REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 56 OF 2018

JOSEPH RIUNGU M'KIRIKA (Suing as the Administrator

of the estate of M'KIRIKA M'NANJAU-DECEASED).....APPELLANT

VERSUS

GERALD NTARI M'MUTEA (Suing as the Administrator of the estate of

M'RITARA M'TUAMBAE-Deceased).....RESPONDENT

(Being an appeal from the judgment/decree of the Honorable H.N NDUNG'U, C.M delivered on 8th November 2018 in Meru CM ELC NO. 268 of 1985)

JUDGEMENT

1. The appellant was the plaintiff in the lower court where he instituted the suit vide a plaint dated 14/08/1985 seeking "*an order of specific performance in respect of the two agreements of August and December 1978 between appellant's father and respondent's grandfather, both deceased"*. 35 Years later, the appellant was to file an amended plaint dated 22/03/2018 seeking the following orders;

> *1) A declaration that the plaintiff is the rightful owner of all that parcel of land No. ABOGETA/NKACHIE/828 measuring 21 acres,*
>
> *2) An order of permanent injunction restraining the defendant, his family members, agents ,servants, employees or anybody acting at his behest from interfering with plaintiff's peaceful occupation, user and ownership of the land parcel No. ABOGETA/NKACHIE/828 measuring 21 acres, plus costs and interests.*

2. It was his case that the initial suit land parcel Abogeta/Nkachie/157 was registered in the name of **M'RITARA M'TUAMBAE.** Vide an agreement dated 21/08/1978, the plaintiff's deceased father **M'KIRIKA M'NANJAU** bought a portion of the aforementioned land parcel No. 157 measuring 5 acres from the respondent's deceased grandfather for a consideration of Kshs.5,000. Sometime in December of the same year, the aforementioned parties agreed through a verbal agreement to sell and purchase a further 16 acres for a consideration of Kshs. 24,200 of which a sum of Kshs. 14,350 had already been paid to the defendant's grandfather.

3. The appellant avers that by a court order, the original land parcel No. ABOGETA/NKACHIE/157 was subdivided into two parcels ABOGETA/NKACHIE/828 & 829 whereby ABOGETA/NKACHIE/828 measuring 21 acres was transferred and registered to the plaintiff's deceased father and their family have been in quiet occupation of this land since 1979 to date. That the other portion ABOGETA/NKACHIE/829 has been sub divided severally and the defendant has sold the parcels. He is now set on getting plaintiff's land.

4. The respondent filed his statement of defence dated 29.7.1998, where he denied all allegations contained in the plaint. He claimed that the suit was time barred by virtue of the Limitations of Actions Act. An amended defence dated 22.4.2018 was later filed where the respondent maintained the claim that the suit was time barred.

5. After marking time for a record 35 years in court, the suit was finally heard. By then, the initial litigants had passed on. On 8/11/2018 the trial court entered judgment as follows;

> ***"The plaintiff's father purchased 12 acres of the land parcel No. Abogeta/Nkachie/828 which will vest into his estate for proper distribution to his beneficiaries. The remaining 9 acres be and is hereby bequeathed back to the defendant father's estate for distribution to rightful beneficiaries of his estate. Given the nature of this suit, I will make no orders as to costs".***

6. The appellant being aggrieved by the decision filed his memorandum of appeal dated 7/12/2018 which was amended on 6/10/2020 basing his appeal on six (6) grounds as follows;-

i. That the learned trial magistrate erred in law and fact in failing to find that the appellant's father had bought 21 acres from respondent's grandfather and was in occupation of the whole parcel of land.

ii. That the learned trial magistrate erred in law and fact in failing to find that the appellant's father had a valid title deed for L.R ABOGETA/NKACHIE/828 and the same was indefeasible without any evidence that it was acquired through fraud or any corrupt scheme.

iii. That the learned trial magistrate erred in law and fact by hiving 9 acres off the appellant's land and bequeathing it to the respondent's father's estate despite the fact that the respondent had not pleaded for it either by way of a counterclaim or a stand alone suit.

iv. That the learned trial magistrate erred in law and fact in failing to appreciate that Section 3(7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance, since the appellants have been in occupation as from the time the transaction was conducted in 1981.

