



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL NO. 10 OF 2019

NICHOLAS KIOKO MUOKI.....1ST APPELLANT

ODHIAMBO OKON'GO NYAKUNDI JOEL.....2ND APPELLANT

VERSUS

OMAR FEIZAL MOHAMMED.....RESPONDENT

(Being an Appeal from the Judgement of Hon. R.O. Odenyo (Senior Principal Magistrate)

in Migori SPMCC No. 2422 of 2015 delivered on the 24th day of April 2019).

JUDGMENT

A. Introduction

1. The property in dispute in the instant appeal is the whole of Title number SUNA EAST/KAKRAO/4463 measuring approximately zero decimal zero zero four hectares (0.004 Ha) in area (hereinafter referred to as the “**suit land**”). The same is located in Migori County within the Republic of Kenya.
2. The appellants who were the plaintiffs in the original suit before the trial court, are represented by the firm of Abisai and Company Advocates.
3. The respondent who was the defendant in the original suit is represented by the firm of Soire and Company Advocates.
4. In the counter-claim, the respondent herein was the plaintiff whilst one Ismael Ochieng Utende was the 1st defendant (Hereinafter referred to as “ISMAEL”) and the appellants herein were the 2nd and 3rd defendants respectively.
5. The firm of Kerario Marwa and Company Advocates filed a Memorandum of Appearance on behalf of ISMAEL on 20th November 2015, However, by a Notice of Change of Advocates dated 23rd of April 2018 and duly filed in court on 28th November 2018, the firm of Nelson Jura and Company Advocates represented ISMAEL in the counter-claim.
6. It is noted that ISMAEL is not a party to this appeal.

B. The gist of the parties' respective cases before the trial court

7. The appellants sued the respondent by way of a plaint (Fast Track) dated 23rd October 2015 and filed in court on 29th October 2015 for orders infra;
 - a) A permanent injunction to issue restraining the defendant from trespassing, occupying, cultivating and/or carrying out any dealings on the suit land and an order for removal of the caution lodged on the plaintiff's title.
 - b) Costs of this suit.
 - c) Interest on (b) at the current court rates.

d) Any other relief that the court may deem fit.

8. Briefly, the appellants lamented inter alia, that they were the only joint registered proprietors of the suit land upon which the respondent trespassed with effect from September 2015. They pleaded particulars of trespass at paragraph 6 of the plaint. That as a result, they have been deprived of the suit land as the same is occupied by the respondent.

9. The 1st appellant (PW1) and 2nd appellant (PW2) testified that they jointly bought the suit land from ISMAEL on 27th July 2015. That on or about September 2015, the respondent forcefully entered into the suit land and continued to erect a fence and cultivate the land. They made reference to the sale agreement, certificate of official search and a title deed thereto (PExhibits 1, 2 and 3 respectively).

10. The respondent denied the appellants' claim in his statement of defence dated 13th November 2015 duly filed in court on 19th November 2015. In the counter-claim, the respondent alleged fraud against the defendants therein and pleaded particulars at paragraph 13 thereof. Thus, he sought;

a) An order of cancellation of title to 2nd and 3rd defendants herein to the suit land.

b) An order of specific performance to the 1st defendant herein to transfer the suit land to the plaintiff.

c) Costs of this counterclaim.

d) Any other relief this court deems fit to grant.

11. The respondent (DW1) produced as part of his evidence, a sale of the suit land agreement of 1979 made between Isaya Utende the deceased father of ISMAEL and Marko Evembe (DEXhibit 1). DW1 further relied on Land Control Board form (DEXhibit 2) and mutation of the suit land (DEXhibit 3). His witness, Joseph Esaji Evembe (DW1) produced a sale of land agreement dated 19th September 2011 made between himself and ISMAEL. (DEXhibit 4).

12. In brief, the respondent testified that the suit land was originally Land Parcel No. SUNA EAST/KAKRAO/2496. That the first registered owner of the suit land was the deceased father to ISMAEL and upon his demise, the land was transferred to his eldest son, Elisha Abade, (also deceased). After the death of the eldest son, his estate was vested upon ISMAEL who proceeded to distribute the estate of his deceased father to the beneficiaries among them, the family of Evembe, who had previously purchased and fully paid for the land from the said deceased as shown in PEXhibit 4.

13. The respondent contended that the Evembe family sold one parcel of the suit land to the respondent through PEXhibit 2 for a consideration of Kshs. 180,000/- after which the family of Evembe gave vacant possession. That upon instructions from the Evembe family, ISMAEL proceeded to the Local Land Control Board and the suit land was subdivided into 3 portions as per mutation plans (PEXhibit 3) and new numbers created as follows:- LR No.SUNA EAST/KAKRAO/4462 for the family of Evembe, LR NO.SUNA EAST KAKRAO 4463 for the respondent herein and LR NO.SUNA EAST/KAKRAO/4464 for another buyer.

C. The trial court's findings

14. After hearing PW1, PW2, DW1 and DW2 and upon considering the rival submissions, the learned trial magistrate held, inter alia;

"I have looked at the evidence and I am satisfied with the defence evidence that occupation of the land started well before the plaintiffs bought the same piece of land from Ishmael. I have also considered that the plaintiffs did not produce a copy of consent to transfer the land to them from the seller and in my opinion, the defendant is justified to claim that the purported sale/purchase was fraudulent."

15. Finally, the learned trial magistrate reasoned as follows;

"In conclusion, it is my finding that the plaintiffs have not established their case against the defendant to the required. I do therefore dismiss the plaintiff's case with costs to the defendant."

D. Gist of the instant appeal

16. Being dissatisfied by the said judgment, the appellant filed a Memorandum of Appeal dated 17th May 2019 in court on 20th May 2019 as shown in the record of appeal dated 7th August 2020 duly filed on 11th August 2020. The ten (10) grounds of appeal as per said Memorandum are summarised as follows:-

a) That the learned Trial Magistrate erred in law and fact by failing to take into account the fact that as a registered proprietor of land the appellants were legally in actual possession of the suit land and that the respondent herein was indeed a trespasser.

b) That the learned Trial Magistrate erred in law and fact by failing to acknowledge the legitimacy of the Appellants' title to the suit land in the absence of proof to the contrary thereby arriving at a wrong conclusion in law.

c) That the learned Trial Magistrate erred in law and fact by failing to appreciate that the Appellants herein were the purchasers for

value without notice who lawfully bought land and a sale agreement duly adduced before court.

d) That the learned Trial Magistrate erred in law and fact by failing to take into account the fact that the Respondent herein failed and/or neglected to produce any proprietorship documents in rebutting the Appellants' ownership of land.

e) That the learned Trial Magistrate erred in law and fact by failing to give due consideration to the contents of the Appellants' submissions and more specifically the authorities on proprietorship of land thereby erroneously arriving at a wrong conclusion in law.

f) That the learned Trial Magistrate erred in law and fact by dispossessing the Appellants in total disregard of Article 40 of the Constitution of Kenya 2010 and section 2, 24, 25, and 26 of the Land Registration Act.

g) That the learned Trial Magistrate erred in law and fact by awarding the Respondent title to L.R. SUNA EAST/KAKRAO/4463 when the respondent failed to prove his case on a balance of probability.

h) That the learned Trial Magistrate erred in law and fact in finding that the Appellants claim was not worthy of the prayers sought in the plaint even in the face of finding no irregularities in the manner title over the suit land was issued and/or obtained by the Appellants herein.

17. Therefore, the appellants prayed that the appeal be allowed on terms thus:-

a) A permanent injunction to issue restraining the Respondent from trespassing, occupying, cultivating and/or carrying out any dealings on L.R. NO. Suna EAST/KAKRAO/4463 and an order for removal of the caution lodged on the Appellants title.

b) Costs of the appeal.

c) Interest of (b) at court rates.

d) Any other orders the court deems just and equitable in the circumstances.

