



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 17 OF 2019

JOANA MUTIA KAORA APPELLANT

VERSUS

THOMAS M'ANAMPIU MNDEGWA1ST RESPONDENT

JOHN MWITI 2ND RESPONDENT

DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER..... 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal from the judgment of Hon. G.N Wakahiu, Chief Magistrate's Court at Maua delivered on

31/12/2018 in MAUA SRM CC No. 343 of 2010)

JUDGMENT

1. The appellant was the plaintiff in the lower court where she instituted the suit vide a plaint dated 8/12/2010 and amended on 4/11/2013 seeking a declaration that the cancellation of the plaintiffs registration to land parcel No. 5840/AKIRANG'ONDU 'A' ADJUDICATION SECTION is illegal, null and void and an order to issue directing the 3rd defendant to register the plaintiff as the proprietor of land parcel No. 5840/AKIRANG'ONDU 'A' ADJUDICATION SECTION, plus costs and interests of the suit.
2. It was her case that vide an agreement dated 12/06/2010, she bought land parcel No. 5840/AKIRANG'ONDU 'A' ADJUDICATION SECTION from the 2nd respondent for a consideration of Kshs.150,000, the land was transferred to her and she took immediate possession.
3. The appellant avers that on or about 03/08/2010, the 1st, 2nd, and 3rd respondents fraudulently and illegally conspired to deprive her of the suit property, whereby, the 3rd respondent proceeded to register the property in the name of the 2nd respondent after unilaterally de-registering the appellant's registration.
4. The 1st and 2nd respondents filed their statement of defence dated 26/01/2011 and amended on 27/8/2012, where the 2nd respondent denied having entered into an agreement with the appellant or that he received Kshs.150,000 from the appellant or that the appellant ever took possession of the suit land.
5. The 2nd respondent averred that the registration of the suit land in favor of the 1st respondent was done lawfully and procedurally and he vehemently denied the allegations of fraud, illegality and conspiracy. The 1st and 2nd respondents further averred that the said agreement dated 12/06/2010 was fraught with fraud and any purported transfer of land arising from the same is therefore void and a *nullity ab initio*. They sought to have the suit dismissed as it was illegally incompetent and a non-starter.
6. The 3rd and 4th respondents filed their statement of defence dated 11.9.2014 which contains a general denial of plaintiff's claim.
7. On 31/12/2018, the trial court delivered its judgment against the ***appellant whose case was found to have no merits and the same was dismissed with costs to the respondents.***
8. The appellant being aggrieved by the decision thereof filed her memorandum of appeal dated 21/01/2019 raising four (4) grounds as

follows:-

- i. That the learned trial magistrate erred in law and fact by failing to find that the appellant had been defrauded his land in view of the evidence tendered by the appellant.**
- ii. That the learned trial magistrate erred in law and fact in the manner he analyzed the evidence and therefore arrived at the wrong decision.**
- iii. That the learned trial magistrate erred in law and fact in failing to find that the appellant had proven her claim on a balance of probabilities.**
- iv. That no trial court properly exercising its mandate could arrive at the impugned decision based on the facts presented before it and therefore the decision was against the weight of the evidence tendered and erroneous.**

9. The appeal was canvassed by way of written submissions. The appellant submitted that she tendered evidence showing how she purchased the suit land from the 2nd respondent and the court erred by failing to find that she was the 1st occupant of the suit land going by her sale agreement. She argued that a court of equity must be guided by the maxim “*where the equities are equal, the first in time prevails*”. Thus the facts were in her favour as she was the first one to purchase the land. The appellant relied on the case of **Salome Warware V George Muna & Another [2015] eKLR**.

10. The 1st and 2nd respondents on the other hand submitted that the onus was upon the appellant to prove fraud as she was the one who made the said allegations. That her evidence ought to have met the standard of proof, but she failed terribly in her case and her claim of fraud remained frivolous and unproven, hence the appeal should be dismissed with cost. They relied on the cases of; **Urmila w/o Mahendra Shah v. Barclays Bank International Ltd & Another (1979) eKLR**, **Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another (2000) eKLR**, **Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others (1996) eKLR** and **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020]eKLR**.

