



REPUBLIC OF KENYA



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Omwenga (Sued on his own behalf as Chairman of Amani Self Help Group & 12 others v Kamanja & another (Civil Appeal E892 of 2023) [2024] KECA 1953 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1953 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E892 OF 2023
MS ASIKE-MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
DECEMBER 20, 2024**

BETWEEN

EARNEST OMWENGA (SUED ON HIS OWN BEHALF AS CHAIRMAN OF AMANI SELF HELP GROUP 1ST APPELLANT
PETER KINYUA 2ND APPELLANT
ABEL OYARO 3RD APPELLANT
PROTAS MANDELA 4TH APPELLANT
JOHN NGIGE 5TH APPELLANT
CHARLES AKUNGA 6TH APPELLANT
SAMUEL MOTURI 7TH APPELLANT
EVANS OBIERO 8TH APPELLANT
FRANCIS NDIRANGU 9TH APPELLANT
PETER KIOKO 10TH APPELLANT
STEHEN KIBUNJA 11TH APPELLANT
MARY WAMBUI 12TH APPELLANT
LUCY NJERI 13TH APPELLANT

AND

KAREGI CATHERINE KAMANJA 1ST RESPONDENT
CHARLES MUNENE GATIMU 2ND RESPONDENT

(Being an appeal against the Judgment of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) delivered on 21st September, 2023 in E.L.C Case No. 288 of 2013.)



JUDGMENT

1. It is our duty as a first appellate court to re-evaluate the evidence, to analyse the case that was before the trial court but must bear in mind that we do not have the benefit of the trial Judge of seeing and hearing witnesses – *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where that duty was recognised by this Court to be:

“...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...”

2. In a plaint filed at the Environment and Land Court (‘ELC’) in Nairobi Charles Munene Gatimu and Karegi Catherine Kamanja (the 1st and 2nd respondents) against the 13 appellants led by Ernest Omwenga (Chairman of Amani Self Help Group) it was claimed that the respondents were the registered owners of a parcel of land known as L.R No. 209/11970 situate in Dandora in Nairobi (the suit land); that the appellants with others unknown to the respondents had invaded and occupied the suit land in 2007 and 2008 after breaking a barbed wire perimeter fence and deprived the respondents of the use of the suit land; that all efforts to have the appellants vacate the land had been in vain and for all that the respondents prayed that the court orders the appellants to vacate the suit land “...grant vacant possession to the plaintiffs and in default eviction to issue”. There was also a prayer for mesne profits from January, 2008 and costs of the suit.
3. It was deponed by the 1st respondent in a verifying affidavit that he had authority of the 2nd respondent to swear the affidavit on her behalf and attached to the plaint was a list of documents which included Grant No. 132396 and Deed Plan No. 176452 in respect of the suit land. The 1st respondent stated in a witness statement that he and the 2nd respondent were registered owners of the suit property which had been invaded by the appellants in 2007/2008 during post-election violence. The 1st respondent deponed in an affidavit where he attached a copy of the title to the suit property that he, the 2nd respondent and one Charles Arap Sigei had in 1993 applied to the Commissioner of Lands for allocation of the then vacant industrial plot to establish a factory; that they had been allocated the plot which became the suit land after they had paid the requisite fees and met other conditions attached to the allocation; that after acquiring a title for the suit property and after securing the same by erecting a perimeter fence they were sued by one Mark Omollo Ageng in Nairobi HCCC 1269 of 2011 but the suit had been dismissed; that they had then bought out the said Charles Arap Sigei’s share and title was issued in their two names; that the appellants had no document to support their occupation to the suit land.
4. In a statement of defence and counter-claim the appellants denied the respondents’ claim stating that the suit land had been allocated to Amani Self Help Group which had apportioned it to its members who had been in occupation since 1999; that if the respondents possessed any title to the suit land the same must have been obtained through fraud; that the appellants had been in possession of the suit land for over 12 years and have invested heavily by erecting permanent buildings after taking loans; that the respondents had obtained title to the suit property by fraud and particulars of fraud were given it being averred that the title had been illegally obtained. They prayed in the counter-claim that title to



the suit land in favour of the respondents be cancelled and the suit land be registered in their favour and a prohibitory order be issued restricting any dealings with the suit land. In a witness statement accompanying the statement of defence Ernest Ngare Omwenga (the 1st appellant) stated that the suit property was occupied by over 70 families since the year 2000; that he had purchased 2 parcels of land from one Maina ('the Chairman') for an unstated amount of money in 2002 and another from Amani Self Help Group in 2004 and had since been in occupation; at paragraph 8 of the statement:

“That the 1st plaintiff was a senior demolition officer with the City Council of Nairobi while the 2nd plaintiff's husband was a senior person at the Surveys of Kenya and they want to use their influence under which they registered the said land in their names to illegally obtain the suit property from the Defendants.”

5. He went further to set out steps taken by the respondents to acquire the suit land which according to him were a demonstration that the acquisition was fraudulent.
6. The hearing of the case started before Komingoi, J. who took evidence of the 1st respondent who adopted his witness statement which we have already summarized in this Judgment. He testified that after applying to be allocated the suit land he and the 2nd respondent had been issued an Allotment Letter and thereafter a title document both of which (with Deed Plan) he tendered as evidence. He and the 2nd respondent had paid all the requisite fees before being issued with the title. The case for the respondents was then closed but there was an application by the appellants for the 1st respondent to be recalled for further cross-examination which application was allowed after which the case was adjourned on various occasions at the instance of the appellants. On being recalled and in further cross-examination the 1st respondent explained how he and the 2nd respondent had applied to be allocated the suit land and the steps that had followed the allocation. He denied that the title to the suit land had been fraudulently obtained. The case for the respondents was closed once again upon the Court being informed that the 2nd respondent was adopting the 1st respondent's evidence. The appellants applied and were granted leave to file further witness statements and summons were issued to the Director of Surveys to attend court. The case was adjourned and upon resumption counsel for the appellants applied for adjournment on grounds that Director of Surveys had not been served with summons to attend Court. That application was opposed and the trial court after finding no good reason to adjourn the case ordered that the case proceed later that day. Upon resumption of the hearing counsel for the appellants asked the Judge to recuse herself as the appellants were unhappy with the way the case was being handled by the trial Judge. The Court ordered that the appellants file a formal application to that effect and when the same was heard the Judge recused herself. When the matter went to Okongo, J. he ordered that the matter proceed from where it had reached; counsel for the appellants indicated that they would appeal that order but the record does not show whether any appeal was pursued. Many other applications followed leading to the case being adjourned several times and when eventually the case proceeded before Oguttu Mboya, J., the 1st appellant adopted his witness statement. He testified that he and the other appellants were members of Amani Self Help Group and that all of them resided on the suit land; that the suit land was developed and there were 2 schools on the land. He denied that the appellants had trespassed on the land and prayed that the respondents' suit be dismissed and judgment be entered on the counter-claim. Challenged in cross-examination he did not have any document to prove ownership of the suit land or how the appellants came to be on



the land. Counsel for the appellants then applied for adjournment to call more witnesses, a request that was granted, the court ordering, inter alia:

“The application for adjournment at the instance of the Defendants be and is hereby marked as the last adjournment.”

7. Witness summons were issued to the Director, Land Administration Ministry of Lands, Public Works, Housing and Urban Development, the Director of Surveys and The Director, Legal Services/Head of Legal Department, National Land Commission it being ordered that those witnesses attend court to testify for the defendants (appellants). The appellants were ordered to extract summons and serve the said witnesses and pay their expenses, if any. Those orders were made on 14th March, 2023. When the case resumed 3 months later (14th June, 2023) the appellants applied for adjournment on the ground that the said witnesses had not attended court. The Judge observed that the case had been in court for many years; that the appellants had disobeyed court orders by failing to pay court adjournment fees; that the appellants were in contempt of lawful court orders; that the appellants had been granted a last adjournment and for all that the application for adjournment was declined. Counsel for the appellants stated:

“Mr. Maosa:

In the premises, I do wish to close the Defendants’ case.”

It was so ordered.

8. The parties filed written submissions and in a fairly lengthy judgment running into 128 paragraphs some of which are rather repetitive of each other judgment was entered for the respondents it being ordered that the appellants hand over vacant possession of the suit property within 120 days from the date of judgment in default eviction to issue; an order of permanent injunction was issued to restrain the appellants from dealing in any way with the suit land; the prayer for mesne profits was declined; the counter-claim was dismissed and costs were awarded to the respondents.
9. The appellants are dissatisfied with those orders and in the 8 grounds set out in Memorandum of Appeal drawn by their lawyers M/S Maosa & Company, Advocates it is said that the Judge erred in law and fact when he gave judgment in favour of the respondents when the 2nd respondent had not lodged a witness statement; that the 2nd respondent should have attended Court and testified; that the Judge erred in law and fact for not making a finding on how title to the suit land had been acquired by the respondents; that the Judge erred by not issuing notices to show cause for court attendance to some witnesses who would have showed how the suit land was acquired; that there was inconsistency between the Letter of Allotment which had 3 names and the title which had 2 names; that the respondents had not proved change of user of the suit land from industrial use to residential and, finally, that the Judge acted unfairly towards the appellants. We are asked to allow the appeal by setting aside the said judgment and award costs to the appellants.
10. When the appeal came up for hearing before us on 29th July, 2024 learned counsel Mr. Maosa appeared for the appellants while learned counsel Mr. Obonyo appeared for the 1st respondent and learned counsel Mr. Were appeared for the 2nd respondent. All parties had filed written submissions and in a highlight counsel for the appellants submitted that production of a title document is not sufficient evidence to prove ownership of land.
11. Counsel for the 1st respondent submitted that there were competing interests on ownership of the suit land where the appellants had not produced any document to prove ownership of the suit land.



- Counsel submitted on other grounds of appeal that the appellants had been issued with witness summons but had not called desired witnesses.
12. Counsel for the 2nd respondent submitted that the appellants were to blame for not calling witnesses after they had been issued with summons.
 13. In a rejoinder counsel for the appellants submitted that the suit land comprised government land and necessary steps for allocation of such land had not been taken.
 14. We have considered the whole record, submissions made and the law.
 15. The appellants complain that there was lack of compliance with Order XI of the 2010 Civil Procedure Rules because the 2nd respondent did not record a witness statement and was not called to testify in the case. Order XI of those rules was on “Consolidation of Suits” where 2 or more suits raising similar questions could be considered and heard as one. The summons by the respondents and it was deponed in a verifying affidavit and in another affidavit that the 1st respondent was authorised by the 2nd respondent to testify in the case on behalf of both of them. There was no legal requirement for the 2nd respondent to testify and repeat what she had authorised the 1st respondent to do.
 16. On the complaint by the appellants that the Judge erred for finding that the respondents were the lawful owners of the suit land the 1st respondent testified how he, the 2nd respondent and another person had applied to the Commissioner of Lands to be allocated a vacant industrial plot where they wanted to establish a factory; that they were given a Letter of Allotment which had various conditions which they met and were finally given a title document which they produced into evidence. The appellants did not have a title to the suit land. The Judge considered the adverse positions taken by the parties and held at paragraphs 85-87 (inclusive) of the judgment:

“85. There being no other parallel certificate of title which was availed to the Honourable court and upon evaluating the totality of the documents which were produced by and on behalf of the Plaintiffs, there is no gainsaying that indeed the Plaintiffs herein lawfully applied for allotment; were allocated the suit property and upon compliance with the conditions contained at the foot of the Letter of allotment, same were issued with the requisite certificate of title.”

86. Additionally, it is important to underscore that upon the issuance of a certificate of title, the Plaintiffs herein became the lawful and legitimate proprietors of the suit property and their title thereto can only be challenged and/or impugned on the basis of fraud and or misrepresentation, if any, to which it is proved that same were privy and/or party to in terms of the provisions of Section 26 1(a) of the *Land Registration Act, 2012*.

87. On the other hand, the certificate of title/Grant issued to and in favor of the Plaintiffs herein: can also be impugned or vitiated on the basis of illegality, irregularity and corrupt scheme; if any, demonstrated and established in accordance with the provisions of Section 26 1(b) of The *Land Registration Act, 2012*.”



17. The procedure for allocation and acquisition of land has been explained by this Court in various decisions such as *Wreck Motor Enterprises v. Commissioner of Lands & 3 Others* [1997] eKLR as follows:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

18. The respondents proved in evidence that they were allocated the suit land; met conditions attaching to the allocation and that they were finally given a title to the suit land. The appellants complain that the trial Judge refused to issue summons to some witnesses to attend court and testify on their behalf. This complaint is however not supported by the record. The record shows that the appellants applied for and were given summons and the particular order made on 14th March, 2023 was as follows:

19. Further orders:

1. Witness summons be and are hereby issued to and in favour of the following witnesses:
 - a. Director, Land Administration Ministry of Lands, Public Works, Housing and Urban Development.
 - b. The Director of Survey,
 - c. The Director, Legal Services/Head of Legal Department, National Land Commission.For coherence, the named witnesses shall be served with the witness summons and the same to attend court and to give evidence for and on behalf of the Defendants.
2. The Defendants shall extract the summons and thereafter effect service on the named witnesses.
3. The Defendants shall also foot the witness expenses of the witnesses if any.”

20. When hearing of the case resumed on 14th June, 2023 the appellants were not ready to proceed. They applied for adjournment on grounds that witnesses they wished to call were engaged elsewhere. Counsel for the appellants is recorded as telling the court:

“In addition, I do not wish to apply for warrants of arrest at this juncture. Based on the foregoing, I wish to seek the indulgence of the court and pray for an adjournment in the matter.”

21. As we have seen that application for adjournment was refused for various reasons including that the appellants who had been granted a last adjournment had failed to comply with various court orders. The order rejecting the application for adjournment was not appealed.

22. The position is that the trial court granted witness summons to various government officers who were to be served with those summons by the appellants. The appellants did not avail those witnesses when the hearing resumed 3 months later and they were to blame for failure of those witnesses to attend court. The complaint by the appellants in that regard has no merit and is dismissed. Then there is the complaint that there was variance between Letter of Allotment and the title document. That variance was explained by the 1st respondent who testified that he and the 2nd respondent had bought out the share of the 3rd person before title was issued and that was the explanation for absence of the name of the third person in the title document. That explanation was sufficient.



- 23. The respondents proved to the required standard that the vacant parcel of land which became the suit land had properly been allocated to them after they followed all lawful steps in acquiring the land. The appellants were trespassers on the land who entered and occupied the land forcefully taking advantage of unlawfulness that characterised the country during the post- election violence of 2007/2008. They have no legitimate or any claim to the suit land.
- 24. We find this appeal to have no merit and we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

A. K. MURGOR

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original
signed

DEPUTY REGISTRAR

