Koech v Kipserem (Environment and Land Appeal 8 of 2022)
[2023] KEELC 20508 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20508 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND APPEAL 8 OF 2022

L WAITHAKA, J

OCTOBER 5, 2023

BETWEEN

REUBEN KOECH ..... APPELLANT

AND

TAPTUEI KIPSEREM ..... DEFENDANT

(Being an Appeal from the judgment of Hon. Caroline T. Ateya SRM delivered on 17th January 2022 in Iten ELC 13 of 2019)

JUDGMENT

1. By a plaint dated 4th June, 2019 the Respondent herein instituted a suit in the lower court to wit Iten SPMCC ELC Case No.13 of 2019 seeking judgment against the Defendant (now appellant) for:-

    i. A permanent injunction barring the defendant either by himself, servants, agents and/or employees from trespassing on the parcel of land known as Cherangany/Koitugum/359 or cultivating the said parcel or any portion thereof, or otherwise interferring with her occupation and possession of the entire suit property or any portion thereof;

    ii. An eviction order;

    iii. Damages for trespass and mesne profits from the date of illegal occupation and cultivation;

    iv. Costs and interest at court rate.

2. The suit was premised on the grounds that at all times material to the suit, the parcel of land known Cherangany/Koitugum/359 (hereinafter referred to as the suit property) belonged to Kipserem Chemjor (deceased). That sometime in 2011, the defendant without any colour of right or lawful justification entered into and occupied 5.2 acres of the suit property and has, since that time been cultivating the said portion of the suit property.

3. Terming the defendant's activities on the suit property illegal, the plaintiff instituted the suit referred to herein above seeking the reliefs listed herein above.

4. The defendant filed a statement of defence and counterclaim dated 28.6.2020 and amended on 22nd July 2020 denying the allegations contained in the plaint and contending that he had bought a portion of the suit property from the plaintiff, her son or her servant or agent or whomever sold to him the 5.2 acres of the suit property he occupies.

5. Explaining that he had enjoyed peaceful use and possession of the suit property since 2011 when he bought the portion of the suit property in question, the defendant pleaded that vide an agreement executed in 2019 in presence of the assistant chief, Kapkitony sub-location, the plaintiff acknowledged that she had sold a portion of the suit property to him.

6. By way of counterclaim the defendant sought judgment against the plaintiff for:-

    i. A declaration that he, the defendant, is the lawful owner of 5.2 acres out of the suit property having acquired them by constructive trust upon purchase;

    ii. An order directing that the land restriction lodged by the plaintiff, her agents and/or servants against the suit property upon purchase be vacated/or lifted;

    iii. An order of specific performance compelling the plaintiff to sign all relevant transfer forms in his favour with respect to the 5.2 acres failure of which the executive officer of the court to execute the same;

    iv. A permanent injunction to restrain the plaintiff and/or her agents from encroaching on the 5.2 acres he purchased comprised in the suit property or in any manner interfering with his use, possession and peaceful enjoyment of the suit land;

    v. General damages and mesne profit;

    vi. Cost and interest.

7. When the case came up for hearing, the plaintiff, who testified as P.W.1, availed five (5) witnesses herself included.

Evidence

Plaintiffs Case

8. The plaintiff also produced the following documents in support of her case:- certificate of death for Kipserem Chemjor, limited grant of letters ad litem, certificate of official search in respect of the suit property as Pexbt 1-3.

9. The plaintiff denied having sold the land to the defendant and stated that the land had only been leased to him by her son. She urged the court to order him to leave the suit property.

10. Selly Chepkemoi, stated that the land belongs to his deceased father and that they had not sold it to the defendant.

11. She acknowledged that the defendant had been using the land since 2011 but like P.W.1 stated that the land was leased but not sold to him.

12. John Kosgei Serem, a son of the deceased, denied having sold the suit property to the defendant and stated that he only leased it to him. He further stated that he had no authority to sell the suit property to the defendant.

13. John Kironei, informed the court that he attended a meeting called to resolve the dispute between the plaintiff and defendant over the defendant's claim that he had bought a portion of the suit property from P.W.3. They asked for the sale agreement and learnt that the defendant had none. They advised the parties to pursue the matter in court.

14. Benard Kipchirchir Kosgei, stated that the suit property is family land and that they never sat as a family to subdivide it.

Defendants Case

15. D.W.1, Reuben Koech Kosgei, informed the court that he bought the 5.2 acres he claims from the plaintiff, John Koech and John Kipserem. He produced the agreements dated 15th October, 2021; 1st January 2020; 1st January, 2010; 12th July, 2012, the minutes of the meeting held on 10th December, 2019 and the chief's letter dated 26th September, 2019 as Dexbt 1 to 6. He urged the court to assist him get the portion of the suit property he bought failing which he be paid the current purchase price of the suit property.

16. In cross exam, the defendant admitted that when he bought the suit property the registered owner was deceased.

17. D.W.2, Joseph Kipkoech, informed the court that he sold to the defendant land which he bought from plaintiff in 2011. He sold it to the defendant at Kshs. 180,000/-. When he bought the land, Kipserem Chemjor was dead. He admitted that succession in respect of the estate of Kipserem Chemjor had not been done.

18. D.W.3, Gabriel Chelimo, informed the court that he was present in the meeting of 10/5/2019 when the plaintiff agreed to give the defendant 2.5 acres out of the suit property.

19. It is on the basis of the foregoing evidence that the learned trial magistrate entered judgment in favour of the plaintiff and dismissed the defendant's counterclaim.

20. In so doing the learned trial magistrate inter alia stated:-

> " The defendant in his counterclaim had prayed for an order directing the plaintiff to refund him his purchase price. The defendant testified that he bought part of the land from the plaintiff, the plaintiff's son and DW2. It appears from the pleadings and evidence tabled before court that the plaintiff and her family have purportedly sold part of the suit land to several people. There was however no document showing that the plaintiff and the defendant entered into an agreement for sale of land. A prayer for refund is a specific prayer and it is not clear how much money was directly paid to the plaintiff for court to make an order for refund.
>
> While he is entitled to such refund under the principle of unjust enrichment, the court can only make orders against parties to a suit. The only remedy available for the defendant is to pursue the persons who purported to sell the property to him.
>
> In summary, therefore, the court finds as follows:-

a. The claim by the plaintiff against the defendant fails as the same was null and void ab initio having been based on an illegality as provided for under Section 45 and 82 of the *Law of Succession Act*.

b. Under the counterclaim, the defendant is only entitled to a claim for a refund under the principle of unjust enrichment. This is however a specific claim and the court cannot make an award against the plaintiff as the same was not specifically proved. The defendant is at liberty to pursue the persons who purported to sell him the property.

c. There is no order to cost."

21. Dissatisfied with the decision of the learned trial magistrate the defendant appealed to this court on five (5) grounds. These are that the learned trial magistrate erred by:-

i. Failing to find that the respondent ought to have refunded him a sum of Kshs.395,000/- which she had received as consideration for the 2 ½ acres purchased vide sale agreement dated 10th May 2019;

ii. Failing to find that the defendant had purchased one acre of land from Joseph Koech and there was no privity of contract between the respondent and the appellant;

iii. Failing to find that Joseph Koech was not party to the proceedings hence the court ought not to have made adverse orders on a party not heard;

iv. Failing to consider his evidence and submissions;

v. Arriving at a wrong decision.

22. The Appellant urges this court to allow the appeal, set aside the judgment of the lower court and substitute it with an order that he, the appellant, is entitled to refund by the respondent and is entitled to 1 acre of the land he purchased from Joseph Koech.

23. Pursuant to directions given on 23rd May, 2023 that the appeal shall be disposed off by way of written submissions, parties filed submissions which I have read and considered.

24. In his submissions filed on 8th June, 2023 the Appellant has identified two issues for the court's determination. These are:-

i. Whether he, the appellant, is entitled to refund of the purchase price; and

ii. Whether he, the appellant, is entitled to one acre that he purchased from Joseph Koech.

25. With regard to the first issue, it is submitted that the Appellant in his amended defence and counterclaim dated 22nd July, 2020, paragraph 19 thereof, specifically pleaded for refund of his purchase price.

26. The appellant acknowledges that a prayer for refund of money paid is in the realm of special damages which must be specifically pleaded and proved and submits that the Appellant's claim for refund of consideration paid to the respondent is made out vide paragraph 6, 8 and 19 of his amended defence and counterclaim.

27. The Appellant is said to have produced evidence capable of demonstrating that he bought 2½ acres in 2012 through the agreement dated 10th May 2019, where the respondent acknowledged to have received Kshs. 395,000/-.

28. Terming the respondent's contention that she did not sign the agreement of 10th May 2019 an afterthought, the Appellant urges this court to find that he made up a case for refund of Kshs.395,000/- which the respondent admitted having received from him for the 2 ½ acres she sold to him in 2012.

29. On whether the appellant is entitled to the one acre he purchased from Joseph Koech, it is submitted that the learned trial magistrate erred by failing to find that the defendant bought one acre from Joseph Koech and that there was no privity of contract between the respondent and the appellant concerning that portion of the suit property.

30. According to the appellant, the portion of the suit property sold to Joseph Koech before it was subsequently sold to him by Joseph Koech could not form part of the respondent's claim against him.

31. In her submissions filed on 19th June, 2023 the respondent submits that the appellant failed to state with precision who received the money in respect of the various agreements he relied on in support of his case.

32. It is pointed out that the respondent denied receiving any funds in relation to the agreements and submitted that the burden was upon the appellant to proof that the respondent indeed received the money.

33. The agreement dated 10th May 2019 is said to be incapable of forming a basis of the appellant's claim for refund.

34. It is acknowledged that the appellant could pursue a claim for refund of the monies paid from the persons who received the money but reiterated that he failed to prove that the respondent received any money from him arising from the impugned sale agreements.

35. Concerning the appellant contention that the learned trial magistrate erred by failing to find that he is entitled to the 1 acre he bought from Joseph Koech, it is submitted that arising from the fact that the estate of the deceased had not been succeded to when Joseph Koech purportedly bought the land, Joseph Koech did not acquire any good title to the portion of the suit property which he could pass to the appellant.

36. Terming the appeal lacking in merits, the respondent urges this court to dismiss it with costs to her.

Analysis and determination

37. From the grounds of appeal and the submissions, the sole issue for the court's determination is whether the appellant has made up a case for interfering with the decision of the trial magistrate.

38. Concerning that issue, in discharge of the duty vested in this court as a first appellate court I have reevaluated the evidence adduced before the lower court with a view of of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.

39. A review of the evidence adduced in the lower court shows that the suit property at the time it was purportedly sold to the Defendant/Applicant and his witness, Joseph Koech (D.W.2), formed part of the estate of Kipserem Chemjor (deceased). By operation of law, and in particular section 45 as

read with section 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya, both the Appellant and his witness, D.W.2, did not acquire good title in the portions they purport to have bought.

40. There being evidence that at the time D.W.2 sold a portion of the suit property, the portion bought belonged to the estate of Kipserem Chemjor (deceased), the Appellant cannot be heard to claim that he acquired good title to the suit portion he bought from D.W.2 merely because he bought it from a third party. If the third party had no good title in the suit property, it means that no good title capable of legal protection passed to the defendant/Appellant from D.W.2.

41. For that reason, I find the Appellant's argument that the learned trial magistrate erred by failing to find that the defendant had purchased one acre of land from Joseph Koech and that there was no privity of contract between the respondent and the appellant regarding the portion bought from D.W.2 to be unfounded. The issue before the learned trial magistrate was legality or otherwise of the plaintiff's possession of the suit property, which possession, from the pleadings and evidence adduced was premised on illegal contracts purportedly entered into between the Defendant/Appellant, the Appellant's witness (D.W.2) and persons who had no authority to deal with the estate of Kipserem Chemjor hence null and void ab initial. In that regard see the case of *Re Estate of Jamin Inyanda Kadambi (Deceased)* s where it was held:-

> "A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have power to sell the property by virtue of section 82. Even then, immovable assets, like land such as Kakamega/Kegoye/30 cannot be disposed off by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(1)(b)(ii) of the *Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to section 54 and 82(b)(ii) of the *Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law."

42. Turning to the contention that the learned trial magistrate erred by failing to find that Joseph Koech was not party to the proceedings hence the court ought not to have made adverse orders on a party not heard, it is the finding of this court that the learned trial magistrate did not make any adverse orders against Joseph Koech. All what he did was to make a finding on a question of fact and law based on the evidence presented before him, which finding is sound and based on law. I find that ground of appeal to be illadvised and incapable of availing the Appellant the reliefs sought.

43. As to whether the learned trial magistrate erred by failing to find that the respondent ought to have refunded the appellant a sum of Kshs.395,000/- which she had received as consideration for the 2 ½ acres purchased vide sale agreement dated 10th May 2019, whilst the respondent admitted having received some money from the Appellant in what would be consideration for the various sale agreements executed between the Appellant and the persons he entered into the agreements with, I do find the Appellant's pleadings in support of the claim that he is entitled to a refund of Kshs. 395,000/- from the Appellant to have been inadequate for purposes of hinging his claim for that amount. I say so because a review of the pleadings filed by the Appellant does not reveal a claim of refund of Kshs.395,000/- based on a specific agreement and against who.

44. It is trite law that special damages have to be specifically pleaded and strictly proved. In that regard see the case of *Hahn v. Singh*, Civil Appeal No.42 of 1983 (1985)KLR 716 where the Court of Appeal held:-

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

45. In the special circumstances of this case where the Appellant had not specifically asked the court to award him Kshs. 395,000/- based on the agreement purportedly entered into in 2012 and acknowledged vide the agreement signed in 2019, I find the pleading to be incapable of forming a basis of the Appellant's claim to entitlement of refund of Kshs. 395,000/- from the Respondent.

46. The upshot of the foregoing is that the appeal is that the appeal lacks in merit and is for dismissal. Consequently, I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ITEN THIS 5TH OCTOBER, 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms Kinyanji holding breif for Mr. Matheri for the appellants

Ms Luwasi for the respondents

Christine – Court Assistant