



REPUBLIC OF KENYA

AT MALINDI

ENVIRONMENT AND LAND COURT

CIVIL APPEAL NO. 37 OF 2007

(Being an appeal from Judgment of Hon. C.O. Obulutsa, S.R.M, Kilifi delivered on 14th July, 2007)

SULTAN ALI ISLAM.....APPELLANT

=VERSUS=

SHEINAZ JAN MOHAMED OMAR.....RESPONDENT

JUDGMENT

Introduction:

1. The Appellant filed the Record of Appeal on 26th January 2010. The Appeal is premised on three main grounds, that is, that the learned Magistrate erred both in law and in fact by finding that the Respondent proved her case on a balance of probabilities; that the learned Magistrate erred in law and in fact in failing to consider the evidence adduced by the Appellant and that the learned Magistrate did not consider the contradictions in the evidence given by the Respondents.
2. The appeal arises from the Judgment of the lower court in which the Respondent's claim was allowed. The lower court permanently restrained the Appellant from entering the suit property.
3. The parties agreed to dispose of the appeal by way of written submissions.

The Appellant's case:

4. Mr. Odhiambo, The Appellant's advocate, submitted that the case by the Respondent in the lower court was that the Respondent bought the suit property from Dw 2. The Appellant also bought the same parcel of land from Dw 2. Counsel submitted that the Respondent should have sued Dw2 for selling the plot to the Appellant.
5. The Appellant's counsel further submitted that the Respondent did not give evidence to prove that the Appellant had wrongfully entered and took possession of the suit property.
6. The Appellant's counsel finally submitted that the trial court did not give reasons why it held that as a purchaser without notice, the Appellant was to blame for the wrongs of the seller.

The Respondent's case:

7. The Respondent's counsel submitted that the Agreement that was entered into between the Respondent and the seller, Dw2, in 1999 was binding in law. Counsel submitted that the Appellant, while aware of the existence of the agreement between the Respondent and Dw2 entered into another agreement with Dw2. Consequently, it was submitted, the second agreement

in voidable.

Analysis and findings

8. This being a first appeal, I am required to review the evidence that was tendered in the lower court and determine whether the conclusions of the Magistrate should stand (**See Peters -Vs- Sunday Post Limited (1958) EA 424**).
9. The suit in the lower court was commenced by way of a Plaint which was amended on 21st September 2006. In the Plaint, the Plaintiff (the Respondent herein) averred that he was the owner of a residential plot near Mawajuni having bought it from Constance Daniel Munga, DW 3, in 1999. However, in the year 2005, the Defendant (Appellant) wrongfully entered and took possession of the same plot. The Defendant (Appellant) went ahead and put up a structure on the disputed plot.
10. The Plaintiff (Respondent) finally averred that he has suffered loss and damage. He particularised the loss and damage suffered.
11. In its amended Defence filed on 29th August, 2006, the Defendant (Appellant) averred that she purchased the suit property on 20th March 1999 from Constance Daniel Munga, DW 3. The Defendant stated in her defence that if the Plaintiff has suffered any loss, and damage, then the same was not occasioned by the acts of the Defendant.
12. The Plaintiff (Respondent) produced in evidence the agreement in respect to the suit property as exhibit number 1. The Plaintiff informed the court that he paid kshs. 20,000/= for the plot thereafter.
13. In cross-examination, the Plaintiff (Respondent) denied that she owned the vendor any money for the balance. The Plaintiff stated that although she paid to the purchaser 20,000/= the agreement stated that the purchase price was kshs. 25,000/=. It was the evidence of Pw1 that although the vendor was willing to refund the purchase price, she declined to receive the money.
14. The Appellant, Dw1, informed the court that the vendor approached him and informed him that she wanted to sell the suit property. The vendor did not inform her that she had already sold to the Plaintiff (Respondent) the same property. They entered into a sale agreement and she paid the full purchase price of kshs. 50,000/=.
15. The vendor, Dw3, stated that the Plaintiff (Respondent) agreed to pay her kshs.30,000/= for the suit property. She was paid kshs.20,000/= in installments while kshs.10,000 was paid to the advocate. She stated that she however sold the same plot to the Defendant (Appellant).
16. After hearing the evidence, the Magistrate held that that Plaintiff (Respondent) had proved her case on a balance of probability. According to the Magistrate, the vendor should have demanded for the balance of the purchase from the Plaintiff instead of selling it for a second time to the Defendant. As between the Plaintiff and the Defendant, the court found that the Plaintiff had a better claim over the land because he was the first buyer.
17. The suit by the Plaintiff was basically for specific performance and for a declaratory order that the Plaintiff was entitled to exclusive and unimpeded rights of possession and occupation of the suit property.
18. In the case of **Nabro Properties Ltd. _vs- Sky Structures Ltd. & 2 others (2002) KLR 299**, the Court of Appeal declined to allow the appellant's claim for specific performance because the appellant had not paid the full purchase price and had not applied for extension to complete the transaction.
19. The Defendant (Appellant) produced the Sale Agreement between Dw3 and himself dated 20th March, 1999. The said agreement stated that the vendor, Dw3, was selling to the Defendant (Appellant) a plot measuring 100ft x 50 ft for Kshs.50,000/= which the vendor, Dw3, acknowledged receipt. Dw3 did not dispute that he was paid the said Kshs.50,000/= by the Appellants.
20. On the other hand, the Respondent was supposed to pay to the vendor Kshs. 25,000/=. However, the Respondent, Pw1, informed the trial court that he paid to the vendor Kshs.20,000/= in installments of Kshs. 5,000/= twice and then 10,000/=. Pw3 admitted in cross-examination that she had given Kshs. 10,000/= to an advocate who was supposed to pass the money to the vendor. However, no evidence was called to show that indeed Pw1 paid the said Kshs. 10,000 to the advocate and that Kshs.5,000/=. which was the balance of the purchase price was ever given to the

- vendor by the said advocate.
21. In view of the fact that the Plaintiff did not tender evidence to show that she complied with the agreement of sale, her claim cannot be said to be better than that of the Defendant (Appellant) who paid the full purchase price.
 22. In any event, there was no privity of contract between the Plaintiff and the Defendant. Both the Plaintiff and the Defendant's claim was that they had purchased the suit property from Constance Daniel Munga. The suit could not stand without the Plaintiff (Respondent) suing the vendor. The inclusion of the vendor as a party in the suit by the Plaintiff was even more critical considering that the Plaintiff did not plead fraud as against the Defendant (Appellant). The Appellant had no notice of the sale of the property to the Respondent. The suit could therefore not have succeeded as against the Defendant.
 23. For the reasons I have given above, I allow the Appellants Appeal and set aside the Judgment of the Honourable Magistrate. I substitute the learned Magistrate's Judgment with an order dismissing the suit in Kilifi SRMCC NO. 704 B of 2005. The Respondent shall pay the costs of this Appeal and the costs in the lower court.

Dated and delivered in Malindi this **11th** day of **April**, 2014.

O. A. Angote

Judge