



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 11 OF 2010

***(AN APPEAL FROM THE JUDGMENT AND DECREE OF J.N. MWANIKI (ESQ) S.R.M. AT
BARICHO IN SRM CC NO. 36 OF 2008 DELIVERED ON 27TH JANUARY 2010)***

BENSON MAINA KABAU.....APPELLANT/APPLICANT
VERSUS
JOSEPH WANJOHI NJAU.....RESPONDENT

J U D G M E N T

Before the Senior Resident Magistrate at Baricho the Respondent filed a plaint claiming that he was the registered proprietor of land parcel Mwerua/Kanyokora/1206 (“the suit property”) which the Appellant had without any legal right occupied and had refused to vacate despite notice. The suit was filed for a declaration that the Appellant was in unlawful occupation of the suit property. Eviction, *mesne profits* and permanent injunction were also sought. The Appellant filed a defence and counterclaim. He pleaded that the suit property was sold to him following which the consent of the Land Control Board was obtained and that he occupied in 2004. He claimed that the Respondent had, however, fraudulently obtained registration. It was sought that the suit be dismissed. In the counterclaim, the Appellant sought a declaration that the transfer and registration of the suit property to the Respondent was fraudulent. An order was sought that the registration be cancelled and that the suit property be registered in his name.

The trial court heard the matter in which each side called witnesses. It decided in favour of the Respondent and dismissed the counterclaim. This is what led to the present appeal. This first appellate court has the jurisdiction to review the entire evidence afresh to determine whether the conclusions of the trial court should stand. It is its duty to decide if there was no evidence to support a particular conclusion or if it shown that the trial court failed to appreciate the weight or bearing of circumstances admitted or proved, or was plainly gone wrong. (*PETERS –V- SUNDAY POST LIMITED [1958] EA 424*)

In the Memorandum of Appeal, it was claimed that the trial court had no jurisdiction to grant orders of eviction; that it had relied on a defective sale agreement of the Respondent which did not have the blessings of the Land Control Board; and that the court had generally not properly evaluated the entire evidence. The appeal was heard by way of written submissions of counsel. I have considered the entire record of the trial court and the submissions.

To start with, the suit property was registered in the name of the Respondent who held a title deed. Under sections 27 and 28 of the Registered Land Act (Cap.300) the registration conferred on him absolute and indefeasible claim to the land. Under section 143(1) of the Act, the court may order rectification of a register by directing that any registration be cancelled or amended where it is satisfied that such registration (other than the first registration) has been obtained, made or omitted by fraud or mistake. It was the Respondent’s case that he was the registered proprietor of the suit property but that the

Appellant had illegally occupied it. It is notable that possession, occupation, use and quiet enjoyment are rights that come with registration.

The Appellant, on the other hand, alleged that the registration in the name of the Respondent was fraudulent; that he had a beneficial interest in the suit property.

The power to rectify a register is conferred under section 159 to the High Court, unless the value of the subject land places the matter within the jurisdiction of the a Resident Magistrate. The issue raised about jurisdiction was, however, not about the value of the suit property. The submission by the Appellant's counsel was that the trial magistrate did not have jurisdiction to entertain the claim in regard to eviction since such power was only conferred to a Tribunal set up under the Land Disputes Tribunal Act of 1990, or upon the High Court. However, the Land Disputes Tribunal Act in its section 3(1) does not confer on the Tribunal the jurisdiction to adjudicate on ownership or title of a registered land. (**REPUBLIC –V- KAJIADO DISPUTES TRIBUNAL AND OTHERS *exparte* JOYCE WAMBUI AND ANOTHER H.C. MISC. CIVIL APPLICATION NO.689 OF 2001 AT NAIROBI**). The dispute between the Appellant and the Respondent was basically a contestation regarding who was the owner of the suit property. It was not a contest that the Tribunal had powers to adjudicate upon.

The register of the suit property produced by the Appellant as D. exhibit 1 shows that it measures 0.10 Ha. and was a sub-division of Mwerua/kanyokora/862. It came into being on 29th April 2004 having been registered in the name of Kinyua Karuri who on the same day transferred it to Charles Maina Karitu who on 24th December 2004 transferred it to the Respondent. The Respondent's evidence was that he bought the suit property from Charles Maina Karitu who had bought it from John Waweru Kinyua. He obtained consent of the Land Control Board and became the registered proprietor, he said. One of the reasons why the Appellant complains about this registration is that it was not supported by a valid consent, or that it had no consent at all. The Respondent was cross-examined about the consent. His answer was that the Board had granted him consent in April 2005. He called Charles Maina Karitu as his witness. This is the witness who allegedly sold the land to him. The witness testified that they went to the Land Control Board in 2005 and obtained consent. Neither the Respondent nor Karitu exhibited the alleged consent. If the registration to the Respondent was on 24th December 2004 and the consent was obtained in April 2005 then there is a problem. The registration was not supported by the consent of the Land Control Board. The consent was meant to come before and not after the registration. It was to be obtained within six months of the agreement to sell the land to the Respondent. My conclusion is that there was no consent to support this transaction and therefore the provisions of section 6 of the Land Control Act (Cap.302) were not complied with. The transaction was consequently null and void and could not support the registration. (**KARURI –V- GITURU [1981] KLR 247**). It follows that the complaint by the Appellant that the registration was obtained by fraud for lack of consent of the Land Control Board was valid.

The other contention by the Appellant is that he had actually bought the suit property and had obtained the consent of the Land Control Board to have it transferred to him. The consent was indeed produced as D. exhibit 5 and is dated 1st December 2004. It was produced by Tasisio Mwangi Gakunju who was a member of Ndia Land Control Board which had issued it. The evidence of the Respondent was that Charles Maina Karitu had bought the suit property from one Joseph Wamae Kinyua on 28th April 2004 (exhibit 5). Charles Maina Karitu got registered as owner. Subsequently, on 29th March 2005 Joseph Wamae Kinyua revoked the agreement between them (exhibit 3). In this revocation agreement, it was agreed that the seller be refunded the purchase price and instead the buyer transfers the suit property to the Respondent and thereafter registration was to follow. The register above shows that by the time of this revocation the suit property had already (on 24th December 2004) been transferred to the Respondent. How was this possibly done? The Appellant's contention is that this events confirm his believe that the registration to the Respondent was fraudulent and intended to deny him of his rightful claim to the suit property. This court agrees with him.

In short, the recorded word shows that the transaction in which the Respondent got registered in respect of the suit property did not have the consent of the Land Control Board. Further, it shows the

alleged purchase of the property by the Respondent and the subsequent registration in his name were fraudulent. The court accepts that the trial court did not properly evaluate the evidence that it received from the parties and their witnesses, and therefore came to the wrong conclusions. The result is that the Appellant's appeal succeeds with costs. The judgment of the lower court is hereby set aside and in its place there will be judgment dismissing the Respondent's suit with costs and allowing the counterclaim of the Appellant with costs. An order is hereby made that the register in respect of the suit property be rectified by canceling the name of the Respondent as proprietor and replacing it with the name of the Appellant as the proprietor.

DATED AND SIGNED AT BUNGOMA THIS 28TH DAY OF SEPTEMBER 2011

**A.O. MUCHELULE
J U D G E**

DELIVERED AND SIGNED AT EMBU THIS 19TH DAY OF OCTOBER 2011

**H.ONG'UDI
J U D G E**