REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 23 OF 2004

JOHN KIMENCHU ……..…….....….. APPELLANT

VERSUS

GLADYS NCHORORO

(as legal representative of PETER MBERO (Deceased).....RESPONDENT

(An appeal from judgment/Decree of Njeru Ithiga,SPM in Meru CMCC No.392/91 dated 8th April, 2004).

JUDGMENT

The dispute in this appeal relates to ownership of a parcel of land known as F/NO.3517 Amwathi/Maua Adjudication Section (the suit land). In the suit before the court below the respondent in this appeal had sued the appellant and sought against the latter, in the main general damages and permanent injunction.

It was the respondent's case that, by an agreement dated 2nd April, 1986, the appellant agreed to sell to him the suit land. In consideration thereof he paid to the appellant Kshs.2, 000/=. Despite being paid in accordance with the agreement of sale the appellant failed and/or refused to allow the respondent to occupy the suit land, and instead continued to pick the miraa on the suit land.

Consequently the respondent brought this suit praying for the orders set out above. The appellant, on the other hand, argued that the respondent's suit was *res judicata* PMCC No.468 of 1990.

That he sold to the respondent parcel No.Amwathi/Kilalai/321 and not the suit land. After a trial that lasted several years before different magistrates, Mr. N. Ithiga, SPM, delivered the judgment which is the subject of this appeal.

He found that the respondent had failed to prove general damages. At the same time he held that the respondent had established a basis for the grant of an order of permanent injunction against the appellant.

In this appeal, the appellant contends;-

(i) that the trial magistrate erred in finding that the respondent had proved his case to the standard required.

(ii) that the trial court erred in failing to find that the suit by the respondent was *res judicata*

(iii) that the trial magistrate failed to find that the appellant had sold only 1 acre of Amwathi/Kilalai/321 and not the suit land

(iv) that the trial court failed to see that the respondent was trying to get extra land from the appellant contrary to the agreement

(v) that the court failed to find that the respondent never established the measurements of the suit land before taking possession

(vi) that the court also failed to ascertain what the respondent was entitled to.

The final ground regarding the delay by the trial magistrate to deliver the judgment in question appears to have been abandoned. These grounds were considerably canvassed before me on 22nd May, 2007.

I have now had the chance to consider the entire appeal, counsel's submissions as well as authorities cited. Being the first appellate court, I am bound to re evaluate the evidence on record in order to come to an independent conclusion.

I have already observed that the case was heard over a long period of time by different magistrates. Mr. D. K. Gichuki, SRM took over from the late Mr. J. E Ashioya, SRM on 17th August, 1994. The former heard all the witnesses called by the respondent and went ahead to deliver the judgment.

That judgment was set aside by the late Ongundi, J, who ordered a retrial. At the retrial, counsel agreed, by consent, to adopt the evidence recorded by the previous trial magistrates.

Eventually the fresh trial commenced before Mr. A. O. Muchelule, on 22nd November, 2001. Mr. N. Ithiga, SPM took over from Mr. Muchelule, on 17th February, 2003, reheard nearly all the previous and the remaining witnesses and delivered the judgment against which this appeal has been preferred.

Briefly, the respondent called evidence to the effect that he purchased from the appellant one acre of land which was adjacent to the land he had already acquired from others.

After this he consolidated all the parcels into No.3517. The appellant, however, refused to give him vacant possession of the suit land.

Following this refusal, the respondent filed PMCC No.468A of 1990, which was dismissed. He then filed the suit to which this appeal relates. PW2, James Njagi, the in charge Land Adjudication Section for Amwathi/Maua gave the history of the suit land as reflected in the record held by him at the time. He stated that the respondent purchased various parcels of land from one Kariuki, Benson Karunge, Ikwinga Amenchu, Pharis Kariuki Kakuya, 1 the appellant, and there is 0.53 acres from No.4035, making a total area of 4.53 acres, comprised in the suit land.

Njagi further testified that parcel No.3995 which belongs to the appellant is adjacent to the suit land. The respondent called six witnesses who traced the history of the suit land and confirmed that indeed the appellant was compensated by the respondent for the suit land. Of particular importance to this appeal is the evidence of Pharis Kariuki Gakuya who testified that during consolidation, a portion of the appellants land was annexed to his land to make two acres, which he then sold to the respondent. The latter compensated the appellant.

Also of significance is the testimony of Isaiah Mithika Munoru, PW7, who drew the agreement forming the basis of the parties' relationship with regard to the suit land.

The appellant called one witness. In his own evidence the appellant stated that he agreed to sell to the respondent 1 acre from Amwathi/Kilalai/321 at Kshs.4,000/- but only Kshs.2,000/- was paid as compensation for his crops.

That the respondent has not paid for 0.30 acres of Amwathi/Kilalai/321 todate. The appellant blamed the officials from the Lands Department for tampering with his parcels of land and the respondent for committing fraud in acquiring the suit land.

DW2, Charles Kaberia confirmed that the appellant was compensated. According to him the dispute between the appellant and the respondent arose when the appellant pressed for payment of the balance relating to 0.30 acres. That constitutes the evidence adduced at the trial.

It is conceded by the appellant that he signed the agreement in question. However, he maintains that he did so in respect of some other parcel of land known as Amwathi/Kilalai/321 and not the suit land.

That was the first dispute that was before the court below. The second dispute was whether or not the suit was *res judicata* PMCC No.468 of 1990. The trial court did not make a finding in respect of the last point on the ground that the judgment was not availed.

Regarding the first issue the trial court held that the respondent's case had been proved to warrant the grant of an injunction. He, however, dismissed the respondent's claim for general damages.

It is in order to set out the agreement in question. It is to the effect that,

" I, John Kimenchu, have received Kshs.2,000/= (two thousand only) being payment for compensation for work and development done on former Kariuki's shamba adjacent to Mr. Peter Mberia's residence and one acre 1 sold to him. I agree there will be no hindrances (sic) there after when Mberia develops the same piece of shamba since I am paid fully for the same"

The agreement was signed by the appellant and the respondent and witnessed by Isaiah Munoru on 2nd April, 1986. From it it is clear that the parcel of land that was the subject of that agreement is identified as that located adjacent to the respondent's residence.

It is also clear that apart from the sale of one acre of land in question to the respondent, the latter also compensated the appellant for the developments thereon.

The respondent, therefore, in my view, demonstrated to the trial court that he had acquired proprietary interest in the said one acre to which the agreement relates.

The appellant, on the other hand, failed to persuade the trial court as he has failed to convince me that he intended to sell a different parcel of land altogether.

The appellant made no counter-claim either against the respondent or sued the Land Adjudication Office. Indeed it is not clear what the appellant's case is. Is it that the land he intended to dispose of is No.321 and not the suit land or is it that he was not fully paid for the suit land in respect of 0.30 acres? I can only conclude that the appellant probably changed his mind after committing himself beyond recall.

Regarding the issue of *res judicata*, I have looked at the judgment which was produced in the earlier trial. It relates to PMCC No.468A of 1990. In that judgment the trial magistrate (Miss. Rungare,RM) after reviewing the evidence adduced before her stated;

"The plaintiff claims the land is not in dispute but the miraa on that land is in dispute, the awarding of prayer (b) of the plaint is to determine the land and whatever is on it belongs to the plaintiff, and this cannot be done as it involves ownership determination and this court has no jurisdiction to entertain such matter without the consent of the Adjudication Office. If the land involved falls under Adjudication area"

The court did not, therefore, decide the case on its merit, although it involved the same parties and the same subject matter as in the subsequent suit.

See Pop-in (K) Ltd & 3 Others V Habib Bank AG Zurich (1990) KLR 609. See also Nduati V Mukami (2002) 2 KLR 778. For the doctrine of *res judicata* to apply the trial must be conducted by a court of competent jurisdiction.

For the reasons stated this appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 21st DAY OF SEPTEMBER, 2007

W. OUKO

JUDGE