



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 70 OF 2018

STELLA NDEMANGE.....APPELLANT

VERSUS

NANCY OTIENO OWITI.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's

Court at Machakos in Civil Case No. 492 of 2011 delivered on

18th July, 2013 by Hon. M.K. Mwangi –Ag. Snr. Principal Magistrate)

JUDGMENT

1. The Respondent herein, Nancy Atieno Owiti, filed a suit in the Chief Magistrate's Court at Machakos on 14th July, 2011, seeking for a permanent injunction restraining the Appellant from interfering with her possession and quite enjoyment of Plot No. 2801, Ngwata Phase III and the cost of the suit. After hearing the suit, the learned Magistrate delivered a Judgment in which he allowed the Respondent's prayer of a permanent injunction on 18th July, 2013.

2. The Appellant filed the Memorandum of Appeal on 30th August, 2013. In the Memorandum of Appeal, the Appellant averred that the learned Magistrate erred by finding that the Appellant did not have a *bona fide* and registrable interest in plot number 2801/Ngata Phase III (*the suit property*); that the learned Magistrate erred by finding that the Respondent was a purchaser for value without notice of the suit property and that the learned Magistrate erred by relying on documents from the Mavoko Development Company when such documents did not confer legitimate title to the Respondent.

3. The Appellant finally averred in the Memorandum of Appeal that the learned Magistrate erred by finding the Respondent had satisfied the grounds for grant of a mandatory injunction and that it was an error for the Magistrate to have made a finding in favour of the Appellant against the weight of the evidence tendered.

4. The Appeal proceeded by way of written submissions. The Appellant's advocate reiterated in his submissions the averments in the Memorandum of Appeal which I have summarized above.

5. It was submitted that the vendor to the agreement with the Respondent did not have a good title to pass to the Respondent; that whereas the 2nd and 3rd Defendants were not involved in the fraudulent transaction, their rights could not be protected because Richard Wachira had no proprietary interest in the land and that the Respondent did not satisfy the grounds for the grant of a mandatory injunction.

6. On his part, the Respondent's advocate submitted that the Appellant filed the Memorandum of Appeal on 30th August, 2013, twelve (12) days after the expiry of the deadline to file Appeal without seeking leave. Counsel relied on the provisions of Section 79G of the Civil Procedure Act (*Cap 21*) which provides that;

“Every Appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the Decree or Order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.

Provided that an Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

7. It was submitted that the Appellant did not comply with the express and mandatory provision of the law; that the Appellant having filed the Memorandum of Appeal out of time and without leave, the same must be struck out and that the Notice of Change of Advocates was in

contravention of *Order 9 Rule 9 of the Civil Procedure Rules* which requires that any such change after Judgment shall only be effective with an order of the Court or consent of the outgoing Advocate.

8. The Respondent's counsel submitted that the Record of Appeal filed on 19th October, 2018 is incomplete and incompetent; that the pleadings by the Appellant are not included in the record of Appeal and that there is no statement of Defence by the Defendant, her witness statements' list and bundle of documents and written submissions therein.

9. On the issue of the title, the Respondent's advocate submitted that the trial court rightfully observed that the Appellant claimed to have been allocated the land by the Municipal Council of Mavoko but never produced any such evidence in form of an allotment letter; that the Respondent has a Sale Agreement which has not been challenged and that the Respondent is in actual possession and has developed the suit property.

10. The Respondent's counsel submitted that the Appellant failed during the trial and has failed during the Appeal to demonstrate that she has interests and/or rights over the suit property that are superior to that of the Respondent to warrant interference of the *status quo* by the superior court and that the court should affirm the decision of the lower Court and dismiss the Appeal with costs.

11. The Record of Appeal shows that the Appellant filed the Memorandum of Appeal on 30th August, 2013 challenging the decision of the learned Magistrate which was delivered on 18th July, 2013. The said Memorandum of Appeal was filed after the lapse of 43 days from the date when the court delivered its Ruling.

12. Section 79G of the Civil Procedure Act (*Cap 21*) provides that;

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

13. There is no indication that the Appellant sought the leave of this court to file the Appeal out of time. This court's jurisdiction to hear Appeals from the subordinate court can only be invoked if the Appeal is filed within thirty (30) days or with the leave of the court and not otherwise. This is the position that the Court of Appeal took in the case of **Patrick Kiruja Kithinji vs. Victor Mugira Marete (2015) eKLR**, thus;

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals file out of time with leave of the Court. To hold otherwise would upset the established principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under article 159.”

14. The Record of Appeal before this court is incomplete. The perusal of the Record of Appeal shows that the Defence that was filed by the Respondent in the lower court is missing. Other than the Defence, the Appellant did not also include the Respondent's bundle of documents that were produced as evidence in the lower court.

15. The incomplete Record of Appeal contravenes the provisions of Order 42 Rule 12(4) of the Civil Procedures Rules which requires pleadings to be included in the Record of Appeal.

16. Having filed the Memorandum of Appeal out of time, and without the leave of the court, and in view of the fact that the Record of Appeal is incomplete, it is my finding that the Appeal before me is incompetent.

17. For those reasons, I strike out the Appeal with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE