Ndungu v Thuku (Environment and Land Appeal 18 of 2019)
[2022] KEELC 3411 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3411 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 18 OF 2019

BM EBOSO, J

JUNE 9, 2022

BETWEEN

SAMUEL KIRUTHI NDUNGU ..... APPELLANT

AND

MARY GATHONI THUKU ..... RESPONDENT

((Being an Appeal arising from the Judgment of the Chief Magistrate Court at Thika by Hon M. W Wanjala, Senior Resident Magistrate, delivered on 20/1/2019 in Thika CMC Civil Case No 22 of 2013))

JUDGMENT

1. This appeal arose from the judgement of Hon M W Wanjala (SRM) rendered on January 20, 2019 in Thika CMC Civil Case No 22 of 2013. The key issue in the said suit was whether the respondent had sold to the appellant land parcel number Ruiru/Ruiru East Block 2/2317. The learned magistrate found that the respondent did not sell the suit property to the appellant. He further found that the appellant was illegally in possession of the suit property. He ordered the appellant to vacate the suit property within sixty days. I will outline a brief background to the dispute before I analyze and dispose the issues that fall for determination in this appeal.

2. Through a plaint dated June 6, 2013, the respondent sought an order that the appellant be ordered to vacate the suit property. She averred that she was the registered proprietor of the suit property and that the appellant had illegally entered the suit property and developed a permanent house thereon without her knowledge. She added that in the year 2012, she discovered that her title deed relating to the suit property was missing. She reported the loss at Makuyu Police Station and she was issued with a police abstract. She thereafter caused the Land Registrar to publish a notice in the Kenya Gazette relating to loss of her title. She was subsequently issued with a new title. It was her case that she discovered the appellant's occupation of the suit property towards the end of the year 2012.

3. The appellant contested the suit through a statement of defence and counterclaim dated July 4, 2013. The appellant subsequently amended the statement of defence and counter-claim and abandoned the limb of the counter-claim that was anchored on the doctrine of adverse possession. Through the amended defence and counter-claim dated August 31, 2018, the appellant sought an order of specific performance against the respondent in relation to the suit property. He averred that the respondent sold to him the suit property in 2001 and gave him the original title. It was his case that having purchased the suit property from the respondent, he developed a permanent residential home thereon and he had been in possession of the suit property all along. He relied on a land sale agreement dated December 20, 2001 and contended that the respondent's late husband signed the land sale agreement on behalf of the respondent.

4. In her reply to defence and defence to counter-claim, the respondent denied selling the land to the appellant. She denied being privy to the agreement. Further, she denied receiving purchase price from the appellant. She similarly denied giving the appellant the original title deed.

5. Viva voce evidence was taken and parties filed their respective written submissions. Subsequently, the trial court rendered the impugned judgment and held that it was highly improbable that the respondent was present when the sale agreement was being prepared; and that it was highly improbable that the respondent sold the suit property to the appellant. He allowed the respondent's claim and ordered the appellant to vacate the suit property within 60 days.

6. Aggrieved by the judgment of the trial court, the appellant brought this present appeal, advancing the following verbatim grounds:

> " 1. The learned trial magistrate held that the appellant was not entitled to ownership of the property known as Ruiru/Ruiru East Block 2/2317 (the suit property) as the agreement for sale dated December 20, 2001 had not been executed as required by section 38(1) of the *Land Act* No 6 of 2012 and section 3 of the *Law of Contract Act*. This was an error of the law considering that;
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> (a) Section 3(3) of the *Law of Contract Act* and the *Land Act* No 6 of 2012 were in force in December 2001 where the agreement for the sale of suit property was entered into.
>
> (b) No evidence was led by the respondent to suggest that she did not execute the agreement for sale.
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> 2. The learned trial magistrate held that it was not possible for the respondent to enter into the transaction since her identity card number that appeared in the transaction was the old generation number yet she had a more recent identity card at the time of the transaction. In arriving at this conclusion, the learned trial magistrate fell in error considering that:
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> (a) The appellant was not afforded adequate opportunity to interrogate the respondent's recent identity card number which the respondent's advocate introduced by ambush during cross-examination.
>
> (b) The burden of proving that the respondent did not have an old generation ID Card at the time of the transaction was vested on her. The above finding of the court unjustifiably shifted the burden to the appellant.

3. The learned trial magistrate fell into errors and considered non-issues and irrelevant factors in deciding that the appellant was not entitled to the relief sought in the amended counterclaim. Some of the irrelevant factors that were considered are:

(a) The agreement for sale did not capture the identity card number of Peter Thuku, the respondent's husband even though he executed the agreement. No law required the agreement to capture the identity card number of the said Peter Thuku or any of the parties that executed the agreement for sale.

(b) Mr Wilson Ngugi never availed a bank statement to demonstrate that he withdrew the amount that was used by the appellant to purchase the suit property. This was not an issue before the court and therefore unnecessary.

(c) The plaintiff did not place a thumbprint on the agreement for sale. No law required a party to a sale agreement to impress a thumb print on a sale document at the material time for it to be binding.

4. The learned trial magistrate abrogated her mandate in not appreciating the nature and importance of the evidence that was tendered by the appellant. In particular, and for avoidance of doubt, the learned magistrate ignored the implication of the fact that:

(a) The appellant was holding the original title document for the suit property.

(b) The appellant had been in possession of the suit property for over 12 years.

(c) Its final orders breathed life to the respondent's dishonesty and unjust enrichment."

7. The appeal was canvassed through written submissions dated January 6, 2022, filed by the firm of Rapando & Odunga Advocates. Counsel for the appellant identified the following as the two key issues falling for determination in the appeal:

(i) Whether section 3(3) of the *Law of Contract Act* was in force in December 2001 when the agreement for sale of the suit property was entered into; and

(ii) Whether the appellant had a valid interest over the suit property.

8. Counsel for the appellant faulted the trial court for relying on section 3(3) of the *Law of Contract Act*, contending that the said legal framework was introduced in the year 2003 and was therefore not in force when the contract was executed. Counsel added that the appellant having proved that he had actual and/or constructive possession of the suit property since 2001, pursuant to a sale where purchase price had been paid, a resulting trust automatically arose. Counsel relied on the framework in section 3(3) of the pre-2003 *Law of Contract Act*. Counsel cited the Court of Appeal decision in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR and the Court of Appeal decision in *Willy Kimutai Kitili v Michael Kibet* [2018] eKLR.

9. On whether the appellant had a valid interest in the suit property, counsel submitted that the appellant had been in peaceful and uninterrupted occupation of the suit property for over 12 years and held the original title document to the suit property. Counsel argued that there was evidence that no one had ever challenged the appellant's occupation of the suit property. Counsel submitted that the fact that the respondent made her claim after the death of her husband who was privy to the sale demonstrated dishonesty on her part. Counsel added that the respondent was all along aware that the appellant had established a permanent home on the suit property where he had been residing with his family for

over 12 years without any objection from the respondent. Counsel cited the decision in *Mwangi & another v Mwangi* [1986] KLR and submitted that the rights of a person in possession or occupation of land were equitable and binding on the land. Counsel further cited the decision in *Public Trustee v Wanduru* [1984] KLR 314 and submitted that a purchaser in possession had an overriding interest under the provisions of the *Registered Land Act*. Counsel urged the court to allow the appeal.

10. The respondent filed written submissions dated January 24, 2022 through the firm of Nganga Ngigi & Co Advocates. Counsel identified the following as the two issues falling for determination in the appeal:

    (i) Whether the sale agreement dated December 20, 2001 is valid; and

    (ii) whether the appellant has a valid interest in the suit property.

    Counsel submitted that the respondent had tendered evidence to the effect that she never signed the agreement dated December 20, 2001. Counsel added that without a power of attorney, the respondent's husband had no authority to execute the agreement on the respondent's behalf. Counsel for the respondent relied on section 3 of the current *Law of Contract Act* and argued that no suit can be maintained on the contract dated December 20, 2001.

11. On whether the appellant has a valid interest in the suit property, counsel for the respondent submitted that the appellant entered into the suit property illegally without the knowledge or consent of the respondent. Counsel added that the appellant trespassed into the suit property and built a permanent residential house on it but the respondent only got to learn about it in the year 2012. Counsel for the respondent faulted the trial magistrate for not awarding the respondent costs of the suit. It was the position of counsel for the respondent that this appeal is unmerited.