v. That the learned trial magistrate erred in law and fact in failing to appreciate that Section 3(3) of the Law of Contract Act having come into effect in 2003 does not apply to an oral contract for sale (or exchange) of land concluded before it came into effect such as the oral contract between the appellant's father and the respondent's grandfather which was witnessed by one Elizabeth Chure.

vi. That the learned trial magistrate erred in law and fact in hiving off nine (9) acres of land parcel No. ABOGETA/NKACHIE /828 and clearly affecting the beneficiaries distribution thereof vide MERU HC SUCC CAUSE No. 124 of 2006 (IN THE MATTER OF THE ESTATE OF M'KIRIKA M'NANJAU)

7. The appeal was canvassed by way of written submissions, the Appellant vide submissions dated 30/11/2020 submitted that his deceased father bought land from the respondent's deceased grandfather on several occasions. The first being 5 acres, then 16 acres which totaled to 21 acres. The land was to be hived off from parcel 157. The respondent's father was to file a succession cause to effect the said transfer to the appellant's father, which he never did prompting the appellant's father to institute a suit where judgment was delivered and he was issued with a title deed in 1994. His family has since been occupying and utilizing the suit land.

8. It was submitted that the appellant's deceased father's title to the suit property could only be challenged successfully on allegation of fraud as provided in section 24, 25 and 26 of the Land Registration Act, and no such allegations have been tabled challenging the title to the suit property. Further, the respondent did not file a counter claim and it was trite law that parties are bound by their pleadings. Thus the learned trial magistrate abandoned her role as an independent and impartial adjudicator and she overstepped her mandate when she hived off 9 acres of the appellant's father's land bequeathing it to the respondent without also taking into consideration that the appellant's father's beneficiaries had already undertaken succession and the land had been distributed among the beneficiaries.

9. The appellant further submitted that he Law of Contract Act is not applicable as the oral agreement between the parties for the sale of 9 acres happened in 1981 before the coming into force of the aforementioned statute.

10. In conclusion, the appellant submitted that he had proven his case on a balance of probability and prays that this appeal be allowed. He has relied on the following cases; **Arthi Highway Developers Limited V West End Buchery Limited & Others (2015) eKLR, Esther Nyaguthii Muriuki Mathenge V Phoebe Muchiri Warui [2018]eKLR, Anderson Omondi Owandho (suing as the legal rep. of the Estate of Thomas Owandho Rajwai (Deceased) V Augustinos Ondiek [2017]eKLR.**

11. The respondent filed his submissions on 30.12.2020. He avers that the appellant did not prove his case on a balance of probabilities as the amended plaint introduced new causes of action and serious contradictions and the witnesses were not trustworthy. The appellant alleged that there were 3 agreements and he was wrong to lump them together. He ought to have filed 3 different suits.

12. Further the Land Control Board Consent was never obtained within the three months of the sale agreement as required in law. The respondent had also pleaded in his defence that the claim was time barred. He added that this appeal is incomplete as it lacks a copy of the decree appealed against and it stands vitiated and ought to be struck out.

13. The respondent relied on the following cases; **Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 others [2015]eKLR, Chege V Suleiman [1988]eKLR, Kilonzo David t/a Silver Bullet Bus Company V Kyalo Kiliku & Another [2018]eKLR.**

Analysis and determination

14. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [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."

15. **Pw1 Joseph Riungu** testified on 18.7.2018. He is the son of the deceased plaintiff. He adopted his statement recorded on 8.11.2011 as

his evidence. He contends that his father M'Kirika M'Nanjau was the initial plaintiff, but he passed on and the current plaintiff was appointed the legal representative vide the ad litem grant of 29.9.2006 in Misc succession cause no. 124 of 2006 in Meru.

16. That on 21.8.1978, his father entered into an agreement with the father of Mutea M'Ritara for the purchase of 5 acres for a consideration of shs.5000. That in 1981, his father entered into an oral agreement with the then defendant's father for sale of 9 acres at a sum of sh. 9000 of which pw2, Elizabeth Churi was a witness. That on 23. 8.1983, his father again bought 7 acres from the then defendant at a sum of sh. 7600. By then, the land was still registered in the name of Mutea M'Ritara's father who was deceased. Mutea was to file a succession cause to effect the transfer of the whole 21 acres.

17. The plaintiff further stated that the then defendant did not effect the transfer as agreed prompting his father to file the suit before the lower court of which, the then defendant did not defend. This culminated in an exparte judgment entered on 26.2.1991. Thereafter, the father of plaintiff obtained a court order sanctioning the transfer of the 21 acres and this gave rise to the issuance of the title deed in 1994. To date, the suit land is still in the name of plaintiff's father.

18. The plaintiff relied on the documents in his list dated 8.11.2011 which were produced as p. exh 1-7 respectively.

19. In cross-examination, **PW1** stated that he had bought 21 acres, whereby he initially bought 5 acres, then 7 acres then another 2 acres and finally another 7 acres. He had exhibited 2 agreements one for 2 acres and another for 7 acres showing he bought 12 acres! He added that it is the court which directed that he gets the suit land. He contends that he has lived on the land for 33 years.

20. **PW2 Elizabeth Churi** also adopted her statement recorded on 8.11.2011 as her evidence. In the said statement, pw2 averred that the appellant was her neighbor and she witnessed the respondent's grandfather receive Kshs. 7,000 for 9 acres of land from the appellant's father. The seller was M'Ritara M'Tuambae while buyer was M'Kirika M'Nanjau.

21. In cross examination, she stated that she was only summoned by the parties to see the exchange of money and she only knew it was for 1 acre though the same was being bought to add on to what the appellant's deceased father had already bought earlier. The monies paid was sh. 7000.

22. **DW1 Gerald Ntari** is the current respondent. He stated that he is the son of Mutea M'Ritara, whose father sold only 5 acres in 1978. He contends that his father never sold any land to plaintiff's father. In cross examination he stated that he had a good relationship with his father who was in Mombasa at the time of the agreement in the month of August.

23. **DW2 Stanley Muthinga Kabururi** adopted his statement dated 24.11.2011 as his evidence. He stated that he is a cousin to Mutea M'Ritara, hence his uncle was M'Ritara M'Tuambae. He contends that his uncle told him he sold only 5 acres to M'Kirika M'Nanjau. In cross examination he stated that he was not present when the agreement was made but the defendant's grandfather told him he sold only 5 acres**.**

24. **Section 24 of the Land Registration Act** states that 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 thereto. **Section 25** of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in **Section 28** of the Act.

25. **Section 26 of the Land Registration Act, 2012** provides that;

> ***"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***
>
> ***(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".***

26. The provisions of **Article 40(6) of the 2010 Constitution** provide that;

> ***"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".***

27. In the present case, it is not disputed that the land parcel no Abogeta/Nkachie/828, is registered in the name of plaintiff's father. The court will therefore proceed to determine whether the trial court erred in ordering the excision of 9 acres thereof to be remitted back to respondent's father's estate.

28. In order to have a grasp of the history of the case, it is essential to identify the parties to the dispute. The suit was filed vide a plaint dated 14.8.1985 by M'KIRIKA M'NANJAU against MUTEA M'RITARA. MUTEA M'RITARA was son to M'RITARA M'TUAMBAE who was the registered owner of parcel no. 157. Both M'Kirika M'Nanjau and Mutea M'Ritara passed on during the lifespan of the suit no. 268 of 1985 in the trial court and were replaced by the current parties. Thus the current respondent (Gerald) is the son of Mutea and a grandson of M'tuambae while appellant is son to M'Kirika.

29. Going by what is pleaded in paragraph 8A of the amended plaint, appellant's father became the registered owner of the suit land 828 via a court process. He was not the registered owner of the suit land 828 by the time he filed this case in 1985. Apparently the suit had proceeded undefended culminating in a judgment in favour of appellant's father. Thus the plaintiff's father's title was born out of the exparte proceedings.

