



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CIVIL APPEAL NO 21 OF 2020

CHARLES NGIGI NDUNGU.....APPELLANT

VERSUS

JOSEPH KIMANI GACHECHA.....1ST RESPONDENT

FRANCIS MAINA NJONJO.....2ND RESPONDENT

(Being an Appeal from the Judgment of Thika Chief Magistrate Court

(Honourable C A Otieno-Omondi SPM) delivered at Ruiru on 29/4/2020

in Thika CMC MCLE No 118 of 2019)

JUDGMENT

Background

1. This appeal arose from a judgment rendered on 29/4/2020 by Hon **C. A Otieno Omondi, SPM**. The suit property is indicated in the Judgment as **Ruiru Kiu Block 2 Githunguri/4270**. The record of the trial court shows that subsequent to delivery of the Judgment, the file was placed before the trial magistrate on 6/5/2020 and, acting under **Section 99** of the **Civil Procedure Act**, the trial magistrate amended the Judgment to reflect the suit property as **Ruiru Kiu Block 2 Githunguri /4970**. It is also noted that the suit property was described in the plaint as **Ruiru Kiu Block 2/4970**. There is no record of any lawful amendments effected on the plaint.

2. A brief background to the dispute is that in September 2019, the 1st respondent initiated **Ruiru SPMC E & L Case No 118 of 2019**, seeking a declaration that he was the proprietor of a parcel of land which he described as **Ruiru Kiu Block 2/4970 [sic]**. Further he sought an order cancelling the appellant's title to the said property. Thirdly, he sought an order directing the appellant and the 3rd respondent [**Francis Maina Njonjo**] to vacate the said property. Lastly, he sought general damages against the appellant and the 3rd respondent on the ground of trespass.

3. The case of the 1st respondent was that, through a sale agreement dated 7/8/2007, he purchased what was described in the sale agreement as "**Residential Plot Number 1416 measuring approximately 1/8 acre at Gitambaya and unballoted 1/4 acre to be in Ruiru Town both in Githunguri Constituency Ranching Company Limited.**" The seller was one **Margaret Ngendo Wambaki**. The said Margaret Ngendo Wambaki had inherited the two plots from **Philisilah Wambaki Kiguru**. The purchase price for the two plots was Kshs 300,000. Upon purchasing the plots, Githunguri Constituency Ranching Company [**the company**] informed him that the unballoted plot was not immediately available but the company was in the process of subdividing several open spaces to accommodate shareholders who were entitled to unballoted plots. Subsequently, parcel number **Ruiru Kiu Block 2/339** was subdivided by the company to create parcel numbers **Ruiru Kiu Block 2/4970; 4971 and 4971**. On 3/4/2008, he was cleared by the company to be registered as proprietor of **Ruiru Kiu Block 2/4970**, measuring 0.4 of a hectare.

4. He contended that he subsequently learnt that one **James Kamau Njoro** [2nd Respondent] had fraudulently caused the said parcel of land to be registered in his name and had subsequently conveyed the land to the appellant fraudulently. It was his case that actual subdivision of parcel number 339 into the three parcels took place in 2007 and that the parcel register which was opened in 2004 was fraudulent. He contended that he had been unable to have his title processed owing to the existing register in the name of the appellant.

5. He added that the 3rd respondent entered the land in 2009 and started developing it in disregard of his [1st respondent's] rights.

6. The appellant's case in the trial court was that he purchased his land from the late **James Kamau Njoro** at Kshs 60,000 in 2007. At the

time of purchase, the land was registered. He obtained a search prior to purchasing the land. Upon purchasing the land, the land was transferred into his name. He denied being privy to the fraud alleged by the 1st respondent. He emphasized that the due diligence which he conducted prior to purchasing the land revealed that the parcel register was opened in the name of **Githunguri Constituency Ranching Company Limited** on 14/9/2004 and the land was subsequently conveyed to James Kamau Njoroge.

7. The estate of the late James Kamau Njoroge did not file a defence. The record does not bear evidence by the plaintiff demonstrating that Margaret Njeri Kamau who was sued on behalf of the estate was indeed the duly appointed personal representative of James Kamau Njoroge.

8. The case of the 3rd respondent [Francis Maina Njonjo] was that he purchased the suit property from one **John Kinyanjui** in 2007 at a consideration of Kshs 1,200,000. The said John Kinyanjui was introduced to him by the late James Kamau Njoroge who at the time was the Chairman of Githunguri Constituency Ranching Company. While processing a title in his name, he learnt that the land was titled in 2004 in the name of **James Kamau Njoroge** and was subsequently transferred to the appellant in 2007. At that point, he lodged a restriction against the title held by the appellant.

9. It was the case of the 3rd respondent that, having purchased the land from James Kinyanjui who had been introduced to him by the Chairman of the land buying company, he entered into the suit property. The 3rd respondent added that James Kamau processed and took to him a title but he became suspicious of the title.

10. During trial, the 1st respondent testified and closed his case without leading any other evidence. Similarly, the appellant and the 3rd respondent testified but did not lead any evidence. The 2nd respondent did not participate in the proceedings. Subsequently, the learned magistrate rendered a judgment in which she made a finding that the 1st respondent had proved fraud against the late James Kamau Njoroge and against the appellant. She declared that **Ruiru Kiu Block 2 Githunguri/4270** belonged to the plaintiff. As indicated in the preceding paragraph of this judgment, the learned magistrate subsequently amended the Judgment to reflect the suit property as **Ruiru Kiu Block 2 Githunguri/4970** instead of **Ruiru Kiu Block 2 Githunguri/4270**.

Appeal

11. Aggrieved, the appellant brought this appeal, and urged the court to set aside the judgment of the trial court. He advanced the following verbatim grounds of appeal:

- 1. The Learned Magistrate erred in law in hearing a land dispute in respect of land whose value was Kshs. 26,000,000/= and thus in excess of the court's statutory jurisdiction under Section 7 of the Magistrate's Courts Act, 2015 which states that a magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed Kshs. 15,000,000/= where the court is presided over by a Senior Principal Magistrate.*
- 2. The Learned Magistrate erred in law and fact when she found that the appellant did not prove that he was a bona fide purchaser for value without notice of Title Number Ruiru Kiu Block 2 Githunguri/4970.*
- 3. The Learned Magistrate erred in law and fact in finding that the Appellant did not have or produce a sale agreement between him and James Kamau Njoroge who sold the land to him.*
- 4. The Learned Magistrate erred in law and fact in failing to find that on the basis of the oral and documentary evidence placed before the court, the appellant is the only lawful and duly registered proprietor of Title Number Ruiru Kiu Block 2 Githunguri/4970.*
- 5. The Learned Magistrate erred in law and fact in reaching the draconian decision to cancel the appellant's title deed on the uncorroborated testimony of the plaintiff.*
- 6. The Learned Magistrate erred in law and fact by making orders that exceed the authority conferred upon court by the provisions of Section 80 of the Land Registration Act, 2012.*
- 7. The Learned Magistrate erred in law and fact in failing to find that the 1st respondent failed to adduce any or sufficient evidence to prove fraud or impropriety in the issuance of the appellant's title for Title Number Ruiru Kiu Block 2 Githunguri/4970.*
- 8. That the Learned Magistrate erred in law and fact by introducing the concept of vicarious liability in fraud in holding that even if no fraud had been proved against the appellant, his title could be vitiated on the basis of fraud against James Kamau Njoroge, which in any event, was not proved.*
- 9. The Learned Magistrate erred in fact and law by failing to consider material evidence placed before the court including a land board consent issued in respect of the agreement and transfer that conveyed Title Number Ruiru Kiu Block 2 Githunguri/4970 to the appellant.*
- 10. The Learned Magistrate erred in law and fact in finding that Title Number Ruiru Kiu Block 2 Githunguri/4970, 4971 and 4972 all emanated from Ruiru Kiu Block 2/339 contrary to testimony and evidence that Title Number Ruiru Kiu Block 2 Githunguri/4970 was a first registration and not a subdivision.*
- 11. The Learned Magistrate erred in law and fact in finding that the plaintiff's unballoted ¼ acre of land and the suit property herein are one and the same property.*

12. The Learned Magistrate erred in law and fact in failing to take charge of her court to prevent abuse of the court process through collusion between the plaintiff and the 3rd defendant to the detriment of the appellant.

13. The Learned Magistrate erred in fact and law by attributing unjustified weight of evidence produced by the 1st respondent and the 2nd respondent including an unsigned and unregistered mutation form regarding the alleged subdivision of Ruiru Kiu Block 2 Githunguri/339 To Title Number Ruiru Kiu Block 2 Githunguri/4970, 4971 and 4972, which were subsequently registered in the name of James Kamau Njoroge, instead of finding that the said application “dated 29th March 2006” could not, rationally and chronologically, have been the one used to subdivide Ruiru Kiu Block 2 Githunguri/339 To Title Number Ruiru Kiu Block 2 Githunguri/4970 4971 and 4972 in 2004

14. The Learned Magistrate erred in law in failing to find that the application “dated 29th March 2006”, by Githunguri Constituency Ranching Company Limited for subdivision of Title Number Ruiru Kiu Block 2 Githunguri/339, is unregistered and unauthenticated and was therefore of no probative value to the extent that it was aimed at proving that it was the one used to subdivide Title Number Ruiru Kiu Block 2 Githunguri/339 to Title Number Ruiru Kiu Block 2 Githunguri/4970, 4971 and 4972.

15. That the learned magistrate erred in law and fact by failing to issue witness summons directed at the Land Registrar in spite of the conflicting narratives regarding ownership of the disputed land.

16. That the Learned Magistrate erred in law and fact in holding that the appellant conspired with James Kamau Njoroge to defeat the 1st respondent’s title yet there was no evidence adduced to show that the appellant was involved in any conspiracy.

17. That the Learned Magistrate erred in law and fact in holding that the 1st Respondent had proved fraud against the appellant or was a party to fraud, yet no evidence of fraud was adduced at all or to the standard required in law.

18. The Learned Magistrate erred in law and in fact in holding that the appellant was required to do more than an official search and investigate how James Kamau Njoroge came to be the owner of the suit property yet the Registered Land Act Cap 300 (now repealed) incorporated the Torrens principles, one of which is the curtain principle, which holds that a purchaser, like the appellant, need not investigate the history of past dealings with the land, or search behind the title as depicted on the register because the government guarantees the authenticity of the title as depicted in the register.

12. The appeal was canvassed through written submissions filed through the firm of *Mbugua Atudo & Macharia Advocates*. Counsel identified the following as the four key issues falling for determination in the appeal: (i) Whether the trial court had jurisdiction to hear and determine this dispute; (ii) Whether the appellant was an innocent purchaser for value without notice; (iii) Whether the appellant’s title should be cancelled; and (iv) Whether the appeal is merited.

13. On the first identified issue, counsel submitted that a question relating to jurisdiction can be properly raised at the appellate stage. Counsel argued that the appellant submitted a valuation report to this court dated 8/4/2020, showing that the value of the suit property was Kshs 26,000,000 while the 1st respondent submitted a valuation report dated 30/6/2020, showing that the value of the suit property was Kshs 14,900,000. Counsel contended that the 1st respondent had deliberately suppressed the value of the suit property to give the trial court pecuniary jurisdiction and sway the decision of this court. Counsel urged the court to find that the value of the suit property was over and above the pecuniary jurisdiction of the trial court.

14. On whether the appellant was an innocent purchaser for value without notice, counsel for the appellant submitted that the appellant had demonstrated that he purchased a registered title from **James Kamau Njoroge** and had proved all the elements of an innocent purchaser for value as set out in the Ugandan case of *Katende v Haridar & Company Limited* namely that; he held a registered title; he purchased the property in good faith; he had no knowledge of the alleged fraud; the vendor had an apparent valid title; he purchased the property without notice of fraud and; he was not a party to any fraud.

15. On whether the appellant’s title should be cancelled, counsel submitted that fraud was not proved on part of the appellant. Citing Section 24 of the Land Registration Act, counsel submitted that fraud must be specifically proved and if fraud is not specifically proved against a registered proprietor, the title of the registered proprietor is indefeasible.

16. On whether the appeal has merit, counsel submitted that the trial magistrate erred in law and fact in failing to find that, on the basis of the oral and documentary evidence placed before the court, the appellant was the lawful and duly registered proprietor of the suit property. Counsel added that the burden of proof rested with the 1st respondent and that the 1st respondent had failed to discharge that burden as against the appellant. Counsel faulted the trial magistrate, contending that she erroneously introduced the concept of vicarious liability in fraud. Counsel added that the failure of the appellant to produce a sale agreement did not render his title illegal or unlawful. Counsel urged the court to allow the appeal.

