



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 202 OF 2014

JAMES KARURI KAMAU.....APPELLANT

AND

TITUS MBUVI KITUNGU.....1ST RESPONDENT

BETH MUEKE NDULU.....2ND RESPONDENT

AARON KITUNGU MBUVI.....3RD RESPONDENT

MUTUKU KILONZO.....4TH RESPONDENT

BENJAMIN NZYOKI NDOONI.....5TH RESPONDENT

(Appeal from the judgment of the Honorable Mr. L.N. Mugambi Senior Principal Magistrate delivered on 12th September, 2014 at the Senior Principal Magistrates Court of Kenya at Kangundo in Civil Case Number 11 of 2011)

JUDGEMENT OF THE COURT

1. This is an appeal from the judgment of the Senior Principal Magistrates Court dismissing the appellant's suit wherein he claimed for an injunction prohibiting transactions on the suit land and a declaration that 6 acres of the suit land belongs to him and it be registered in his names.

Pleadings in the Trial Court

2. By a plaint filed on 12th January, 2011, the appellant averred, among other things that, vide three agreements in 2003 and 2005, he purchased 6 acres of land from the 1st and 2nd respondents that was registered in the name of Lukenya Ranching and Farming Co-operative Society at a price of Shs. 425,000/= per acre; that the respondent took possession of the land on payment of the last installment in 2005 and fenced it awaiting to be registered as proprietor; that the 1st and 2nd respondents breached the agreement by registering the land in their names as joint-proprietors and subdivided the land into 4 portions; that the 1st and 2nd respondents fenced a portion of the appellant's land and ought to be restrained. He sought a declaration that he has proprietary right over the 4 plots in the suit land and an injunction restraining the respondents from trespassing upon or interfering with the 6 acres on the suit land that are now since subdivided into plots 740, 741, 742 and 743.

3. The 1st and 2nd respondents filed a defence denying the plaintiff's interest in the suit land. The 3rd, 4th and 5th respondents filed a notice of preliminary objection. During hearing, the 3rd to 5th respondents averred that the application for an injunction was brought under the wrong provisions of the law, that is order 39 instead of order 40, the said preliminary objection was struck out and the status quo was ordered to be maintained until the suit was completely determined.

Findings of the Trial Court

4. The appellant gave evidence at the trial and called one witness. The 1st and 5th Respondents gave evidence at the trial and did not call any witness. The learned Magistrate in his judgment made the following findings of fact:

a. The 1st defendant granted authority to the 3rd to 5th defendants trading as Kausyani Agents to act as his agent in disposing his interest in the suit land.

b. Only the contract dated 22.9.2003 and 10.3.2004 meet the strict requirements of Section 3(3) of the Law of Contracts Act wherein they dispose 5 acres; the one dated 7.4.2005 fails for lack of proper attestation.

c. The appellant paid Shs. 425,000/= subsequent to entering onto the agreements.

d. The appellant took possession and is still in occupation of the land allocated to him when the parcel was demarcated and the land parcels are now registered in the names of the 1st and 2nd respondents but consent from Lukenya Co-op Society was not sought to undertake dealings on the land, and the appellant's claim to the entitlement to the land has been complicated by the registration of the 1st and 2nd respondents as co-owners.

e. It would be difficult to grant an injunction and the court cannot grant a relief not prayed

5. On the basis of those findings, the trial court held that the Kshs 425,000/- paid by the appellant is recoverable from the respondents jointly and severally together with interest except from the 2nd respondent and dismissed the appellant's claims for injunction and declaration of ownership of the suit land.

The Appeal

6. The appeal is based on four grounds that can be summarized into three namely: that the magistrate misdirected himself in fact and law in partly disallowing the appellants suit despite the overwhelming evidence in support of the same; the magistrate erred in law and fact in finding fault in the 3rd sale agreement as entered between the 3rd to 5th Respondents; lastly the judge erred in law and fact in finding that the 1st respondent would not dispose the suit property without the express consent of the 2nd respondent.

Submissions

7. The Appellant submitted that the issues for determination in this appeal are whether the 1st and 2nd respondents were co-tenants at the time of the sale of the suit property to the appellant; whether it was relevant to obtain Lukenya Co-operatives consent prior to the transaction; whether the 3rd sale agreement between the plaintiff and the agents was compliant within the law.

8. On the 1st issue, the appellant submitted that the sale transactions the subject matter of the suit took place before the registration of the suit property to the 1st and 2nd respondents as co-proprietors thus there was no need for the 2nd respondent's consent to validate the sale and enforce the sale contracts as envisaged under Section 91(1) and 91(4) of the Land Registration Act, therefore the finding of the trial court that the registration of the 2nd respondent as co-owner negatively affected the sale to the appellant. On the issue of the requirement of consent of the Lukenya Co-operative Society, the appellant submitted that in so finding that the consent was required, the magistrate did not cite any law thus there is no legal obligation to obtain such consent. On the issue of validity of the 3rd sale agreement, the appellant submitted that the magistrate ought to have looked to the intention of the parties rather than the form, he relied on the case of **Mombasa ELC No 152 of 2016 Nasoor Suleiman Mbaruk v Jamila Nassir Ali & Another (2017) eKLR**. In conclusion, the appellant sought for a relief under Section 80 of the Land Registration Act for rectification of the register.

9. The 1st and 2nd Respondents in their submissions agreed with the findings of the trial court and submitted that the sale and disposition of the deceased' property without letters of administration is illegal, thus the sale of the suit property herein is illegal and the court cannot enforce such; they cited the case of **Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd and Another, Civil Case No 11 of 2016**. Learned Counsel further submitted that the trial magistrate did not err in finding that the 1st Defendant/Respondent would not dispose of the suit property without the express consent of the 2nd Defendant/ Respondent, and he quoted the provisions of Section 102 of the Registered Lands Act and the case of **Moses Bii v Kericho District Land Registrar & Another, Civil Suit No 8 of 2014**. Counsel concluded by submitting that the court should dismiss the appeal with costs.

10. The 3rd, 4th and 5th Respondents have not filed any submissions.

Analysis

11. This appeal relates to the validity of agreements entered into for sale of land and the need of the appellant to have the title deed that is registered in the names of the 1st and 2nd respondents to be registered in his names. I have extensively looked at the provisions of the Land Registration Act, the Constitution and the cases cited by the appellant in support of his contention that the trial court erred in its decision. I am in agreement with the **Mombasa ELC No 152 of 2016 Nasoor Suleiman Mbaruk v Jamila Nassir Ali & Another** decision, but disagree with the applicability, the singular issue for my determination is whether the honourable court is seized of the requisite jurisdiction to grant the orders sought.

12. In arriving at my decision I am guided by the celebrated case of **The Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited 1989 KLR 1653** the Court of Appeal held as follows:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

13. Article 162(2)(b) and 165(3)(a) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Court Act, 2011 the jurisdiction of the Environment and Land Court is for determination of disputes relating to environment planning and protection, climate

issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. I wish to refer to the case of **John Kimani Njenga v Margaret Wanjiru Kanyiri & others ELC No. 345 of 2014** where it was held that the ELC Court had jurisdiction to hear and determine disputes, actions and proceedings concerning land.

14. The jurisdiction of the Environment of Land Court is set out in section 13 of Act No. 19 of 2011. The court has original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the constitution and with the provisions of the Act or any other written law relating to environment and land. The court also exercises appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. The court further exercises supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution of Kenya.

Determination

15. As pointed out above, the dispute relates to the instrument or lack thereof that creates the interest of the appellant in the suit land. I have considered the lengthy submissions by the appellant and the 1st and 2nd Respondents, however in light of the analysis above, I find that the court is not seized with jurisdiction to grant the remedies sought by the appellant in the plaint and in the appeal. The Appellant ought to have lodged the appeal at the Environment Land Court.

16. I note that the learned magistrate made the findings of fact in terms of paragraph 4 above and also made a finding that the appellant was entitled to refund. It was not in dispute that the 1st respondent sold a portion of his land to the appellant. He gave possession of the land to the appellant; however, the respondent did not transfer the land to the plaintiff and instead caused the land to be registered in his names together with the 2nd respondent as co-owners.

17. As I have held in essence that, the court has no jurisdiction to grant the orders sought, this does not preclude the court from ensuring that the monies paid are refunded, I find that the trial court reached the correct decision and therefore the appeal has no merit. Suffice to add that the Appellant herein is appealing against the trial court's order that he be refunded the purchase – price consideration.

18. For the foregoing reasons, the appeal is dismissed with costs to the respondents.

Dated and delivered at Machakos this 22nd day of January, 2019.

D. K. KEMEI

JUDGE