



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO 419 OF 2006

BEATRICE MAARA.....APPELLANT

VERSUS

WINNIE MURUGI MUREU.....RESPONDENT

J U D G M E N T

The appeal arises from the Judgment and decree of Hon. Kandet, RM at the Resident Magistrate Court at Milimani Commercial Court. It concerns Plot No. C50 Umoja Innercore-Sector 1 which according to the allotment letter dated 27th July 2001 belongs to Simon Mbugua. The Respondent filed proceedings in the lower court claiming that she and her late husband, Humphrey Hiuhi Wakahiu bought the said parcel of land for a consideration of Kshs.350,000/=. The Respondent was being evicted by the then Nairobi City Council, so that the parcel would be reinstated to the Appellant, who was alleged to be the secondary allottee.

In response the Appellant had stated that she was the lawful owner of the plot No. C50 Umoja Innercore-Sector 1, having purchased the same from the original allottee, Earnest K. Kabiru vide an assignment which was registered with the City Council of Nairobi on 23rd October 2003. The Appellant had further stated that before purchasing the suit property from Earnest K. Kabiru, the same had been verified vide allocation letter from the Nairobi City Council dated 25/08/1978. She also stated that the suit property had been transferred to Earnest K. Kabiru through a Sale Agreement dated 22/09/1981.

The record before court shows that the parties adduced evidence and the witnesses were cross- examined. The court made its judgment on 13/6/2006, holding that the Respondent had proved her case on the balance of probability and also declared her the lawful owner. The Appellant being aggrieved by this decision, appealed to this court. Among the grounds of complaint in the appeal are as herebelow summarized: -

1. ***The court erred in law and in fact by entering judgment for the Respondent against the Appellant in terms of prayers a) & c) of the plaint.***
2. ***The court erred by failing to take into account the evidence adduced by both parties.***
3. ***The court failed by considering that suit plot no. C50 Umoja Innercore-Sector 1 was allocated to Simon Mbugua who transferred the same to the Appellant.***
4. ***By declaring the Respondent as the lawful owner the subordinate court purported to allocate the said plot to the Respondent knowing very well it was not the allocating authority for such plots.***

5. *The court erred in law and in fact by ignoring the pleadings filed by the Appellant and the Nairobi City Council.*

During the hearing of the appeal, the court directed the matter to be prosecuted by way of written submissions. On the hearing day, Mr. Onyango, counsel for the Appellant, informed the court that he filed and served his submissions but there was no response by the Respondent. The will therefore proceed without the Respondent's submissions.

The Appellant submitted that both parties adduced evidence to prove ownership of the said suit property. The Nairobi City Council in its defence stated that the property belonged to the Appellant. The Appellant further submitted that the position taken by the Nairobi City Council was supported by a search document which indicated that the Appellant was the owner of the property. The Appellant further submitted that with that confirmation and considering the fact that the Nairobi City Council was vested with the authority to assign plots to any persons upon payment of the requisite fees, it would have not been possible for the lower court to enter judgment in favour of the Respondent. The lower court had no basis to give ownership to the Respondent in anyway.

The Appellant also submitted that the court ignored the reasons given by the Nairobi City Council in their pleadings as to why the property did not belong to the Respondent. The Appellant further submitted that the lower court was biased by relying on the Respondent's evidence and pleadings while ignoring the rest.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal, all of which I have carefully considered. The main issue raised in this appeal is ***whether or not the Trial Magistrate was entitled to arrive at the conclusions she did.***

This being the first appeal, it is the courts duty to assess and re-evaluate the evidence adduced before the lower court, having not had an opportunity of hearing the testimony of the witnesses who testified. The court must also ensure that the findings of the trial court on facts were based on evidence adduced pursuant to pleadings and that the findings were based on sound principles of the law. **See SELLE –VS- ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] EA 123.**

