



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

CIVIL APPEAL NO. 9 OF 2013

PETER MUSUNGU KENYATTA.....PLAINTIFF

VERSUS

JULIUS KITURI NGONDO.....RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment and Decree of the Honourable Principal Magistrate Mrs A.M Obura, delivered on 19th February 2013 in *Kilifi SRMCC No. 291 of 2009*.

2. In his Complaint filed before the said Magistrates Court on 14th July 2009, Peter Musungu Kenyatta (the Plaintiff/Appellant) had sought Judgment against Julius Kituri Ngondo (the Defendant/Respondent) for: -

a) A permanent injunction restraining the Defendant either by himself, his agents, servants and or otherwise howsoever from trespassing, alienating, encroaching, taking away, disposing of and/or otherwise carrying on activities of any kind upon the Plaintiff's property and or from interfering with the Plaintiff's peaceable and quiet enjoyment of the demised property and/or handing over vacant possession of the piece of land measuring 50 ft x 80 ft curved out of Plot No. CP 18287742/III/M;

b) Any other relief deemed fit by this Honourable Court to grant; and;

c) Costs of and incidental to this suit.

3. Upon hearing the parties the Learned Magistrate found and determined that the Plaintiff/Appellant was not entitled to the injunctive orders sought but to a refund of Kshs 250,000/- paid to the Defendant/Respondent towards the purchase price of the suit property.

4. Aggrieved by that decision, the Plaintiff/Appellant lodged a Memorandum of Appeal dated and filed herein on 22nd February 2013, appealing against the whole of the said Judgment on some six (6) grounds listed thereon to the effect that: -

1. The Learned Magistrate erred in law and fact in not finding that the Plaintiff had proved his case on a balance of probability as by law required;

2. The Learned Magistrate erred in law and fact by not granting the injunctive orders sought in the Complaint;

3. The Learned Magistrate erred in law and fact by reaching a decision that is at variance with the pleadings, evidence and witness testimony;

4. The Learned Magistrate erred in law and fact by granting orders that were not sought by either party;

5. The Learned Magistrate erred in law and fact by failing to appreciate the facts in issue before the Court and thereby reaching a per incuriam Judgment and

6. The Learned Magistrate erred in law and fact by finding that the Plaintiff was entitled to only the refund of the purchase price concerning the subject matter in issue.

5. On those grounds, the Appellant urges this Court to allow the Appeal, set aside the Judgment of the Learned Magistrate and to proceed to allow the Appellant's suit as instituted in the Magistrates' Court with costs.

6. The Appeal being opposed by the Defendant/Respondent was canvassed before me by way of written submissions. I have considered the Grounds of Appeal as well as the submissions and authorities placed before me by the Learned Advocates for the parties.
7. Briefly for the Appellant, it was submitted that the Learned Trial Magistrate had grossly misapprehended the dispute and the facts in issue before her and that she ended up delving into issues that were neither pleaded nor canvassed by either party. The Appellant further submitted that the Learned Trial Magistrate failed to adhere to the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules which spell out the requirements of the contents of a Judgment in a defended suit thereby rendering her entire decision bad in law.
8. The Appellant told the Court that the only issue for determination before the Trial Court was whether the Appellant was entitled to the orders of a permanent injunction sought based on the evidence tendered, and if so proceed further to issue any other or further relief, either appurtenant and/or analogous to the injunction, if granted.
9. The Appellant further submitted that if in the circumstances the Respondent intended to claim against the Appellant either for vacant possession or to a refund of the deposit of the purchase price, then he would have done so by way of a Counter-claim or cross suit, which was not the case herein.
10. In response thereto, the Respondent submitted that it was incumbent upon the Appellant to prove his case on a balance of probability. In this respect, the Respondent told the Court that the Appellant did not in fact prove any bonafide claim against him warranting the issuance of the injunction because the agreement between the parties was unenforceable for lack of consideration.
11. The Respondent further submitted that the Appellant had no legal right over the suit property capable of being protected by way of injunction as the document purporting to give him possession was not enforceable. The Respondent however agreed with the Appellant that there was no basis for the grant of the orders of the refund/or Kshs 250,000/- to the Appellant as neither party had sought such orders.
12. As this is a first appeal, it is my duty to analyse and re-assess the evidence on record to enable this Court to reach its own conclusion in the matter. In doing so and as was stated in *Selle –vs- Associated Motor Boat Co. (1968) EA 123*, this Court is conscious of the fact that it has neither seen nor heard the witnesses and will therefore make due allowance in that respect. This Court is nonetheless not bound necessarily to follow the trial Magistrate's findings of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities or materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Sarif –vs- Ah Mohamed Sholan (1955) 22 EACA 270*).
13. I think the six Grounds of Appeal can actually be collapsed into one: that the Learned Trial Magistrate erred in law and in fact in failing to grant the injunctive orders sought in the Plaintiff and hence arrived at a decision which is at variance with the pleadings, evidence and the witness testimony before her.
14. A perusal of the record reveals that the Appellant sought the injunctive orders on account that he was at all times material the proprietor of a parcel of land measuring 50ft x 80ft curved out of a parcel of land described as PC18287742/III/MN situated at Mtwapa within Kilifi District. It was the Appellant's case that by a written Sale Agreement dated 25th February 2009, he had purchased the suit property from the Defendant at a consideration of Kshs 700,000/- and that he had made part payment of the purchase price to the tune of Kshs 250,000/-.
15. The Appellant told the Court that prior to the execution of the Sale Agreement he had already been in actual possession of the suit property having occupied the same for seven years as a caretaker of the Defendant. Later on and after making some improvements on the property, the Appellant came to realise that the Respondent was not the owner but a mere tenant on the property. On that account, the Appellant ceased the payments of the balance of the purchase price and the parties thereafter agreed to seek permission from the registered proprietor to legalise the transaction.
16. The Appellant told the Court that thereafter, the Respondent started sending goons to disrupt his peaceful occupation of the suit property with a view to evicting him therefrom after selling the land to a third party.
17. On his part, the Respondent took the position that the Appellant had not paid any consideration for the suit property. It was further his case that the Appellant had failed to remit the balance of the purchase price as agreed on or before 31st March 2009. The Respondent otherwise denied that the suit property belonged to someone other than himself and or that he had no power to sell the same.
18. Upon perusing the evidence presented before her by the parties, the Learned Trial Magistrate found and determined that the suit property was indeed leased to the Respondent under a Tenancy Agreement dated 8th November 1990. The said agreement described the proprietors of the suit property as the administrators of the Estate of Kalume Kitsaumbi (deceased) and (who) are the registered owners of all that parcel of land known as No. CR 18287 742/III/MN.
19. While Clause VIII of the Sale Agreement allowed the Respondent to sell the leasehold interest in the land with the consent of the land owners, no such consent was produced before the Learned Trial Magistrate and neither were the said administrators called as witnesses. On that account, the Trial Magistrate found as a fact that the Respondent lacked capacity to sell the suit property and ordered him to refund the deposit paid of Kshs 250,000/- to the Appellant.
20. Arising from the foregoing, I was unable to find any fault with the findings of the Learned Trial Magistrate. On the evidence placed before the trial Court, neither the Appellant nor the Respondent had any proprietary interest on the suit property capable of being protected as sought by an order of injunction. As an equitable remedy, an injunction could not have issued in favour of the Appellant when he had no proprietary rights over the same.
21. Indeed, the orders for a refund of the deposit paid by the Appellant was justifiable given that he had made the payment yet no interest in

the land could pass between the purported Vendor and himself as the Vendor was not the proprietor of the suit property.

22. Arising from the foregoing, I did not find any reason to disturb the Learned Trial Magistrate's Judgment. It follows that I did not find any merit in the Appeal and the same is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE