



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 105 of 2007

JANE WANGARI NGANDA.....APPELLANT

VERSUS

JOSEPH WAGURA NGANGA.....1ST RESPONDENT
LEONARD MWANGI NJUGUNA.....2ND RESPONDENT
CHAIRMAN NDATHI MUGUNDA
COMPANY PROBE COMMITTEE.....3RD RESPONDENT
WILSON NDIRITU NGIRI.....4TH RESPONDENT
JAMES NJERU KANJA.....5TH RESPONDENT
STEPHEN GIKUNJU MIGWI.....6TH RESPONDENT
DAVID KANYUIRA.....7TH RESPONDENT

(Being an Appeal arising from the judgment of M. K. K. Serem, Senior Resident Magistrate, in Chief Magistrate's Civil Case Number 288 of 2007 delivered on 24th September 2007 at Nyeri)

JUDGMENT

This judgment is the result of the appeal against judgement of the Hon. Mr. M. K. K. Serem learned Senior Resident Magistrate delivered on 24th September 2007 through Nyeri CMCC 288 of 2007. **JANE WANGARI NGANDA** had filed the aforesaid suit against **JOSEPH WAGURA NGANGA** and six others, hereinafter referred to as the “1st – 7th respondents” by way of a Plaint dated 27th February 2003 filed before this court. The aforesaid suit was later withdrawn from this court and transferred to the Chief Magistrate’s Court at Nyeri for hearing and determination. In the aforesaid Plaint the Appellant sought for judgment in the following terms:

- (1) The allocation of plot No. 56 CHAKA TRADING CENTRE by the 3rd, 4th, 5th, 6th, 7th, defendants to the 1st Defendant and the purported sale to the 2nd defendant be declared null and void.***
- (2) The 2nd defendant to be evicted from the plot and the Plaintiff be placed in possession.***
- (3) The 2nd defendant jointly and severally be condemned to pay costs of this suit.***

The Respondents on their part each filed a defence to deny the claim. The suit was finally heard and dismissed on 24th September 2009. The Appellant was aggrieved hence this appeal.

On appeal the Appellant put forward a total of 11 grounds in his Memorandum of Appeal. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have this appeal

determined by written submissions. I have considered the recorded proceedings and the written submissions. Before going into the merits and demerits of the appeal, let me set out the brief background of the facts leading to this appeal.

The Plaintiff/Appellant tendered the evidence of three witnesses before the trial court to support her case. The Defendants too tendered the evidence of three witnesses. JANE WANGARI NGANDA, the appellant herein, produced evidence in form of a Share Certificate and payment receipts to show how she acquired **plot no. 56, CHAKA TRADING CENTRE. JOSEPH WAGURA NGANGA**, the 1st Defendant/Respondent tendered documentary evidence showing how he also acquired the same plot. The duo were each issued with proprietorship documents by NDATHI MUGUNDA CO. LTD through its Chairman NEWTON GITONGA MUHORO. What is not in dispute is that there was a double allocation of Plot No. 56. The 1st Respondent was allocated on 21st July 1983 whereas the appellant herein was allocated on 18th November 1983. Upon hearing the evidence of both sides, the learned Senior Resident Magistrate came to the conclusion that the 1st Respondent herein, to have been allocated the plot first in time as against the Appellant. He consequently proceeded to dismiss the suit. The appellant being unhappy has filed this appeal.

This being the first appellate court, the parties are entitled to a re-evaluation of the evidence. I have already stated that the Appellant put forward 11 grounds of appeal in her Memorandum of Appeal. I will deal together with those grounds while re evaluating the evidence tendered before the trial court. Those grounds are set out as follows:

- 1. Although it is trite law that a court document is deemed to have been filed when the necessary fees are paid, the Learned Magistrate ignored the fact that the Request for Judgment was filed and paid for on 10th March 2005 and the misleading court stamp must have been affixed by an error.***
- 2. The Learned Magistrate in his observation on the issue of how Interlocutory Judgment was entered, imputed unbecoming conduct on the part of the Appellant which view runs throughout the entire judgment.***
- 3. The Learned Magistrate erred in law and in fact in concluding that just by mere fact that one PETER MUKWANJU NGUNUNGU, who incidentally was not called to testify, paid his entrance fee earlier than the appellant he was the one entitled to the plot number 56.***
- 4. The Learned Magistrate erred in law in not noticing that between 1977 and 1983 no plots had been allocated to members in this company and if PETER MUKUWANJU NGUNUNGU sold anything to the First respondent he sold only the 4 receipts which amounted to Kshs.1,540/-.***
- 5. The Learned Magistrate erred in law and in fact in trying to justify why the First Respondent obtained his Share Certificate before he became a full member of the company.***

6. *The Learned Magistrate erred in law and in fact in allowing the relationship between the former chairman of the company and the Appellant influence his decision.*
7. *The Learned Magistrate totally ignored the effect of the Nyeri C.M.C.C. No. 427 of 2001 in which up to 2001 the First Respondent was seeking the court order to declare him the owner of this plot which suit is still pending in court.*
8. *the Learned Magistrate erred in law and in fact in failing to make a finding that the First Respondent was never shown the plot, never occupied the same and therefore is the one who was double allocated a plot already given to the appellant.*
9. *The Learned Magistrate erred in law and in fact in allowing himself to be influenced by the remarks of a Magistrate in another case.*
10. *The Learned Magistrate erred in law and in fact in misconstruing the essence of the registration number of the company because whereas the registration number of the company was 68497 which number was supposed to appear in all its documents, the First respondent's Share Certificate showed a different number 64897 which was not in any other document, an indication that it did not originate from the company records.*
11. *The Learned Magistrate erred in blaming the Appellant for not having a Clearance Certificate and yet they were being given only to those who had cases before the Probe Committee and not to those who were already settled like the appellant.*

On the evidence tendered, it is apparent that the appellant paid for the entrance fees of Kshs.40/= to be a member of Ndathi Mugunda Company Ltd., on 24th November 1977 whereas Peter Mukunaju Ngunungu, paid the entrance fee of Ksh.40/= on 25th February 1977 to be a member of the aforesaid company (3rd Respondent). The evidence on record further shows that Peter Mukwanju Ngunungu paid Ksh.1500/= for shares in respect of plot no. 56, Chaka in three installments, that is, Ksh.100/= on 25th February 1977, Ksh.200/= on 6th September 1977 and Ksh.1,200/= on 17th September 1977. The 1st Respondent bought shares representing both Plots No. 55 and 56 from Peter Mukunaju Ngunungu, a member of Ndathi Mugunda Co. Ltd. (3rd Respondent) at Ksh.22,940/=. The 3rd Defendant approved the sale and consequently caused the aforesaid plots to be transferred to the 1st respondent who in turn paid for survey and title fees to the 3rd Respondent. Unfortunately the 1st Respondent could not take possession of the aforesaid Plot because the 3rd respondent's Chairman, Newton Gitonga Muhoro was in occupation. The record shows that the 1st Respondent was issued with a Share certificate on 21st July 1983. The appellant on her part is alleged to have bought shares in

respect of Plots numbers 56 and 61 at Ksh.10,600/= on 26th September 1983. She was issued with a Share Certificate on 18th November 1983. On the 10th day of June 2002 the 1st Respondent sold the aforesaid plot to the 2nd Respondent at KShs. 250,000/=. It is apparent from the evidence that the Peter Mukwanju Ngunungu was the first to be allocated the plot in dispute. His receipts were checked, stamped and signed at the rear. The Appellant herein was the second allottee. Her receipts were not stamped and signed at the rear. The 1st Respondent was given clearance certificate on 2nd May 2001 by a Probe Committee appointed by the Government to sort out issues from double allocation. The Appellant was not cleared.

From my analysis of the evidence tendered before the trial court, I have come to the conclusion that the 1st Respondent is the rightful owner for **plot no. 56 CHAKA TRADING CENTRE** having acquired shares as first in time to the Appellant. Consequently the Appellant had acquired no proprietary interest over Plot 56 therefore the sale transaction between the 1st Respondent and 2nd Respondent was lawful. The trial magistrate came to the correct conclusion by dismissing the suit.

Let me now turn to the grounds of appeal. The 1st and 2nd grounds of appeal relate to procedural matters which in my view did not go to the root of the case hence I am not going to belabour in considering them. In grounds 3, 4 and 5 the Appellant has attacked the manner in which the learned Senior Resident Magistrate treated the documentary evidence of the Peter Mukwanju Ngunungu. The appellant is of the view that the trial Senior Resident Magistrate erred when he concluded that since Peter Mukwanju had paid for entrance fees in advance compared to the appellant, he was entitled to the Plot. It is also said that the 1st Respondent merely bought receipts since plots had not been allocated. I have carefully considered the aforesaid grounds and I-am unable to agree with the appellant. It is clear from both the Share Certificate and the receipts of the registration fees that Peter Mukwanju was first in payment of both registration and shares fees. In fact the Share Certificate transferred to the 1st Respondent was stamped and cleared by the Probe Committee which was appointed to sort out the problem of double allocation. I therefore see no merit in grounds 3, 4 and 5. In ground 6, it is argued that the learned trial magistrate when he imputed that the appellant's father was the author of double allocation. I have carefully re-considered the evidence tendered before the trial magistrate. There is no dispute that the Appellant's father, Newton Gitonga Muhoro, was the Chairman of the 3rd Respondent during the time when Plot No. 56 was double allocated. He as the one who issued both the Share Certificates. I cannot lay blame on the learned Senior Resident Magistrate in coming to the aforesaid conclusion because of the conflicting documents presented to him issued by one person who happens to be related to the appellant. I have considered grounds 7 and 9. I think nothing turned out during the trial hence the trial magistrate cannot be blamed in not making a finding as to the relevance of Nyeri C.M.C.C.C. No. 427 of 2001. In ground 8, it is alleged that the trial magistrate failed to make a finding to the effect that the 1st Respondent had not been shown the plot in dispute save for the appellant. A careful consideration of

the evidence will reveal that the learned trial magistrate found as a matter of fact that the 1st respondent could not take possession of Plot No. 56 because Newton Gitonga Muhoro, the appellant's father was in occupation. It is obvious the issue was dealt with. I may add by stating that it would appear that the appellant took occupation of the Plot in dispute through her father who was apparently the Chairman of Ndathi, Mugunda Company Limited (3rd Respondent). In ground No. 10, the appellant has accused the learned trial magistrate of misconstruing the essence of the registration number of the 3rd respondent. It is argued that the Share Certificate of the 1st respondent bears No. 64897 yet the registration number of the company is 68497. In other words it is the appellant's submission that the aforesaid numbers should be in agreement. The learned magistrate did not put much weight to the discrepancy. I have also re-considered the same and I do not think I should put much emphasis on the same. There is no dispute that the documents presented by both parties are genuine. It is possible there was a typographical error in printing the receipts and or Share Certificates. I will ignore the objection the same way the trial Court did and proceed to look at the substantive justice of the matter.

In the end and on the basis of the above reasons, I see no merit in the appeal. It is dismissed with costs.

Dated and delivered at Nyeri this 23rd day of April 2010.

J. K. SERGON

JUDGE