30. This court is a court of law as well as a court of record. As such, the court has keenly looked at the records captured on page 19 – 20 of the main Record of Appeal which indicate that a ruling was delivered on 25.8.1998 which overturned all the earlier proceedings. The then defendant Mutea M'Ritara had filed an application dated 29.7.1998 seeking inter-alia orders to set aside the exparte judgment entered on 26.2.1991. In that ruling of 25.8.1998, the application to set aside the exparte judgment was allowed and the draft defence was deemed as properly filed. The court went on to state that:

> ***"All the orders therefore from the initial judgment, the excision of 21 acres of land from the main land, the transfer of the said land to the respondents, the committal of the applicant to jail and any subsequent orders entered herein was irregular and wrong. It cannot stand. I therefore find that the judgment entered exparte on 6.7.1991 cannot stand. Same be and is hereby set aside together with all subsequent orders that has been made and executed herein".***

31. It is pertinent to note that the father of the current appellant lodged an appeal in Meru High court civil appeal no. 79 of 1998 against the aforementioned ruling of the trial court of 25.8.1998. In a judgment captured on page 22 of the Record of Appeal, that appeal was dismissed.

32. In essence, whatever rights and interest the father of the appellant had acquired vide the exparte proceedings and judgment of1991 became null and void in view of the ruling of 25.8.1998. That is why the parties had to go to trial all over again culminating in the proceedings of 18.7.2018, and the judgment dated 8.11.2018.

33. It follows that the title held by appellant's father is irregular as the same was obtained through procedures which were nullified by the same court. It matters not that the respondent did not file a counter-claim. This is because the amended plaint of 2018 introduced a totally different cause of action, whereby the appellant was seeking protection of his father's title. The new cause of action was geared to change the legal landscape in favour of the appellant.

34. The fact remains that the ruling of 28.5.1998 was sustained even in the appellate forum, thus the appellant cannot base his claim on the indefeasibility of a title. The appeal fails on this point.

35. Another point of concern is that the Record of Appeal is not only incomplete but it is in disarray and contains unexplained strange proceedings. The supplementary record of appeal is the one which contains the proceedings of the trial court. However, a large portion of those proceedings appear to refer to a different case altogether. I am at a loss as to why the proceedings of the lower court case *Meru CMCC No. 268 of 1985 (which forms the subject matter in this appeal)* were merged with those of another case *Meru CMCC No. 265 of 1986 (Ciomboroki Kanake vs Henry Taricha)*. The latter case concerned damage of property by elephants in which Pw 1 was one Ciomboroki Kanake! (see page 9 of the supplementary record of appeal). This court is not able to tell the point at which the correct proceedings were captured for **case Meru CMCC no. 268 of 1985**. What I discern is that the crucial proceedings in which exparte proceedings were conducted, exparte judgment entered and then set aside are conspicuously missing! Yet these are the proceedings which gave rise to the issuance of the title.

36. It is also not lost to this court that the documents relied on by the appellant have not been availed in the record of appeal. The same had apparently been produced as P. exhibit 1 – 7 – see page 49 of the Record of Appeal. Thus again the record of appeal is incomplete.

37. As cited by the respondents in the case of **Bwana Mohammed Bwana vs Silvana Buko Bonaya & 2 others (2015) eKLR:**

> ***"Without a record of appeal, a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law, or the constitution, where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues".***

38. To this end, I find that the appeal lodged before this court is defective for want of the requisite documents and the same was therefore dead on arrival.

39. As regards the entitlement of appellant's father in so far as the issue of purchase is concerned, I find that the trial magistrate considered that the sale of the five acres was not disputed. From the testimony of both rival parties before the trial court, indeed the sale of the 5 acres was not disputed. The current respondent has stated that *"My grandfather sold 5 acres in 1978"*. As to the issue of 7 acres, the trial magistrate relied on an agreement that was written. That was the basis of allowing the claim of appellant to the tune of 12 acres. The rest of the claim was not allowed as there was *"no written and attested sale agreement to that effect"*.

40. The appellant challenges the verdict averring that the trial magistrate failed to consider that section 3 (7) of the law of contract makes exceptions to oral contracts for sale of land captured with performance. However, even though this issue was not given an in-depth analysis by the trial court, I find that the claim of the appellant was still governed by rules of evidence in line with Section 107 – 109 of the evidence Act. The appellant (or his father for that matter) bore the burden of proofing that they bought the 21 acres from the grandfather of the current respondent.

