



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 41 OF 2008

(Being an appeal from the judgment of the Resident Magistrate Mombasa – Hon. H. Adika dated 19th February, 2008 in SRMCC No. 5438 of 2004)

AGNES MBOTE MWIHAKI APPELLANT

V E R S U S

PHOEBE S. TITUS RESPONDENT

JUDGMENT

1. Appellant filed a suit in **Mbsa SRMCC No. 5438 of 2004** against the Respondent. Appellant sought judgment in that suit of an order of permanent injunction to restrain the Respondent from interfering with the Appellant's ownership of Parcel No. HC/MS 115 PLOT NO. 546 MIKINDANI (**Plot No. 546**)
2. The Respondent in her defence filed a defence denying the claim and also counterclaimed. By her counterclaim the Respondent prayed for a declaration that Plot No. 546 belong to her and one BABU KHAMIS OMAR as administrators of the Estate of Boniface Mbithi Munyao (Deceased). The Respondent also sought mandatory injunction to compel the Appellant to demolish the structure on Plot No. 546 and a permanent injunction restraining the Appellant from trespassing, constructing or developing Plot No. 546.
3. The trial Magistrate's Court after hearing the parties delivered its judgment on 19th February 2008 by which the appellant's case was dismissed and a mandatory injunction was granted to the Respondent.
4. It is that judgement that is the subject of this appeal. As the 1st Appellant Court this Court is expected to evaluate the evidence tendered at trial and to reach to its own conclusion bearing in mind the caution set out in the case **SELLE & ANOTHER -VS- ASSOCIATION MOTOR BOART COMPANY LTD & OTHERS [1968]EA 123** where the Court stated-

“An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial Judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally....”

The Court will also be guided by the case **PETER -VS- SUNDAY POST LTD [1958] EA 424**

where it was also stated-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide... “

5. Appellant in evidence stated that she bought Plot No. 546 on 7th January 1992 from an agent called Gaitho & Wasika. The plot belonged to Boniface Munyao. She purchased it for Kshs. 60,000/- and paid all the debts related to the plot. After making that payment it was then that the agreement for sale was signed. Appellant produced the card entitled **MUNICIPAL COUNCIL OF MOMBASA HOUSING DEVELOPMENT DEPARTMENT** which was in the name of Christopher Mwangi. Appellant also produced various receipts issued by the Municipality of Mombasa of various dates in the name of Christopher Mwangi. Appellant also produced a Power of Attorney signed by Boniface M. Munyao on 25th June 1992 and witnessed by Manghnan Advocates.
6. Appellant stated that after buying Plot No. 546 she put 'someone' in possession of the plot and that she fenced it. She stated that she was however stopped from carrying out construction on that plot by someone who claimed ownership of it. That from 1992 to 2004 she had remained on the Plot without anyone disturbing such occupation. In respect of the transaction of the purchasing the plot she stated-

“I never saw the owner of the Plot but the agent showed me the plot.”

7. In cross examination Appellant stated that she left Kenya for Switzerland in 1999 but made visits back to Kenya every six months and every time she visited Kenya she ensured to see the plot. Again on cross examination in respect of the transaction of the purchase of that plot she stated-

“I never saw the person who sold the plot to me. I know the agents from long ago.”

8. In reference to the sale agreement between her and Boniface Munyao on being cross examined she stated-

“Boniface is the one who made the agreement but I don't know who made it. There is no signature of mine The agent is the one who gave me the documents.”

9. PW2 was John Mungai Gaitho. He said that his business was selling properties as an agent. He recalled that in 1992 he sold to the Appellant Plot No. 546. He proceeded to state-

“She (Appellant) came to me she wanted a plot in Mikindani. I showed her the plot and she bought it from Boniface Mbithi The money was given to me and I gave Boniface his money.”

10. This witness stated that he saw Boniface signing the Power of Attorney which he took to the Lands office for registration. On being cross examined without saying who, he stated that an Advocate signed the Power of Attorney.

11. He also confirmed in cross examination that the Appellant never met

Boniface. He further stated-

“I am the one who used to deal with him (Boniface). I was the agent. The agreement was prepared by my Company I saw Boniface sign it.”

12.PW3 was an Advocate called Manghnan. He was questioned about his signature appearing as a witness in the Power of Attorney. This is what he said-

“On the face of it, it appears to be my signature The Power was not done in my office but on the face of it (sic) is my signature On the face of it is my signature but I have no recorection of it.”

Respondent in evidence confirmed she was the Administrator of the Estate of her late husband Boniface Mbithi Munyao (Deceased). She produced a Certificate of Confirmation of Grant made in High Court Succession Cause No. 229 of 2003 in respect of the Estate of Boniface Mbithi Munyao (Deceased). Amongst the property which was the subject of distribution in that Estate is Plot No. 546. That property is reflected in the Certificate of Confirmation of Grant. Respondent also produced a document entitled Municipal Council of Mombasa Housing Development Department Certificate of Transfer of Property, that is Plot No. 546 was dated 28th April 2004. It showed that the said property was registered in the name of Boniface Mbithi Munyao and it reflected the transfer of that plot into the Respondent's name alongside the name of Babu Khamis Omar her co-administrator.

13.Respondent denied under cross examination that the Plot was sold by her late husband.

14.I wish to begin by considering ground four of the Appellants grounds of appeal. By that ground Appellant stated that the learned Trial Magistrate erred in finding that the Power of Attorney was not valid at the time of sale. Looking at the judgment of the trial Magistrate's Court nothing could be further from the truth. On the issue of Power of Attorney this is what the learned Magistrate stated in his Judgment-

“... the produced Power of Attorney which she (Appellant) said was signed before and (sic) Advocate called Manghnan. The Advocate testified before this Court and categorically said he does not remember signing the particular document”

That statement in the judgment of the Magistrate is in my view a true reflection of the evidence adduced by the Advocate whose signature appears as a witness to the execution by Boniface M. Munyao on the Power of Attorney.

