



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 75 OF 2021

GERALD MUTUA MUTEAAPPELLANT

VERSUS

GAKII M'MWITARI1ST RESPONDENT

SUSAN KANYUA KAURO2ND RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant had been sued in the lower court by the 1st respondent for fraudulent/illegal transfer of her late husband's Parcel No. Nyaki/Thuura/2148 and subsequent eviction from the land. She sought for the cancellation and reversion of the land to the name of her husband and eviction of the appellant from her land.
2. The appellant opposed the claim, insisted that the dispute had initially been determined by a panel of clan elders and that all the subsequent processes and procedures towards his acquisition were lawfully done with the full knowledge and in strict compliance with the law. The 2nd respondent sought and obtained leave to be joined as an interested party to the suit as a co-wife of the 1st respondent. She averred that her deceased husband Domisiano Kauro had allegedly exchanged Parcel No. Nyaki/Giaki/1640 with the suit land herein in favour of the appellant.
3. Further the appellant filed a notice of preliminary objection dated 28.2.2020 stating the court lacked jurisdiction to cancel the title deed, the matter fell under Section 2(1) of the Law of Succession Act and should therefore be canvassed through a succession cause under section 76 of the Law of Succession Act particularly in Meru Succession Cause No. 504 of 2012.

B. Testimony

4. The 1st respondent testimony was that she was the wife of the late M'Mwitari who passed on in 1990 leaving behind three widows namely; Kangai, Tabitha and herself. She testified the deceased had given three portions no. Nyaki/Thuura/2149, 2150 and 2148 to the three houses. Further the 1st respondent testified she did not file any succession cause to transfer the land to herself.
5. She insisted the names of the deceased were not in any of the succession causes indicated in the appellant's list of documents before court hence could not understand how the appellant became a registered owner of her land. Further the 1st respondent told the court that Domisiano Kauro was a step brother born of the eldest wife of the 1st house who had allegedly sold her share to the appellant in utter disregard to the law and without her consent or approval.
6. Additionally the 1st respondent clarified while the appellant was sold land by her step children the land was Parcel No. 2149 and not Parcel No. 2148 since no succession cause had been filed against the latter parcel of land hence the reason a police report was made against the fraudulent and illegal transfers leading to the forcible eviction in 2015.
7. In support of her claim the 1st respondent produced the original title deed, green card thereof a limited grant in P/A No. 39 of 2017 and court file no's P & A Succession Causes No. 504 and 507 of 2012.
8. The appellant's case was that he lawfully acquired the suit land, took vacant possession and made various developments thereon. He produced a sale agreement dated 26.3.2008, minutes of the Njuri Ncheke copy of title deed as D. exhibit 1-8. He insisted he started using one acre of the land in 2001 and later on assumed occupation of the other one acre in 2014 after the 1st respondent voluntarily and consensually left it to him. As regards Succession Cause No. 507 of 2012, the appellant told the court he had filed the same which was not objected to by 1st respondent but was not certain if the names of the deceased M'Mwitari Mutuera were appearing on the two succession

files.

9. He denied ever chasing or assaulting, forcefully evicting the 1st respondent from the suit land after obtaining the title deed.

10. Similarly the appellant told the court that he was sold the land by Domisiano Kauro in 2008 but could not know who the owner of the land was at the time though he undertook due diligence through a search which showed the said Domisiano allegedly became the owner on 26.4.2014.

11. DW's 1- 4 confirmed to the court the 1st respondent lived on Parcel No. 21408 but left in 2014.

12. The 2nd respondent as the interested party told the court the Thuura land belonged to her late husband M'Mwitari Mutwiri who subdivided the land to his three sons among them her husband Domisiano Kauro who had exchanged the land with a portion measuring one acre left in favour of the 1st respondent. She insisted that the 1st respondent was entitled to her share where her house stood in Giaki as opposed to the one in Thuura. In her view the 1st respondent had agreed to move to Giaki land but changed her mind after she left to live with one man by the name M'Inoti. She could not however confirm if her late husband's succession causes related to Parcel No. 2148 initially registered in the name of her late father in law.

C. Grounds of Appeal

13. The appellant faults the lower court decree for; overlooking the main issue had arisen out of a succession cause; failing to consider the entire evidence; concluding that the appellant allegedly evicted the 1st respondent out of the suitland following the sale agreement which was illegal, invalid and entered into without due diligence and lastly failing to hear the preliminary objection dated 28.2.2020.

14. The parties were directed to put in written submissions to the appeal by 23.3.2022.

15. The appellant submitted that the issues calling for determination as:

(i) Whether the trial court erred in law and in fact in concluding the failure of the appellant to exercise due diligence.

(ii) Whether the trial court erred in law and in fact in concluding in issue of possession and use of the suit property.

16. As regard the 1st issue the appellant submitted that the 2nd respondent was an innocent purchaser for value without notice of the 1st respondents claim to the property without actual or constructive notice of any defects in or infirmities, claims or equities. Reliance was placed on ***Elizabeth Wambui Githinji & 29 others vs Kenya Urban Rural Road Authority (2019) Lawrence Mukiri Mungai, Attorney M. Mwaura vs A.G & 4 others (2013).***

17. On the issue of wrong succession, the appellant submitted that as per the preliminary objection dated 28.2.2020 if the court had heard and determined it, it would have reached a different outcome in the matter.

18. Concerning the issue of possession and use of the property the appellant submitted under Section 25 and 26 of the Land Registration Act, a title could only be impeached on account of fraud and misrepresentation.

19. Reliance was placed on ***Eunice Grace Njambi Kamau & another vs Hon. AG & 5 others (2013) and Vijay Morjaria vs Nansighu Darbar & another (2000), CBK Ltd vs Trust Bank Ltd & 4 others (2016) eKLR*** on the proposition that fraud must not only be pleaded but proved.

20. This being a first appeal, the court is expected to rehearse, re-hear and re-appraise itself on the lower court record and come up with independent findings and conclusion while aware the trial court had firsthand experience in hearing and noticing the demeanor of the witnesses. ***See Peter vs Sunday Post Ltd (1958) E.A.***

21. Having gone through the record of appeal, the grounds of the appeal, evidence and written submissions the issues for determination are;

(i) If the trial court erred in law and in fact in assuming jurisdiction in the matter.

(ii) If the 1st respondent pleaded and proved fraud, illegality and mistake in the manner the appellant had acquired LR. No. Nyaki/Thuura/2148 and subsequently evicted her from occupation and possession.

(iii) If the appellant was an innocent purchaser for value without notice holding title duly covered by law.

22. It is trite law that parties are bound by their pleadings and issues flow from pleadings. ***See IEBC & another vs Stephen Mutinda Mule & 3 others (2014).***

23. In this matter the appellant filed two defenses dated 3.8.2018 and 20.11.2018. On top of that he filed a Preliminary Objection dated 28.2.2020 raising the issue that the dispute ought to have been raised under Sections 2 (1) and 76 of the Law of Succession Act in the primary Succession Cause No. 504 of 2012.

24. This court rightly gave directions that the issues raised to be canvassed at the main hearing. The discretion to hear and determine a preliminary objection falls within the trial court. Looking at the preliminary objection as presented it was obvious facts were disputed by the parties and evidence was required to establish if it was a pure point of law; and calling for evidence to support it.
25. In *Oraro vs Mbaja (2005) IKLR 141* a preliminary objection over res judicata the court held it needed ventilation through viva voce evidence whereas in the court. Court have also held that every preliminary objection raised goes to the root of jurisdiction of the issue falls under the exercise of a court's discretion.
26. The issue before the court was relating to fraud, mistake, misrepresentation and illegality in the manner the appellant had acquired the suit land.
27. The evidence produced from the succession cause files indicated that the files did not relate to Parcel No. 2148 and or the initial owner, that is the estate of the late M'Mwitari Mutuera duly represented by the 1st respondent on account of limited grant ad litem issued to her in Meru CMC P & A no. 39 of 2017 on 7.9.2017.
28. Given that evidence was needed to clarify the issue, the trial court was in order to refer the preliminary objection to be determined at the main hearing.
29. The 1st respondent had the burden to plead and prove fraud, mistake, illegality and misrepresentation in the manner the appellant was transferred and registered as the owner of the suit land.
30. At paragraphs 5, 6, 7, 8, 9 and 11 of the plaint dated 28.5.2018, the 1st respondent stated the suit land was initially in the name of her deceased husband M'Mwitari Mutuera, she was put into possession upon marriage by the deceased, was holding the original title deed; that on 22.12.2014 the land was fraudulently transmitted to Domisiano Kauro M'Mwitari through Meru High Court Succession Cause No. 507 of 2012 and out of forged documents, the appellant acquired a title deed which she alleged was tainted with illegalities, irregularities and stood for cancellation.
31. In the two defences alluded above and a preliminary objection, the appellant maintained his acquisition of the suitland was lawful, legal, procedural and beyond doubt based on knowledge and consent by the 1st respondent, title acquired out of a gazettment with no wrong doing and hence the suit disclosed no cause of action against him.
32. As regards the 2nd respondent leave was granted to put in a defence but none was filed other than witness statements.
33. The 1st respondent produced a copy of the records as p. exh. 2 showing the register for Parcel No. Nyaki/Thuura had been opened on 5.6.1985 in the name of M'Mwitari Mutuera, gazetted vide gazette notice no. 1716 of 26.7.2013 and a title deed issued on 30.4.2014 in the name of Domisiano Kauro M'Mwitari following Succession Cause No. 507 of 2012, after which he subsequently transferred the land to the appellant on 22.12.2014. The appellant on the other hand produced a copy of records as D. exh 4, a sale agreement as p. exh 6 dated 12.2.2003 and copy of records for L.R No. Nyaki/Thuura/972 as D. exh 8.
34. Looking at D. exhibit 7 against P. exhibit 2 it is evident that as at 12.2.2003, Parcel No. 2148 was still in the name of the 1st respondent's deceased husband who had passed on in 1990.
35. The alleged agreement did not contain the parcel numbers. The same was not executed by anyone with legal capacity to deal with the property of the deceased's estate. All the beneficiaries of the deceased at the time were not involved in the transaction.
36. Similarly the purported sale or land exchange agreement fell short of the requirements of Section 3 (3) of the Law of Contract Act and hence my finding is that the same was unenforceable in law.
37. Further the appellant traced his land to Domisiano Kauro alleged to have had capacity to transfer or transmit the title to parcel no. 2148. The 1st respondent called the executive officer of the court who produced records for P & A Succession Cause no. 504 and 507 of 2012.
38. None of the files related to the estate of the deceased M'Mwitari Mutuera in general and specifically parcel no. 2148.
39. The law is that any one claiming ownership to land has to provide an unbroken chain of events tracing his root of title to the record.
40. In this suit, the 1st respondents produced a clear path leading to her late husband as the original owner of the suit land. The chain was interrupted by the entry into the picture of the appellant between 25.4.2014 and 23.12.2014.
41. Other than D. exhs 4, 6, 7 & 8, the appellant failed to bring any transfer forms, land control board consents and receipts showing that indeed his title deed was validly, procedurally and lawfully acquired so as to be capable of protection under Sections 25 & 26 of the Land Registration Act 2012 given the cogent and consistent evidence by the 1st respondent that the appellant presented a certificate of grant purportedly issued by the court in Succession Case No. 507 of 2012 which did not relate to the estate of the deceased as the owner of the suitland as at 1990.
42. The witnesses called by the appellant were of little assistance to him for they did not author the impugned documents. The appellant had pleaded the title deed was issued after a gazettment notice. He did not produce that gazette. The Succession Cause No. 507 of 2012 was contrary to the copy of the records held by the land registry. All these are facts which were in existence and in which the appellant pleaded

and stated in his evidence alleging he had done due diligence prior to acquiring the suit land.

43. Assuming that the appellant had done background check then at the time the agreement was signed on 12.2.2022 the deceased was no more. Letters of administration had not been sought and or obtained. The appellant knew the deceased had pushed on yet he purported to acquire the land without involving the 1st respondent. In his defence, the appellant pleaded the 1st respondent was privy, consented and or authorized the transaction. Unfortunately the appellant's evidence and witnesses failed to demonstrate how, when and where the 1st respondent consented, approved and or voluntarily gave out her beneficial share to the suit land prior to the forcible eviction in 2015.

44. Section 45 of the Law of Succession Act Cap 160 Laws of Kenya, forbids intermeddling with a deceased property. It is only a personal representative who could deal with the land and any sale of land by a person lacking such capacity is null and void as held in *Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & 3 others (2016) eKLR*, see *Said Mabruk Abed vs Margaret Mumbua Muli (2022) eKLR*.

45. A bonafide purchaser is one who genuinely intended to purchase a land but did not intend to acquire it wrongly.

46. In *Nancy Kahoga Amadiva vs Expert Credit Ltd & another (2015) eKLR*, the Court of Appeal held the extent of due diligence to be exercised by a purchaser was not cast on a stone.

47. Given the circumstances in this matter the appellant cannot escape blame. The sale agreement clearly talks of Kshs.16,000/= being given by the appellant to facilitate the succession proceedings out of which he was to acquire the suit land. He therefore participated in the illegal scheme to obtain the land. He was the beneficiary of the outcome which this court has found above could not be used to transfer the deceased's land.

48. My finding therefore is that the appellant was party to the illegal, unprocedural and invalid process toward the acquisition and registration of the suit land in his name.

49. In view of the foregoing, I find the 1st respondent had proved his case in the lower court to the required standard. The appeal herein lacks merits and is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 27TH DAY OF APRIL, 2022

In presence of:

Mrs. Otieno for applicant

Mutuma for respondent

HON. C.K. NZILI

ELC JUDGE