REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 135 of 2003

JULIANO M'MUGAMBI MUTUA MWARI .....APPELLANT

VERSUS

JOHN OYARO ....RESPONDENT

(Being an appeal from the Judgment/Decree of the learned trial magistrate

Mr. Nduku Njuki dated 5th day of November 2003 in Nkubu SPMCC No. 49 of 2001)

JUDGMENT

The respondent filed a plaint in the lower court on 10th August 2001. The same contrary to order VII rule 1 did not have a verifying affidavit accompanying it. The respondent with the leave of the court amended his plaint on 6th May 2002 and again the amended plaint was not accompanied by verifying affidavit. That as it may be, the respondent by the said action was seeking a declaration that he was the rightful owner of parcel No. ABOGETA/U-KITHANGARI/117. Further, he sought that the court would restrain the appellant or his servants or agents by order of injunction from interfering with that parcel of land. The appellant filed an amended defence and counterclaim and alleged that the respondent who was then a government forester had agreed to allow him to harvest 20 trees from the Mount Kenya forest and in turn he agreed that he would transfer the suit property to him and Franklin Muchena, deceased. He pleaded in his defence and counterclaim for a declaration that the transfer of the suit property into the respondent's name and Muchena was null and void and prayed that the same be transferred to him and an injunction be issued against the respondent. The evidence adduced was as follows: - The respondent stated that he worked with the ministry of Environment and Natural Resources and at the time of giving evidence was based in Meru North. In the year 1991 he said he was stationed at Ruthumbi Forest station Meru Central. He got to know the appellant who was then working in the forest. Although he stated in evidence that the appellant worked in the forest, it became clear as the evidence was tendered that the appellant was involved in logging of wood in the forest. Around that year, the appellant offered to sell to him the suit property at an agreed price of Kshs. 45000 per acre and in total paid Kshs. 135,000 for 2.98 acres. The transaction was approved by the Land Control Board and in that regard he submitted in evidence part of the register indicating the transaction and indicating the approval given. The appellant according to him

appeared at the land board with his wife and two children and gave their consent. He also produced the transfer signed in that transaction. That it was agreed the appellant would vacate the land but he had refused to vacate hence the court action. He prayed that the court would declare him as the legal and rightful owner of the land. He denied the fraud alleged in the counterclaim. On being cross examined, he stated that there was no written agreement between himself and the appellant relating to that transaction. He said that the ban of logging trees in the forest was effected in 1985. He however said that he paid the appellant the money agreed and paid to the bank where the appellant had charged the title in order for the title to be released. He was questioned about the transfer which reflected the consideration of Kshs. 20,000 and displayed ignorance of the same. The appellant gave evidence in his defence. He said that he was in the business of splitting timber for a living. He knew the respondent as a forester. He said that they struck a deal in 1991 whereby he agreed to give the respondent his land and in turn the respondent was to give him access to the forest to cut down 20 trees. The suit property was valued at Kshs. 250,000 and had he gotten the 20 trees he would have raised Kshs. 400000. He said that the respondent took him to the forest and he even chose the trees that he was going to cut down. He then stated in chief:-

"Before I cut the trees, the government slapped a ban on tree cutting in the forests."

He said that Muchena, who was then deceased, was a forest guard. He transferred the suit property in both the respondents and Muchena's name. Thereafter, on making inquiry, the respondent kept telling him that he should await the lifting of the ban. He stated that he had never been able to get the trees as promised. He then stated that since the respondent had not paid him for the suit property, and because he had not given him the trees as it had been agreed, that the court should dismiss the suit and allow his counterclaim. On being cross examined, he denied that the respondent had paid any money into the bank. He said that he cleared his loan in 1998. Looking at the green card which was exhibited before court of the suit property however, one finds that the property was discharged by Kenya Commercial Bank Ltd. on 19th Nov. 1991. The property was transferred to the respondent and a title was given to him on 28th Nov. 1991. That evidence of the appellant in that respect therefore is not credible. He did not call any other witness and that was the only evidence tendered before court. I have considered the submissions that have been filed by the parties in this matter. The appellant submitted that the lower court had no jurisdiction to entertain the matter because the respondent essentially was seeking a declaration that the appellant was a trespasser. The appellant argued that the prayer for trespass was within the realms of the Land Dispute Tribunal Act and should not have been entertained by the magistrate. The appellant relied on Section 3(1) of the Land Dispute Tribunal Act which is in the following terms:-

"3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the division of or the determination of boundaries to land, including land held in common;

(b) A claim to occupy or work land: or

(c) Trespass to land shall be heard and determined by a Tribunal established under section 4".

