



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 231 OF 2000

PAUL WAIRURI MWANGIAPPELLANT

VERSUS

NJOGU MACHARIARESPONDENT

J U D G M E N T

At the center of this dispute has been plot Number Ruiru/Mugutha/T.440 which the appellant alleged he purchased from one Mary Wangare through her son in-law Peter Ngugi Njeru.

But the respondent claimed the same plot, alleging that he too, had purchased it from the same Mary Wangare through his son Peter Gatibe Kirangi at the same time he purchased Ruiru/Magutha/T.441, which is was adjacent to Ruiru/Mugutha/T.440.

It would appear the appellant was not in the picture of the latter transaction, until when the respondent fenced off and started constructing a building on Ruiru/Mugutha/T.440.

He filed a suit in the court of the Principal Magistrate at Thika on 1.8.1995 to claim from the appellant, amongst others:-

- (a) a permanent injunction to issue against the defendant by himself, his servants and agents from in any way interfering with the plaintiff's land parcel number Ruiru/Mugutha Block 1/T.440;
- (b) general damages as per paragraphs 5 and 6 (of the plaint)
- (c) costs of this suit plus interest and any other belief this Honourable Court may deem justifiably fit to grant.

A defence filed to this suit on 20th November, 1995 denied the averments in the latter but instead laid a claim to the same plot for the defendant by virtue of having bought the same from Mary Wangare Kirangi in 1992.

The case was heard by the Senior Resident Magistrate, (E.O. Awino) on 9th August 1999 when both parties testified. Judgment was delivered on 8th October, 1999 and the appellants case dismissed; hence the present appeal filed herein on 11th May 2000 through a memorandum of appeal which listed five (5) grounds of appeal.

They were as follows:-

- (1) The learned Trial Magistrate erred in law and in fact in admitting in evidence documents which ought not to have been admitted and hence arriving at a wrong decision.
- (2) The learned Trial Magistrate erred in law and in fact when he failed to appreciate the legal nature of the documents produced before him and hence arrived at a bad decision.
- (3) The learned Trial Magistrate misdirected himself in point of law when he failed to appreciate or apply the fundamental Maxim Nemo **DAT QUOD NON HABET** in regard to the alleged sale of land by a person who had no title to pass and hence arrived at the wrong decision.
- (4) The Learned Trial Magistrate misdirected himself in point of law and fact when he gave a judgment whose effect would be to cancel a first registration contrary to Section 143(2) of the Registered Land Act and hence arrived at a wrong decision;
- (5) The learned Trial Magistrate erred in believing the evidence of the respondent against that of the appellant without assigning any legal reasons and hence arrived at a wrong decision.

Counsel for the parties appeared in this court on 4th November, 2002 to submit either in favour or against the appeal.

Counsel for the appellant submitted that plot numbers Ruiru/Mugutha/T.440 and T.441 were owned by one Mary Wangare and adjacent to one another and that the former was sold to the appellant in 1994 through Wangare's son in-law and title transferred to him on 21st June 1994.

That as the title was transferred to him, he discovered the respondent was putting up a house thereon and when he told him to stop and the former refused to do so, the appellant filed the suit subject to this appeal in the lower court.

That apart from the agreement which was produced in the lower court, the appellant's evidence was confirmed by the owner of the plot who testified in the case that she had authorized her son inlaw, Peter Ngugi Njeru to sell the suit plot to the appellant. That having entered into an agreement to purchase the suit plot in 1993, it was not probable the respondent would already have constructed his house thereon, otherwise he – the said appellant, would not have agreed to buy it.

According to counsel the magistrate was wrong in accepting evidence of a power of attorney by which Mary Wangare's son – peter Gatibe Karangi, allegedly sold the same plot to the respondent along with plot number Ruiru/Mugutha/Block T.441 which the said Mary Wangare denied.

That by the time of alleged sale of the suit plot to the respondent was made transfer had already been effected in respect of plot number Ruiru/Mugutha/T.440 and that if the agreement of sale related to both plots to the respondent then transfer of both should have followed or been effected immediately.

That since transfer of plot No. T.441 was made to the respondent and No. 440 to the appellant, there must have been an intention on the part of the seller to transfer the two plots to the respective buyers.

According to counsel, all the circumstances of both the sales favoured title to the appellant in respect to plot No. T.440. That the factor of the respondent constructing his house on plot No. T.440 in 1992 wrongly influenced the magistrates decision because by that year, the appellant's evidence was that there was no construction going on that plot.

That when the respondent entered the plot the first time in 1994, the appellant took steps to warn him that the plot belonged to him and that as at this time the land was already in the name of the

appellant.

That the respondent was aware then that the suit plot belonged to the appellant and should have tried to resolve the issue of ownership before putting his resources in constructing a building on it. Counsel prayed that this appeal be allowed with costs.

On the respondent's side, Counsel for him opposed the appeal and submitted that in the lower court, counsel for the appellant objected to the production of the power of attorney but that the court took it as a letter of authority and not as a power of attorney. According to counsel for the respondent, by the time the suit was filed in court to seek orders of permanent injunction, general damages and costs, the respondent had already moved in and started building on the plot, hence the appellant's first prayer – permanent injunction, had already been overtaken by events. That since there was no prayer for eviction and that parties are bound by their pleadings, the magistrate had no alternative but to dismiss the suit.

That the magistrate could not have addressed the issue of first registration as it was not in the pleadings. That though there were 2 agreements in respect to the sale of the suit plot, the respondent's agreement came earlier than that of the appellant, hence the respondent bought the suit plot earlier than the appellant.

According to counsel, Mary Wangare gave her son authority to sell the suit plot to the respondent and that the magistrate rightly dismissed the appellant's suit.

He prayed that this appeal be dismissed with costs. These are submission made by the parties on this appeal and recorded by the court for consideration and decision.

By virtue of Section 27(a) of the Registered Land Act:-

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

The appellant had plot number Ruiru/Mugutha/T.440 transferred and registered in his name on 21st June 1994 (see plaintiff's exhibit 1) and that the respondent came to occupy it or started building thereon either immediately before or after such transfer was inconsequential since this occupation is not one of overriding interests under Section 30 of the Act.

This is a legal issue and need not be pleaded in the plaint as, it is a point of which Judicial notice should be taken.

That there was a letter of authority or power of attorney to the son or son in-law of Mary Wangare to sell the suit plot to the appellant or respondent, as the case may be was neither here nor there when, fortunately Mary Wangare appeared in the lower court and testified in favour of a sale of the suit plot to the appellant.

The situation would have been a little bit complicated if she was not alive.

In a case of this nature, where the respondent was supposed to make a search at the lands office before taking steps to venture into the suit land, one cannot say the orders sought by the appellant, particularly prayer 1, had been overtaken by events.

There was evidence in the lower court that the respondent was cautioned against constructing a building on a plot which belonged to the appellant but he ignored that caution. This is not a litigant one can say was not aware of the ownership of the suit plot.

I allow this appeal and set aside the order of the lower court dismissing the appellant's suit and substitute therewith one granting a permanent injunction to restrain the respondent by himself, his servant

and agents from in any way interfering with the appellant's land parcel number Ruiru/Mugutha/Block T.440. He should in fact move out of it within 9 months from today.

I will, however, not award him any general damages as no evidence was adduced to show what loss has been suffered by the appellant due to the occupation of his plot by the respondent.

I shall grant the appellant costs of this appeal and case in the lower court.

Orders accordingly.

Delivered this 12th day of November, 2002.

D.K.S. AGANYANYA

JUDGE