Wanjiku v Kibue (Environment and Land Appeal 10 of 2020)
[2022] KEELC 12627 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12627 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 10 OF 2020

JM MUTUNGI, J

SEPTEMBER 27, 2022

BETWEEN

ELIZABETH WANJIKU ..... APPELLANT

AND

GRACE WANJIKU KIBUE ..... RESPONDENT

(Appeal arising from the judgment of Hon. J M Kalo CM, In Nakuru CM ELC No.349 of 2018)

JUDGMENT

1. This appeal has been instituted by the appellant who was the defendant in the suit before the subordinate court. The appeal is against the judgment and decree of Hon JB Kalo Chief Magistrate in Nakuru CM ELC No 349 of 2018 delivered on April 21, 2020. By the judgment the learned trial magistrate upheld the plaintiff's (present respondent) claim and made a declaration that land title number Miti Mingi/Mbaruk Block 5/2090 (Kiungururia) belonged to the respondent on account of forfeiture of her money that was due and owing to her by the appellant. The learned trial magistrate dismissed the appellant's counterclaim and awarded the costs of the suit and the counterclaim to the respondent. That precipitated the present appeal by the appellant.

2. The brief facts of the suit before the subordinate court are that the appellant and the respondent were good friends and were business associates. The respondent lent to the appellant various amounts of money acknowledged by the appellant vide loan agreement dated November 12, 2009, June 4, 2010 and September 24, 2010. The last of the agreements dated September 24, 2010 indicated the loan due to be Kshs 829,000/= which the appellant acknowledged. The loan was to be free of interest and the security for the loan was to be land parcel Miti Mingi/Mbaruk Block5/2090 owned by the appellant. As per the agreement the loan was to be repaid in equal instalments starting March, 2010 till completion. It is noteworthy that the agreement was dated September 24, 2010 and provided for instalment payment from March 2010 through the instalment amount was not given. The agreement provided a penalty clause in the event of default. The respondent filed suit vide the plaint dated April 8,

2011 and was amended on July 30, 2012. The respondent by the amended plaint prayed for judgment against the appellant for:-

a. A declaration that LR No Miti Mingi/Mbaruk Block 5/2090 (Kiungururia) legally and validly belongs to the plaintiff on her forfeiture of her money owing and due from the defendant.

b. Or in the alternative a refund of the Kshs 829,000/= which amount was loaned to the defendant by the plaintiff.

3. The appellant filed a defence and counterclaim to the respondent's suit. The defendant admitted the loan debt of Kshs 829,000/= and stated that she deposited her land title to stand as security for the payment of the money. The appellant stated the respondent in breach of the agreement dated September 24, 2010 fraudulently transferred the appellant's land parcel Miti Mingi/Mbaruk Block 5/2090 to her name and that the respondent could not validly seek to be declared as the owner of the same land she had unlawfully transferred to herself.

4. By the counterclaim the appellant stated she deposited the title of her land as security for the repayment of the loan amount but no formal charge was created that could be enforced. The appellant averred the respondent fraudulently transferred her land without following due process. The appellant by the counterclaim prayed for judgment against the respondent as follows: -

(a) An order that the title to the parcel of land known as Miti Mingi/Mbaruk Block5/2090 (Kiungururia) be cancelled and the register be rectified to reflect the defendant (plaintiff in the counterclaim) as the owner of the land.

(b) The agreement dated September 24, 2010 be enforced and the defendant (plaintiff in the counterclaim) be allowed to pay the sum thereof in (20) monthly instalment of Kshs 41,450/ = each.

(c) The plaintiff (defendant in the counterclaim) be ordered to release log book for Tuk tuk registration number xxxx and xxxx since the loans thereof have been fully paid.

(d) Sub- division of the parcel of land known as Nakuru/Lare/Kiriri/942.

(e) Costs of the suit.

5. Before the subordinate only the parties gave evidence and none called any witness. The learned trial magistrate after hearing the parties and evaluating their evidence and their respective submissions rendered a judgment in favour of the respondent as follows:-

> ' The court finds that the plaintiff has proved her case against the defendant to the required standard. The court finds further that the defendant has not proved her counterclaim against the plaintiff. Consequently, judgment is entered for the plaintiff against the defendant as follows:-
>
> a. A declaration is hereby issued that land title Number Miti Mingi/Mbaruk Block5/2090 (Kungururia) ('The land'/legally and validly belongs to her on forfeiture of her money owing and due from the defendant.
>
> b. The plaintiff shall be awarded costs of the suit and interest from the date hereof until payment in full.
>
> c. The defendant's counter-claim is dismissed with costs to the plaintiff'.

6. The appellant being dissatisfied and aggrieved by the judgment appealed to this court. The appellant through her memorandum of Appeal dated May 22, 2022 has set out 7 grounds of appeal which are reproduced hereunder:-

1. The trial magistrate erred in law, analysis of facts and evidence in enforcing an illegal transaction.

2. The trial magistrate erred in his analysis of the law relating to charges. More specifically the learned trial judge erred in law in finding that the Respondents transfer of the parcel of land known as Miti Mingi/Mbaruk Block5/2090 (Kiungururia) was legal.

(a) That the trial magistrate erred in law and in fact in finding that title to the parcel of land known as Miti Mingi/Mbaruk Block5/2090 (Kiungururia) had been forfeited to the respondent when it was clear from the contract that repayment of the loan was secured by a simple deposit of the title to the parcel of land known as Miti Mingi/Mbaruk Block/1929 (Kiungururia) and Miti Mingi / Mbaruk Block5/2090 (Kiungururia).

(b) The learned trial magistrate erred in law and in fact in rewriting a fundamental condition of the contract. In specific the learned trial magistrate introduced a clause on forfeiture of the title to the parcel of land known as Miti Mingi/ Mbaruk Block5/2090 (Kiungururuia) which clause was not part of the contract.

(c) The learned trial magistrate erred in law and in the interpretation of the Registered Land Act (which was applicable at the time) in finding that a party can foreclose or enforce right of a foreclosure in respect of registered land transferred without registration of a formal charge.

d. The trial magistrate erred in law by finding that there was an agreement to transfer land into the names of the respondent when there was no such written agreement. The learned trial magistrate rums counter the provisions of section 3 (3) of the *Law of Contract Act*.

e. The learned trial magistrate made a finding on a prayer on forfeiture which was not supported by any substantive pleadings.

3. That the learned trial magistrate erred in law in finding that the parcel of land known as Miti Mingi/Mbaruk Block 5/2090 (Kiungururia) was sufficient consideration for the debt owed by the appellant to the respondent without directing a valuation of the land.

4. The trial magistrate erred in law in finding that the respondent had proved her case in spite of the admission on oath by the respondent that there was a fundamental error on the contract.

5. The trial magistrate erred in law and fact when he ignored the fact that appellant had attempted to make amendments after she discovered the mistake in the contract.

6. The trial magistrate erred in law in failing to properly analyze the fact and the evidence and support his conclusions based on the evidence.

7. The judge erred and ignored the Appellants counter claim.

7. The appellant prays that the appeal be allowed and that the judgment be set aside and the counterclaim by the appellant before the subordinate court be allowed with costs.

8. The appeal was canvased by the parties by way of written submissions. The appellant filed her submissions on May 10, 2022 while the Respondent filed her submissions on May 9, 2022. The appellant's counsel in his submissions contended that the learned trial magistrate miscontrued the agreement dated September 24, 2014 between the appellant and the respondent. He submitted the agreement had an anomaly as it provided that the loan due by the appellant to the respondent would be paid by equal monthly instalments commencing March 2010 until payment infull. He argued the payment could not have commenced in March 2010 which was already past and the reference to March could only have meant March 2011. The appellant surmised that he could not have breached the agreement when the effective instalment payment date had not reached.

9. The appellant's counsel further submitted the deposit by the appellant of her title with the respondent was a security for payment and even if there was default in payment that could not vest the title in the respondent. The loan agreement did not provide that in the event of default the title would automatically be transferred to the respondent. The appellant submitted that the learned trial magistrate misdirected himself when he held the respondent was on the basis of the loan agreement entitled to transfer the suit land to her name more so because the appellant had surrendered the title to the respondent and had availed a signed transfer form and copies of Pin and identity card. The appellant further submitted the simple deposit of title as security did not constitute a charge over the suit property as envisaged under the law so that the necessary realization procedures would have kicked in upon default. The appellant finally submitted the learned trial magistrate erred in finding that the appellant's title had been forfeited on account of default in the repayment of the loan.

10. The Respondent's counsel in his submissions maintained the parties were bound by the terms of the agreements that they had entered into. It was his position that the appellant was in breach of the agreement made on September 24, 2010. The respondent submitted that as the appellant had defaulted and she had offered her land title as security, and had furnished executed transfer forms, she (respondent) was entitled to effect the transfer of the title to her name which she did on January 3, 2011.

11. As relates to the counterclaim by the appellant the Respondent submitted that the appellant had not proved that the transfer effected in favour of the respondent was fraudulent. The respondent placed reliance on the case of *Kibiru Wagoro Makumi -Vs- Francis Nduati Macharia & another (2018) eKLR* where Kemei, J in considering what constitutes fraud referred to the definition of the term fraud in Black's Law Dictionary set out as follows:-

> ' Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another'.

12. The respondent contended that as allegations of fraud are serious, where fraud is alleged the standard of proof must be above proof on a balance of probabilities though not beyond as reasonable doubt. The Respondent averred that although the appellant had alleged her signature on the transfer was forged there was no proof by way of evidence and hence there was no proof of fraud that would have merited court to allow the appellant's counterclaim.

13. Broadly the appellants grounds of appeal challenge the learned trial magistrate's analysis and evaluation of the evidence and application of the law. The grounds are not distinct and separable. The court will consider the same together and make such findings as may be appropriate. This being a first appeal, the court is under a duty and indeed obligated to re-evaluate and reconsider the evidence laid before the trial court in order to determine whether the decision reached by the lower court was justified. The court is not bound by the findings of fact by the lower court and may reach its own findings and conclusions upon evaluation of the evidence before the lower court. The court will however only depart from the trial magistrate's findings of facts and the law where it is clear from the record that the Magistrate misapprehended the evidence and/or applied wrong principles in reaching the decision that he/she did.

14. The case of *Selle & Another -vs- Associated Motor Boat Co Ltd & others (1968) EA 123* established the principle that an appellate court ought to apply in considering an appeal of first instance. The court enunciated the principle as follows:-

> ' –This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect'

15. I have re-evaluated the evidence that the parties adduced before the lower court. The appellant did not dispute she had taken a loan from the respondent and that as at September 24, 2010 when both entered into the final of the three loan agreements, a sum of Kshs 829,000/= was owing by the appellant to the Respondent. There had been an earlier loan agreement between the parties dated June 4, 2010 which vide clause 9 of the loan agreement of September 24, 2010 was superseded by the later agreement. Hence the loan arrangement between the appellant and the Respondent henceforth was governed by the agreement dated September 24, 2010. For ease of reference the conditions of the said agreement are set out hereunder:

    1. That the lender shall advance to the borrower a loan in the sum of Kshs 829,000/= receipt of which is hereby acknowledged by the borrower.
    2. That the loan advanced shall be free of interest
    3. That the security for the loan shall be the title deed to land parcel namely Miti Mingo/Mbaruk Block5/2090.
    4. That the lender shall be free to lodge a caution against the said title deed.
    5. That the lender shall return the title deed and remove the caution lodged against them upon repayment of the loan amount.

6. That the loan in the sum of Kshs 829,000/= shall be repaid in equal installments starting March 2010 till completion.

7. That the advocates fees for the loan agreement shall be bourne by both parties.

8. That in the event of default of any one monthly installment the breach clause shall be activated and the whole amount shall become due.

9. That this agreement super cedes the earlier agreement dated June 4, 2010.

10. That in case of default, the guilty party shall be liable to a penalty 15% of the loan amount to the innocent party in addition to refund special and general damages due on breach.

16. I have set out the terms of the said agreement in extenso as I consider that the judgment of the lower court turned on the interpretation of the agreement. The salient terms of the agreement were that the loan was to be free of interest; was to be secured by the title deed of land parcel Miti Mingi/Mbaruk Block5/2090; the lender was given liberty to lodge a caution against the title pending the repayment of the loan but was to remove such caution and return the title to the borrower upon the repayment of the loan. Significantly the agreement provided that the loan amount of Kshs 829,000/= was to be repaid in equal instalments starting March 2010 until completion. It is noteworthy that the instalments were not defined and further that the commencement date of the installments payment given as March 2010 was long past as the agreement was entered into on September 24, 2010 which was 6 months later. The agreement was in my view fundamentally flawed as to be incapable of being performed unless there was confirmation or clarification of the instalment payable and the effective date of commencement. The appellant has argued the commencement date was meant to be March 2011 but as the Respondent had devious intent she had as at January 3, 2011 caused the appellant's land title to be unlawfully transferred to her name.

17. If the agreement of September 24, 2010 provided that the loan would be paid by equal monthly instalments from March 2010, how would that have been possible if the date was already past? No specific amount of the instalment was specified either. How then could the appellant have been said to have been in default?

18. I have perused the record of evidence adduced by the respondent, she acknowledges the agreement of September 24, 2010 and affirms the same provided for repayment of the loan in instalment from March 2010. She stated the appellant did not make any payment and she decided to transfer the title to her name, though the agreement never made any provision for transfer of the title in the event of default. Clause 10 of the loan agreement of September 24, 2010 provided thus:-

> ' That in the event of default, the guilty party shall be liable to a penalty 15 % of the loan amount to the innocent party in addition to refund special and general damages due on breach'

19. It is unclear from the evidence of the Respondent when she determined breach of the agreement dated September 24, 2010 had occurred and what the particulars of the breach were. As I have observed above the agreement of September 24, 2010 had fundamental flaws as it provided for payment of instalments effective from a date that had already passed and besides the agreement did not quantify the instalment that was payable. The agreement further made provision for remedy in the event of breach or default. The agreement in my respectful view, as drawn, was incapable of being breached by the appellant.

20. The respondent appears to have taken the view that since she held a title belonging to the appellant in simple deposit as security for the loan, she could without any other action proceed to transfer the same to her name in the event of default. The Registered Land Act, Cap 300 Laws of Kenya (now repealed) made no provision for creation of a charge by way of simple deposit of title. Section 65 of the Act made provision as to how a charge over land could be created and section 74 provided for the remedies of a chargee in the event of default.

21. In the agreement entered into between the respondent and the appellant, there was no provision that the title pledged as security would vest in the lender in the event of default by the borrower. The agreement did not provide for forfeiture of the title in any event. The agreement did infact specifically provide for penalty in the event of default. The learned trial magistrate in his judgment stated:-

> ' On the issue of whether a charge was registered on the title or not, it is not in contention that the same was not done; However, the plaintiff's action of causing the title to be transferred into her own name was based on an agreement between her and the defendant which led the defendant to surrender to the plaintiff the title, a signed transfer form, copies of KRA and identity card'.

22. With respect to the learned trial magistrate, I agree with the submissions of counsel for the appellant that this was a misdirection. The agreement both parties had signed did not provide for such eventuality. The parties had freely entered into the agreement and they were bound by it. Even if there had been default/breach on the part of the appellant, which has however not been demonstrated, the consequence would not have been for the Respondent to transfer the land to herself. The respondent's remedy was in damages which the agreement had provided for. The Respondent's option was to file a suit for recovery of her money from the appellant and when and if she obtained a decree she would perfectly have been entitled to attach the land whose title she held in execution of the decree. In such eventuality she would have been entitled to continue holding the title in lien until her debt was repaid.

23. I am persuaded that the respondent unlawfully and unprocedurally got land title Miti Mingi/ Mbaruk Block5/2090 (Kiungururia) transferred to her name. Although the appellant pleaded that her signature on the transfer had been forged, I agree with the learned trial magistrate that the appellant did not prove there was forgery. However, as I have made a finding that the transfer effected to the respondent was unlawfully and unprocedurally procured it means the title cannot stand and has to be cancelled. Under section 26 (1) (b) of *Land Registration Act* 2012 a title that is shown to have been unlawfully and unprocedurally acquired can be revoked and/or cancelled. Section 26 (1) of the Act provides as follows:

> 26. 'Certificate of title to be held as conclusive evidence of proprietorship (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

24. In the plaint in the lower court I note that the respondent had pleaded in the alternative for the refund of the loan amount of Kshs 829,000/= while the appellant in the counterclaim had sought the cancellation of the title transferred to the respondent and an order that she be allowed to repay the loan amount in 20 monthly instalments of Kshs 41,450/= each. On the basis of my reevaluation and analysis, I am satisfied the appeal has merit and I allow the same on the following terms:

    1. The judgment delivered by Hon JM Kalo CM on April 21, 2020 is hereby set aside and in place thereof judgment is entered in favour of the respondent in the alternative prayer in the sum of Kshs 829,000/= together with interest at court rates from July 30, 2012 against the appellant.

    2. The appellant to pay the amount decreed within a period of 6 months from the date of this judgment failing which execution to issue.

    3. The title in respect of Land parcel Miti Mingi/Mbaruk Block5/2090 (Kiungururia) registered in the name of Grace Wanjiru Kibue to be cancelled and the title reverted to the name of Elizabeth Wanjiku Mbuguah.

    4. The parties to bear their own costs of this appeal and the costs of the court below.

Judgment dates signed and delivered virtually at Nakuru this 27th day of September 2022.

J M MUTUNGI

JUDGE