The appellant's argument does not succeed because the appellant by the counterclaim removed the action from the land Dispute Tribunal. The appellant in his counterclaim sought prayers of declaration and injunction. The tribunal would not have had the jurisdiction to entertain those prayers and accordingly the submissions on jurisdiction by the appellant is rejected. The appellant also submitted that the transaction between himself and the respondent and Muchena was caught by the provisions of section 3(3) of the Law of Contract Act Cap 23. Section 3(3) provides as follows:-

"3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is found –

(i) is in writing;

(ii) Is signed by all the parties thereto; and

(iii) Incorporates all the terms which the parties have expressly agreed in one document; and

(iv) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

The appellant also relied on the case of HCC No. 74 of 1999 Meru Silas Mbiu Vs. Margaret Karitho. I am not persuaded by that case where the court found that a sale of land where a title had been issued could be reversed because of lack of compliance to section 2(3). Reading of that section makes it clear that it bars the enforcement of an agreement to sell land which is not reduced in writing. That indeed was the finding in the case of Civil Appeal No. 112 of 1997 Machakos District Co-operative Union Ltd Vs. Philip Kiilu where the Court of Appeal had this to say:-

"…….Section 3(3) of the Law of Contract Act we have no doubt about the correctness of Mr.Kalicha's submissions on this point. We agree with him that there was no agreement in terms of section 3(3) of the Law of Contract Act which the respondent could enforce against the appellant."

The point I am making is that section is only useful where a party seeks to enforce an agreement to sell land but where that agreement has not been put into writing. This was not the case here. No party was seeking to enforce an agreement for sale of land. That agreement between the parties was concluded when the title was issued to the respondent. The respondent gave evidence and produced before court the register of the Land Control board to show that consent was given for the transaction. However, as I started in this judgment, I did state that the respondent did not file verifying affidavit as required by Order VII Rule 1(2) which provides:-

"*The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."*

The rule under (3) provides that the court may on its own motion or on application by another party order a plaint which is not accompanied by such a verifying affidavit to be struck out. That am afraid will be the fate of the respondent's plaint in the lower court. The same having breached that rule will be struck out. The appellant in his case stated that the transaction between him and the respondent was fraudulent but it ought to be noted in his own words he stated:-

"*Before I cut the trees, the government slapped a ban on tree cutting in the forests."*

The appellant was not elaborate to show what form the fraud took. It is well accepted in law that the standard of prove where fraud is claimed is much higher than that under the normal civil standard of prove. Fraud is defined in the Black's law Dictionary as follows:-

"*Fraud occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved."*

The appellant did not show what misrepresentation was made by the respondent that could be termed as fraudulent. He knew the respondent as a forester employed by the government. What that means is that the appellant also knew that the forest did not belong to the respondent but rather to the Government of Kenya. How then did the respondent misrepresent the facts? In my view, the appellant failed to prove misrepresentation and failed to prove fraud. In the end, I find that the appeal does fail in respect of the appellants counterclaim but as stated before, the respondent's plaint contravene the civil procedure rules and the judgment entered for the respondent will be set aside and the plaint be struck out. The judgment of the court is:-

1. The appellant's appeal in respect of his counter claim is dismissed with costs to the respondent.

2. The respondent's plaint dated 10th August 2001 and amended on 6th May 2002 is hereby struck out for failing to abide by order VII Rule 1(2) of the Civil Procedure Rules with costs being awarded to the appellant. That being so, the judgment for the respondent in lower court is set aside.

3. Each party shall bear their own costs in respect of this appeal.

Dated and delivered at Meru this 6th day of November 2009.

MARY KASANGO

JUDGE