



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

E.L.C. APPEAL NO. 52 OF 2019

JOSPHAT KINOTI MWANJA.....APPELLANT

-VERSUS-

SAMSON MIRITI M'ITIRI (on behalf of the estate of

M'ITIRI M'MUGAINE (Deceased)...1STRESPONDENT

JOSEPH KITHINJI 2ND RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment and decree of *Hon. J. Irura (PM) dated 20th March, 2019 in Nkubu PMCC No. 47 of 2006 – Samson Miriti M'itiri (suing on behalf of the estate of M'itiri M'Mugaine (deceased))*. By the said judgment, the trial court allowed the 1st Respondent's suit for recovery of the suit properties from the Appellant and granted certain consequential orders to give full effect to the judgment. The 1st Respondent was also awarded costs of the suit.

2. The material on record indicates that by a plaint dated 7th August, 2006 the 1st Respondent sought a declaration that the Appellant had obtained registration of Title No. Nkuene/Kithunguri/566 and 567 (*the suit properties*) through fraudulent means. The 1st Respondent sought cancellation of all the alleged fraudulent entries in the land register and for the suit properties to revert to the estate of the deceased. Parcel No. 567 was registered in the name of the Appellant absolutely whereas parcel 566 was registered jointly in the names of the Appellant and the deceased.

3. The Appellant filed a defence dated 20th September, 2006 whereby he denied the 1st Respondent's claim. He denied any fraud in the acquisition of the suit properties and asserted that he was a *bonafide* purchaser for value of the suit properties from the deceased during his lifetime. He, therefore, prayed for dismissal of the 1st Respondent's suit with costs.

4. The material on record further indicates that upon a full hearing of the suit, the trial court found for the 1st Respondent and granted the prayers for recovery of the suit properties. The court consequently granted a declaration to the effect that the Appellant had fraudulently obtained registration of the suit properties; that the relevant title deeds should be cancelled so that the suit properties are restored into the name of the deceased; and that the Land Registrar Meru do effect the cancellation of titles with immediate effect.

5. Upon consideration of the conflicting evidence tendered by the parties in support of their respective positions, the trial court believed the 1st Respondent's case and evidence and held that there was no sufficient evidence of purchase of the suit properties by the Appellant and that, in any event, the alleged sale was null and void for lack of consent of the Land Control Board. The trial court was of the opinion that the alleged sale agreement between the Appellant and the deceased was not valid in terms of **Section 3(3) of the Law of Contract (Cap. 23)** and that alleged agreement was in a vernacular language which was never translated into the language of the court.

B. THE GROUNDS OF APPEAL

6. Being aggrieved by the judgment of the trial court, the Appellant filed a memorandum of appeal dated 5th April, 2019 raising the following nine (9) grounds of appeal:

- a. The learned trial Magistrate erred in law and fact by finding that the Appellant did not purchase the parcel of land L.R. No.

Nkuene/Kithunguri/567 from Ithiri M’Mugaine despite the evidence in writing to demonstrate the sale of land.

b. The learned trial Magistrate erred in law and fact by failing to find that the Appellant had adduced evidence in support of his defence to the effect that he purchased L.R. No. Nkuene/Kithunguri/567 and ½ share of L.R. No. Nkuene/Kithunguri/566 from the late Ithiri M/Mugaine despite the evidence which was adduced in court by the Appellant.

c. The learned trial Magistrate erred in law by finding that the Appellant did not satisfy the requirements of **Section 3 of the Law of Contract Act (Cap. 23) despite the production of the evidence in writing in court.**

d. The learned trial Magistrate erred in law and fact by impeaching the Appellant’s title deeds when Respondent’s allegations of fraud were not strictly proved to the standard required by the law.

e. The learned trial Magistrate erred in law and fact by shifting the burden of proof on the requirement of the consent from the Land Control Board when the Respondent did not produce the documents to challenge the Applicant’s registration of the suit lands in the names of the Appellant.

f. The learned trial Magistrate erred in law and fact that by finding that the Appellant did not purchase the land from the deceased despite the evidence from the Appellant.

g. The learned trial Magistrate erred in law and fact by finding and ordering the cancellation of the Applicant’s title deeds with immediate effect contrary to the law providing for filling an appeal.

h. The learned trial Magistrate erred in law and fact in that she failed to consider the Appellant’s evidence, submissions and the judicial authorities thereof and thereby arrived at the wrong decision.

i. That the decision of the learned trial Magistrate was against the weight of evidence and the law.

7. Consequently, the Appellant sought the following orders/reliefs:

a. That the judgment of the trial court in Nkubu PMCC No. 47 of 2006 be set aside.

b. That the 1st Respondent’s suit be dismissed with costs.

c. That costs of the appeal and the suit before the trial court be borne by the 1st Respondent.

C. DIRECTIONS ON SUBMISSIONS

8. When the appeal was listed for hearing on 31st August, 2020 it was directed that the same shall be canvassed through written submissions. Consequently, the parties were given timelines within which to file and exchange their written submissions. However, since the Appellant had already filed his submissions on 28th August, 2020, the Respondent was granted 14 days to file his submissions. The record shows that the Respondent filed his submissions on 21st October, 2020.

D. APPLICABLE LEGAL PRINCIPLES

9. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

“...Briefly put they are that this court must 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424** Sir `Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

11. In the same case, **Sir Kenneth O’Connor** quoted **Viscount Simon, L.C in Watt v Thomas [1947] A.C 424** at page 429-430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the

circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

E. THE ISSUES FOR DETERMINATION

12. Although the Appellant raised 9 grounds in his memorandum of appeal and argued 5 of them in his submissions, the court is of the opinion that the appeal may be effectively determined by resolution of the following four (4) key issues:

- a. Whether the trial court erred in law and fact in holding that there was no sufficient evidence to demonstrate the Appellant’s purchase of the suit properties.
- b. Whether the trial court erred in law and fact in holding that the 1st Respondent had established fraud against the Appellant.
- c. Whether the trial court wrongfully shifted the burden of proof to the Appellant on the issue of consent of the Land Control Board.
- d. Who shall bear the costs of the appeal.

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law and fact in holding that there was no sufficient evidence to demonstrate purchase of the suit properties

13. Whereas the Appellant contended that there was massive evidence on record to demonstrate that he lawfully acquired the suit properties from the deceased as a purchaser for valuable consideration, the 1st Respondent poked holes into the evidence tendered by the Appellant as incredible and insufficient. The Appellant relied upon an undated document in vernacular which he claimed demonstrated the impugned sale. The witnesses to the said agreement were not called at the trial. And as the trial court pointed out, the said agreement was never translated into the language of the court. The trial court also pointed out that the particulars of the property the subject of the alleged sale were not captured in the document.

14. The court is aware that the trial court was faced with conflicting evidence by the parties. The trial court had the benefit and advantage of hearing the witnesses who testified and observing their demeanor. The trial court cannot, therefore, be faulted for believing the Respondent’s evidence on the issue of the alleged purchase of the suit properties by the Appellant.

15. The material on record shows that one of the persons who was alleged to have accompanied the deceased for the purpose of initiating the transaction, Joseph Kithinji, denied having been so involved. He also completely denied knowledge of the alleged sale transaction. Some of the Appellant’s own witnesses such as DW2 stated that he did not see anyone sign the sale agreement even though he claimed to have been present during the sale.

16. The court is satisfied that the trial court did not err when it found that there was no credible or sufficient evidence to demonstrate the alleged purchase of the suit properties by the Appellant from the deceased. This court’s own evaluation of the evidence on record leads the court to the conclusion that the alleged purchase was not proved. It is strange that the Appellant never asserted his ownership of the suit properties during the lifetime of the deceased. He only appeared to have claimed ownership in 2006 when the 1st Respondent’s family felled some trees to make way for installation of electricity poles and cables.

(b) Whether the trial court erred in law and fact in holding that the Respondent had established fraud against him

17. The Appellant contended that the fraud and particulars of fraud alleged against him by the 1st Respondent were not proved or adequately proved to the required standard. He relied upon the case of **Kibiro Wagoro Makumi v Francis Nduati Macharia & Another (2018) eKLR**. The record shows that the trial court made reference to **Black’s Law Dictionary** for the definition of fraud and stated as follows:

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional...”

18. The court has further noted from the judgment that the trial court correctly appreciated the standard of proof in a suit where fraud is alleged. The trial court held that the standard of proof is higher than on a balance of probabilities but not as high as proof beyond reasonable doubt. So, the sole question for determination is whether the trial court correctly applied the law with respect to proof of the fraud alleged against the Appellant.

19. The 1st Respondent’s claim before the trial court was that the Appellant had obtained registration of the suit properties through fraudulent means. The Appellant’s defence to the claim was that he was a purchaser for value from the deceased. The court is of the opinion that once the trial court found and held that there was no evidence of the alleged purchase, there was no other basis or justification upon which the Appellant could have been lawfully registered as absolute owner and joint owner of the suit properties. The only conclusion which could be drawn from the circumstances was that the Appellant had obtained registration through deceit or fraud as defined in **Black’s Law Dictionary**. The trial court cannot, therefore, be faulted for reaching that inevitable conclusion.

(c) Whether the trial court wrongfully shifted the burden of proof to the Appellant on the issue of the consent of the Land Control Board

20. The court has considered the material and submissions on record on this issue. The Appellant contended that the trial court wrongfully shifted the burden of proof to him to demonstrate that the consent of the Land Control Board was obtained for the transactions in issue. He submitted that it was the duty of the 1st Respondent to prove that the said consent was never granted. He relied upon **Sections 107 and 109 of the Evidence Act (Cap. 80)** in support of that submission.

21. On the other hand, the 1st Respondent contended that the question of whether or not the consent of the Land Control Board was obtained was a fact which was peculiarly within the knowledge of the Appellant hence he had an obligation to either prove or disprove the same under **Section 112 of the Evidence Act (Cap. 80)**. The 1st Respondent relied upon the Court of Appeal decision in the case of **George Mbiti Kiebia & Another v Isaya Theuri M’Lintari & Another [2014] eKLR** in support of that submission.

22. The court is persuaded by the 1st Respondent’s submission that in terms of **Section 112 of the Evidence Act** the Appellant had an obligation to demonstrate that the alleged sale transactions had the sanction of the Land Control Board. The court is persuaded by the Court of Appeal decision in the case of **George Mbiti Kiebia & Another v Isaya Theuri M’Lintari & Another (supra)** whereby the court held that:

“...Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the Appellant got registered as proprietor of land parcel No. 70 is a fact within the personal knowledge of the Appellant and it was upon him to dislodge the motion that land parcel No. 70 was ancestral land and refute that he was registered as proprietor as a representative of the family of the late M’Kiebia Baithumbu...”

(d) Who shall bear costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the 1st Respondent shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

24. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. Accordingly, the appeal is hereby dismissed in its entirety with costs to the 1st Respondent. The 2nd Respondent shall not be awarded any costs since he never participated in the appeal.

It is so decided.

Judgment dated and signed in chambers at **Nyahururu** this **20th** day of **May** 2021.

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Y. M. ANGIMA

JUDGE

JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021

In the presence of:

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L. N. MBUGUA

ELC JUDGE