Analysis and determination

11. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

12. **Pw1** Joana Mutia Kaora testified that he bought the land from the 2nd respondent of which they wrote an agreement and a transfer. On 23/06/2010 he was given 0.010 points at the DLASO offices. He was using the land when he found out that his name had been removed from the register and replaced with the name of Samwel Kobia. In cross-examination, **PW1** stated that he had paid Kshs. 150,000, where there was an initial installment of Kshs. 51,000 and the balance was paid later. He relied on the documents in the file.

13. **PW2 Joseph Ntoiti** averred that the appellant bought the land parcel No. 5840 measuring ten points in Akirangondu/Machungulu village, where the last monies were paid on 5/9/2010. That on 25/6/2010, the appellant was registered as the owner of the suit land. In cross examination, he stated that he did not witness the agreement, he only witnessed the balance of the purchase price being paid. He added that plaintiff was given a booklet after the land was registered in his name on 26.6.2010.

14. **PW3 M’Ariamu M’Mbori** testified that he witnessed the appellant paying the Kshs. 89,000 and on 25/6/2010, they went to the lands office where the land was registered in appellant’s name. There after, the appellant who is his neighbor started utilizing the land. On cross examination he stated that he was not a witness to the agreement. However, he witnessed the acknowledgement on 5.9.2010 and that of 12.7.2010. They were in an advocate’s office but they were not issued with a receipt. He also stated that the appellant had planted nappier grass as from 25/6/2010. The appellant was only there for some months before they heard that the land was registered in someone else’s name.

15. **DW1 Samwel Kobia Kaunga** adopted his recorded statement as his evidence. He stated that he bought the plot no. 5840 for Kshs. 130,000 from the 2nd respondent vide an agreement dated 22/8/2010. Before buying the land he went at the DLASO’s office and there was no objection.

16. He occupied the land immediately and it was his 9th year on the suit land by the time he was giving his testimony. He fenced the land with barbed wire and he planted nappier grass and trees. He had never seen the appellant before and prayed that the suit be dismissed. He produced a copy of the sale agreement, receipt for barbed wire to fence the property, an adjudication record showing he is the owner and a letter of consent from the DLASO.

17. In its determination, the trial court had found that the major issue for determination narrowed down to the question of ownership of the land parcel no. 5840. To this end, the trial court agreed with the submissions of the respondents’ in their citation of the case **Peter Mbiri**

Michuki V Samuel Mugo Michuki [2014] eKLR where the learned judge reiterated the case of **Public Trustee v Wanduru (1984) KLR 314 at 321** where it was stated that **“A purchaser in possession has an overriding interest under the provisions of the Registered Land Act”**.

18. The trial court went ahead to find that the 1st respondent had adduced evidence indicating that he bought the suit land via a sale agreement which was witnessed by one Mwirichia and that the said 1st respondent took possession of the land. Further, the trial court had found that the appellant did not prove the allegations of fraud levelled against the respondents. I find that the trial magistrate rightly framed the question for determination which touches on the **Ownership, of parcel no. 5840/AKIRANG'ONDU 'A' ADJUDICATION SECTION?** This court will therefore analyse the issue as to whether the trial court erred in its verdict where the appellants claim was dismissed.

19. At this juncture I must point out that this court does not know who the current 1st respondent (Thomas M'Anampiu) is. The person who was sued as the 1st defendant before the trial court is SAMUEL KOBIA who also testified as DW1. After both sides closed their respective cases before the trial court, the parties filed submissions whereby in plaintiff's submissions, Samuel Kobia was still identified as the 1st defendant. However, in defendant's submissions as well as in the ensuing judgment, the name of Thomas M'Anampiu M'Ndegwa was indicated as the 1st defendant. The proceedings do not capture how Thomas came to replace Samuel. I will say no more on the issue since even in the appeal, the parties were mute on the said issue.