In re-evaluating the evidence, the record shows that the Appellant told the court that she bought the land from Ernest Kariuki Kabiru in 1981. The Appellant produced a sale agreement dated 22nd September, 1981 between the Nairobi City Council and Ernest Kariuki Kabiru for Kshs.23,800/-. The sale agreement was marked as Exhibit “**Dex1**”. The Appellant also produced an assignment made on 23th October, 2003 between the Nairobi City Council, Ernest Kariuki Kabiru and Beatrice Wahu Maara. The assignment was produced and marked as exhibit “**Dex 2**”. The record also shows that the plot was assigned to her as shown by the minutes of an ordinary meeting which was held on 7th January, 1992. The said minutes were also produced and marked as exhibit “**Dexh3**”. The Appellant further told the court that she was issued with a beacon certificate which was produced and marked as exhibit “**Dexh4**”.

On the other hand, the Respondent stated that she bought the property for Kshs.350,000/= from Simon Nganga Mbugua as shown by the Sale Agreement dated 16th November 2001. The agreement was produced and marked as exhibit ‘**WMM2**’. The property was allocated to Simon Nganga Mbugua by the Nairobi City Council vide a letter dated 27th July 2001. The allotment letter was produced in court and marked as exhibit “**WNM1**”. The Respondent also produced a power of Attorney dated 16th November 2001 by the said Simon Nganga Mbugua to Humphrey Hiuhi Wakahiu and Winnie Murugi Mureu, the Respondent. The power of Attorney was marked as exhibit “**WNM3**”. The Respondent also produced receipts showing payments to the Nairobi City Council towards the property.

The Respondent told the court that during a housing management committee meeting of the Nairobi City Council held on 27th October, 1994, the council passed a resolution that the plots stated in the report which included the suit property were to be repossessed. Notice to vacate was thereafter issued but she bought the property back after it was repossessed.

From the matters reproduced above, it is not disputed that the suit property is public land vested in the Nairobi City Council now known as Nairobi County Government. It is not also disputed that the Nairobi City Council is vested with power to dispose plots which are not required for public purpose within the township.

I have carefully examined the evidence on record upon which the trial court based its judgment. The issue here, as was before the trial court is: who is should be the lawful owner of the suit property.

There is evidence on the record that the Appellant indeed purchased the plot in 1991 – long before the Respondent came into the picture. She purchased the plot from one Earnest K. Kabiru through a Sale Agreement in 1991. Although she did not produce the written agreement as exhibit, she nevertheless had assignment registered in her favour at the City Council Registry in October, 2003 just before this suit was filed in December, 2003.

Clearly however, the Appellant after purchasing the plot from the said Earnest K Kabiru, did not follow it up with the City Council. There is also no evidence that she paid the City Council rents and rates. So much so that she did not become aware that due non-payment of such rates and rents, the City Council of Nairobi, by its minutes of 27th October, 1994 repossessed the plot C50 Innercore-Sector thus forfeiting the ownership of the plot by the Appellant.

When the Respondent bought the plot from one Simon Mbugua, the latter appears to have been allotted the same after the repossession. There is evidence that the Respondent through the name of the said Simon Mbugua, paid all the outstanding rates and rents inclusive of those that led to repossession from the Appellant. There is evidence on record to suggest that the plot was still in the name of Simon Mbugua because it had not been re-assigned by the City Council. However, that did not in the view of the court, alter the fact that the Respondent had lost ownership of the plot through repossession a process that was never reversed at any relevant time.

Sadly, it was the City Council of Nairobi who had reallocated the Plot to Simon Mbugua after officially repossessing it. It cannot again be the City Council which appears to be supporting the claim to the plot by Appellant.

I have carefully noted the evidence on the record. The trial magistrate considered all these pieces of evidence. She properly came to the conclusion she reached. She was satisfied on the balance of probability that the Respondent had a better claim to the plot. I find no fault with her conclusions. I indeed have come to a similar conclusion.

I accordingly find no merit in this appeal which I hereby dismiss with costs. Orders accordingly.

Dated and delivered at Nairobi this 25th day of May, 2015.

.....

D A ONYANCHA

JUDGE