Maina v Mwakio (Environment and Land Appeal E005 of 2024)
[2024] KEELC 6945 (KLR) (Environment and Land) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6945 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E005 OF 2024

EK WABWOTO, J

OCTOBER 24, 2024

BETWEEN

DAVID MBUTHIA MAINA .... APPELLANT

AND

ANAGRET WAKIO MWAKIO .... RESPONDENT

(Being an appeal from the judgment/decree of Hon. Sinkiyian (PM) delivered on 22nd January 2024 at Voi Law Courts in ELC Case No. 4 of 2020)

JUDGMENT

1. The proceedings leading to this appeal commenced in the subordinate court vide a plaint dated 19th February 2020 which was later amended on 26th September 2022.
2. The Plaintiff who is now the Appellant herein averred that together with the Respondent they have been living peacefully as immediate neighbours and that his father got the land from village elders, sometimes in 1979 his father built a house where he stayed with his family until his demise in 2011. It was averred that he continued to live peacefully in the land until 20th May 2019 when the Respondent in a company of hired goons invaded the Appellant's premises and demolished six toilets and 2 rooms belonging to the Plaintiff. The said action was repeated on 5th July 2019.
3. It was also averred that the Respondent constructed a permanent structure on the suit property from 14th February 2020. The Appellant therefore prayed for judgment against the Respondent for a permanent injunction restraining her from entering or interfering with the suit property L.R No. 1956/345. The Appellant also prayed for a declaration that he has a beneficial interest of a portion of the suit property. He also prayed for costs of the suit and any other relief that the subordinate court may deem fit to grant.

4. The Respondent who was the defendant before the proceedings at the lower court filed a statement of defence and counterclaim dated 1st February 2023. The Respondent denied the contents of the plaint and averred that the suit property was legally and through a court order allocated to her deceased mother Scholar Walowe Mwakio alia Scholastica Mwakio John on 5th November 2018 for a term of 99 years vide a letter of allotment from the National Land Commission. It was also averred that upon allocation her deceased mother made payment of Ksh 36, 840/- being the required fees and was issued with a receipt dated 1st February 2019 signifying outright ownership of the stated plot. The said allocation was never reviewed, varied nor revoked. In the counterclaim, she averred that the Appellant has continuously trespassed onto the suit property and she sought for the following reliefs; an order of permanent injunction, a declaration that the Estate of Scholar Walowe Mwakio alia Scholastica Mwakio John is the owner of the suit property, general damages and costs.

5. Upon hearing the matter, the learned trial Magistrate Hon. T.N. Sinkiyian, PM delivered a judgment on 22nd January 2024 dismissing the suit and granted the reliefs sought in the counterclaim. She also awarded costs of the suit and counterclaim to the Respondent.

6. Aggrieved with the outcome, the Appellant filed this appeal vide a Memorandum of Appeal dated 29th May 2024. The grounds of appeal are as listed on the face of the Memorandum of Appeal. The Appellant prayed that the appeal be allowed and judgment of the lower court be set aside. The Appellant also prayed for costs of the appeal be borne by the Respondent.

7. The Appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 26th July 2024 while the Respondent filed written submissions dated 22nd July 2024. The court has duly considered all the written submissions filed by the parties.

Analysis and Determination

8. Upon considering the court record, pleadings, evidence tendered, grounds of appeal, written submissions as earlier stated and the law, this court has settled on the following issues for determination herein:-

    i. Whether the trial court erred in law and fact in arriving at its decision.

    ii. What are the appropriate reliefs to grant herein.

9. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. See Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.

10. Similarly, in China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:
>
> a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
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> b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

11. The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in Peters vs Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484."

12. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

13. The court shall proceed to determine the said issues simultaneously.

14. The Appellant in his submissions faulted the trial court for the reasons that he had been living in the suit property for more that 8 years and at no time had the Respondent lived in the suit property to the exclusion of the Appellant. It was further submitted that there was no claim of adverse possession before the trial court and thereof the finding by the trial court on adverse possession was in error.

15. It was also submitted that failure by the Appellant to obtain proper documentation for the suit property should not have denied him from getting his share which the portion should have been 50:50.

16. In respect to the decision rendered by the trial magistrate, the Respondent submitted that the same was not made in error since the Appellant's family had a separate allotment letter different from the suit parcel. It was also submitted that the Respondent had produced in evidence during trial before the lower court a letter of allotment confirming ownership of the suit property to her family and the same had not been controverted.

17. From the evidence that was tendered herein the Respondent produced a letter of allotment which was issued in 2019. It was also evident that the Appellant had no documentation nor any allotment letter in respect to the suit property. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR. Equally in the case of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

> " We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which

claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest".

18. As earlier stated both parties are laying claim to the suit property. It is trite law that 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."
>
> Sections 109 and 112 of the same Act states;
>
> > "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
> >
> > 112. "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

19. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M'Nabea vs David M. Wachira [2016] eKLR stated as follows:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.
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> ...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> > "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

20. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

21. It is incumbent upon a party to prove ownership of land through documentary evidence that extend to the root of the title. The court must be left in no doubt that the holder of the documents proved is the one entitled to the property. Where there exists title or documentation to the property then the title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.

55. In the instant case the Respondent was also able to adduce evidence confirming that indeed there was compliance with the conditions of the allotment letter issued to her. The Appellant did not adduce any evidence before the trial court controverting the Respondent's case and as such he was unable to prove his case to the required standard. The trial court was also not furnished with any evidence demonstrating fraud on the part of the Respondent's allotment letter.

56. In respect to allotment letters, the law is settled to the effect that only once a letter of allotment is issued and the terms thereon accepted, that title comes into existence. The Supreme Court of Kenya in the case of Torino Enterprises Limited vs Attorney General (Petition No. 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) stated that;

> " It is settled law that an allotment letter is incapable of conferring interest in land, being nothing than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr. *Joseph N. K. Arap Ng'ok vs Justice Moijo Ole Keiyua & 4 Others C.A 60 of 1997* (unreported) and in Gladys Wanjiru Ngancha vs Teresa Chepsaat & 4 Others High Court Civil Case No. 182 of 1992 [2008] eKLR, the superior courts restated this principle..."

22. The evidence on record which was not controverted confirmed that the Respondent's deceased mother Scholar Walowe Mwakio alia Scholastica Mwakio John was issued with an allotment letter dated 5th November 2018 for a term of 99 years from 1st November 2018. Upon allocation the Estate of the deceased accepted the conditions set out in the said allotment letter which required her to confirm acceptance and make payment of stand premium and other expenses within a period of 90 days. The evidence on record which was again not controverted confirmed that there was a letter of acceptance dated 18th January 2019 which confirmed acceptance of the allotment and the same enclosed a bankers cheque of Ksh 36,840/- upon which a receipt dated 1st February 2019 was issued. It was also evident that pursuant to the decree issued in Mombasa ELCA No. 290 of 2012 dated 31st May 2015 a New Grant in the name of James Njagi Gacigira was cancelled and the property L.R No. 1956/345 – CR.

26642 issued to the deceased mother Scholastica. To this particular extend the court is satisfied that the Estate of the deceased Scholastica acquired legitimate proprietor interest in the suit property.

Conclusion

23. 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. It therefore follows that the Learned Magistrate did not err in law and fact in arriving at her decision. It is therefore not open for this court to interfere with the same.

24. Consequently, the Appeal is unmerited and it fails. The same is dismissed.

25. On the issue of costs, considering the circumstances of this Appeal, this court directs each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 24TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

David Mbuthia Maina the Appellant in person.

Ms. Wambura for Respondent.

Court Assistant: Mary Ngoira.