Daudi & 3 others v Bundi (Environment and Land Appeal E099 of 2021)
[2024] KEELC 7548 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7548 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E099 OF 2021

CK YANO, J

NOVEMBER 14, 2024

BETWEEN

SAMIRA DAUDI ..... 1ST APPELLANT

JACKLINE NYABOKE ..... 2ND APPELLANT

ANJERA NAMORU ..... 3RD APPELLANT

PETER EDONGA ..... 4TH APPELLANT

AND

HARRISON GITONGA BUNDI ..... RESPONDENT

JUDGMENT

1. The respondent in this appeal moved the trial court vide a plaint dated 6th June, 2014 seeking orders of a permanent injunction restraining the appellants by themselves, their agents and or persons acting under them from in any way interfering with the respondent's proprietary rights over plot No. 97 Bulapesa and costs of the suit.

2. It was the respondent's case that at all times relevant to the suit he was the registered owner of all that parcel of land known as Plot No.97 Bulapesa having bought the same through a written land sale agreement dated 16th May 2002 and had been in peaceful use and occupation by inter alia, paying all outgoings and having a part development plan drawn for the plot.

3. The respondent stated that sometimes on 7th November, 2013, without any justification and or colour of right, the appellants descended upon his plot and fenced off a portion of it. That the respondent reported the illegal incursion to the relevant authorities in the county government who cautioned the appellants to no avail. The respondent stated that the appellants' action had greatly inconvenienced him and that despite several requests and demands, the appellants remained adamant.

4. The Appellants denied the respondents claim and filed their defence and counterclaim wherein they pleaded that the suit land belonged to their grandmother and mother which was later transmitted to the appellants automatically and absolutely under African Customary law and or trust land.

5. The Appellants aver that the respondent's purported purchase and use of the suit land is from persons or their predecessors who had no beneficial or saleable interest in the land. That it was the appellants' uncles who purported to sell the suit land to one George Kithinji who in turn purported to sell to the respondent.

6. The Appellants pleaded that the respondent's purported registration is futile, unlawful and incapable of usurping or abrogating their beneficial and possessory interests and rights over the suit land. That the respondent should pursue whoever sold to him the land for refund of money he may have paid.

7. The Appellants sought a declaration to the effect that they are the legitimate beneficial owners in possession of part of the suit land measuring 100 ft by 50 ft and eviction of the respondent.

8. Upon considering the matter, the trial court found that the respondent had proved his case on a balance of probabilities against all the appellants as pleaded.

9. The appellants were aggrieved by that judgment and filed this appeal on the following grounds: -

    1. That the Learned Trial Magistrate erred in Law and in fact by proceeding with hearing of the main suit in the absence of the Counsel for the Appellants.

    2. That the Learned Trial Magistrate erred in Law and in fact by failing to find that the suit was statutorily time barred.

    3. That the Learned Trial Magistrate erred in Law and in fact by failing to engage an expert to ascertain the size of the suit property.

    4. That the Learned Trial Magistrate erred in law and in fact by failing to find that the Respondent was refunded his purchase price thus he is not entitled to the suit property.

    5. That the Learned Trial Magistrate erred in Law and in fact by awarding the Respondent the whole of the suit property yet the Respondent only purchased a portion of the property.

    6. That the learned Trial Magistrate erred in fact and in law by proceeding on wrong principles and misapprehending evidence and therefore arrived at a wrong decision.

7. The appellant prayed that the appeal be allowed, the judgement and decree of the Chief Magistrate's Court in Isiolo CMC (ELC) Case No.88 of 2014 delivered on 27th July, 2021 be set aside, that the Appellant's counterclaim dated 29th December,2014 in the trial court be allowed, the costs of the Appeal as well as the costs of the suit at the trial court be awarded to the appellants and any other relief the court deems fit and just to grant.

8. The appeal was canvased by way of written submissions. The appellants filed their submissions dated 10th July, 2024 through the firm of Kitheka & Ouma Advocates LLP while the respondent filed his dated 19th August, 2024 through the firm of Mokua Obiria &Associates.

Appellant's Submissions

9. The Appellants submitted on a brief background of the matter before proceeding to submit on ground 1. It was submitted that the learned trial magistrate declined to grant the Appellants an adjournment on 27th April,2021 when their advocate on record by then a Mr. Kaume sent his colleague Mr. Jarso to seek

an adjournment to enable him file an application to cease from acting. The Appellants submitted that the previous adjournment which was marked as the last was granted at the behest of the respondent when the Appellants advocate was actually ready to proceed with the hearing on 9th February, 2021. The Appellants submitted further that the respondent had on many previous occasions successfully sought adjournments on the 22nd October, 2019 when the Respondent's counsel was indisposed but it is the Appellants who finally got punished on 27th April 2021 when their Advocate sought time to make an application to cease from acting for whatever reason. The Appellant's urged the court to note that the then Appellants' Advocate had indicated his intention to proceed during the call over in the morning but somehow disagreed with the Appellants later on the same day and therefore the Appellants came to court knowing that they had an advocate and never got a chance to appoint another one because the court insisted on proceeding with the hearing on the same day. The Appellants urged the court to find that the Appellants were prejudiced in the trial court since they were denied the chance to replace their advocate who left them in the last minute of the hearing date and thus the ultimate outcome of the trial court case was biased in favour of the respondent who enjoyed the advantage of representation by counsel.

10. Regarding ground 2 of the appeal, the appellants submitted that the *Limitation of Actions Act* provides that an action arising from land dispute such as the present one cannot be successfully sustained after 12 years. That the respondent claimed to have bought the suit property on 16th May, 2002.

11. It was submitted that the Appellants testified that they were in possession of the suit property continuously since the early 1990's, but the respondent waited until 2014 before instituting the case. The Appellants submitted that the agreement relied on by the Respondent stated at paragraphs *4* and *6* that the respondents ought to have taken vacant possession immediately upon execution of the agreement and that the suit property was sold without any encumbrances whatsoever. That strangely, during the trial the respondent testified that they had agreed with the vendor that the appellants would continue staying on the property and vacate on a later date.

12. The Appellants urged the court to find that the trial court case was statutorily time barred since the Appellants occupied the suit property continuously and uninterruptedly for more than 12 years since 16th May, 2002 when the respondent purportedly acquired interest until 21st November, 2014 when the suit was instituted.

13. The Appellants argued ground 3 and 5 together. It was their submission that the respondent purportedly bought only 50 x 100 ft portion of the suit property. That during the trial, the actual size of the suit property was not ascertainable since it was unregistered at the time when the original owner (the appellants' mother) passed on. The appellants further submitted that all witnesses agreed that the respondent only occupied a portion of the suit property while the appellants occupied the rest. The Appellants submitted that the trial magistrate erred in fact by failing to engage the land surveyor to ascertain the right size of the suit property and that consequently, the Appellants were thrown into the street destitute and homeless.

14. With regard to ground 4 of the appeal, the Appellants urged the court to peruse the testimonies of the Appellants witnesses and find that the ground has merits and it is self-explanatory.

15. Regarding grounds 5 of the appeal, the Appellants submitted that the trial magistrate failed to look into the root of the ownership of the suit and faulted the Appellants for failing to produce ownership documents of the suit property. It was further submitted that the trial court disregarded the principle of nemo dat quod non habet in that George Kithinji could not pass a good title to the respondent since he did not possess good title in his favour in the first place.

16. The Appellants submitted that the respondent did not produce the sale agreement to show that the said George Kithinji bought the suit property from the previous owner. It was submitted that the contract for sale of land must be in writing as mandatorily required under section 3 (3) of the *Law of Contract Act*. On the issue of costs the appellant relied on Section 27 of the *Civil Procedure Act* which stipulates that it follows the event. They urged the court to allow the appeal with costs.

Respondent's Submissions

17. The respondent gave a brief background of the matter and submitted that all the witnesses who testified on his behalf were emphatic on how the respondent got the suit plot. That the 1st appellant also admitted that it was the respondent who was paying the rates and rent and that the land was sold by their uncles. The respondent faulted the appellants for raising issues in the appeal for the first time.

18. While arguing ground 1 of the appeal, the respondent submitted that the appellants did not protest nor made an application to be allowed time, either to call their advocate or engage a new counsel.

19. The respondent submitted that the issue raised on grounds 2 of the appeal was not raised in the state of defence. That it did not as well emerge during the hearing. That this is just an afterthought. That from the respondent's pleadings and his testimony in court it is clear that the respondent's claim is within limitation period.

20. The respondent argued ground 3,4,5 and 6 together and submitted that those are non- issues. That it was not upon the trial court to prosecute the defence. That there is a clear evidence that the suit plot measure 50x100fts.

21. It was submitted that no evidence was led in court to demonstrate that any refunds were made. That what is on record are just mere averments and statements.

22. The respondent submitted that the trial court ruled rightly by awarding the whole of the plot to the him. The respondent urged the court to dismiss the appeal with costs.

Analysis and Determination.

23. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal held that:

> " This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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."

24. The issues for determination as I can deduce are:

    i. Whether the trial magistrate was justified in proceeding with hearing of the suit in the absence of the counsel for the Appellants.

    ii. Whether the trial Magistrate erred in Law and in fact by failing to find that the suit was statutorily time barred.

iii. Whether the trial court erred in failing to engage an expert to ascertain the size of the suit property.

iv. Whether the trial court proceeded on wrong principles and misapprehended the evidence and therefore arrived at a wrong decision.

Whether the trial magistrate erred in Law and in fact by proceeding with hearing of the main suit in the absence of the counsel for the Appellants.

25. The Appellants submitted that the trial Magistrate declined to grant them an adjournment on 27th April,2021 when their Advocate then on record Mr. Kaume sent his colleague Mr. Jarso to seek an adjournment to enable him file an application to cease from acting.

26. I have perused the record and it is indicates that Mr. Jarso indicated that Mr.Kaume had indicated that he had disagreed with his clients and sought time to file a formal application. The court noted that:

> " The application to adjourn the matter is disallowed. Case is old and the court made it very clear to the parties that was the last adjournment. The case to proceed as earlier on scheduled."

27. I opine that the trial court ought to have been mindful of the predicament the Appellants found themselves in and in the same breadth the court ought to have been guided by Article 47 & 50 of *the Constitution*.

28. Article 47 (1) of *the Constitution* states as follows;

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"
>
> Article 47(2)
>
> "If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

29. Article 47 has now been effectuated by the *Fair Administrative Action Act*, 2015 under which section 4(3) provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

30. The status of fair administrative action in Kenya's constitutional and jurisprudential framework was discussed by Onguto, J in Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR in which the learned Judge expressed himself inter alia as follows:

> " As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, stated thus:
>
> > "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..." [Emphasis supplied]
> >
> > Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.
> >
> > The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of *the Constitution* makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
> >
> > The right to fair hearing is evidently closely intertwined with fair administrative action. The often-cited case of Ridge vs. Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights.

Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

> "The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."
>
> I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50 (1) of *the Constitution*. The court proceeding under Article 47 of *the Constitution* is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.
>
> It may sound like stretching the precincts of traditional judicial review, but clearly by *the Constitution* providing for a "reasonable "administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review."

31. Article 50(1) of *the Constitution* provides that every person has a right to have a dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. Article 48 provides that the state shall ensure access to justice for all persons and shall not impede access to justice. In my view, access to justice also includes the right to have legal representation.

32. In rejecting the application for adjournment, the learned trial Magistrate stated that the case was old and that the court had made it very clear to the parties that that was the last adjournment. In this case, the appellant's counsel withdrew his services after disagreeing with the appellants. Counsel sought for time to make a formal application. Having placed before the trial court the reasons that in my view, justified the adjournment, the appellants were entitled to be given a chance to look for another advocate to act for them. The granting or rejecting an application for adjournment entails a discretion which must be exercised judiciously. Although the court may have ordered a last adjournment in the matter, the trial court should have empathized with the appellants whose advocate withdrew his services when the hearing was to start, and allow the appellants time to instruct another counsel.

33. In denying the appellants' application for adjournment, and forcing them to proceed with the hearing on their own, the trial court also did not address its mind to the critical question whether denial of the adjournment would occasion a miscarriage of justice. In the case of *Job Obanda Vs Stage Coach International Services Ltd& another CA No. 6 of 2001*, the Court of Appeal was emphatic that where, among others a judge fails to apply his mind to the question whether a miscarriage of justice might be occasioned to a party who is refused an adjournment, that would constitute sufficient basis upon which an appellate court would be entitled to interfere with the exercise of the discretion. On the facts before me, I would agree with the appellants' submissions, without hesitation, that the appellants' right to adequate time to prepare for their defence was blatantly violated. The appellants could have been granted the adjournment to enable them either to prepare their defence or to engage another advocate. The respondent could not have suffered any prejudice as he could have been compensated by way of costs.

34. Having found that the appellants should have been granted the adjournment sought, it is my finding that the appellants' appeal on that ground alone must succeed. There is no need for me to delve into the merits of the appeal. The upshot is that I make the following orders.

    1. The judgment of the trial court dated 27th July, 2021 is hereby set aside.

    2. The suit is remitted back to be heard and determined afresh by a Magistrate other than HON. S.M MUNGAI C.M.

    3. Each party to bear their own costs of the appeal.

35. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF NOVEMBER, 2024

In the presence of

Court Assistant – Tupet

Mrs. Otieno Holding brief for Kitheka for appellants.

No appearance for respondent

C.K YANO

ELC JUDGE