17. The 1st respondent filed written submissions dated 1/11/2021, through the firm of *Matiri Mburu & Chepkemboi Advocates*. Counsel for the 1st respondent identified the following as the three key issues falling for determination in the appeal: (i) Whether the appellant’s valuation report is admissible and properly before this honourable court; (ii) Whether the appellant’s title should be cancelled; and (iii) Whether the appeal is merited.

18. On whether the appellant’s valuation report is admissible and properly on record before this court, counsel submitted that the issue of pecuniary jurisdiction of the trial court was never raised by the appellant during trial. Counsel added that no valuation report was presented to the trial court. Counsel added that no formal application was made to this court to admit additional evidence and argued that the appellant was attempting to introduce additional evidence through the back door. Counsel cited the criteria outlined by the Supreme Court on admission of additional evidence at the appellate stage in the case of **Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** and submitted that the appellant had neither satisfied that criteria nor the provisions of **Section 78(1)** of the Civil Procedure Act and **Order 42 rule 27(1)** of the Civil Procedure Rules. Counsel argued that the appellant had ample opportunity to raise the

issue of pecuniary jurisdiction in the trial court and urged the court not to entertain the issue and to reject that ground of appeal.

19. On whether the appellant's title should be cancelled, counsel for the 1st respondent submitted that the 1st respondent had tendered evidence to demonstrate that the parcel register relating to the title held by the appellant did not exist in 2004 because the suit property was a subdivision out of **Parcel Number Ruiru Kiu Block 2/339** which existed until 2007 when it was subdivided into three parcels, Ruiru Kiu Block 2/4970, 4971 and 4972. Counsel added that the appellant did not produce any sale agreement to demonstrate that he purchased the suit property from the late James Kamau Njoroge in 2007. Counsel contended that the appeal herein is unmerited.

20. The 3rd respondent filed written submissions dated 25/10/2021 through the firm of *Njonjo Okello & Associates*. On the issue of pecuniary jurisdiction of the court, the 3rd respondent submitted that at the time of filing his defence in the trial court, the appellant admitted that the court had pecuniary jurisdiction to hear and determine the dispute. The 3rd respondent contended that the issue of pecuniary jurisdiction is one that requires evidence and was never raised in the trial court. It was the position of the 3rd respondent that the appellant has no automatic right to introduce new evidence at the appellate stage, contending that if he so desired, he should have made a formal application.

21. On whether the appellant was an innocent purchaser for value without notice, the 3rd respondent submitted that the suit property, Ruiru Kiu Block 2/4970 was a subdivision out of Ruiru Kiu Block 2/339 which was subdivided in 2007 and did not exist in 2004.

22. On whether the trial court was right in cancelling the title of the appellant, the 3rd respondent cited **Section 26** of the Land Registration Act and submitted that the trial court having found that James Njoroge Kamau did not have a good title to pass to the appellant, she properly cancelled the appellant's title. The 3rd respondent argued that this appeal does not have merit, contending that the 1st respondent had proved that he was the owner of the suit property.

Analysis and Determination

23. I have considered the entire record of the trial court, the record of appeal, the memorandum of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellant itemized eighteen (18) grounds of appeal. His counsel subsequently condensed the eighteen grounds of appeal into four (4) thematic issues. I propose to make brief pronouncements on the four thematic issues taking into account all the eight grounds of appeal which were itemized. I will start with the last one which is the question as to whether this appeal is merited. I have elected to start with the last issue because, depending on the finding of the court and the court's disposal order on that issue, it may be prejudicial to make pronouncements on the other issues.

24. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in a first appeal were summarized in the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123* at page 126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

25. The last issue framed by the appellant is whether the appeal herein has merit. The dispute before the trial court related to the validity of the land register which generated the title held by the appellant. The 1st respondent contended that the title held by the appellant was fraudulent because the land register which allegedly gave rise to it did not exist in 2004. The 1st respondent contended that the suit property was registered as **Ruiru Kiu Block 2/4970** and was a subdivision surveyed in 2007 out of parcel number **Ruiru Kiu Block 2/339**. Indeed, this is what was contained in his plaint and the two witness statements he adopted during trial. There was no evidence of any amendment to the plaint and/or witness statements.

26. What property did the trial court make findings on? The trial court rendered a judgment on 29/4/2020. In the analysis part of her judgment, the trial magistrate referred to parcel number **Ruiru Kiu Block 2 Githunguri/4970** which she stated was a subdivision out of Ruiru Kiu Block Githunguri/339. In her disposal orders, she alluded to **Ruiru Kiu Block 2 Githunguri/4270**. In the subsequent amendment to the judgment, effected on 6/5/2020, the parcel was described as **Ruiru Kiu Block 2 Githunguri/4970**.

27. It is glaringly clear from the 1st respondents's pleadings and the Judgment of the trial court that whereas the dispute was about the land register relating to **Ruiru Kiu Block 2/4970**, the trial court did not pay adequate attention to the issue of identity of the land register vis-à-vis the land on the ground. This was a grave error because what was at the centre of the dispute was the land register relating to a particular parcel of land.

28. Secondly, the 1st respondent who was the plaintiff in the trial court testified in his evidence-in-chief that when he tried to process a title to the suit property, the Land Registrar told him that a title had been issued by the Land Registry in 2004. That contention, together with the fact that there were conflicting particulars relating to the survey and registration details of the land in dispute, were a reason for the trial magistrate to exercise her powers under Order 1 rule 10(2) of the Civil Procedure Rules to order joinder of the Land Registrar together with Githunguri Constituency Ranching Company as necessary parties to the suit, for the purpose of achieving an effectual and complete adjudication and settlement of the question relating to the validity of the land register relating to the land in dispute. The Land Registrar was necessary for the purpose of assisting the court establish the survey and conveyance history of the land which gave rise to the disputed land register and title and the actual land on the ground. The land buying company appeared in the land register said to have been opened on 14/9/2004 as the first registered proprietor. The land buying company was therefore a necessary party in assisting the court establish the survey and conveyance history of the land and the opening of the contested land register.

29. The view I make of this appeal is that the trial magistrate erred in making the findings she made relating to the land register and the title of the appellant without the evidence and participation of the Land Registrar and the land buying company. Further, the trial magistrate erred in making findings and disposal orders relating to a title and a land register that were different from what the 1st respondent pleaded in the plaint.

30. I will, in the circumstances, set aside the Judgment of the trial court and order that Githunguri Constituency Ranching Company together with the relevant Land Registrar be joined as defendants in the suit and the suit be heard afresh. Having come to the above conclusion, I will not make pronouncements which may prejudice the parties when they go for fresh trial. I will only make brief pronouncements on the issue of pecuniary jurisdiction of the trial court.

31. The dispute in this appeal relates to land. The court is alive to the fact that often than not, land appreciates with time. Whenever a party wishes to challenge the jurisdiction of a magistrate court dealing with a land dispute on account of its pecuniary limit, that party is expected to present to the court proper evidence relating to the value of the land. Where a defendant admits or does not contest the pecuniary jurisdiction of a magistrate court handling a land dispute, the appellate court would be reluctant to entertain the issue of pecuniary jurisdiction as a ground of appeal.

32. Secondly, the procedure for seeking admission of fresh evidence is to make a formal application and serve it so that the other party is afforded the opportunity to respond to the application. The merits of the application are subsequently considered. None was made in this appeal. No leave was granted to the appellant to adduce fresh evidence.

33. In the absence of proper evidence in the record of appeal, this appeal will be disposed on the basis that the trial court had and still has jurisdiction to deal with the dispute. Should any party be of the view that the trial court is no longer seized of jurisdiction, there is a proper procedure for ventilating that issue.

Disposal Order

34. In the end, this appeal is disposed in the following terms:

a) The judgment of the trial in Ruiru SPMC MCLE Case No 118 of 2019 is set aside.

b) The plaintiff shall amend the plaint to join the relevant Land Registrar and Githunguri Constituency Ranching Co Ltd as the 4th and 5th defendants respectively.

c) The said suit shall be heard afresh.

d) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF MARCH 2022

B M EBOSO

JUDGE

In the presence of: -

Peter Ndukuthyo - 1st Plaintiff present

Ms Kamunya for the Defendant/Applicant

Court Assistant: Lucy Muthoni