18. On 19th November 2020, this court ordered and directed that the appeal be heard by way of written submissions. Ms. E. Apondi held brief for Mr. Sigei for the Appellants. There was no appearance on the part of the respondents although they were duly served via email by the court in line with the Corona virus disease pandemic (COVID-19) guidelines.

E. Appellants' submissions in this appeal

19. In his submissions dated 28th January 2021, learned Counsel for the appellants argued grounds 1, 2 and 3 of appeal to the effect that they speak of the sanctity of title. That it was not in dispute that they were the registered owners of the suit land. That their right to land is indefeasible as stated in Section 26 of the Land Registration Act, 2016 (2012) (The LRA) until the respondent proves the contrary.

20. Counsel submitted that the learned trial Magistrate did err by dismissing the appellants' case on the basis that they did not produce a consent of the Land Control Board whilst they were not required by the court to do the same. To fortify the grounds, counsel cited the cases of :

a) **Sophie Wanjiku John –vs-. Jane Mwaniki Kimani [2013] eKLR** where Lady Ougo J held that the onus of proof in a fraud claim should be beyond reasonable doubt

b) **Mbira-vs-Gichuhi [2002] E.A. 138** where Kuloba J held that where there is a dispute on ownership rights of land, a person with the title was in actual possession, the other one was a trespasser.

21. On grounds 4, 5 and 6 of appeal, the appellants' counsel submitted that they were innocent purchasers for value without notice. They exercised their due diligence by conducting a search at the Lands Office before signing a sale agreement. That as at 22nd July 2015, the records show that the suit land was registered in the name of ISMAEL. That the respondent had not lodged any caution, or prohibitory order on the title and if he had, it would have constituted notice to any person including the appellants. Counsel relied on the case of **Lawrence Mukiri-vs. Attorney General & 4 others [2013] eKLR** where the court gave the parameters in which a person is considered a bona fide purchaser for value.

22. Learned counsel also submitted that the respondent ought to have proved the allegation that they obtained the title by fraud. That section 107 of the Evidence Act chapter 80 Laws of Kenya puts strict proof upon the person to prove the existence of any fact. As such, the appellant relied on the decision in the case of **Gichinga Kibuthia-vs-Caroline Nduku [2018] eKLR**. Counsel further submitted that the learned Trial Magistrate simply assumed that the appellants were aware of any previous sale. That the remedy available to the respondent was for breach of contract as against the vendors not the appellant. That the learned Trial Magistrate erred by purporting to grant specific performance in a sale of land agreement which can only issue if the Land Control Board had sanctioned the sale.

23. Regarding grounds 7 and 8 of the appeal, learned counsel for the appellant submitted that the learned Trial Magistrate failed in his duty to fully consider and analyse the case before him. That the analysis of the facts and evidence was very casual. He did not frame the issues and consider the submissions thereby leading to a travesty of justice. That the learned Trial Magistrate ought to have been guided by the submissions, authorities, legal provisions and sound analysis hence, deprived the appellants of the fruits of justice.

24. In respect of grounds 9, 10 and 11 of appeal, learned counsel submitted and emphasized that the doctrine of sanctity of title is central to property law in jurisprudence. That Article 40 of the Constitution of Kenya grants every person the right to acquire and own property whilst sections 24 and 25 of the LRA provide for on the rights of a registered owner of land. That the respondent is a trespasser on the suit parcel of land and ought to vacate the same and remove the caution lodged on the title. Therefore, counsel urged that the appeal be allowed in the following terms

- a. The judgment of the lower court dated 24/04/2019 be set aside and the same be substituted with judgement being entered in favour of the appellants.
- b. A permanent injunction do issue against the Respondent from trespassing, occupying, cultivating and/or carrying out any dealing on LR. SUNA/KAKRAO.4463 and removal of the caution lodged on the aforesaid title.
- c. Costs of the lower court.
- d. Costs of this appeal.

F. Respondents' submissions in the instant appeal

25. Despite being given time pursuant to the court's directions and service of notice through email, the respondent did not file his submissions in the present appeal.

G. Issues for determination

26. I have duly considered the entire record of appeal including the grounds of appeal therein and the appellants' submissions together with all the cited authorities. On that account, the issues for determination that flow therefrom are whether;

- a) ISMAEL held a valid title to the suit land which he could sell and transfer to the appellants.
- b) The appellants hold absolute and indefeasible title to the suit land as innocent purchasers for value without notice.
- c) The present appeal is merited for the grant of the prayers sought therein.

H. Discussion and disposition

27. It is trite law that it is the duty of the first appellate court to scrutinize afresh the evidence and findings of the trial court to make its own independent findings bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses firsthand; see **Peterson-vs-Sunday Post (1958) EA 424 at 429 and Kamau-vs-Mungai and another (2006) 1KLR 150**

28. Similarly, this duty is well stated in **Selle & Another-vs-Associated Motor Boat Co. Ltd. & Others (1968) EA 123 and in Kenya Ports Authority-vs- Kuston (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held, inter alia:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

29. In regard to the first issue, PW1 and PW2 testified that they jointly bought the suit land from ISMAEL as shown in PExhibits 1, 2 and 3. Quite clearly, ISMAEL was registered as it's proprietor on 11th May 2015 and title deed issued to him on 15th July 2015 pursuant to Section 30 of the LRA.

30. Clearly, the appellants claim that they are the only joint legal proprietors of the suit land. On that score, I bear in mind the meaning of the term “proprietor” under section 2 of the LRA.

31. According to the appellants, they entered into the sale agreement dated 27th July 2015 (PExhibit 1) with the vendor, ISHMAEL for the purchase of the suit land. The consideration thereof was the sum of Kshs. 900,000/- only which ISMAEL duly acknowledged.

32. The evidence on record is that both appellants lay ownership claim over the suit land based on PExhibits 1, 2 and 3. On the other hand, DW1 and DW2 relied on DExhibits 1, 2, 3 and 4 in claiming ownership of the same land.

33. It is common baseline that ISMAEL was the administrator of the estate of the late Elisha Abade, the proprietor of the suit land who sold the suit land to the family of Evembe. However, the transfer of the suit land was not done since it was yet to be sub-divided.

34. It is at the point of administration of the estate of the Deceased and upon instructions from the Evembe family, that ISMAEL applied for survey to be done and mutation was done on 10th July 2012 (DExhibit 3). One of the resultant parcels of the suit land was the parcel of land subject of this appeal. The respondent then took possession of the suit land and has been in occupation of the same to date.

35. At the point of signing the agreement between the appellants and ISMAEL, was the latter legally empowered to dispose of the suit land? In **sections 3 of the Law of Succession Act Chapter 160 Laws of Kenya**, the term “Personal representative” means;

“The executor or administrator, as the case may be, of a deceased person.”

36. **Section 82 (b) of the Law of Succession Act** (Ibid),reads;

“Personal representatives shall, subject to any limitation imposed by their grant, have the following powers-

a)

b) to sell, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.”

37. As the administrator of the estate of his deceased father, ISMAEL was tasked with the distribution of the estate of the deceased to its rightful beneficiaries. On that strength, did he have a good title to the suit land to pass to the appellants?

38. Since ISMAEL had powers to sell the suit land to any person including the appellants, he held good title to the same as discerned in PExhibit 2. The testimonies of PW1, PW2, DW1 and DW2 as well as paragraphs 35 and 36 hereinabove, speak to the same position.

39. On the second issue, the appellants obtained PExhibit 3 by way of transfer from ISMAEL as provided for at section 26 (1) of the LRA. I take into account section 24 of the LRA on interest conferred by registration as well as section 25 as read with section 28 of the same Act in respect of the inroads of the rights of a proprietor

40. It is prudent that purchasers of a property do ascertain it’s status before purchase by even conducting site visits to the same. The appellants contended that they carried out thorough search in respect of the suit land, paid for it and obtained title deed thereto and part of the process is revealed by way of PExhibits 1, 2 and 3.

41. Under Section 26 (1) of the LRA, a certificate of title issued by Registrar shall be taken by all courts to be conclusive evidence of proprietorship. Nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances:

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

42. In the case of **Elijah Makeri Nyangw’ara -Vs- Stephen Mungai Njuguna & another (2013) eKLR**, the court held, inter alia:-

“...is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

43. The appellants claim that they were innocent and bona fide purchasers for value of the suit land. They produced PExhibit 2 which show ISMAEL as the proprietor of the suit land and it is on that basis they proceeded to sign the sale agreement-PExhibit 1.

44. This court is well guided by trite law on the essential elements of a bonafide purchaser for value; See **Lawrence Mukiri Mungai (supra) and Katende-vs-Haridars & Company Ltd (2008) 2 EA 173**.

45. In the ancient case of **Fletcher-vs-Peck 10 US 87 (1810)**, it was held thus;

“..but the rights of 3rd persons who are purchasers without notice for favourable consideration can not be disregarded.....he had no notice that cancelled defects can not be set up against him,.....he had paid money for a good title at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties.....” (emphasis supplied)

46. In the counter claim, the respondent alleged fraud against the appellants. As grounds of impeaching PExhibit 3, the particulars thereof are distinctly stated at paragraph 13 of the counter claim as noted in the case of **Kuria Kiarie and 2 others-vs-Sammy Magera (2018) eKLR**.

47. Similarly, in **Kinyanjui Kamau-vs-George Kamau (2015) eKLR**, the Court of Appeal held;

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts.”

48. This court is aware of sections 107,108 and 110 of the Evidence Act Chapter 80 Laws of Kenya regarding proof. The respondent failed to avail evidence in support of his allegations to the requisite standard. It is not the duty of this Court to infer the allegations from the facts presented in this appeal as held in **Kinyanjui Kamau and Kuria Kiarie cases** (supra).

49. The respondent relied on DExhibits 1, 2 and 3 and stated that ISMAEL did not obtain consent from the relevant land control Board for transfer of the suit land to him. His remedy for the purported transaction between him and ISMAEL may fall under section 7 of the Land Control Act (Cap302 Laws of Kenya) and as held in Kariuki-vs Kariuki 1983 KLR 227. Whereas I note the situation of the respondent in the alleged sale, the appellants were bonafide purchasers for value as held in **Fletcher, Mukiri Mungai and Katende cases** (supra) and not parties to the alleged fraudulent processing of the title. So, section 80 (1) (2) of the LRA is not applicable to the appellants' title over the suit land.

50. Regarding the third issue, I find that the registration of the title in the name of the appellants is absolute and indefeasible in regard to the suit land. Section 152A of the Land Act, 2016 (2012) prohibits unlawful occupation of private land including the suit land upon which the respondent is a trespasser as observed in, inter alia, **Mbira case** (supra). Therefore, the appellants are entitled to the suit land as enshrined in Article 40 (1) of the Constitution of Kenya, 2010

51. It is important to note that the court cannot uphold an illegality. However, in the instant matter, the respondent failed to establish the alleged fraud or illegality to the requisite standard against the appellants who have absolute and indefeasible title to the suit land; see **Kibuthia, Kiarie and Kamau cases** (supra), among other authorities.

52. In the result, I am of the considered view that the decision of the learned Trial Magistrate rendered on 24th of April, 2019 is not sound in law. Thus, it cannot be allowed to stand. The instant appeal is therefore, merited.

53. Wherefore, the present appeal commenced by way of memorandum of appeal dated 17th May 2021 and lodged in court on 20th May 2020, is hereby allowed in the terms set out in paragraph 24 hereinabove. Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MIGORI THIS 23RD DAY OF MARCH 2021

G M A ONGONDO

JUDGE

In the presence of:

Ms Okota learned counsel for the appellants

Tom Maurice, court assistant