12. I have considered the entire record of appeal; the original record of the trial court; and the grounds set out in the memorandum of appeal. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in the appeal. The appellant itemized four grounds of appeal but in his subsequent written submissions, he condensed the four grounds of appeal into two issues. On his part, the respondent identified two issues focusing on the question of validity of the agreement dated December 20, 2001 and the question as to whether the appellant has any valid interest in the suit property. Taking all the above into account, in my view, the following are the issues that fall for determination in this appeal:

    (i) Whether the trial magistrate erred in relying on the framework in section 3(3) of the post – 2002 *Law of Contract Act* and section 38 of the *Land Act*, No 6 of 2012;

    (ii) Whether the respondent sold the suit land to the appellant in 2001; and

    (iii) Whether the appellant is a trespasser on the suit land.

    I will make brief sequential pronouncements on the three issues in the above order.

13. This is a first appeal. The principles upon which a first appellate court exercises jurisdiction are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* [2013] eKLR as follows:-

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

The above principle was similarly outlined in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kustron (Kenya) Limited (2000) 2EA 212."

14. The first issue is whether the trial magistrate erred in relying on Section 3(3) of the post - 2002 *Law of Contract Act* and section 38 of the *Land Act*, No 6 of 2012. The trial magistrate rendered himself on this issues as follows:

> " I have considered all the evidence as well as the submissions filed by the parties. The main issue for determination is whether the defendant bought the suit land from the plaintiff and whether he is in legal occupation of the same. It is not in dispute that the land herein is registered in the names of the plaintiff, that there are currently two titles both issued in the name of the plaintiff, and that the defendant is in occupation. As regards the legality of the agreement herein, section 38(1) of the *Land Act* No 6 of 2012 as read together with Section 3 of the *Law of Contract Act* states as follows:-
>
> > "No suit shall be brought upon a contract for the disposition of an interest in law unless:
> >
> > (a) The contract upon which the suit is founded-
> >
> > (i) Is in writing
> >
> > (ii) Is signed by all the parties thereto; and
> >
> > (b) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party."

15. Was the above framework applicable to the disputed land sale contract? The disputed contract was allegedly signed on December 20, 2001. This was before the current legal framework in section 3(3) of the *Law of Contract Act* was enacted in 2002. The framework came into force in 2003. The framework cannot be invoked to invalidate an agreement that was allegedly entered into in 2001 because it was not in force then. I therefore entirely agree with the appellant's counsel that the trial magistrate erred in relying on the post -2002 amendments to the *Law of Contract Act* to invalidate a pre-2002 land sale agreement. The framework which the trial magistrate should have relied on is the one that was in force as at December 20, 2001. The relevant part of the pre-2002 *Law of Contract Act* provided as follows:

> " (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized him to sign it;
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
>
> (i) Has in part performance of the contract taken possession of the property or any part thereof; or

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

16. It is clear from the proviso in the above pre-2002 framework that where a party to a non- compliant contract took possession of the land or any part thereof or being already in possession, he continued in possession in part-performance of the contract and did other acts in furtherance of the non-compliant contract, the purchaser would maintain an action for enforcement of the contract. Had the trial magistrate not made the above error, he would not have come to the finding that he made.

17. The same scenario applies in relation to section 38 of the *Land Act*, No 6 of 2012. The framework in section 38 of the *Land Act* is, by and large, a replica of the framework in section 3(3) of the *Law of Contract Act*. The contract at the centre of the dispute was signed on December 20, 2001, more than ten years before the current *Land Act* was enacted. Deference to the framework in the *Land Act* was therefore a grave error on part of the trial court magistrate. Consequently, my finding on the first issue is that the trial magistrate erred in relying on the post-2002 framework in the *Law of Contract Act* and the *Land Act*, No 6 of 2012. This error resulted in a misapprehension of the law on the validity of a non-compliant pre-2002 land sale contract.

18. The second issue is whether the respondent sold the suit land to the appellant in 2001. The respondent testified that she balloted for the suit property and she was shown the land in 1984. She was issued with a title in 1992. In 2012, it became necessary for her to transfer the suit property to her children. When she went looking for her title, she did no find it. She then made a report to Makuyu Police Station, swore an affidavit and caused the Land Registrar to gazette the loss. On February 25, 2013, she was issued with a new title. After she got the new title, she went to the suit property in the company of her children, "just to be taken by surprise to find a permanent building upon" the suit land. She investigated through neighbours and discovered that the appellant was the one who had build on the land. It was her evidence that she believed the appellant had illegally gotten hold of her lost title. She added that the appellant "took opportunity" of her "not vising the land" over a period of time to build up the permanent building on the land.

