



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E30 OF 2021

JOSHUA MWITI M'IKAMATI.....1ST APPELLANT

CHARLES MBAJO M'IBUTU.....2ND APPELLANT

VERSUS

SEBASTIAN KARINGURI.....RESPONDENT

(Being an appeal from the Judgment of Hon. P.M. Wachuri (P.M.)

delivered on 26th January, 2021, in Tigania PM ELC No.110 of 2015)

JUDGMENT

A. PLEADINGS

1. The appellants sued the respondent in the lower court for trespass into his **Parcels No. 4160 and 2568 Uringu I adjudication section**, they sought for a declaration that they are the recorded owners and for eviction of the respondent from the suit land.
2. The respondent filed a defence and counterclaim dated 21.12.2013 denying that the appellants were the recorded owner(s) as alleged or at all. He alleged **Parcel No. 2568** was in the joint names of Kiera Nkumbu and Benjamin Mugwika Nkumbu who sold to him the land in 2007, took vacant possession but soon thereafter there was a tussle when the seller's wife refused to execute the transfer but eventually, the issue was resolved in 2008 before the adjudication committee. He later on discovered an illegal cancellation of his name in the adjudication records at the land office.
3. In his counterclaim, the respondent denied he was a trespasser. On the contrary, he averred that he was in occupation as a purchaser for value and that the alleged sale and transfer of **Parcel No. 4160 and 2568** to the appellants and was malicious, fraudulent, irregular, wrongful, ultra vires, suspicious and void for lack of partition and signature by the joint owners.
4. He sought for the rectification of the register to reflect his name and a permanent injunction to restrain the appellants from interfering with his occupation/quit possession of his land.
5. The appellants filed a reply to defence and defence to the counterclaim dated 21.1.2014 denying the alleged registration of the suit premises in the name of the respondent as alleged or at all or that their transfer and registration was irregular, a conspiracy, fraudulent and or illegal.
6. On 31.10.2019, the court ordered the District land and settlement office Tigania West to visit the **locus in quo** and prepare a report of the alleged encroachment.

B. EVIDENCE

7. PW1 testified that was that he bought a piece of land measuring 0.20 acres from Nkumba Kiera and Charity Kinaitore which was excised from **Uringu I adjudication section** and issued Parcel No. 4160. It was while taking on vacant possession that he found the respondent on the land who refused to move out hence his claim for eviction. He produced a consent dated 14.10.2013; sale agreement dated 5.2.2013; confirmation letter of ownership dated 2.7.2013; and a receipt, an agreement dated 22.11.2017 and a letter confirming ownership as **P exh 1 – 7** respectively.

8. In cross examination, the appellant told the court he was transferred the land by Nkumbu Kiera and his wife in 2007 as per the sale agreement and that Benjamin Mugwika was their son, though he had not produced the transfer form as part of his evidence. He insisted he did not know about any previous sale of the land to anybody else.
9. As regards the complaint at the CID offices, PW1 admitted to have written a statement at the police station but could not recall the outcome of the investigations.
10. Further, PW1 told the court that after the transfer the demarcation officer issued with a parcel number. Later on he found the respondent on the land who refused to vacate claiming one Charity had allegedly sold to him the land yet the land was previously in the names of Benjamin Mugwika and Nkumbu Kiera.
11. PW2 adopted his witness statement dated 14.11.2012 largely associating his evidence with that of PW1. In his view, the respondent had initially declined to clear the purchase amount hence the reason the property was resold to them. He could not know if the previous sale agreement between the seller(s) and the respondent had been rescinded.
12. PW3 testified that he had sold the land to the appellants as per the sale agreement dated 31.8.2007. He admitted receiving the purchase price though there was an outstanding balance.
13. As regards the previous sale agreement with the respondent, he could not confirm if he cancelled it before the 2nd agreement with the appellants. However, he admitted he had received some money but the respondent alleged took vacant possession without his approval or consent.
14. Further, PW3 stated the respondent had a balance of **Kshs. 18,000/=** which he failed to clear by 2007. Eventually, he resold the land to the appellants in 2013 after the respondent breached their agreement.
15. PW4 told the court he only sold the land to PW1 and PW2. He however his son PW3 had allegedly purported to sell the same land to the respondent to which he reported the matter to the police for investigations.
16. Further, PW4 admitted that the respondent was not refunded his money after they sold the land to the appellants. In his view, the respondent was on the land illegally since he did not personally sell, transfer or receive any consideration from him over the land. He insisted that the respondent had no right to occupy the land.
17. DW1 adopted his witness statement filed on 2.12.2020. He said PW3 sold to him 0.20 points out of 0.40 points vide a sale agreement dated 31.8.2007 for Kshs. 30,000/= which he was to pay in two equal installments. Thereafter, they signed a transfer letter which was rejected at the lands office since the land was jointly owned with PW4 following which PW4 reported PW3 to the police for selling and or purporting to transfer his land without his consent or approval.
18. DW1 testified that after the parties were summoned to the District Officer's/CID office, the wife to PW4 sought for time to negotiate matter after PW3 was arrested for fraud.
19. Eventually, DW1 testified it was agreed before the area chief that the land could be subdivided into two portions and in the alternative he could purchase the whole parcel at **Kshs. 30,000/=** payable in two instalments of **Kshs. 20,500/=** and **Kshs. 9,500/=** respectively.
20. Further, DW1 testified that a transfer letter for the whole parcel of land was signed at the CID offices. However, PW4 refused to sign it because he had allegedly sold and transferred the land to the appellants since they had offered a higher amount. He later on lodged a caution over the land on 20.1.2008.
21. DW1 testified the lands committee later on summoned him and gave him the land as per the confirmation letter produced before court. It is afterwards that he learned of the sale agreement between PW1, PW2, PW3 and PW4.
22. DW1 further testified that PW4 alleged that he had forged his signature over the transfer, investigations were commenced whose outcome was that the signatures or thumbprints belonged to PW4. He henceforth took the land with effect from 2007 and extensively developed it. He produced the sale agreement dated 31.8.2017; a request for transfer, confirmation of ownership later dated 18.10.2012; exhibit memo form inquiry, findings and recommendations by a fingerprint expert, letters dated 27.5.2015, 28.1.2015, caution dated 27.5.2015, statements under inquiry by the parties and a sale agreement as **D exh 1 – 9** respectively.
23. In cross-examination, the respondent admitted he made two agreements one of which was consolidated after he realized that the property was jointly owned though backdated to read 30.8.2007. PW4 refused to sign

C. GROUNDS OF APPEAL

24. The appellants appeal against the lower court judgment on the basis that: the trial court failed to appreciate their pleadings, evidence, written submission and hence reached the wrong decision; misrepresented the facts, evidence and the law; applied conscience rather than the law in evaluating the evidence and reached a finding unsupported by law and lastly vitiated its judgment thus arriving at an erroneous finding.

D. WRITTEN SUBMISSIONS

25. This being a first appeal, the court under **Section 78 of the Civil Procedure Act** is mandated powers to rehear, reassess and rehearse the pleadings and evidence, come up with its own independent finding and conclusions while alive the fact that the trial court had the opportunity to see and hear the witnesses first hand.

26. With leave of court, parties opted to dispose of the appeal through written submission dated 8.12.2022 and 28.12.2021 respectively in line with **Order 42 Rule 16 Civil Procedure Rules**.

27. The appellant submitted that there were two issues for this court to determine namely:- if the trial court failed to address and make a proper finding on the issues raised in the pleadings and submissions and secondly if the court misrepresented the facts, evidence and the law.

28. In the first tissue, it was submitted that there was a valid contractual agreement between the appellants' witnesses and the respondent which the court could not rewrite.

29. On the other hand, there was no agreement between the appellant and the respondent as such the doctrine of privity of contract should have guided the contract between the respondent and the appellants which the court in essence rewrote and imposed an obligation on a bonafide owner.

30. Further, it was submitted a contract binds only parties to the agreement as held in *Savings & Loan (K) Limited –vs- Kanyenje Karangaita Gakombe & Another, [2015] eKLR.*

31. It was also submitted that if at all any contract between the respondent and the appellants' witnesses PW3 and PW4 existed, then the same was void ab-initio as it had been executed by parties who had no title to pass especially as indicted at Pages 23 and 24 of the proceedings that the alleged consolidated agreement had been signed by the wife to PW4 going by the doctrine **nemo dat quod habet**.

32. It was further submitted that the witness to consolidated of the agreement was a clerk to the law firm who did not testify at all. Coupled with this, it was submitted the respondent did not discharge the burden of proof under **Section 107 of the Evidence Act** and the court should not have relied on the statement of inquiry to impute any liability on the appellants.

33. In my view, the issues for determination are:-

1. If there was a binding sale agreement between the appellants and the sellers on the one hand and between the respondent and the seller on the other hand.

2. If the sale agreements could be enforced as against the parties.

3. Whether the appellant and the respondents were entitled to the prayers in their respective claims.

34. The appellants claim was that they were bonafide purchasers for value and recorded owner(s) of the suit premises. In support of that claim, they produced ownership documents including a confirmation letter from the District land adjudication and settlement officer. They also called PW3 and PW4 are the persons who sold and transferred the land to them.

35. On the other hand, the respondent averred he allegedly bought the same land from one of the co-owners but later on a consolidation agreement was signed at the District officer's office, hence he could not be a trespasser and that the registration in favour of the appellants was irregular, suspicious, illegal, ultra vires and wrongful: DW1 therefore sought for its cancellation/rectification of the register to his favour and a permanent injunction.

36. It is trite law parties are bound by their pleadings and issues flow from pleadings in line with **Order 15 of the Civil Procedure Rules**. See *Stephen Mutinda Mule –vs- Independent Electoral and Boundaries Commission & Another [2014] eKLR.*

37. The respondent did not plead and or prove any fraud, illegality and or irregularities against both the appellants, PW3 and PW4. He did not enjoin the District land and settlement officer(s) who effected the transfer in favour of the appellants. He did not produce any evidence that his registration was in the first instance in existence and secondly, that there was a technical error in registering the appellants as bonafide owners. See *Central Bank (K) Ltd –vs- Trustee Bank Kenya Ltd & 4 Others [1996] eKLR, Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000] eKLR, Katende –vs- Haridar & Company Limited [2008] 2 E.A.173, Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) –vs- Stephen Njoroge Macharia [2020] eKLR.*

38. The onus was on the respondent to prove the irregularities and or illegalities on the title held by the appellants. It could not be inferred at all. He did not call the makers of the registration documents held by the appellants. He did not report such fraud or illegality to the police for investigations. The respondent produced no single letter alleging such irregularities and illegalities directed at either the appellants, PW3, PW4 and or the land adjudication offices.

39. Further, the land in issue was still under the land adjudication process thus the alleged caution could not exist in law. In any event, the same talked of 0.20 acres as opposed to 0.40 acres. Again, it was dated 27.5.2015 yet the consolidated agreement was dated 5.2.2013. See *Arthi Highway Developers Ltd –vs- West End Butcheries Ltd & 6 Others [2015] eKLR.*

40. The respondent admitted in his evidence that the consolidation sale agreement was not signed by the recorded owner PW4. PW4 also told the court he had not sold and or transfer the land to the respondent and that he had objected to the sale leading to the arrest of PW3 on account of fraud.

41. Further, DW1 testified a consolidated sale agreement was allegedly executed at the District officer(s) or CID offices and a letter written to that effect. Similarly, DW1 testified the balance of the purchase price was allegedly paid to the wife of PW4. The said wife was not called to testify on behalf of the respondents.

42. Similarly, the respondent did not call the CID officers, the chief and the District Officer so as to support his claim that PW3 and PW4 together with his wife willingly and consensually sold and or transferred the suit land to him.

43. There was evidence that the initial agreement between PW3 and DW1 was void for lack of a consent and or approval by PW4. PW4 was also consistent in his evidence that he did not sell and or transfer the suit land to the respondent but only dwelt with the appellants. In absence of evidence to the contrary, my finding is that the respondent failed to prove his agreements were in compliance with **Section 3 (3) of the Law of Contract Act**.

44. Further, in *Jane Catherine K. Karani –vs- Daniel Mureithi Wachira [2014] eKLR*, the Court of Appeal held a signature of each party must be appended to an agreement and attested during its execution. See *Sammy Nzioka Mulwa –vs- Jackson Matata Mulwa & 2 others [2020] eKLR*.

45. The sale agreements held by DW1 were therefore invalid for lack of signature(s) belonging to PW4. See *Elizabeth Ndulu Mathuva –vs- Joseph Mbiu Muthiani [2022] eKLR*.

46. On the other hand, PW3 and PW4 were consistent that they sold and transferred the suit land to the appellants. The appellants produced exhibits to back their claim. **Section 3 of the Trespass Act** defines who a trespasser is. The appellants were able to trace ownership to PW3 and PW4.

47. On the other hand, the respondent could only trace their title to PW3 who disowned him and was found to have engaged in an illegal transaction with the respondent. Instead of withdrawing from transaction, the respondent engaged the mother to PW3 to circumvent PW4 and by extension to put undue pressure and or subject PW4 to the police in order to unduly make him execute the sale agreements ostensibly to regularize the previous transaction. By that time, title had already passed to the appellants. This was the context under which the consolidated sale agreement was allegedly made.

48. In my view, the aforesaid attempts were coming too late and doing too little since the suit land was no longer available for a second sale or transfer to the respondent. See *Caroline Awinja Ochieng & Another –vs- Jane Anne Mbithe Gitau & 2 Others [2015] eKLR*.

49. The respondent also failed to join PW3 and PW4 as parties to the suit yet he was claiming they had allegedly sold to him the land but failed to transfer the same to him. In absence of a valid agreement and transfer, my finding is that he was a trespasser to the subject land and could not therefore sustain a claim against the appellants who had better title than him.

50. In the upshot is the appeal has merits. It is allowed with costs. The appellants' claim in the lower court is allowed and the respondent's defence and counterclaim dismissed with costs.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF MARCH, 2022

In presence of:

Karanja for appellants – present

Kevin Nyenyire for respondent – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE