Mkwachu v Mbogho (Environment and Land Appeal E002 of 2024) [2024] KEELC 7114 (KLR) (Environment and Land) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7114 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E002 OF 2024

EK WABWOTO, J

OCTOBER 30, 2024

BETWEEN

PATRICK MWANDANGO MKWACHU .... APPELLANT

AND

GEORGE MWAVISWA MBOGHO .... RESPONDENT

(Being an appeal from the judgment of Hon. T. N. Sinkiyian (PM) delivered on 15th January 2024 in ELC Case No. 14 of 2020 at Voi)

JUDGMENT

1. This appeal is against the judgment of the trial court, Hon. T. N. Sinkiyian, P.M delivered on 15th January 2024 in respect to Voi ELC Case No. 14 of 2020. In her judgment the Learned Magistrate entered judgment in favour of the Respondent as follows:-

> " The Plaintiff is the duly registered and the bonafide owner of the property L.R 1956/955 CR 28898 Voi Municipality. The Defendants are directed to grant him vacant possession of the property title No. LR 1956/955 CR 288898 Voi Municipality measuring g0.0860ha. The Plaintiff is authorised upon lapse of 90 days of today to carry out eviction and demolition of the structures on the said land title No. LR 1956/955 CR 28898 Voi Municipality should the Defendants fail to do so. The same shall be at 2nd Defendant's expense and with the supervision of the officer in charge of Voi Police Station. A permanent injunction restraining the Defendants by themselves, their agents and or servants from entering onto or encroaching selling and or remaining on and or constructing on or in any other manner whatsoever interfering with the quiet possession of the Plaintiff on the suit

land title No. L.R 1956/955 (CR 28898) Voi Municipality is issued. The 2nd Defendant shall bear the Plaintiff's costs of the suit."

2. The Appellant being aggrieved by the aforementioned decision filed this appeal vide a Memorandum of Appeal dated 14th February 2024. The Memorandum of Appeal set out the following grounds of appeal:-

    1. That the Learned Magistrate erred in law and in fact in failing to exercise his discretion in favour of the Appellant.

    2. That the Learned Magistrate erred in law and in facts by disregarding the Appellants oral evidence and submissions.

    3. That the Learned Magistrate erred in law and in fact by disregarding the history tendered in court by the Plaintiff regarding the ownership of the suit property.

    4. That the Honorable Magistrate erred in law and fact by failing to appreciate that the appellant held the land in trust for his family and that he has been on the land for a long time without any interruption from anyone and infact built a permanent structure on the land.

    5. That the Honorable learned Magistrate erred in law and facts by overlooking the procedure and legality of the ownership documents presented by the Respondent.

    6. That the Honorable learned Magistrate erred in law and fact by stringently maintaining that title to land is absolute proof of ownership without interrogating or inquiring into any aspect of existence of any fraud in acquiring of the ownership documents of the subject suit land.

    7. That the Learned Magistrate erred in law by deciding that the Appellant did not prove his Counterclaim against the Respondent thus dismissing the same.

    8. That the Honorable learned Magistrate erred in law and facts and misdirected herself by acting on wrong and unsound principles and provisions of the Law.

3. The Appellant prayed for the following orders:-

    a. That the appeal be allowed.

    b. That the Judgment/decree of the lower court be varied and/or set aside in its entirety and judgment be entered in favour of the Appellant.

    c. That costs of the Appeal be borne by the Respondent.

4. Parties took directions to have the Appeal canvassed by way of written submissions. The Appellant filed written submissions dated 30th August 2024 while the Respondent filed written submissions dated 4th October 2024.

5. The Appellant submitted on the following issues:-

    i. Whether the Learned Magistrate erred in law and in fact in failing to exercise her discretion in favour of the Appellant.

    ii. Whether the Learned Magistrate erred in law and in fact by disregarding the Appellant's oral evidence and submissions.

    iii. Whether the Learned Magistrate erred in law and fact by disregarding the history tendered in court by the Appellant regarding the ownership of the suit property.

iv. Whether the Appellant erred in law and in fact by failing to appreciate that the Appellant held the land in trust for his family and that he has been on the land for a long time without any interruption from anyone and in fact built a permanent structure on the land.

v. Whether the Learned Magistrate erred in law by overlooking the process and legality of the ownership of the ownership documents presented by the Respondent.

vi. Whether the Learned Magistrate erred in law and in fact by stringently maintaining that the title deed to land that is absolute proof of ownership without interrogating or inquiring into any aspect of existence of any fraud in acquiring of the ownership documents for the subject suit land.

vii. Whether the Learned Magistrate erred in law and in fact by deciding that the Appellant did not prove his counterclaim against the Respondent thus dismissing the same.

viii. Whether the Learned Magistrate erred in law and in fact and misdirected herself by acting on a wrong unsound principles and provisions of the law.

ix. Costs.

6. The Appellant faulted the Learned Magistrate for failing to appreciate the evidence on record and arrived at a different and wrong decision.

7. Citing the cases of Dina Management Limited =Versus= County Government of Mombasa & 5 Others (2023) KESC 30 (KLR) and Munyu Maina =Versus= Hiram Maina (2013) eKLR it was submitted that the Appellant had been living in the property until 2019 when the Respondent showed up and hence the Appellant's family was entitled to be allocated the land.

8. It was further submitted that the suit property is family land and the Appellant has been in active possession and occupation of the same for so many years without receiving any intrusions from any person and the court erred by disregarding this evidence.

9. The Appellant argued that the property in dispute falls within the Municipality and hence consent from the Commissioner of Lands and no such consent was produced in court. The cases of Lagat =Versus= Kebut (Environment and Land Appeal E021 of 2022) (2023) KEELC 18432 (KLR) and Robert Ngaruiya Chatha =Versus= Joseph Chege Ndungu Civil Appeal No. 293 of 2018 were cited in support.

10. Counsel also submitted that the Respondent's title was fraudulently obtained.The Learned Magistrate was faulted for not properly considering the same.

11. In respect to the Appellant's counterclaim before the trial court, it was argued that the Appellant tendered sufficient evidence in proving the counterclaim and the Learned Magistrate disregarded the same in arriving at her decision.

12. The Appellant concluded his written submissions by urging this court to allow the appeal with costs payable by the Respondent.

13. The Respondent in his submissions maintained that the judgment was properly rendered by the trial court. The Appellant's evidence was full of inconsistencies and incorrect statements with no documentary evidence. The Respondent in his submissions traced the root of title from the time it was surveyed up to the time he acquired the same and denied the Appellant's submissions that the same was ancestral land.

14. The Respondent also took issue with the appellant for claiming that he had been staying in the property since time in memorial yet he was not able to avail any documentary evidence and neither could he confirm ever seeing any Surveyor surveying the property and the subsequent issuance of title deeds around 1995.

15. The Respondent also submitted that the Appellant was unable to produce his title deed in court during the hearing of the matter and hence he had not proved the allegations of fraud as against the Respondent. The court was urged to dismiss the Appeal with costs to the Respondent.

16. The court has settled on the following issues for determination:-

    i. Whether the Appellant proved his case and counterclaim before the trial court to the required standard.

    ii. Whether the Respondent's case was proved to the required standard before the trial court.

    iii. Whether the Learned Magistrate erred both in law and fact in arriving at her decision.

    iv. Based on the foregoing, what are the appropriate reliefs.

17. 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. 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;
>
> 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
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> 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."

18. 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."

19. 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.

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

21. The Appellant in his submissions faulted the trial court for various reasons as was demonstrated in his submissions. The Respondent on the other hand maintained that the court's decision was properly rendered and further the Appellant had repeatedly lied to the trial court while adducing his evidence.

22. At this stage the court shall now proceed to consider two issues simultaneously whether the Appellant's case and Counterclaim was proved to the required standard and whether the Respondent's case was proved to the required standard.

23. The Appellant's case and Counterclaim before the trial court was that he is the lawful owner of the suit property having inherited it from his grandfather one Mnyaka Mwanyasi. It was his case that the Respondent was guilty of fraud and misrepresentation and the following particulars of fraud and misrepresentation were pleaded:-

    a. Misrepresentation to the Land Registrar to effect transfer to the Respondent while the Appellant was on the suit property.

    b. Failing to disclose to the Land Registrar at Mombasa that the subject land was not free for transfer.

    c. Colluding with the land officers to get the Appellant's land transferred to him.

24. It was also his case that he cannot trespass on his own land and that the Respondent herein had not demonstrated how he acquired his property.

25. In respect to his counterclaim, it was pleaded that the Plaintiff fraudulently acquired the title deed for the above suit property knowing that the land belonged to the Appellant. The following particulars of fraud, deceit and material disclosure were particularised:-

    i. The Plaintiff (now Respondent) used conspicuous means to acquire the suit property belonging to the Plaintiff.

    ii. The Plaintiff failed to inform the Land Registrar that the 2nd Defendant (now Appellant) was already on the suit property when the title deed was being transferred to him.

    iii. The Plaintiff colluded with the Land Registrar to issue him with the title deed while the 2nd Defendant was on the suit property.

26. The Appellant sought for the following orders in his counterclaim:-

    a. An order for revocation of Title Deed LR 1956/99.

    b. A declaration that the 2nd Defendant is the legitimate owner of the suit property by having inherited it from his grandfather.

    c. An order directing the Registrar of Titles to issue title documents in respect to Title Deed No. 1956/99 in favour of the 2nd Defendant herein.

    d. Any other order that the court may deem fit to grant and meet the ends of justice.

    e. Costs of the suit.

27. The Respondent's case was that he is the lawful registered owner of the suit property. It was his case that in March 2020 the Appellant invaded and trespassed his property and they are trespassers who ought to be stopped by the court. It was his case that the Appellant illegally subdivided his land and installed electricity. Owing to the Appellant's actions, he sought for an order of permanent injunction, an order of vacant possession and a declaration that he is the duly registered and bonafide owner of the suit property.

28. From the record of appeal, the Appellant testified that he was given the plot by Munyaka Manyasi who had acquired the same from his father one Tambura.

29. When cross-examined, he stated that his grandfather Munyaka gave him the land in 1995 and at that time he was about 16 years old. He stated that neither his grandfather nor himself was aware of the survey exercise which was undertaken. He also stated that he constructed on the property in 2007.

30. Manasi Mejuhi Nuru who testified as DW2 stated that he was a tenant and not the owner of the property since he is paying rent to the Appellant.

31. John Wanjohi Gichuki, Principal Land Registrar, Mombasa testified as DW3 and he stated that from their records, L.R No. 1956/955 is currently registered under the names of the Respondent. The current owner was registered on 9th November 2018. The first owner was Arthur Kagondu who was registered on 7th October 1995. He also stated that the Appellant's claim about the title was as a result of allotment by the Commissioner of Lands and he did not have any information on the allocation process. He also stated that if there was a person on the ground at the time of allotment then the said person could have been given consideration since once a title deed is issued, the Land Registrar cannot revoke the same and parties have to go to court. On cross-examination, he stated that he did not have any transfer documents from the Appellant.

32. The Respondent's testimony and evidence before the trial court was that he did a search before purchasing the property in 2005. Arthur Kagondu Kuria was the registered owner. He also physically visited the suit property and had a sale agreement executed before Muthami & Company Advocates. He also produced a transfer which was executed. Later in 2018 he found a temporary structure on the land and Manasi Mejohi was found to be the one who had intruded on his property.

33. On cross-examination, he stated that an agent linked him to the property, the seller was not known to him prior to the transaction. He stated that Arthur was the owner of the land and he never inquired on the history of the matter. He also stated that he did not know how Arthur came to own the land.

34. Bethany Mkangombe Mwasare testified as PW2 and stated that she is a co-owner of the property.

35. Ammon Mwanyama Mzee testified as PW3 and stated that he is the one who connected the seller and buyer in respect to the property in question. When cross-examined, he stated that he was a witness to both the seller and buyer. He also stated that the plot was vacant and undeveloped at the time of purchase. He also stated that since the land had a title there was no need for an allotment letter to be produced.

36. 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".

37. 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."

38. 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.
>
> ...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."

39. 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."

40. The Court will be guided by the aforementioned provisions and cases. An analysis of the evidence that was tendered herein clearly confirmed that the suit property was vacant as at the time the same was purchased by the Respondent in the 2005 when the same was purchased from Arthur Kagondu Kuria. The evidence on record only shows that while the Appellant alleged to have built a temporary structure in 2007 it was only proved that the same was actually built in 2018 when Manasi Mejuhi Nuru the tenant moved to the property in 2018. From the said evidence there is uncertainty as to whether the Appellant indeed had any ancestral interest in the property. The Appellant was unable to prove or adduce any evidence demonstrating their occupation and or interest in the land. There were no structures and or any activity being undertaken by the Appellant in the suit property as at the time the same was purchased by the Respondent. The Respondent on the other hand was able to demonstrate how he purchased the property, the Respondent produced his sale agreement, transfer and even evidence of land rent that had been paid. In the circumstances, this court is satisfied that the Respondent was able to prove his case before the trial court to the required standard. There was no evidence adduced by the Appellant demonstrating that the said property was fraudulently acquired by the Respondent. For the reasons explained the Appellant's case and Counterclaim was not proved to the required standard before the trial court,

41. 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.

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

43. In respect to costs the Respondent is the successful party and is deserving of costs of this Appeal. The Appellant shall pay the Respondent's costs of this Appeal assessed at Ksh 40,000/-.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 30TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazighe for the Appellant.

Goerge Mwaviswa Mbogo the Respondent in person.

Court Assistants: Mary Ngoira and Norah Chao.