



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. E051 OF 2021**

**GILBERT KINYUA .....APPELLANT**

**VERSUS**

**PETER MUTETHIA MUGAMBI.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. S. Ndegwa (S.P.M.) delivered on 1<sup>st</sup> March, 2018 in Githongo SPM ELC No. 44 of 2017)*

**JUDGMENT**

1. The appellant has brought an appeal dated 31.3.2021. He seeks to overturn the lower court decree on the grounds that:- the trial court was wrong to make a finding that the respondent lawfully acquired the suit property through an auction, in absence of any evidence to that effect; failing to find the existence of a conspiracy in **Meru CMCC No. 88 of 2005** between Justus Muriuki M'Tuerandu and Escoreen Gacheri Rutere; failing to find the appellant had established fraud on the part of the respondent; awarding **Kshs. 100,000/=** as general damages with interest which was excessive and was not prayed for and or proved in court and lastly failing to consider the appellant's evidence, submissions and authorities supplied in support of his case.
2. This being a first appeal the court is required to re-assess, rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. **See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.**
3. By an amended plaint dated 22.3.2018 the appellant had sued the respondent seeking to be declared an absolute owner of **Parcel No. Abothuguchi/Mariene/990**, an eviction restraining the respondent from interfering with the suit land on the basis that he had lawfully purchased and was transferred the same after a successful public auction.
4. Through an amended defence and counterclaim dated 9.7.2018, the appellant denied the claim, stated the suit land was an ancestral family land, and was secretly and without notice sold while there was an appeal pending, that the respondent had fraudulently acquired it hence prayed the court declares the sale was invalid, the land reverts to him and sought for a permanent injunction restraining the respondent from entering into the land.
5. The respondent replied to the defence and put in a defence to the counterclaim dated 31.7.2018 and stated he rightly/lawfully acquired the land in a public auction, sanctioned by a court decree.
6. The respondent testified that the suit land was sold in a public auction as a consequence of a decree in **Meru CMCC No. 88 of 2005**. He produced the proceedings, certificate of sale, notification of sale, letter from the auctioneers, newspaper advert for the auction sale, a copy of the title deed and a demand letter as P exh 1 – 7 respectively.
7. The respondent told the court he got the title deed in 2007 when no one was occupying the land, he knew the appellant was not a party to the lower court suit and that he had not conspired with either Esther Gacheri or one M'Tuerandu to illegally acquire the land. Similarly the respondent denied being aware of a pending appeal.
8. In cross-examination, the respondent stated the land was in the name of one Japhet Kaburu before he acquired it, that he did not conduct any search, that he was taken to the land by the auctioneers, that he bought the land through a public auction and that he only signed the terms and conditions of the sale as the highest bidder.
9. He admitted he did not attend any land control board meeting or sign any land transfer forms. He denied ever conspiring with one Justus Muriuki and Escoreen Gacheri to acquire the land.
10. As regard's due diligence, the respondent testified he was informed by the auctioneer the court had okeyed the public auction: that after he purchased the land, the court authorized the transfer.

11. Further the respondent stated he was unaware if Japhet had filed any appeal against the **Meru CMCC No.88 of 2005**. He insisted he bought land for **Kshs. 440,000/=**.
12. The appellant adopted his witness statement dated 21.7.2018 and produced a list of documents dated 2.5.2012 which included a chief's letter dated 14.4.2018, minutes No. 297 of the land control board, letter from M/s Meenye & Kirima advocates dated 28.9.1991, a copy of green card for **L.N Abothuguchi/Mariene/5990**, a copy of application for land control board dated 11.7.2007 as **D exh 1 - 5** respectively.
13. He stated, he did not know how his father's land came to be transferred to the respondent yet he was the one in occupation.
14. In cross-examination, the appellant admitted his father was deceased but denied he ever had a civil case in Meru Chief Magistrate's Court. He insisted he attended the land control board meeting to oppose a sale to Escoreen Gacheri wife to Peter Mutethia and stated if the court authorized the sale of the land in the said suit, he was not privy to it though they did not appeal against the judgment.
15. Further the appellant testified his late father did not disclose to them about the pending suit or its outcome. According to him records showed, the respondent was transferred the land on 13.12.2007 after paying Kshs. 400,000/= on account of a case, **Meru CMCC 88 of 2005**. He claimed the respondent fraudulently acquired the land since no auctioneer came to the land and informed him of the alleged auction sale.
16. DW2 told the court the appellant was her nephew and Japhet Kaburu died in 2019 and that she was not aware of the auction sale after Japhet Kaburu allegedly lost a suit he had filed against Escoreen Gacheri and Justus Muriuki.
17. DW3 told the court it was DW1 who was living on the land and that he was not aware on how the respondent acquired the land.
18. DW4 told the court she was the wife to the late Japhet Kaburu and that she had lodged a caution to the suit land; she stated she was not aware of any suit her husband had before the court and denied the respondent had lawfully bought the suit land since her son was the one occupying the land after he got married.
19. DW5 told the court he was the one who wrote **D exh 2** to enable a caution to be registered over the land. Similarly he confirmed writing **D exh 3** as evidence of the activities the appellant was undertaking on the land since 1996.
20. In cross-examination DW5 claimed he was not aware if the respondent was the registered owner of the land after he bought the land at a public auction, duly authorized by a court following a civil suit.
21. DW6 told the court he was aware the appellant's father passed on a while ago, and denied the respondent lawfully bought the suit land.
22. With leave of the court, parties opted to dispose the appeal through written submissions dated 8.11.2021 and 15.11.2021 respectively.
23. The appellant submits the respondent did not prove any public auction sale took place, did not produce any sale, transfer or land control board consents, as well as a receipt for the amount he paid. Similarly, it is submitted the failure to call the auctioneer to establish the legality of the public auction weakened the respondent's case.
24. Secondly, it is submitted the respondent did not undertake any due diligence otherwise he would have established there was an inhibition order lodged by DW4.
25. Thirdly, it is submitted the public auction was contrary and in violation of the **Auctioneers Act and Auctioneers Rules 1997** particularly **Rule 15** for lack of 45 days redemption notice in line with **Order 21 Rule 62 Civil Procedure Rules**. He relies on **David Mukanda –vs- Julius Wepukhulu Muindi (unreported)**.
26. Fourth, the appellant submits the land was ancestral family land hence the transfer and sale was fraudulent for lack of a consent.
27. Lastly, the appellant submits given the foregoing the evidence by the respondent had not met the threshold under **Section 107 of the Evidence Act**.
28. On the other hand the respondent submits he produced the requisite documentary evidence to prove there was an auction sale in his favour which were the legal necessity.
29. Secondly, the respondent submit issues over the legality of the public auction sale are improperly being raised before this court; the appellant did not raise before the **Meru CMCC No. 88 of 2005** by the then former registered owner of the land up to his demise and that the appellant lacks locus standi to sue for and on behalf of the estate of the late Japhet Kaburu.
30. He relies on **Jared Nyauma Ondieki & 6 Others –vs- Football Kenya Federation [2019] ECLR and Khelef Khalifa El-Busaidy – vs- Commissioner of Lands & 2 others [2003] eCLR**.
31. Thirdly, it is submitted the appellant had no protectable right in the suit property.
32. Fourth, the respondent submits the sale was in line with **Order 22 Rules 68, 69, 70, 71 and 72 of the Civil Procedure Rules** hence the transfer cannot be faulted.

