respondent against the weight of the evidence tendered on record.

4. The Appellant prayed for the following reliefs in respect to his appeal:-

    a. This Appeal be and is hereby allowed with costs.

    b. The Judgment of the Honorable Chief Magistrate be set aside and a proper finding be made.

    c. The Sale Agreements which reflect the correct acreage/size of each parcel be determined and maintained and the County Survey/Land Registrar Taita Taveta County be compelled to extract the disputed portion of the land measuring 19 acres from the Respondent's land and transfer it to the Appellant.

    d. Costs of this appeal and the costs of the lower court be to the Appellant.

5. The appeal was contested by the Respondent and parties took directions to have it canvassed by way of written submissions. The Appellant filed written submissions dated 12th August 2024 while the Respondent filed written submissions dated 24th October 2024.

The Appellant's submissions

6. The Appellant submitted that he had discharged his evidential burden in relation to the fact in issue being as to whether the Appellant was rightful proprietor of the 12 ½ acres of land.

7. Citing Section 26 of the *Land Registration Act*, it was argued that Respondent's reliance on the title as conclusive evidence of ownership is incorrect. The title was obtained illegally and procedurally. The Respondent failed to inform the Appellant about the lawsuit for obtaining letters of administration and did not acknowledge the land transactions between the parents and the Appellant, despite being aware of and even attesting to these agreements by signing them. These agreements are sufficient to establish ownership, as they demonstrate that the transactions occurred and that the Appellant has a rightful claim to the 12 ½ acres of land.

8. It was contended that the initial agreement was executed in 1999, wherein the purchase price was duly paid and subsequent payments were acknowledged by the Respondent. The first handwritten agreement, dated 19th October 1999, was made between Arnold Mwamburi, the Respondent's father, and the Appellant as the purchaser. This agreement acknowledged the payment of a deposit of Kshs. 4,000 with a remaining balance of Kshs. 19,000 to be paid.

   Subsequently, the Appellant made a payment of Kshs. 6,000 on 2nd November 1999 leaving a balance of Kshs. 13,000. It was further contended that the veracity of these agreements was corroborated by the testimony of DW2, who confirmed his presence as a witness at the time the agreement was executed. The Appellant made additional payments of Kshs. 3,000 on 13th October 2001 and Kshs. 2,000 later, leaving a balance of Kshs. 6,000. Another agreement was entered into on 15th September 2006 wherein the Respondent agreed to an increase in the initial parcel of land measuring 12 by 25, for which the Appellant was to pay kshs. 23,000. This in addition to the remaining balance from the first parcel amounted to Kshs. 27,000.

9. It was the Appellant's contention that the Appellant completed the purchase agreement entered into in 1999, acquiring the land measuring 0.3acres through three transactions. The Appellant paid Khss. 12,000 an additional Kshs. 39,000 and finally settled the remaining balance of Kshs. 9,000. Subsequently another agreement was executed to add four more acres, with a purchase price of Kshs. 40,000 which was duly acknowledged by the Respondent's mother.

   The total land acquired exceeded the initially stated 0.3acres as the parties entered into multiple agreements. Each agreement acknowledged the respective transactions thereby establishing the Appellant as the rightful owner of the land in question.

10. According to the Appellant, the order concerning the payment of the purchase price was unlawful, as it failed to account for the depreciation in value since the original payment and hence therefore, a mere refund would not adequately compensate the Appellant. The remedy of specific performance would be more appropriate to address the Appellant's entitlement and uphold the contractual obligations of the Respondent.

11. The Appellant submitted that he did not seek a refund of the purchase price from the Respondent since he was entitled to an order for specific performance, which compels the Respondent to fulfil their contractual obligations. The award made by the trial court was inadequate because it ordered only the refund of the purchase price without interest, which fails to compensate the Appellant fairly given the time elapsed and the appreciation of the property's value. At the time the sale agreement was entered into, the Respondent did not hold the title to the suit property. The Respondent subsequently obtained the letters of administration which conferred upon them the authority and obligation to

manage and dispose of the estate including the suit property. As such, the Respondent was obligated to subdivide the suit property and transfer the sold portion to the Appellant in accordance with the terms of the sale agreement.

12. It was argued that an order for specific performance is the most appropriate remedy in these circumstances as it would ensure that the Respondent fulfils her duty to convey the agreed-upon portion of the property which was 12 acres and not 0.3acres to the Appellant thereby honouring the original contract and providing the Appellant with the benefit of the bargain.

13. The court was urged to grant an order of specific performance compelling the Respondent to complete the transfer of the agreed portion of the suit property to the Appellant since the said remedy would uphold the contractual rights of the Appellant and ensure equitable justice is served. The court was also urged to grant costs of the Appeal to the Appellant.

The Respondent's submissions

14. The Respondent submitted on following issues:-

    i. Whether the trial court erred in finding only 0.3068 acres were the only land purchased and fully paid for.

    ii. Whether the order of specific performance was granted.

15. It was also submitted that the claim that the Appellant had purchased and paid for over 12.5 acres parcel of land from the Respondent's mother was not proved at all.

16. It was argued that as per the Record of Appeal, the Appellant paid a purchase price of Kshs. 23,000/= for the first transaction, then between 1999 to 2006 he paid a total of Kshs. 17,000/= leaving a balance of Kshs. 6,000/= then on 24th November 2008 he paid a sum of Kshs. 5,000/=, 29th November 2008 the purchase price was amended to Kshs. 60,000/= from the earlier sum of Kshs. 23,000/=. On 12th May 2010 the Appellant paid Kshs. 39,000/= leaving a balance of Kshs. 22,000/= for the first 2 pieces of land and on 23rd November 2010 the Appellant was added another 4 acres for purchase of Kshs. 40,000/= of which he paid nothing as no single document was shown and proved.

17. It was also submitted that the Appellant failed to show and prove that he paid the balance of Kshs. 22,000/= for 0.3 acres even though the trial court ordered the piece of land to be given to him by the Respondent and/or in the alternative, refund of his money. It was contended that there remains a sum of Kshs. 62,000/= due and payable for the 0.3 acres and 4 acres.

18. In respect to the order of specific performance, it was submitted that the same was granted by the trial court but the Appellant has refused to follow up to take up his piece of land since the Respondent has been ready and willing and hence therefore the Appellant cannot again come before this court and seek for the same order.

Analysis and Determination

19. Having considered the entire Record of Appeal and written submissions, this court proceeds to determine the Appeal on the following issues:-

    i. Whether the Appeal is merited.

    ii. What are the appropriate reliefs to grant herein.

    iii. What orders should issue as to costs.

20. The said issues shall be considered sequentially.

Issue No. (i)

Whether the Appeal herein is merited

21. The Appellant's case before the lower court was that between 1999 to 2010 through different agreements signed within the said period, he purchased a portion of the suit property herein measuring 12 ½ acres from Arnold Mwamburi Mwawasi (deceased) and Dinais Mwamburi Mwawasi (deceased) the parents to the Respondent at a time when the suit property was unregistered. According to the Appellant upon clearing the purchase price in full he took possession of the purchased portion and since then he has been farming without any disturbance from the Respondent or the family of the deceased Arnold Mwamburi Mwawasi and Dinais Mwamburi Mwawasi.

22. It was also the Appellant's case that when the titling exercise was being conducted, he was never notified until 2021 when he learnt that the land had been issued with a title deed in the name of the Respondent by way of transmission upon issuance of grant of Representation of the Estate of her deceased mother Dinais Mwamburi Mwawasi.

23. It was averred that the Respondent declined to have any subdivision alleging that she was not aware of the agreements despite witnessing the same and this prompted him to place a Caution.

24. The Appellant maintained that he was a bonafide purchaser for value of a portion of the suit property measuring 12 ½ acres purchased form the initial owner of the deceased mother to the Respondent.

25. The Respondent's case before the trial court was that she was the registered proprietor and/or registered owner of the parcel of land Number Taita Taveta/mwachambo Scheme 1/295 which the Appellant had placed a caution purportedly that he has a claim of a portion of the land. It was also averred that on or 30th April 2021 or thereabout without the consent and/or knowledge of the Respondent the Appellant placed a caution against the said property. The Respondent denied being a party to any of the sale agreements and the said caution. It was averred that the sale agreements do not touch on the suit property since they do not expressly state which property and the acreage or the size of the purchased land and hence the same are enforceable under the law.

26. During trial, the Appellant and Respondent testified in support of their respective cases. The trial court upon considering the evidence adduced and the applicable law granted the reliefs in its judgment.

27. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

    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."

28. In the instant case, the Respondent stated in cross-examination that she saw her parents signature on the sale agreement but she did not know which plot was bought by the Appellant. She also conceded that she knew that her parents had sold the land to the Appellant. She also stated in cross-examination that she signed the document dated 23rd May 2010 where the Appellant was required to pay Kshs. 40,000/= which remains unpaid to date.

29. The Appellant on the other hand stated in cross-examination that he was not involved when the land was transferred to the Respondent despite signing the sale agreements and transacting with the Respondent's parents.

30. Vensenslus Mwakio who testified as DW2 stated that he was present when the land was sold to the Appellant and the transaction was witnessed by other people. He also stated that he was aware that the Appellant had made payment to the same. Prudence Chao Nyange who testified as DW3 stated that he was a neighbour to the Appellant's property and he had not seen any problem between the Appellant and the Respondent's parents. He also stated that he moved out of the area in 2016. Fredrick Mtoto equally stated that he was a neighbour to the Appellant's property and he was aware that the Respondent's parents had introduced the Appellant to him. He also stated that he was not aware of any difference between the Respondent's parents and the Appellant.

31. From the evidence that was tendered herein, it is not in dispute that the Respondent is currently the registered owner of Taita Taveta/Mwachabo Scheme/295 measuring 16.62 ha which was registered in her name upon which the Appellant is claiming interest in respect to the same on the basis that he had entered into various sale agreements with the Respondent's parents.

32. From the analysis of the evidence on record, there was an agreement dated 19th October 1999 when purchase price was agreed at Kshs. 23,000/= and the Appellant paid Kshs. 4,000/= leaving a balance of Kshs. 19,000/=. There was another entry on 2nd November 1999 indicating that the Appellant paid Kshs. 6,000/= and leaving a balance of Kshs. 13,000/=. The Appellant further made payment of Kshs. 3,000/= on 13th October 2001, Kshs. 2,000 on 14th November 2002 and 26th August 2003 respectively leaving a balance of Kshs. 6,000/=. On 15th September 2006 a further agreement was entered into showing that an additional parcel was added to the Appellant pushing the initial figure of Kshs. 23,000/= to 27,000/= and on 24th November 2008, the Appellant cleared the outstanding sum of Kshs. 4,000/= in the presence of the Respondent and his mother.

33. From the analysis of the evidence on record, the Appellant demonstrated that on 24th November 2008 the Respondent's mother received a sum of Kshs. 12,000/= which pushed the purchase price to Kshs. 60,000/= for 0.3 acre and it was agreed that the outstanding sum was Kshs. 48,000/=. From the said evidence on record, it was also clear that on 12th May 2010 an acknowledgment of Kshs. 39,000/= was made leaving a balance of Kshs. 9,000/=. As such the Respondent herein could not claim that she was not aware of the said agreements when the property was transferred to her.

34. From the further analysis of the evidence on record, there was another transaction on 23rd November 2010 an agreement that the Appellant had a balance of Kshs. 9,000/= and he was added 4 more acres for Kshs. 40,000/= which also the Respondent was aware of the same. However, there was no evidence that the Appellant had paid this balance to warrant the acquisition of the additional 4 more acres. The minutes of the meeting held on 22nd April 2012 which was produced in evidence at least confirmed that the said balance was still outstanding.

35. The court has painstakingly gone through the entire record and evidence adduced during trial and it is evident that the Appellant failed to demonstrate how he had made any payment in respect to Kshs. 40,000/= that was outstanding and hence this can only arrive at the conclusion that the said sum remains outstanding to date. Considering the totality of the evidence adduced during trial, it is the finding of this court that the Appellant was not able to prove his case before the trial court and as such the Appeal is unmerited.

Issue No. (ii)

What are the appropriate reliefs to grant

36. The Appellant in his Memorandum of Appeal dated 1st August 2022 sought for the judgment of the lower court to be set aside and further that each parcel be determined and maintained and the County Surveyor/Land Registrar Taita Taveta County be compelled to extract the disputed portion of the land measuring 19 acres from the Respondent's land.

37. In respect to the reliefs sought in this Appeal, this court has already made a finding that there was no evidence confirming that the Appellant ever made payment of Kshs. 40,000/= for the additional 4 acres that was added to him. The Appellant had an opportunity to adduce the said evidence before the trial court but failed to do so and as such the court arrived at the conclusion that his appeal is unmerited. In the circumstances the Learned Magistrate did not err in law and in fact in arriving at her decision and it is therefore not open for this court to interfere with the same.

38. In view of the foregoing, the reliefs sought by the Appellant are not for granting.

39. In respect to costs, considering the circumstances of this appeal, this court directs each party to bear own costs of the appeal.

Final Orders

40. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the Learned Magistrate and I wish to reiterate that this court cannot interfere with the same. In conclusion, this appeal is therefore determined as follows: -

    i. The Appeal is devoid of merit and is dismissed.

    ii. Each party to bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 22ND DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwanyumba for Appellant.

N/A for Respondent.

Court Assistants: Mary Ngoira and Norah Chao.