19. On his part, the appellant testified that in the year 2001, he wanted to buy land. He engaged a Mr Thuku Muria [now deceased] to identify for him a suitable piece of land. Mr Muria informed him that the respondent was selling her land. The appellant was known to the respondent at the time. He travelled to Makuyu where the respondent lived. He slept in Makuyu. The following day, he travelled to Thika together with the respondent and her husband, Peter Thuku and got an agreement drafted. He signed the agreement and the respondent's husband signed the agreement on her behalf. The agreed purchase price was Kshs 75,000. He paid the respondent Kshs 68,000 on signing the agreement. The respondent gave him the original title and allowed him to take possession of the land. He paid the respondent a further sum of Kshs 5,000, living a balance of Kshs 2,000. Upon taking possession of the land in 2001, he began construction of a five bedroom house on the land. He finished building the house in 2002 and moved in. He has lived on the land since 2002. He was surprised to learn that the defendant had fraudulently procured another title through false allegation of loss of title while aware that she had sold to him the land and she had given him the original title.

20. The Area Chief, Peter Kamau, testified that the appellant had lived on the suit land since 2002 and that in 2013 the appellant reported to him that the respondent sold to him the land where he lives but had failed to transfer it to him. He summoned the respondent but the respondent did not heed the summons.

21. Wilson Ngugi Ndungu testified that he is the one who withdrew and gave the appellant the money that the appellant paid to the respondent at the time of signing the agreement. He stated that he is the one who drew the hand-written agreement.

22. I have considered the totality of the evidence on record. Both Mr Peter Kamau and Wilson Ngugi Ndungu corroborate the appellant's testimony. Mr Peter Ngugi who is the Area Chief and a resident of the area since 1993 confirmed that the appellant has lived on the land since 2002. The respondent was completely unable to give any credible explanation as to how the appellant came to be in possession of the original title from 2001 to 2013, if not through the disputed sale. She was unable to give a plausible explanation for her inaction for the period of eleven years during which the appellant had been in quiet possession of the suit property, having built there a five-bedroom house between 2001 and 2002 in which he had been residing with his family since 2002.

23. It is similarly inconceivable that upon realizing that her title was missing in 2012, the respondent never went to the suit property and never contested the appellant's occupation of the land until she procured a new title. The logical conclusion I draw from the respondent's actions is that she sold the land to the appellant, received purchase price, handed over the original title and gave the appellant the go-ahead to take possession of the land. That is why she did nothing between 2001 and 2013. That is also why she did nothing until after the death of her husband who had signed the sale agreement on her behalf. That is why she did not object to the development of the suit property by the appellant.

24. In my view, although the respondent did not personally sign the sale agreement, there was a valid agreement for sale of land because the validating elements in the pre-2002 *Law of Contract Act* were fully satisfied as demonstrated through possession, development and occupation of the land prior to the enactment of the current framework in the *Law of Contract Act* and the *Land Act*. In my view, the principle in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR properly applies to the circumstances of this appeal.

25. Consequently, my finding on the second issue is that, on the balance of probabilities, the respondent sold the suit property to the appellant in 2001 and that is the only reason why the appellant had the original title and actual quiet possession of the land from 2001 to 2013 and developed it between 2001 and 2002 without any objection from the respondent.

26. Having made the above findings, it follows that the appellant is not a trespasser on the suit property.

27. The result is that, this appeal is allowed with costs. The judgment and decree of the Senior Resident Magistrate Court in Thika CMC E & L Case Number 22 of 2013 is set aside and is substituted with the following orders:

    a) An order directing the Land Registrar to cancel the subsequent title procured by the plaintiff together with all the related entries in the parcel register.

    b) An order directing the plaintiff in the said suit to facilitate conveyance of the suit property to the defendant within 60 days and in default the relevant officer at Thika Chief Magistrate Court shall execute all documents necessary for conveyance of the land to the defendant.

    c) An order dismissing the plaintiff's claim.

    d) An order awarding the defendant costs of the primary suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF JUNE 2022.

BM EBOSO

JUDGE

In the Presence of:-

Mr Ochieng for the appellant

Mr Wainaina for the respondent

Court Assistant: Ms Lucy Muthoni