15.The Power of Attorney was donated by Boniface M. Munyao. Appellant in that Power of Attorney referred to Boniface M. Munyao as the Purchaser. It is important to consider what Power is alleged to have been donated by Munyao to the Appellant. I will therefore reproduce some parts of that Power of Attorney as follows-

“NOW IN CONSIDERATION of such payment as aforesaid I HEREBY IRREVOCABLY APPOINT the Purchaser and all persons deriving title under him to be my lawful Attorney or Attorneys for me in the name to do and execute at my own expense all or any of the following acts deeds and things that is to say:-

1. ***To assign and/or transfer the said property (which expression shall for all purpose of this Power of Attorney include all building and other improvements thereon, if any;***
2. ***To sell lease or otherwise dispose of the said property or any parts thereof for any purpose and on any such terms as he or they may in his or their sole discretion think fit, but not to mortgage charge the same.***
3. ***To occupy and manage and otherwise deal with the said property in such manner as he or they in his or their sole think fit.***
4. ***To receive all rents or other income from the said property and all proceeds of any sale or other disposals thereof and to give valid receipts and discharge for the same;***
5. ***To commence carry or defend or compromise all or any actions or proceedings touching the said property;***
6. ***To execute all such documents as he or they may consider necessary or proper for any of the***

foregoing purposes;

7. *Generally to act in relation to the said property as fully and effectively in all respects as I myself could do as being himself or themselves sole beneficial owner or owners thereof;*
8. *To appoint and remove at pleasure any substitute for or agent under them or him in respect of all or any of the matters aforesaid upon such terms as my Attorney or Attorney may think fit.”*

16. It is accepted by all that Munyao died in the year 2003. Since the donor of that Power of Attorney was dead when this case came to this Court it is not clear what purpose that power was intended to be used. The Power of Attorney automatically terminated on the death of Munyao. Blacks Law Dictionary 8th Edition defines Power of Attorney as-

“An instrument granting someone authority to act as agent or attorney. Infact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principle.” (underlining mine)

17. It follows therefore that the Power of Attorney could not assist the Appellant to advance her case in any way because it had terminated. That Power of Attorney as will be seen above would only have enabled Appellant to deal with the land on behalf of Mbithi but was incapable of transferring ownership of the land to her.

18. Appellant's grounds of appeal Nos. 1, 2 and 7 relate to the trial Court treatment of the evidence adduced before it. Those grounds fault the trial Magistrate for making findings contrary to the evidence and also fault the Magistrate for finding that the Appellant had not proved her case. In that regard the learned trial Magistrate stated-

“The Plaintiff (Appellant) to my mind has not proved her case and (sic) a balance of probability and her case is dismissed.”

19. As stated before the Power of Attorney did not advance Appellant's

case at all. The agreement of sale which was exhibit 8 showed that Boniface M. Munyao was selling Plot No. 546 to the Appellant for total Kshs. 75,000/-. It showed that the Appellant was to make first payment of Kshs. 60,000/- and then pay the balance within one month. That agreement was however not signed by the Appellant. It was only purportedly signed by Boniface M. Munyao. If the agreement was not executed by both the vendor in this case Munyao and the purchaser in this case the Appellant can it be said to be a valid agreement? To be valid the agreement needed to be signed by both parties. The Appellant's signature on that agreement would have signified her acceptance of the offer to purchase the plot. The learned author Treitel in the book **THE LAW OF CONTRACT** 11th Edition stated-

“And acceptance is a final and unqualified expression of assent to the terms of the offer.”

How can the Court determine that the Appellant assented to the terms of the purchase if she did not sign the agreement? This situation is even made more complicated by the Appellants own acknowledgement that she did not meet Bonfiace Munyao and all along in regard to the transaction of the purchase dealt with Gaitho the agent. How did she even determine that Gaitho had authority of Munyao to sell Plot No. 546? No evidence of such authority was produced before Court. It follows therefore that the Appellants grounds No. 1, 2 & 7 are rejected.

20. In ground 3 the Appellant faulted the Appellant Court for awarding the Respondent a mandatory injunction to demolish the foundation constructed on Plot No. 546 by the Appellant. In view of the finding made that the Appellant did not prove her case on the required standard of proof and bearing in mind the defence exhibit No. 2 that is Certificate of Transfer of property into the Respondent's name with her co-administrator it was logical for mandatory injunction to be issued. The trial Court should have proceeded to make the declaration sought in the counter claim that the

plot belonged to the Respondent and one Babu Khamis Omar. There is sufficient evidence in this regard.

21. On ground six the Appellant faulted the trial Magistrate for failing to give reason for the judgment issued by his Court. In my view the learned Magistrate by his judgment showed that he appreciated that the Appellant failed to prove her case and that the Respondent proved her counter claim on a balance of probability. In any case since this is the 1st Appeal the Appellant was entitled to re-evaluation of the evidence and if indeed the trial Magistrate did not give reasons for his decisions since this Court is re-evaluating the evidence there is no basis for ordering re-trial.

22. In the end I find no merit in this appeal and it is dismissed with costs to the Respondent since the Respondent did not cross-appeal I will not make declarations as sought in her counter claim. It is so ordered.

Dated and delivered at Mombasa this 21st day of November, 2013.

MARY KASANGO

JUDGE