



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 205 OF 2006

KADZO LEWA.....1ST APPELLANT
JANET NEEMA MWAMULANDA.....2ND APPELLANT
-AND-
BENJAMIN MULATYA MUTHOKA.....RESPONDENT

(An appeal from the Ruling of The Honourable Mrs. B. T. Jaden, Senior Principal Magistrate, dated 23rd October, 2006 in RMCC No. 4672 of 2003 at Mombasa Law Courts)

JUDGMENT

Coming up before the learned Senior Principal Magistrate was the respondent's Chamber Summons of **30th November, 2005**; and the main prayer was -

“THAT the 2nd defendant [2nd appellant herein] by herself, her servants and/or agents and/or assignees be restrained by an Order of injunction from constructing, developing, clearing and/or in any way interfering with Plot No. 979 Mwembelegeza Settlement Scheme in any way whatsoever till the suit is heard and determined.”

The learned Senior Principal Magistrate took into account the evidence set out in the depositions: the respondent herein was claiming to have purchased the suit land parcel from 1st appellant, but 1st appellant refused to hand over to the purchaser the letter of allotment - with the consequence that the respondent was unable to have the property registered in his name; and during this period of post-purchase disagreement, 1st appellant herein (the vendor) sold and transferred the same plot to 2nd appellant herein; whereupon 2nd appellant proceeded to have the property registered in her name, and to acquire the title deed for the same, following which she transported building materials to the suit plot, ready for the commencement of construction works. The plaintiff/applicant then moved the Court seeking restraining orders against 2nd appellant herein.

To resolve the dispute at the interlocutory stage, the learned Magistrate framed several questions, as follows:

- (i) whether the respondent herein had paid 1st appellant when he purchased the suit property;**
- (ii) whether the respondent ought to pursue the 1st or the 2nd appellant for his claim;**
- (iii) the effect of orders for the maintenance of the status quo obtained by other parties;**

- (iv) **whether the application is res judicata, in view of orders made in an earlier application;**
- (v) **the effect of the registration of the suit premises, and whether the registration can be challenged;**
- (vi) **whether or not there is a suitable case for the issuance of injunctive orders.**

The learned Magistrate found as follows: there was a sale agreement between the respondent herein and 1st appellant, dated **16th September, 1998** and it showed a sale price of Kshs. 17,000/=; the respondent was seeking orders against 2nd appellant herein; 1st appellant, indeed, did receive the sum of Kshs. 17,000/= from the respondent herein, in connection with the suit premises; orders for maintenance of the **status quo** were made on **11th November, 2003**, before 2nd appellant was enjoined as a party; the question whether the respondent should have pursued 1st and 2nd appellants, in relation to the suit land, was dependent on the registration status of the land; 2nd appellant already had a title deed issued under the Registered Land Act (Cap.300, Laws of Kenya), as well as the land transfer document in her favour; the respondent was challenging the title registered in 2nd appellant's name.

The learned Magistrate concluded the determination of the matter as follows:

“On a balance of probabilities, I find [that] the plaintiff/Applicant [the respondent herein] has a prima facie case. Neither.....the plaintiff [respondent herein]....nor the 2nd defendant [2nd appellant herein] [is] the original allottee of the suit premises. Land issues are sensitive in nature.

“In paragraph No. 11 of the [affidavit] in support of the application, the plaintiff [respondent herein] states [that] [he] will suffer irreparable loss. The probability is there....

“All in all...., I allow the application with costs in the cause.”

The appellants' Notice of Appeal is dated **21st November, 2006**, and the Memorandum of Appeal was filed on **22nd November, 2006**. The grounds of appeal are stated as follows:

- (i) **the Honourable Magistrate erred in law in failing to consider that the respondent herein could be adequately compensated in damages;**
- (ii) **the Honourable Magistrate erred in law and in fact in finding that the respondent herein had shown a prima facie case with a probability of success;**
- (iii) **the Honourable Magistrate erred in law in failing to consider that 2nd appellant herein was the registered proprietor of the suit property known as Mombasa/Mwembelegeza/979;**
- (iv) **the Honourable Magistrate erred in law by exercising her discretion wrongly in granting an injunction against 2nd appellant herein.**

The 2nd appellant was seeking orders as follows:

- (a) that the appeal be allowed;**
- (b) that the order made by the Subordinate Court on 23rd October, 2006 be set aside and, in its place, an order be made dismissing the respondent's application dated 30th November, 2005, with costs;**
- (c) that the respondent do bear the costs of this appeal.**

Learned counsel, **Mr. Kithi**, submitted that the appellant was contesting an order of injunction, as having been wrongly issued against the purchaser of the suit property from 1st appellant, for value, and “without any demonstrable and/or pleaded notice of defect in 1st appellant's title thereto”.

Counsel notes from the record that when the respondent first filed suit (**18th October, 2003**), only 1st appellant was named as the defendant; and 1st appellant was not at the time registered as the legal owner of the suit property. Counsel urges, from the depositions on file, that 2nd appellant had not known that a sale

agreement for the suit land had earlier been made between 1st appellant and the respondent herein, at the time 2nd appellant paid the purchase price, in the sum of Kshs. 150,000/=; and thereafter, 1st appellant handed over the suit property's letter of allotment to 2nd appellant, who then obtained the title deed for the same, on **25th November, 2003**.

Learned counsel submitted that 2nd appellant's title to the suit property was indefeasible, this being a first registration, and one untainted by any allegations of fraud on the part of 2nd appellant. Counsel submitted that, in the absence of any pleading to the effect that 2nd appellant at the time of purchasing the suit property was aware of the existence of any defects in 1st appellant's title, 2nd appellant's title to the suit property is unimpeachable, and 2nd appellant's enjoyment thereof ought to be protected by law.

Counsel submitted that 2nd appellant's enjoyment of the suit land should not be subjected to any limitation in favour of the respondent herein, "more so without any undertakings as to damages proffered by the [respondent]....".

Contesting the respondent's position in these proceedings, counsel submitted that at the time that party moved the Court of first instance, seeking orders of injunction (**Chamber Summons of 18th October, 2003**), "he was already aware that [1st appellant] herein had sold her interest in the suit property to 2nd defendant" (as he states at para.7 of his supporting affidavit of 23rd October, 2003). Yet the respondent herein did not seek to enjoin 2nd appellant herein: and it was only **nine months later** that 2nd appellant joined the suit proceedings, in the capacity of "interested party".

Learned counsel submitted that the motions of equity, in this matter, do not favour the respondent herein: "[the] respondent's **laches** in either blocking 2nd appellant's first registration as proprietor of the suit property, or joining 2nd appellant as a defendant in the suit...., militates against the grant of any orders in his favour". Counsel urged the Court to uphold the appeal, and vindicate 2nd appellant's property rights.

Learned counsel doubted that the respondent had any case to be sustained, as against 2nd appellant's claims: for the respondent's case was based on a sale agreement (dated **16th September, 1998**) that ran counter to the terms of ss. 34(1) and 35(1) of the Advocates Act (Cap. 16, Laws of Kenya), "as it does not state which qualified person, if any, drew it". Counsel impugned the status of the said sale agreement, besides, for not being stamped as required by ss. 5 and 30 (1) of the Stamp Duty Act (Cap. 480, Laws of Kenya), and for not being registered within a period of 30 days as prescribed under s. 6(1) of the Stamp Duty Act. Counsel urged the Court not to rely on the said sale agreement between the respondent and 1st appellant.

Learned counsel **Mr. Adhoch**, for the respondent, urged that all the grounds of appeal be struck out, and the decision of the Court of first instance be upheld.

Learned counsel acknowledges that the respondent herein had brought action for injunctive orders against only 1st appellant, but he states that in the amended plaint filed on **9th May, 2005**, 2nd appellant had been enjoined as a defendant.

Counsel stated that whereas the respondent had paid the full purchase price for the suit property, as required under the sale agreement of **16th September, 1998**, it is 2nd appellant who, five years later, obtained the title for the said property.

Learned counsel focused blame on one of the appellants; in his words:

"The 2nd appellant [probably meaning 1st appellant] declined to give the respondent allotment letters despite having accepted the purchase price from him. On the other hand, the said 2nd appellant [probably meaning 1st appellant] knowing very well of the existence of the contract between herself and the respondent, proceeded to issue allotment letters to 1st appellant [probably meaning 2nd appellant] and even facilitated.....the transfer of the suit property to the 1st appellant [probably meaning 2nd appellant]."

Mr. Adhoch proposed two questions for consideration in this appeal:

- (i) whether first registration under the Registered Land Act (Cap. 300, Laws of Kenya) in favour of [2nd appellant] should be challenged, on grounds of fraud, misrepresentation and collusion;**
- (ii) whether the sale agreement between the respondent and [1st appellant] is invalid for want of compliance with section 34(1) and 35(1) of the Advocates Act (Cap. 16, Laws of Kenya);**
- (iii) whether non-registration of the said sale agreement or non-payment of stamp duty renders the agreement invalid.**

Counsel contested the **bona fides** of the registration of the suit property in the name of 2nd appellant, under the Registered Land Act (Cap.300); he contented that “the acts leading to that registration manifest acts of fraud, collusion and misrepresentation”; he submitted: “It is a matter of fact that once the 1st appellant sold the land to the respondent, [he] had no capacity to sell the same land to another person.”

Learned counsel urged that the exceptions to the indefeasible-title rule under ss. 27 and 28 of the Registered Land Act, “have been clearly manifested”; and he submitted that “the learned trial Magistrate was justified in her findings that, [as] the issue of validity of the title would be [canvassed] at the main trial, it would be proper to grant an injunction pending the full trial where **viva voce** evidence would be adduced to determine whether or not there was fraud, misrepresentation or collusion”.

Mr. Adhoch submitted that the contest to the standing of the respondent’s sale agreement with 1st appellant, on the basis of the terms of the Advocates Act, “is untenable, more so, when it is being raised at this appeal stage”: for the reason that “there was no affidavit evidence controverting the validity of the sale agreement, neither did counsel for the [2nd] appellant raise the issue at [the] trial of the interlocutory application for injunction”; and consequently, counsel urged, “the 2nd appellant is.....estopped from raising it at this stage”.

On the objections of 2nd appellant turning on compliance with the requirements of the Stamp Duty Act (Cap. 480), counsel submitted that “non-registration does not **per se** render the sale agreement that formed the basis of the transaction.....invalid”; and that “the mere existence of the agreement [for] sale operates as a contract [**inter se**], conferring [upon the] parties an equal right of specific performance”: and for this proposition, counsel invokes the Court of Appeal’s decision, **Kenneth Thomas Clarke t/a Shipping General Services v. Sondhi Limited** [1963] E.A. 107. The relevant principles in that case are summarised in the head-note in the law report (p.108):

“(i) any breach of condition or covenant of which the respondent may have been guilty was a matter between the Crown and the respondent and that as the Crown had not sought to forfeit the grant the breach did not in the circumstances affect the relationship of landlord and tenant existing or purporting to exist between the respondent and the appellant.

“(ii) an unregistered lease could operate as a contract *inter partes* and confer on the party in the position of the intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease.

“(iii) the proviso to s. 40 of the Registration of Titles Ordinance does not exclude the use of an unregistered lease to show the terms of the contract between the parties.”

The records show that the original plaint before the Chief Magistrate’s Court was filed on **28th October, 2003**; this suit had only one defendant – 1st appellant herein; it is a simple suit, with one key assertion (para. 5): “The plaintiff avers that despite having paid the full purchase price, the defendant has refused to hand over the original letters of allotment so as to have the said plot registered in his name”; and the prayer was that the suit plot be registered in the name of the respondent herein.

On **9th May, 2005** the respondent herein filed an amended complaint, with the original defendant as 1st defendant, and 2nd appellant herein as 2nd defendant. It is necessary to note the specific allegations which the respondent as plaintiff, made in the pleadings against 2nd appellant as 2nd defendant:

•~~€€€€€€€€~~ **Para. 5a:**

“The plaintiff avers that the 1st defendant in breach of the contract and/or agreement later sold the plot to the 2nd defendant and who [has] through misrepresentation and fraud obtained the title deed to the plot.”

•~~€€€€€€€€~~ Under “**Particulars of Fraud and/or Misrepresentation on the Part of the 1st and 2nd Defendant(s)**”, the respondent herein thus pleaded (and with reference to 2nd appellant herein):

- (i) **1st appellant sold the suit property to both the respondent and 2nd appellant;**
- (ii) **1st appellant transferred the suit plot to 2nd appellant;**
- (iii) **2nd appellant purchased the suit property when she was aware that the same had been purchased by the respondent;**
- (iv) **2nd appellant obtained the title deed for the suit property when she knew of the pending suit.**

The charge of fraud, in my opinion, is only superficially attached to the appellants, and, particularly so in the case of **2nd appellant**. From the record of appeal, I have noted averments in depositions which, even as between 1st appellant and the respondent, show that there were reasons other than fraud, in the differences between that appellant and the respondent.

In an affidavit sworn by 1st appellant on **18th November, 2003** he states: “I refused to hand over the letter of offer until the plaintiff [respondent herein] paysthe balance” (para.9); “.....I sought the intervention of the local Chief who informed me....that the document I signed was a sale agreement to the effect that I had sold my property at Kshs. 17,000/= and not Kshs. 250,000/=”. That dispute between the respondent and 1st defendant was not sorted out, and it assumed a new level of intensity in **August, 2004** when the respondent noticed that **2nd appellant** was bringing construction materials on to the suit property. What was the evidence that 2nd appellant knew of the disagreement between the respondent and 1st appellant? At what point in time did 2nd appellant engage upon a fraudulent deal to deprive the respondent of land that legally belonged to him? In her replying affidavit of **7th September, 2004**, 2nd appellant deposed:

“3. THAT I am not aware that the plaintiff [respondent herein] had purchased the suit premises.

“4. THAT I had purchased all that property or parcel of land known as Mombasa/Mwembelegeza/979 from one Kadzo Mbaga Lewa [1st appellant] at a price of Kshs. 150,000/= and a title deed in respect of the same had been issued to me as the registered proprietor.”

The documentation annexed to 2nd appellant’s said affidavit shows that the suit land was formally transferred to her on **25th November, 2003**; and on that very date a title deed was issued in her favour; that is just about one month after the respondent filed suit. No evidence is shown that the filing of the respondent’s suit (which was initially only against 1st appellant) was **known** to 2nd appellant herein.

From the foregoing facts, it is clear to me that no material evidence has been shown, that 2nd appellant was involved in any act of **fraud** against the respondent. What the evidence shows, on the contrary, is that 2nd appellant duly gave valuable consideration in exchange for the suit land, which was officially transferred to her, and she became the lawful owner of the said land, by virtue of registration at the Lands Registry.

Such a state of **fact** leads to the conclusion that 2nd appellant **is** the rightful owner of the suit land, and ought to have quiet enjoyment of the same, with all the protections for her property rights, as guaranteed under **s. 75 of the Constitution**.

It is not clear that the learned Senior Principal Magistrate, when she made her ruling and orders of **23rd October, 2006**, paid due regard to such vital considerations of basic property rights: and it follows that her decision bore a misdirection, and consequently, must be set aside.

I hereby allow the appeal; set aside the orders of the Court of first instance dated **23rd October, 2006**; dismiss with costs the respondent's application dated **30th November, 2005**; and mulct the respondent in costs in the instant appeal.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this 25th day of June, 2010.

.....

J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellants: *Mr. S. Kithi*

For the Respondent: *Mr. Adhoch*