Koite v Mwangi & 2 others (Environment and Land Appeal 42 of 2020) [2023] KEELC 344 (KLR) (30 January 2023) (Judgment)

Neutral citation: [2023] KEELC 344 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 42 OF 2020

MN GICHERU, J

JANUARY 30, 2023

BETWEEN

MARY KOITE ..... APPELLANT

AND

JAMES GICHEHA MWANGI ..... 1ST RESPONDENT

ELIZABETH NYAMBURA GICHEHA ..... 2ND RESPONDENT

LAND REGISTRAR, NGONG ..... 3RD RESPONDENT

(Being an appeal against the judgment and decree of the Chief Magistrates Court at Kajiado (Hon B Cheloti,SRM) dated and delivered on March 3, 2020)

JUDGMENT

1. This judgment is in respect of Civil Case no 42 of 2015 at the Chief Magistrate's Court at Kajiado. In that case, James Gicheha Mwangi and Elizabeth Nyambura Gicheha who were the plaintiffs were the successful litigants against Mary Koite who was one of the defendants.

2. In her judgment dated March 3,2020, the learned trial magistrate, Becky Cheloti, SRM, entered judgment as prayed for in the plaint. Effectively, the defendant was ordered to be evicted from the suit land which is Kajiado/Olchore- Onyore/4539. She was also permanently injuncted from occupying it either personally or through any person claiming it through her. The plaintiffs were also declared as the lawful owners of the suit land.

3. Aggrieved by the decision of the lower court, the appellant filed this appeal on August 11, 2020. In the appeal, she seeks the setting aside the lower court's judgment and all consequential orders, the allowing of her counterclaim as the judgment of the court and that the costs of this appeal be borne by the respondents.

4. There are eight grounds filed by the appellant. They are as follows. The learned trial senior resident magistrate erred in law or fact in the following manner.

   i. In dismissing the appellant's defence and counterclaim without carefully considering, analyzing and or evaluating the appellant's entire body of evidence on record.

   ii. In referring to the judgment as a determination of an application, she failed to decipher the salient issues of the suit before her and thus arrived at an erroneous conclusion.

   iii. In allowing the respondents to reopen their closed case without leave of court and the established principles of law, she failed to preside over a fair and impartial hearing thereby abandoning her judicial mandate without any lawful cause or basis.

   iv. In allowing the respondents the reopening of the respondent's case, the trial magistrate presided over ferreting out evidence in favour of the respondents which is veritably phasmagonic to the cause and administration of justice, exercise of judicial discretion, judicial independence and fairness.

   v. In granting permanent injunction orders without proof of evidence, she exercised her discretion injudiciously and indiscreetly and therefore fell into error.

   vi. In granting eviction orders against the appellant without sufficient evidence.

   vii. In shifting the legal and evidential burden of proof to the appellant.

   viii. In failing to appreciate and apply the doctrines of equity properly thus arriving at erroneous findings and conclusions.

5. Learned Counsel for the parties filed written submissions on November 1, 2021 and March 15, 2022 respectively.

   The appellant's counsel treated the eight grounds in the memorandum of appeal as the issues. He did not identify clear cut issues for determination. Just like the appellant's counsel, the respondent's counsel did not identify the issues for determination. He however submitted in the following areas.

   i. Whether the respondents are the legal proprietors of the suit land?

   ii. Whether the appellants claim for adverse possession was pleaded and proved?

   iii. Whether there was shifting of the burden of proof to the appellant?

   iv. Whether there was any reopening of the respondent's case?

   I propose to deal with the eight grounds as the appellants issues and the four areas of submissions by the respondents' counsel as their issues.

6. I have carefully considered the appeal in its entirety including the memorandum, the entire record of the lower court, the grounds of appeal, the written submissions by learned counsel for the parties and the case law cited in the submissions.

   This being a first appeal, I am conscious of my role of considering all the above material, evaluate it afresh, then draw my own independent conclusions but bearing in mind that I did not see the witnesses as they testified first hand before the learned trial magistrate.

   Again it is expected that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the magistrate is

shown demonstrably, to have acted on wrong principles in reaching the findings she did. (See *Ephantus Mwangi and another –versus- Duncan Mwangi Wambugu* (1982 – 88) I KAR 278).

7. From the evidence adduced at the trial, two thing are proved or admitted. The first one is that the respondents are the registered owners of the suit land.

   The second fact that was proved is that at the time of filing of the suit, the appellant was on the land. The date of entry was in dispute.

8. I now come to my findings on the eight grounds and the four issues identified earlier on.

   On the first issue, I agree with the appellant that the trial magistrate did not give any analysis on the issue of adverse possession. She ought to have made a finding on this issue of how long the appellant had lived on the suit land. This may however be understandable because, the appellant did not raise the issue anywhere in the defence, the amended defence and the counterclaim. The issue suddenly came up abruptly in the appellant's submissions dated October 15,2019.

   In my own finding, the issue of when the appellant entered the suit land was never proved by the appellant because according to the respondents', the invasion of their land was in August 2014. This evidence was never disproved by the appellant. It is thereafter immaterial that the trial magistrate failed to deal with this issue. Failure to do so does not affect the outcome of the case.

9. On the second ground, it is true that the lower court is referred to the judgment as an application on more than one occasion. This does not in my decision affect the issues for determination.

10. Regarding the third ground, I find no evidence from the record to prove that the respondents ever re-opened their case. After the close of the plaintiff's case, no other witness for the plaintiff testified. The land registrar who testified on July 30, 2019 did so at the behest of the appellant. The only thing the respondents' counsel did was to examine the witness. This was proper.

    It does not matter that the land registrar having come to court to testify gave evidence that was favourable to the respondents and unfavourable to the appellant. He was bound to tell the truth as he knew it irrespective of which party summoned him.

    Even if he had been called by the respondents after the close of the plaintiff's case, there is nothing wrong with that as the trial magistrate had discretion to allow the reopening of the plaintiff's case. In any event, no prejudice was suffered by the appellant because her counsel too examined the witness.

11. Since the fourth ground deals with the reopening of the case, I find that the finding in paragraph (10) above covers it. The word the appellant's counsel meant to use was phantasmagoric which means having a fantastic or deceptive appearance. The other word used, phasmagonic does not exist in the English dictionary.

    I disagree that the trial magistrate ferreted out evidence. She was guided by the evidence adduced before her.

    There was nothing phantasmagoric about the way the decision herein was reached. Everything was factual.

12. When it comes to grounds five and six, I find that they can be dealt with together because they concern the decision made by the trial magistrate. I find that the trial magistrate relied on good evidence to issue a permanent injunction and the eviction order. This is because, the appellant was not able to prove any of her averments in her defence and counterclaim.

    Fraud needs to be proved to a higher standard than the ordinary balance of probabilities. The appellant was not able to prove that she was the wife of the late Simanye Ole Kwetei. She was not able to prove

that he ever owned the suit and. She was not able to prove that she had occupied the land for 12 years from August 23, 2006 when the respondents acquired the title deed.

Finally, she was not able to prove that the original owner did not sell the land to Wahothi Mucheru who later sold it to the respondents. All this burden lay on the appellant and it was never discharged.

This finding has also covered the seventh ground of burden of proof. The burden of proof of all the particulars in the counterclaim lay squarely on the appellant.

13. It has not been pointed out which doctrine of equity was applicable in this case and how it was unapplied or misapplied. Neither the grounds of appeal, nor the submissions of March 15, 2022 bring out this. I find that the trial magistrate applied the law correctly.

14. Coming to the appellants issues, I have already found that the claim for adverse possession was neither pleaded, nor proved. As stated earlier, it first came up abruptly in the written submissions. It needed to be pleaded and proved.

    I have already made the findings on the issue of burden of proof and the reopening of the respondent's case. I need not repeat.

15. Finally as to whether the respondents are the legal owners of the suit land, I find that they are. This is because they hold a title deed to the land and a certificate of official search. More importantly, as per the evidence of the land registrar, officially, they are the lawful owners of land. The appellant has not been able to impeach this ownership under section 26(1) (a) and (b) of the *Land Registration Act* as she sought to do in her defence and counterclaim.

16. In conclusion and for the reasons already given, I find no merit in the appeal and I dismiss it with costs to the respondents.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30TH DAY OF JANUARY, 2023

M N GICHERU

JUDGE