



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO. 49 OF 2019

CORNELIUS KATO.....APPELLANT

VERSUS

PETER JOHN MWANTHI.....RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Suit No. 390 of 2013 delivered on 25th September 2019 by Hon. E. H. Keago, SPM)

JUDGMENT

BACKGROUND

1. By a Plaint dated 29th April 2013 and filed in court on 3rd May 2013, the Plaintiff (now Respondent herein) sought for the following orders;

- (1) A permanent injunction restraining the defendant by himself, his children, servants and agents from trespassing, constructing and/or in any other manner dealing with Plot No. 1016 Utithi Settlement Scheme.**
- (2) Vacant possession over the said suit property.**
- (3) Damages for loss of user.**
- (4) Costs of the suit.**
- (5) Any other relief that this honourable court may deem fit.**

2. The Plaintiff averred that he was the owner of all that land parcel situated at Kibwezi measuring 30ft by 100ft No. 1016 Utithi Settlement Scheme (the suit property) having purchased it from one Mathew Mutua Mutisya; that he placed beacons, excavated a foundation and took possession of the suit property and allowed one Kennedy Mutuku to be the caretaker thereof. He also stated that in June 2012, the defendant without any colour of right trespassed on the suit land and began construction thereon, which actions prompted this suit.

3. The Defendant filed his defence on 12th July 2013 which was later amended on 5th December 2013. The Defendants case was that one Mathew Mutua Mutisya entered into an agreement with Marietta N. Makite, who gifted the land to his brother Pascal Makite. That Pascal Makite sold the land to Daniel Muteti Mukunuku who eventually sold it to the Defendant. The Defendant sought by way of contention for orders that;

- (a) The Plaintiff's suit be dismissed with costs.**
- (b) A permanent injunction restraining the Plaintiff by himself, his children, servants and agents from trespassing, constructing and/or in any other manner dealing with Plot No. 159 Machinery Market.**
- (c) Costs of counter claim.**
- (d) Any other relief the court deems fit to grant.**

4. In the judgment delivered on 25th September 2019, the Chief Magistrate's Court made a finding that the Plaintiff had proved that he was the rightful owner of the suit property and allowed the Plaintiff's claim. On the counterclaim, the court held that no good title could be transferred to the Defendant and therefore the Defendant's remedy ought to have been against the persons who sold land to him.

5. Dissatisfied with the Chief Magistrates Court's decision, the Defendant/Appellant filed this appeal by the Memorandum of Appeal dated 8th October 2019 based on the following grounds;

(a) That the learned magistrate erred in law and in fact by failing to consider the Appellant and his witnesses' evidence.

(b) That the learned magistrate erred in law and in fact by not establishing the Respondent's ownership and actual position of the suit property.

(c) That the learned magistrate erred in law and in fact by dismissing the Appellant's counterclaim.

6. The Appellant sought for the following prayers;

(i) Setting aside and quashing the judgment dated 25th September 2019 and judgment as per the counterclaim.

(ii) Costs of the appeal.

7. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 1st July 2021 while the Respondent filed his submissions on 29th October 2021.

APPELLANT'S SUBMISSIONS

8. Counsel for the Appellant submitted that the trial court failed to consider all evidence tendered before it before coming to the determination. Counsel argued that the court erroneously agreed with the evidence of PW-3 Mumbua Mutua Mutisya, that they did not sell the suit property to any other person save the Plaintiff and that she had no grant of letters of administration to enable her testify on behalf of her deceased husband Mathew Mutisya. Counsel also argued that the court failed to consider the evidence of DW-3 where Mumbua Mutua Mutisya was a witness to the sale agreements produced dated 1st November 1983 and 17th April 1984.

9. Counsel further submitted that the trial court failed to consider the trail of passage of ownership from Mathew M. Mutisya to the Appellant and in error held that the Appellant could not obtain good title from the person who sold him the land. Counsel also pointed out that it was perplexing that the evidence of DW-6 Joshua Nzunia did not feature in the trial court's analysis despite the fact that, that witness witnessed the sale agreement of 18th September 1983 between the Respondent and Mathew Mutisya and that the said witness stated that the land bought in 1983 was not the suit land currently occupied by the Appellant.

10. Counsel contended that the Respondent failed to avail witnesses who witnessed the sale and the placing of the boundaries on the suit land and that none of the Respondent's witnesses could tell where the suit land was.

11. Counsel submitted that it was erroneous for the trial court to hold that the Appellant's counterclaim ought to have been made against PW-2 and PW-3. Counsel argued that the Appellant had demonstrated that he purchased the suit land and obtained good title and has developed the same and was entitled to seek for injunction. Counsel concluded that while it may be true the Respondent purchased part of Plot 1016 at Utithi Settlement in 1983, he did not purchase the suit land and his claim ought to have been made against Mumbua Mutua Mutisya and not the Appellant.

THE RESPONDENT'S SUBMISSIONS

12. Counsel for the Respondent submitted that Sections 108 and 109 of the Evidence Act placed the burden of proof on the person who would fail if no further evidence were given on either side and that the burden of proof of any fact lies with the person who alleges the existence of such fact. Counsel argued that in an adversarial hearing, the judge is not inquisitorial but arrives at their decisions based on the evidence adduced by both parties. Counsel submitted that the Respondent proved his case, which is why the court held that he was the rightful owner of the suit property.

13. Counsel also contended that PW-3 Mumbua Mutua Mutisya testified on her own behalf and not on behalf of her deceased husband hence her evidence was not hearsay as she was present during the transaction. As regards the evidence of Pascal Muli Makite, counsel argued that the said witness did not produce evidence to show he bought the suit property from Marietta Mwaluko. Counsel observed that the defence witnesses had no good title to pass to the Appellant.

14. Counsel placed reliance on the cases of *James Finlay (K) Ltd vs Jacob Wabuke Wanyonyi [2017] eKLR*, *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR*, *Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Other [2012] eKLR* and *M'imana M'ithalia vs Kamotho Ntonjia & Another [2021]*, in arguing that the trial court was right in holding that the Appellant's claim was against a wrong party.

15. On whether the Appellant was entitled to the orders sought, counsel relied on the cases of *DS (minor suing through her mother) JWM vs CKK [2021] eKLR*, *Kiruga vs. Kiruga & Another [1988] KLR 348* and *Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR* to argue that the Appellate court will not normally interfere with the finding of fact by the trial court unless the finding is based on no evidence or on misapprehension of the evidence.

ANALYSIS AND DETERMINATION

16. I have considered the grounds of appeal, the submissions of parties, the record before the court below and all the material before court, and the issue that arise for determination is whether the trial court misapprehended the evidence and arrived at wrong conclusions.

17. This being a first appeal, this court is obligated to review the evidence adduced before the court below and ascertain whether the conclusions made and the decisions arrived at were justified. In the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123*, the duty of the first appellate court was described as follows;

“.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court.....is by way of retrial and the principle upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif vs. Ali Mohamed Sholan [1955] 22 EA CA 270*).

18. In *Peters vs Sunday Post Limited [1958] EA 424*, the Court of Appeal took the same view, 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 *Walt vs Thomas (1), [1947] A.C 484*.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

19. Guided by the above principle, I note that in the instant matter the Respondent testified that on 18th September 1983, he purchased a plot measuring 30 feet by 100 feet being part of parcel number 1016 Utithi Settlement Scheme from one Mathew Mutisya at a consideration of Kshs. 5,000/=-, which amount was paid in full. He stated that he was shown the land and he had a trench dug around the plot to show the boundaries of the plot. The wife of the seller one Mumbua Mutua Mutisya testified that the land in issue was sold to the Plaintiff and she had no knowledge of the land having later been sold to another person, who sold to others who eventually sold to the Defendant.

20. On his part the Defendant stated that he bought the land from one Daniel Muteti Mukunuku who had in turn bought from Pascalia Makite; that Pascalia Makite had received the land as a gift from his sister Marietta Nthenya Makite, and the latter had bought the land from Mathew Mutisya, and that PW3 had signed the land agreement.

21. On the above evidence the Magistrate’s Court made a finding as follows;

“It is established that at the time of selling this property to Daniel Muteti Mukunuku had no good title to pass to the buyer. Hence he couldn’t sell what he didn’t own in the first place, the same will apply to DW3 and Pascal Muli Makite. Hence the same was improperly obtained and has no legal backing. Marietta Nthenya Makite had not obtained good title for the property and therefore had no authority under law to gift let alone sell. Hence the acquisition of the said property was unlawful.

“.....the Plaintiff having been the first in the purchase deal any subsequent sell of the same property will be unlawful, the 1st transaction having been completed. Hence any subsequent deal on the same plot will be illegal and will not stand.....the plaintiff has established that he is the lawful owner of the property which has been subsequently acquired by the present defendant and therefore protected under the law.”

22. The Appellant’s major complaint in this appeal was that the Respondent’s evidence was not sufficient to prove ownership and the actual position of the suit property. I note that the lower court had opportunity to evaluate all the evidence before court. PW3 Mumbua Mutua

Mutisya, the wife of Mathew Mutisya testified on the actual position of the land her husband sold to the Plaintiff and she stated that when she noticed that there was construction going on in 2012, she thought it was the Plaintiff doing the construction. In addition, the evidence of the Plaintiff was that upon purchase of the plot he asked Sammy Mokola to dig a trench around the land, which the latter did. According to the Appellant, the evidence as to the position of the suit land was given by DW6 – Joshua Nzuria Mulwa who alleges to have witnessed the sale agreement between the Plaintiff and the late Mathew Mutisya. The trial magistrate having heard the witnesses chose to believe the testimony of the Plaintiff and his witnesses on the location of the property and its ownership. The appellant has not given any justification as to why the evidence of the Plaintiff and his witnesses on the ownership and situation of the suit property should not have been relied upon by the trial court. The trial court also found that the Plaintiff having been the first to purchase the suit land, meant that the said land was not available to be sold to DW3 Marietta Nthenya Makite. From the evidence on record, it appears the fact that the Plaintiff was the first to purchase land from Mathew Mutisya is not contested. I am in agreement with the finding of the trial court that the land having been sold to the Plaintiff first, was not available for sale to Marietta Makita and consequently to the Appellant. In my view, the totality of the evidence on record demonstrates that the Respondent proved to have purchased the suit property from the late Mathew Mutisya, which property he was shown and took possession hence the question as to whether the Respondent was aware of the situation of the land does not arise, in view of the evidence of PW1, PW2 and PW3. The evidence of DW5 though in contradiction of the evidence of PW1, PW2 and PW3 does not dislodge the evidence that the Plaintiff gave evidence of ownership and situation of the suit land. It will suffice for me to point out that the position taken by the learned magistrate as to where credibility lied on that issue bears great weight for the simple fact that he had the advantage of seeing and hearing the contradictory evidence.

23. On the trial court's finding that the defence witnesses did not pass good title to the Appellant, this court finds that the same was proper and justified in the circumstances.

24. It is trite law that a person can only pass a title to property that he has. Article 40(6) of the Constitution provides that the rights under the said Article do not extend to any property that has been found to have been unlawfully acquired. The doctrine of **Nemo Dat Quod Non Habet** means that the transferor of goods cannot pass a better title than what he himself possesses. See **Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR**. It is therefore my considered view that the Appellant has not demonstrated that the trial court's decision was not justified.

25. Having considered the totality of the evidence adduced before the trial court, it is my finding that this appeal is unmeritorious and the same is dismissed with costs to the Respondent.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Mburu for the Appellant

Ms Wairimu holding brief for Ms Mwikali for the Respondent

Ms Josephine Misigo – Court Assistant