33. Fifth, regarding ancestral land, it is submitted there was no pleading and or proof of the alleged trust or a succession cause determination over the suit land.
34. Regarding the rights of the appellant, it is submitted the respondent holds a clean title and the appellant has not proved any fraud, illegality or mistake in the acquisition of the title deed. Reliance is made on *Shimoni Resort –vs- Registrar of Titles & 5 Others [2016] eKLR* and hence submits he was an innocent purchaser for value without any knowledge of defect in title.
35. The respondent relies on *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura –vs- Attorney General & 4 Others [2017] eKLR*.
36. In my considered view, the issues for determination are:-
- a) **If the respondent lawfully proved his claim on a balance of probabilities.**
  - b) **If the appellant had proved the counterclaim on a balance of probabilities.**
  - c) **If the trial court applied the correct law to the facts and evidence and reached the correct decision.**
37. It is trite law parties are bound by their pleadings and issues flow from pleadings as held in *Joshua Mungai Mulango & Another –vs- Jeremiah Kiarie Mukoma [2015] eKLR, IEBC & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR* and **Order 2 Rule 6 of the Civil Procedure Rules**.
38. The respondent's claim was he bought the suit land in a public auction sanctioned by a court decree and which court also authorized the transfer hence averred he acquired an absolute and an indefeasible title.
39. The amended defence and counterclaim did not specifically address itself on the court decree issued pursuant to **Order 21 Rule 6**, conditions of sale dated 25.11.2018, prohibitory order issued under **Order 21 Rule 49** on attachment and sale of **L.R No. Abothuguchi/Mariene/1990**, order to transfer the land to the respondent dated 4.7.2006, letter dated 19.7.2006 confirming the auction sale, the notifications of sale issued by the court dated 9.6.2018 and the certificate of sale issued by the court on 19.7.2006.
40. The respondent was categorical on how he acquired the land. Instead of raising the issues of fraud, illegality, collusion and mistake on the aforesaid elementary steps and procedures under **Order 21 of Civil procedure Rules**, paragraph 9 of the counterclaim went off the road to address issues unrelated to the respondent's pleadings on the mode of acquisition.
41. Similarly the appellant in his testimony did not demonstrate how the public auction sale and the subsequent transfer to the respondent was illegal, fraudulent and unlawful. Consequently the sale and certificate of sale remained unchallenged, valid, the process binding and legal.
42. Again the appellant admitted he was unaware of the court decree. He stated his father passed in 2019 and did not during his lifetime appeal against the decree or bring any complaint against either the trial court, the auctioneer and or the purchaser of the land after the auction took place.
43. Further the appellant did not bring any proof that his father ever authorized him to make a complaint on his behalf. Likewise, the appellant did not produce any letters of administration to advance the interests of the estate of the deceased and by extension appeal against the decree and the certificate of sale herein.
44. In absence of all these my finding is the appellant lacked capacity to bring the counterclaim and seek for any order for the reversal of the transfer into his name. The trial court therefore did not have any jurisdiction to sit on appeal or review, or interfere with the process of public auction sale and transfer of the suit land to the respondent by a court of concurrent jurisdiction on any other material issue that went to the root of the process of sale.
45. My holding therefore is the sale was not fraudulent or illegal at all since fraud must not only be distinctly alleged but must also be strictly proved to a standard beyond a balance of probabilities as held in *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR*.
46. The appellant did not sue the auctioneer alleging any irregularities in the public auction sale. Having failed to do so also the appellant's case could not be sustained going by the reasoning in *Nancy Kahoya Amadiva –vs- Expert Credit & Another [2015] eKLR*.
47. **Section 34 of the Civil Procedure Act** barred the appellant from mounting a fresh suit in view of **Meru CMCC No. 88 of 2005**. Questions pertaining to the execution, discharge and satisfaction of the court decree are determined by the executing court and not by way of a fresh suit.
48. The counterclaim is a separate suit hence it was contra-statute incompetent and an abuse of the process of the court as held in *Catherine Nyambura Njuguna & 2 Others –vs- Wilson Kihumba Githinji [2020] eKLR*.
49. Given the foregoing, my findings are that ground 1, 2, 3 and 4 of the appeal lacks merits and are hereby rejected.
50. Turning to ground 5 of the appeal, as stated above, the appellant was neither a legal representative of the estate of the deceased nor a

beneficial owner of the estate of the deceased. The evidence produced by the respondent showed he bought the land on 17.7.2006 and subsequently acquired the title deed on 16.1.2008.

51. Once he acquired the land he became entitled to all rights and privileges of an absolute owner as per **Section 25 of the Land Registration Act**. The respondent testified he had not been able to enjoy his occupation and possessory rights on account of the appellant denying him vacant possession.

52. The appellant's justification in remaining on the land was that it was ancestral family land and the same had been sold secretly and without the knowledge of the family and that there was a pending appeal.

53. Whereas DW1, 2, 3, 4, 5 and 6 testified that the land was allegedly family land, evidence showed at the time the suit was filed the appellant's deceased father was still alive. He did not see it fit to enjoin him to the suit or at the very least call him as a witness to establish if he was aware of the auction sale and or the manner the land was ancestral land. The appellant did not lead any evidence that the suit land was family or ancestral land which his late father acquired from his forefathers.

54. There is evidence that the deceased was not buried on the suit land but elsewhere. Evidence was also lead that the deceased had other two wives apart from DW4. Similarly evidence was lead that the appellant came into the suit land after he got married.

55. The legal burden to prove the existence of a trust rests with the one asserting a right under customary trust and that the deceased father was holding the property on behalf of the family.

56. In *Isack M'inanga Kiebia –vs- Isaaya Theuri M'lintari & another [2018] eKLR* the court held for ancestral customary trust to be established one has to establish:

**a) The claimant belongs to the family, clan or group.**

**b) The relationship with the family is close.**

**c) The claimant could have been entitled to be registered as an owner but for some intervening circumstances.**

**d) The claim is directed against the registered proprietor who is a member of the family.**

57. There was no evidence the appellant had brought a claim against the deceased father over customary trust. No evidence was also tendered on the manner the late father came to acquire the suit land. The property passed into the respondent in 2006. He is not a relative of the appellant and no efforts were made to refute his acquisition in the primary suit.

58. Consequently the nexus between the deceased and the appellant is lacking so as to establish any legal or equitable justification on any rights over the suit land. The respondent has produced evidence that he acquired the land through a public auction in the Newspaper. It cannot therefore be true that the sale and transfer was secretly done as pleaded by the appellant.

59. The third attempt to justify occupation of the land is that the appellant claimed there was a pending appeal over the matter. The appellant produced no such appeal before any court of law and or its outcome.

60. Since his father passed on, the appellant did not state if he had sought for and obtained any letters of administration together with his mother DW4 to follow-up and or prosecute any such pending appeal. In absence of any such evidence for any legal or equitable rights as to the suit land, my finding is that the trial court was right in finding the appellant a self-proclaimed trespasser into the suit land contrary to the rights of the appellant who is a bonafide purchaser for value and subsequently an absolute registered proprietor.

61. DW4 alleged she had lodged a caution over the land and wondered how it was removed. Similarly, the area retired chief confirmed he wrote **D exh 2** for purposes of lodging a caution. The appellant did not produce a copy of the caution and in absence of it, a copy of an official search indicating when the caution was lodged and whether it was still in existence.

62. Additionally, there was no evidence if the appellant and by extension, DW4 filed a fresh caution once the respondent became the registered owner of the land in 2008.

63. In view of the above, my finding is that the prayer for the eviction by the respondent was also justified given the appellant had vehemently failed to hand over vacant possession for no legal or equitable justification.

64. On the issue of mesne profits, evidence was tendered by the respondent he acquired the property for value in 2006 and later on was issued with a title deed in 2008 after the primary court sanctioned his transfer. Between the time of the auction and the eventual transfer in his favour, the initial registered owner did not object to the auction sale. Neither of his siblings raised any objection under **Order 21 of the Civil Procedure Rules**.

65. Further, there was no complaint against the auctioneer who conducted the auction, sale over any irregularity or illegalities to the auction process. The former registered owner did not bar the respondent from taking vacant possession since 2007. The appellant has admitted he was the one who denied the respondent vacant possession and continued to occupy the land without any justification in law or otherwise. He now claims the respondent was awarded excessive general damages when the same was not prayed for.

66. The respondent sought for mesne profits as a prayer in the amended plaint. **Order 21 Rule 13 of the Civil Procedure Rules** provides in a claim for the recovery of immovable property, an inquiry as to rent or mesne profits to be done. In **Attorney General –vs- Halal Meats Products Ltd [2016] eKLR** the court held were a person is wrongly deprived of his property he is entitled to mesne profits suffered as a result of the wrongful period of occupation by the other person in the nature of damages accruing for trespass and accruing for the period one has been deprived of his property.

67. A party seeking mesne profits must therefore tender evidence on how much he should be awarded and the basis for it. The amount has to be established and be substantiated. They are in the nature of special damages which must not only be pleaded but also proved. See **Karanja Mbugua & Another –vs- Marybin Holdings Co. Ltd [2014] eKLR**.

68. The respondent did not plead mesne profits nor lead any evidence to that effect. So the trial court was right in declining to grant the prayer.

69. As regards general damage for trespass, **Section 3 (1) of the Trespass Act Cap 294** provides any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.

70. There is no doubt the appellant entered into the respondents' land since 2006. In **Philip Ayaya Aluchio –vs- Crispinus Ngayo [2014] eKLR** the court held the measure of damage for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration whichever is less.

71. In the instant case the respondent did not tender evidence on the exact value of the land before and after the trust. In **Willesden Investments Limited –vs- Kenya Hotel Properties Limited [2019] eKLR** the court said there is no mathematical or scientific formulae in those types of cases and the guiding principles are circumstances of each case.

72. In **Nakuru Investments Ltd –vs- S.S. Mehta & Sons [2016] eKLR** the court held damages are as a way to compensate a plaintiff for the loss so as to return him back to the position he was before the wrongful act was committed.

73. The respondent did not lead any evidence or attach any documentation to establish the exact value of his land prior to and how much damage has been occasioned by the appellant. Be that as it may he had been out of the land since 2006. The trial court awarded nominal damages of Kshs. 100,000/= plus interests.

74. I find the sum reasonable under the circumstances since the court acted on the right principles in law on awarding general damages.

75. In the premises, I find the appeal lacking merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**IN PRESENCE OF:**

**KAIMENYI FOR RESPONDENT**

**KIOGORA ARITHI FOR APPELLANT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**