20. The appellant had sought for a declaration that the cancellation of his registration in respect of the suit parcel no. 5840 is illegal null and void and he desired to be registered as the owner of the land. That being the case, it was upon the appellant to adduce evidence to show that he had been registered as the owner of the suit parcel and that such registration had been cancelled illegally and fraudulently. The evidence which was tendered before the trial court did not however support the appellant's averments.

21. Though the appellant talks of having written the agreement and a transfer, he doesn't state specifically as to when he was registered as the owner of the land as per the adjudication records. It is his witness (PW 2) who stated that the appellant was registered as the owner of the land on 25.6.2010 and he was issued with a book-let to that effect. PW 2 did not have the booklet.

22. None of the appellant's documents depict what can be termed as a registration. The appellant's documents are scattered in the record of appeal. Page 86 of the record of appeal is where plaintiffs list of exhibits is to be found but the documents availed are those relating to the transaction between the 1st and 2nd respondents save the application for transfer.

23. I have however been able to discern that some of the documents of the appellant are those found in his supporting affidavit found on page 4 of the Record of Appeal. The documents found there in are:

- The receipt of shs.1000 of 12.6.2010 issued by Victor Gituma advocate.
- The sale agreement between appellant and 2nd respondent dated 12.7.2010.
- Land transfer document between appellant and the 2nd respondent.

24. I discern that appellant's claim is anchored on the document on page 9 of the record of appeal which is an application for transfer by 2nd respondent to the appellant. The hand written note no. (3) states *“Transfer allowed”*. The notes certainly cannot be termed as a form of registration. It was incumbent upon the appellant to adduce evidence before the trial court that the transfer was effectuated in form of registration in so far as adjudication records are concerned.

25. On the other hand, the person known as Samuel Kobia (1st defendant) did avail the record of his registration as the owner of the land (see document on page 27 of the record of appeal).

26. Thus as far as the evidence adduced before the trial court is concerned, there was nothing to show that appellant became the registered owner of the land at any one time. The issue of fraud and illegality in his de-registration therefore does not arise.

27. Another point of concern relates to occupation. The appellant contends that he started using the land after he bought the same. Appellant's witness (PW 3) also stated that the appellant who is his neighbour started using the land.

28. The agreement between the appellant and 2nd respondent stated in clause 5 that *“the possession of the said 0.10 points will be given at the end of September 2010”*. However, by that time, the 2nd respondent had already entered into an agreement with one Samuel Kobia in August 2010 of which Samuel was put into possession immediately after the transfer. Thus by the time appellant was supposed to take up possession of the land, his claim to occupation of the same had materially been affected.

29. Further in his pleadings, the appellant avers that he took possession of the land after the agreement and that he is still in possession. However during the trial on 11.10.2018, the appellant stated that he had been on the suit land for a year, though he had previously used the land then left it to one John who was arrested. Pw2, talks of the appellant having been given the land but was evicted by Kobia. Pw3 was not aware that appellant was evicted by Kobia. What resonates from the evidence is that the issue of occupation of the suit land by the appellant is not clear.

30. This is therefore not a case where the equities are equal such that the earlier one would prevail as submitted by the applicant. It is a case whereby the rights of the appellant did not crystallize into registration in adjudication records. If they did, he had no concrete evidence to

that effect.

31. As rightly stated by the trial court, “*parties are bound by their pleadings*” -See **Mungai Mwangi Charter house Bank Limited (under statutory management) vs Frank N. Kamau (2016) eKLR, Independent Electoral and boundaries Commission & another vs Stephen Mutinda Make & 3 others (2014) eKLR**. In the instant case, evidence of the appellant did not support his pleadings, to the effect that he had been registered as the owner of the land. Sadly, the appellant did not plead for any alternative prayer. I therefore find no fault in the decision of the magistrate.

32. **In the final analysis, I find that the appeal has no merits. The same is dismissed with costs to 1st and 2nd respondents.**

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 19.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE