



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 10 OF 2020

MARY WATARE JOHANA.....APPELLANT

-VERSUS-

MT. KENYA IMMANUEL ACADEMY LIMITED.....RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Hon. W. Kagendo, Chief Magistrate Nyeri delivered on 21st February, 2020 in Nyeri MC ELC Case No. 39 of 2019.

2. By a Complaint initially filed in this Court on 9th November, 2016 dated the same day, Mt. Kenya Immanuel Academy Limited (*the Respondent herein*) had sought orders against Mary Watari Johana (*the Appellant herein*) as follows:

(a) *A declaration that L.R Title No.s Nyeri/Naromoru/4852, 4853, 4854, 4855 and 4856 (originally 270) belongs to the Plaintiff and further order cancellation of the name of the Defendant as the owner and new Titles be issued with the name of the Plaintiff as the registered owner;*

(b) ...

(c) *An order of mandatory and/or permanent injunction restraining the Defendant, her agents, servants, employees and/or through whoever against trespassing into the Plaintiff's L.R Title No. Nyeri/Naromoru/2730 and 2731 or remaining thereon;*

(d) *An order directing the Defendant to deposit into Court Kshs.24,000/- per month (that) the Defendant has been collecting as rental income for illegally leasing part of the Plaintiff's premises since May, 2013 to date;*

(e) *An order directing the Defendant to return and restore into good order the vandalized classrooms, chairs and/or cease from interfering in any way with any institutional structures and/or goods owned by the Plaintiff on its land aforesaid; and*

(f) *Any other/such other/further relief as this Honourable Court may deem fit/just to grant.*

3. Following directions issued on 7th March 2019, the file was by the consent of the parties transferred to the Chief Magistrates Court, Nyeri for hearing and disposal.

4. Having heard the parties and by her Judgment delivered on 21st February 2020, Hon. W. Kagendo, CM granted some of the Plaintiff's prayers and decreed as follows:

1. That L.R Title No. Nyeri/Naromoru/4852, 4853, 4854, 4855 and 4856 (originally 2730) belong to the Plaintiff and further ordered cancellation of the name of the Defendant as owner and new titles be issued with the name of the Plaintiff as the registered owner.

2. That (there be) an order of temporary injunction directed at the Defendant (her) agents, servants, employees and/or through whoever against alienating, transferring, parting with or in any other way interfering with L.R Title No. Nyeri/Naromoru/4852, 4853, 4854, 4855 and 4856.

3. That (there be) an order of mandatory and/or permanent injunction restraining the Defendant, (her) agents, servants, employees and/or through whoever against trespassing into the Plaintiff's L.R Title No. Nyeri Naromoru/4852, 4853, 1271,

2730 and 2731.

4. That costs of the suit be paid to the Plaintiff.

5. Aggrieved by the said determination, the Appellant who was the Defendant in the lower Court proceedings moved to this Court vide a Memorandum of Appeal dated 12th March, 2020 as filed herein on 13th March, 2020 urging this Court to set aside the Judgment of the Honourable Chief Magistrate on some seven (7) grounds to the effect that:

- 1. The Learned Trial Magistrate erred in law and in fact in making a finding that the Respondent had proved its claim of purchasing and paying for one (1) acres out of LR No. Nyeri/Naromoru/1271, a land that does not exist;*
- 2. The Learned Trial Magistrate erred in law and in fact in awarding the Plaintiff 1.0 acres of land without sufficient proof that the said acres of land had been fully paid (for);*
- 3. The Learned Trial Magistrate erred in law and in fact in granting prayer A, B and C against the weight of evidence ...;*
- 4. The Learned Trial Magistrate erred in law in rendering a Judgment that is difficult to understand and implement; on the one hand the Respondent is awarded 1.0 acres out of 1271 and on the other hand (the court) proceeded to identify the said one acre as parcel No. 4852 and 4853. No evidence was tendered to confirm that parcel No. 4852 and 4953 (sic) measure 1.0 acres;*
- 5. The Learned Trial Magistrate erred in law in making a finding that the Respondent had purchased one acre of land and was entitled to the same, yet no land control board consent had been granted in respect of the said sale;*
- 6. The Learned Trial Magistrate erred in law in failing to make a finding that the sale of land under consideration was void ab initio for lacking the approval of the land control board, and that the Respondent was only entitled to a refund of the deposit paid in the circumstances; and*
- 7. The Learned Trial Magistrate erred in law in rendering a Judgment that is against the weight of the evidence tendered.*

6. Following directions given herein on 28th July 2021, the Appeal was canvassed by way of written submissions. I have had the chance to go through the Record of Appeal and I have also carefully considered the rival submissions and authorities placed before me by the Learned Counsels, Ms Lucy Mwai for the Appellant and Mr. Muchiri Wa Gathoni for the Respondent.

7. In the Prayers made in the Plaint, the Respondent herein had sought a declaration that some 5 parcels of land said to be sub-divisions of land parcel No. Nyeri/Naromoru/2730 belong to itself and urged the Court to cancel the name of the Appellant on the register and to substitute the Respondent's name in the titles. The Respondent also sought a temporary order of injunction to restrain the Appellant from dealing with the said parcels of land pending the hearing and determination of the suit.

8. In addition, the Respondent had sought a mandatory and/or permanent injunction restraining the Appellant from trespassing upon or remaining on LR No. Nyeri/Naromoru/2730 and 2731. The

Respondent also sought an order directing the Appellant to deposit into Court some rent said to have been collected from the premises and for the Appellant to restore the suit premises to its earlier condition.

9. The basis for those prayers was the Respondent's contention that it had on or about 13th October, 2008 purchased a one acre piece of land from the Appellant. That piece of land was to be excised from parcel No. 2730 which was registered in the name of the Appellant. The Respondent told the Court that having sold the land to itself, the Appellant had on 30th November, 2015 proceeded without the Respondent's knowledge to sub-divide the said parcel No. 2730 to the five mentioned portions being Parcel Nos 4852, 4853, 4854, 4855 and 4856.

10. The Respondent further told the Court that it had built an educational institution on its own Parcel No. 2731 but the Appellant and her whole family had since trespassed thereupon and had proceeded to vandalise structures thereon and leased portions thereof to third parties who were paying the Appellant Kshs.24,000/- as rent per month.

11. In her statement of Defence dated and filed on 21st December, 2016, the Appellant who is also a director and shareholder of the Respondent Company denied that the Respondent purchased the said Parcel No. 2730 and/or paid the final purchase price therefore. It was further the Appellant's case that even if the Respondent had shown interest in purchasing 1 acre of land out of the said Parcel No. 2730, the Respondent never paid full consideration therefore and no Land Control Board had been obtained for the sub-division and transfer thereof.

12. The Appellant further denied having trespassed onto Parcel No. 2731 which she conceded belonged to the Respondent. She also denied leasing any part thereof to any third parties. At the same time, the Appellant asserted that any time she had entered Parcel No. 2731, she had done so not as a trespasser but as a shareholder of the Respondent Company.

13. Having heard the parties on the above issues, the Learned Trial Magistrate concluded as follows at Paragraphs 12 to 15 and 17 to 22 of the impugned Judgment dated and delivered at Nyeri on 21st February, 2020:

12. The sale agreement which is the genesis of this case is dated 13th October, 2008. It shows that the purchase price was Kshs.200,000/-. It further says that a down payment of Kshs.100,000/- has been paid. Kshs.50,000/- cash and Kshs.50,000/-

money orders. The payments shown are petty cash dated 8th November, 2008 and another one dated 14th October, 2008.

13. The Plaintiff (sic) admitted that she was paid the Kshs.100,000/- evidence in PEXT 12, the voucher dated 22nd November, 2008, showing the agreement she acknowledged having been paid some Kshs.100,000/- so the total paid is Kshs.200,000/- the total purchase price.

14. The Court notes that the Defendant was a director shareholder of the Plaintiff's company. She lives near the Plot in issue. After that agreement, the Plaintiff took possession and continued to develop it.

15. Her contention (is) that the land was never transferred as there was no consent from the land control board and also the title deed in issue was a security for a loan she had taken as per the charge dated 7th November, 2007. The Court notes that this loan was 9procured) in the year 2007 before the Plaintiff came on board.

16. ...

17. It is therefore mischievous of the Plaintiff (sic) to hide behind the same loan and her inaction in having the land transferred to the Plaintiff. She witnessed and she accepted that indeed the Plaintiff's Chairman injected a lot of money in the development of the school. In as much as she was trying to say that (it) is on parcel 1271 (sic), she also admits that there are staff quarters on 1271 (sic). She is the one benefitting from those quarters now.

18. I find that the Plaintiff has proved, on a balance of probability that they entered into a sale agreement with the Defendant. The Defendant was paid the full purchase price and she is a director/shareholder of the Plaintiff. She was around when the Plaintiff took possession and developed the parcel of land.

19. Accordingly the Court finds that the Plaintiff has proved their claim on one acre out of 1271 (sic). The parties recorded a consent on 1st March, 2017 identifying that portion to be 4852 and 4853.

20. Accordingly prayers A and B of the Plaint are hereby granted and as per Prayer C to include both 1271 (sic) and 4852 and 4853.

21. As to the occupation the Court notes that the Plaintiff owed the Defendant some monies and the actual rental income she is getting was not proved. So the Court will not grant Prayers C and D.

22. Costs of the suit to be paid to the Plaintiff.

14. As the first appellate Court, this Court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and proceed to make my own conclusion about it, of course, bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses first hand (see **Selle & Another -vs- Associated Motor Boat Company Limited and Others EA 123).1968**).

15. From the material placed before me, it was difficult not to agree with the Appellant that the Learned Trial Magistrate had made a finding in regard to a parcel of land that was not in dispute before her. The dispute before the Court revolved around two parcels of land being Nyeri/Naromoru/2730 and 2731. The dispute before the Court was that the Appellant had without the Respondent's knowledge sub-divided the said parcel No. 2730 into Parcel Nos. Nyeri/Naromoru/4852, 4853, 4854, 4855 and 4856 and that the Appellant had also trespassed onto the Respondent's adjacent Parcel No. 2731.

16. That being the case, the reference by the Trial Court to Parcel No. 1271 at Paragraph 17, 19 and 20 of her Judgment as cited hereinabove was erroneous. It was also apparent to me that the Court meant to refer to the Defendant at Paragraphs 13 and 17 of the said Judgment and not the Plaintiff as it now appears.

17. Be that as it may, I am in agreement with the Respondent that those errors were merely typographical and that the same can be resolved by a review of the apparent errors on the face of the record pursuant to **Order 45 Rule 1 of the Civil Procedure Rules** and/or by the Court on its own motion as provided under **Section 99 of the Civil Procedure Act**. Accordingly I did not think that that was sufficient ground to warrant disturbing the Judgment of the Trial Court.

18. Grounds 2, 5 and 6 of the Appeal were quite related and just like the Appellant, this Court shall tackle the same together. It was contended by the Appellants that the Learned Trial Magistrate erred in awarding the Respondent the one acre parcel of land without any proof that the land had been fully paid for and that the sale if any was void for the failure to obtain the Land Control Board consent.

19. As we have seen from the Judgment it was the finding of the Learned Trial magistrate that the Appellant had been paid the full purchase price and had no further claim to the land. The sale agreement dated 13th October, 2008 pursuant to which the land was acquired was a simple one – paragraph agreement executed between the Appellant as the seller and one Paul Wachira Ndonga as the buyer. The same reads in the relevant portion as follows:

SELL (SIC) OF 1 ACRE PLOT NO. 2730

I, Mary Watare Johana have sold 1 acre of land to Mt. Kenya Emmanuel Academy at cost of Kshs.200,000/- (Two hundred thousand shillings only). A down payment of Kshs.100,000/- (one hundred thousand) has been paid. Kshs.50,000/- fifty thousand in cash and Kshs.50,000/- (fifty thousand shillings) in money orders. The rest to be paid later as the transaction of changing the title deed is in progress.

20. A perusal of the sale agreement clearly reveals that only Kshs.100,000/- was paid to the Appellant as at the date of the execution of the agreement on 13th October, 2008. In his statement dated and filed in court on 9th November, 2016, Peter Maina Mugambi who testified as the Plaintiff's sole witness asserts that the Plaintiff purchased the suit property on the said 13th October, 2008.

21. Asked to read the agreement during cross-examination at the trial herein, the Plaintiff's witness insisted without any elaboration that the sum was paid in full. On re-examination by their Advocate on record, the Respondent's witness turned around and stated that

they had paid another Kshs.100,000/- before the date of the agreement by cash and money orders.

22. I have looked at the Petty Cash Voucher in the name of the Appellant dated 8th November, 2008 as well as another one dated 14th October, 2008 in the name of one Pauline Kareche who is said to be a grand-daughter of the Appellant as attached to the Respondent's list of Further Documents dated 29th June, 2018. I was not persuaded that the same represented final payments made on account of the agreement.

23. I say so because there is nothing to show that the name "Mary Watare" appearing at the signature section was appended by the Appellant. She denies receiving the money and it was incumbent upon the Respondents to demonstrate that she is the one who indeed received the money shown on the voucher. Secondly, there was no evidence adduced to demonstrate that the Appellant had authorized the grand-daughter to receive payment on her behalf on 14th October, 2008. Indeed, the payment voucher in the name of Pauline does not even purport to show what the payment of Kshs.50,000/- was for.

24. That being the case, I was unable to arrive at the same conclusion as the Learned Trial Magistrate that the Respondent had paid the purchase price in full to the Appellant.

25. Besides, it was clear to me that this suit has been instituted in the name of a limited liability company. While the Plaintiff purports to have bought the land in question on 13th October, 2008, a perusal of the Certificate of Incorporation of the Mt. Kenya Emmanuel Academy Limited attached to their List of Documents reveals that the company was incorporated on 2nd January, 2009 and was therefore not available in the year 2008 to make the purchase from the Defendant. There was no explanation offered at the trial as to how the purchase price paid by Paul Wachira Ndonga as the buyer came to be acquired by the Plaintiff Company that was not yet born at the time.

26. At any rate and as submitted by the Appellants, even if the Purchase price was paid in full as purported, the parties never obtained the requisite Land Control Board consent for the sub-division and transfer to the Respondent. That being the case, the sale transaction was void for all intents and purposes under **Section 6(1) of the Land Control Act** and the amount paid by the Respondent was only recoverable as a debt from the Appellant.

27. Arising from the foregoing I was persuaded that the grant of prayers A, B and C of the Respondents prayers went against the weight of the evidence that was placed before the Trial Court. I am accordingly satisfied and hereby find that the Appeal has merit.

28. The upshot is that the Judgment rendered in Nyeri MCELC No. 38 of 2019 on 21st February, 2020 is hereby set aside. In lieu therefore, an order is hereby made dismissing the Respondent's suit in the subordinate court with costs.

29. The costs of this Appeal shall be to the Appellant.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022.

In the presence of:

Ms. Lucy Mwai for the Appellant

Mr. Muchiri wa Gathoni for the Respondent

Court assistant – Kendi

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J. O. Olola

JUDGE