41. The evidence of the appellant before the trial court was not consistent on this issue. In his recorded statement of 8.11.2011 which was adopted as evidence, the appellant refers to 5 acres bought on 21.8.1978, then 9 acres were sold to appellant's father around 1981, and on 23.8.1983, plaintiff's father bought 7 acres from Mutea M'Ritara.

42. However, when he was testifying, the appellant talked of 5 acres, then 7 acres, 2 acres and then 7 acres of which he stated that *"My agreement shows I bought only 12 acres!"*

43. In his pleadings (amended plaint on page 43 of the record of appeal) the appellant talks of 5 acres bought on 21.8.1978, 16 acres bought on December 1978 and 7 acres bought on 23.8.1983 (see paragraph 4, 5 and 6A of the amended plaint). Thus in the pleadings, appellant's claim amount to 28 acres while in the evidence, the total sum is 21 acres though arrived at differently in terms of the recorded statement and the evidence given orally in court.

44. It is not lost to this court that even for the alleged purchase of 23.8.1993 (see paragraph 7 of appellant's recorded statement), the parties to the agreement were dealing with the property of a deceased person, as by then the owner of the land, M'TUAMBAE, father of initial defendant had died.

45. Finally, it was submitted that the verdict of the trial court would adversely affect the family of the appellant, whose members have already settled on the suit land in line with a grant in Meru Succession cause no.124 of 2006 (in the matter of the estate of M'Kirika M'Ananjau). To start with, the issue of the succession cause relating to appellant's father's property does not appear to have been disclosed before the trial court, yet the matter was filed way back in 2006. This means that the appellant is guilty of non - disclosure of material facts.

46. In the case **re Estate of Julius Ndubi Javan (Deceased) 2018 eKLR,** Judge Gikonyo gave a strongly worded statement regarding none disclosure of 3rd party claims to an estate of a deceased person as follows;

> ***"Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law".***

47. The court further held that ;

> ***"Where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased".***

48. The purification of the streams of justice alluded to by Judge Gikonyo in the case of **re Estate of Julius Ndubi Javan (Deceased) (supra)** came into play in the case of **re Estate of M'Twerandu M'Murungi (Deceased) [2020] eKLR** and **Leonard Kimeu Mwanthi v Rukaria M'Twerandu M'Iriungi [2018] eKLR,** In the latter case, I awarded the appellant 1 ½ acres of out of land parcel Ntima/Igoki/118, which later became 3185. The appellant had bought this land in 1970s where he was jointly registered with one Stanley M'twerandu in specific shares. By the time I delivered a judgment on 23.5.2018, the whole land appears to have been part of the estate of Stanley M'Twerandu.

49. In a ruling delivered on 27.2.2020 headed ***'Turning of tables"***, Judge Gikonyo in In **re Estate of M'Twerandu M'Murungi (Deceased) [2020] eKLR** overturned earlier orders where the whole land had been part of the deceased estate. The extract of the verdict in that succession case is as follows;

> ***"Now, as boldly as the court pronounced itself before on the basis of facts prevailing at the time, so also shall it pronounce itself here. I note the decree in ELC Appeal No. 92 of 2010 is clear and self-executing. I need only to formally give it effect in these proceedings. Accordingly, I review earlier order declaring the entire portion herein to be the estate property. I now declare that in accordance with the decision of ELC above which declared 1 ½ acres in L.R.No. Ntima/Igoki/1383 to belong to the Applicant, the balance thereof is what constitutes the estate property to be shared amongst the beneficiaries stated in the grant".***

50. What resonates from the foregoing analysis is that it matters not that the appellant's family have embarked on sharing their father's property. The bottom line is that what did not belong to their father in the first place cannot belong to his estate either and shall be taken back. In this case, the reversion is to the tune of 9 acres to be precise.

51. In the final analysis, I find that the appellant did not prove his case on a balance of probabilities in respect of 21 acres of land. I find no reasons to disturb the award of the trial court. This appeal is hereby dismissed with costs of the appeal to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 21ST DAY OF APRIL, 2021 IN PRESENCE OF:

C/A: Kananu

M/S Muriithi for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE