REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 8 OF 2018

PAUL MAGANGA.....APPELLANT

VERSUS

KENEDY JULIUS RIGHA (as administrator of the

Estate of Julius Righa (deceased)...RESPONDENT

JUDGMENT

(Being judgment on appeal from the decision of C.N Ndegwa Principal Magistrate delivered on 17 April 2018 in Mombasa CMCC No. 4281 of 2001)

1. Through a plaint filed on 29 October 2001, the appellant sued one Julius Righa (defendant, now deceased) over ownership of the Plot No. 56 Wundanyi. The appellant claimed that he is the sole owner of this plot. In the plaint, he pleaded that in the year 1981, he contracted the defendant to construct a house on the plot, with the understanding that upon completion of the house, he would recover his charges from the rent thereof which charges stood at Kshs. 13, 467/=. He pleaded that after recovering his fees, the defendant would use further proceeds from rent to construct an extension to the house. He averred that he got concerned as there was no construction going on, and upon inquiry, he was shocked to learn that the status of the property had changed and it was not registered jointly in his name and that of the defendant. He alleged that this transfer was fraudulent, the particulars of fraud being that the defendant forged the appellant's signature in an alleged affidavit. In the suit, the appellant asked for the following prayers :-

> i. An injunction restraining the defendant from collecting rent from the tenants and further compelling the tenant to remit the monthly rental in court pending the determination of this suit.
>
> ii. Vacant possession of the property.
>
> iii. Costs and interest

2. The defendant filed defence where he denied the allegations of the appellant.

3. The appellant testified and called one witness, one Alan Mabuka, the clerk to Taita Taveta County Council. In his evidence, the appellant testified that the defendant was his contractor, and that in his absence, he transferred the plot and collected his allotment letter in the year 1978. He claimed that he forged a signature to say that they were partners. He stated that on inquiry he was told that the defendant had made an application to be included as a co-partner yet there was no such arrangement. Mr. Alan Mabuka's evidence was that the plot was initially allocated to the appellant in 1969. He had County Council minutes of November 1973 indicating transfer of the property so that it is co-owned jointly with the defendant. He however testified that the forms required for the transfer were not filled. He testified that an allotment letter was issued by the Commissioner of Lands in the two names. In cross-examination, he acknowledged that he had not come to court with the entire file but only with what he thought was relevant. He also affirmed that as at 1978 the land was co-owned following the joint allotment letter. He agreed that it is on the basis of County Council minutes that decisions are made. With the above evidence, the appellant closed his case.

4. The now deceased defendant testified that he has known the appellant since the year 1969 as they were neighbours. He testified that the plot was first given to the appellant by Taita Taveta County Council but the appellant could not develop it and it was repossessed. He then approached him so that they can own the plot together and develop it. He agreed, and both their names were inserted as owners of the plot. He produced a letter dated 21 January 1974 addressed to the appellant from the Taita Taveta County Council informing him that his application to have the plot jointly owned was approved and the specific minute indicated. He stated that problems arose when the appellant went to the tenants and demanded that they pay rent to him exclusively. His position was that the plot was jointly owned. Shortly after he testified, the defendant died. He was subsequently substituted by his legal representative, one Julius Righa, who is now the respondent.

5. After assessing the evidence, the trial Magistrate delivered his judgment on 17 April 2018. First, he dismissed the first prayer in the plaint as it was only interim pending hearing of the suit. On the substance of the matter, his findings were that the plot is jointly owned. He found that there was documentary evidence showing that the appellant requested for transfer of the plot to include the name of the defendant, and in the year 1978, a joint letter of allotment was issued. He found the contention of the appellant that he is the sole owner of the property to be baseless and dismissed the appellant's suit. He nevertheless ordered each party to bear his costs given their long relationship.

6. Aggrieved, the appellant filed this appeal and he has cited the following grounds :-

> 1. The learned Magistrate erred in law and fact in holding that plot no. 56 Wundanyi herein the suit property is jointly owned by the plaintiff and defendant.
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> 2. The learned Magistrate erred in law and fact in holding that the plaintiff had written a letter to the County Council of Taita Taveta asking for the plot to be registered in the names of the plaintiff and the defendant.
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> 3. The learned Magistrate erred in law and fact in failing to consider the evidence of PW2 an officer from Taita Taveta County Council.
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> 4. The learned Magistrate erred in law and fact in holding that both the plaintiff and the defendant were sharing profits from the suit property.
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> 5. The learned Magistrate erred in law and fact in holding that prayer (a) of the plaint had been spent due to lapse of time.
>
> 6. The learned Magistrate erred in law and fact in holding that the property rates were jointly paid in spite of the glaring evidence showing the contrary.

7. I directed that the appeal be heard through written submissions, and both Mr. Nyamboye, learned counsel for the appellant, and Ms. Mwainzi, learned counsel for the respondent, filed submissions. I have considered these before arriving at my decision.

8. I will begin by saying that I see no issue with ground (5) of the appeal. The trial Magistrate was correct in finding that the prayer as drawn was one seeking orders pending hearing of the suit. That indeed was how the prayer was drawn and I do not see what quarrel the appellant has for that was his own drafting. The other grounds of appeal really attack the finding of the trial Magistrate that the property was jointly held. Mr. Nyamboye in his submissions argued that the issuance of the Letter of Allotment dated 2 May 1978 did not follow due process to result in the property being allotted to both parties. Counsel referred to the evidence of PW-2. He also referred to the case of *Munyu Maina vs Hiram Gathitha Maina (2013) eKLR* which case held that where title is under challenge then the proprietor needs to go to demonstrate the root of his title. He also relied on the case of *Ali Mohamed Digane vs Hakar Abshir (2021) eKLR* where the court stated that an allotment letter does not confer an interest in land as it is nothing more than an offer. He submitted that the respondent did not produce evidence that stand premium was paid and annual rent/rates paid.

9. The above submissions of counsel do not move me. The documentary evidence presented is in fact very clear on the ownership of the suit property. The property was indeed first allotted to the appellant. However, the appellant did apply to change the proprietorship to be held jointly between himself and the deceased defendant. This is apparent in the letter dated 21 January 1974 written by the County Council of Taita Taveta to the appellant. That letter states as follows :-

> RE : APPLICATION FOR TRANSFER
>
> Your application for transfer of plot No. 56 and building to include Mr. Julius Righa at Wundanyi market in Werugha Location has been recommended by the Trades and markets Committee subject to conditions under minute 19/73 No. 27.
>
> Signed
>
> Clerk to the Council.

10. There must have been an application made by the appellant for this letter to be written. The minutes of the County Council were produced in evidence and entry 27 of the minutes of 1 November 1973, is as follows :-

> Paul Maganga – Transfer of plot No. 56 and building to include Mr. Julius Righa – Wundanyi market – Werugha Location. – Recommended.

11. It is true that in his evidence, PW-2 testified that they never received a letter of application for transfer of ownership from the plaintiff in the standard form and that as per their records, no standard transfer form was filled. But that evidence is hard to believe. First, PW-2 acknowledged that he had not carried with him the file relating to the plot. Without that file, it cannot be concluded that no such application was ever made. Secondly, the County Council could not have deliberated on a non-existent application. There must have been an application made for them to discuss and pass a recommendation, and to me, it matters not that the application was not made in the standard form if that was indeed the case. I find it hard to believe that the County Council simply went on a frolic of its own to discuss a matter that had not been placed before it in the first place. In any event, if indeed it is the case of the appellant that the County Council discussed a matter without him having made an application, then he should have sued the County Council for fraud. If it was the appellant's case that he is not the one who made the application before the County Council, then he ought to have produced the letter or application that was made, and demonstrate that he was not the author of that letter. In his suit, the appellant did plead in his plaint that the particulars of fraud were forgery. He never brought any evidence by any expert that his signature had been forged. I agree with the submissions of Ms. Mwainzi for the respondent, that

the appellant failed to prove fraud. Moreover, we should not forget that the appellant's case was that he contracted the defendant to construct a house and deduct his charges from the rent. No such agreement was ever produced to prove this allegation. I am afraid that the oral evidence of the appellant and PW-2 do not trounce the rich documentary evidence in the matter which is in favour of the respondent. I cannot fault the trial Magistrate for finding as much.

12. As I have mentioned, the County Council of Taita Taveta did deliberate on an application to have the suit property held jointly by the appellant and the respondent. They approved it. What followed was that a letter of allotment was formally issued to the two proprietors. That letter of allotment was issued by the Commissioner of Lands and is dated 2 May 1978. I see no problem with this letter of allotment as it follows what was minuted by the County Council of Taita Taveta. I am aware that Mr. Nyamboye in his submissions raised issue about the letter of allotment. I do not see the place of those submissions. If it is Mr. Nyamboye's submissions that the letter of allotment is faulty, then that does not help his client at all, for it would mean that his client holds nothing in the property, since his proprietary interest, which is a half share of the suit property, stems from that letter of allotment. Attacking that letter of allotment is akin to the appellant now saying that he holds nothing in the suit property which as I have pointed out does not help him at all.

13. There is the ground of appeal that the trial Magistrate erred in finding that both parties were sharing profits and that property rates were being jointly paid. I do not even see the point of addressing this ground of appeal. The dispute before court was not over any sharing of profits or whether property rates were being paid jointly or by one party. The dispute was whether the property was wholly owned by the appellant as he alleged or whether it was jointly owned as claimed by the defendant. It matters not whether the profits were being shared or not, or whether rates were being paid by one party. The case before court had nothing to do with these. If the appellant wishes to pursue a case about sharing of profits or payment of rates, that would be a completely different cause of action which he has every right to pursue to its logical conclusion.

14. I think I have said enough to demonstrate that I find no merit in this appeal.

15. It is hereby dismissed with costs.

16. Judgment accordingly.

DATED AND DELIVERED THIS 20TH DAY OF APRIL, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA