Omesa v Nyakwara & another (Environment and Land Appeal 14 of 2019) [2022] KEELC 14614 (KLR) (3 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14614 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL 14 OF 2019

JM ONYANGO, J

NOVEMBER 3, 2022

BETWEEN

SOPHIA KEMUNTO OMESA ..... APPELLANT

AND

CHRISTINE KWAMBOKA NYAKWARA ..... 1ST RESPONDENT

MICHEAL MAYAKA NYAKWARA ..... 2ND RESPONDENT

(Being an Appeal from the judgment Hon. B. M. KIMUTAI (PM) delivered 15th October, 2019 in KEROKA PMELC CASE No. 2 of 2019)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated November 11, 2020, the Appellant filed an appeal against judgment of Hon BM Kimutai (PM) delivered on October 15, 2019 in Keroka Pmelc Case No 2 of 2019 (hereinafter referred to as 'the Appeal').

2. As per memorandum of Appeal dated April 20, 2022, the Appeal is premised on the following grounds:

    a. The learned trial magistrate erred in law and fact by failing evaluate the evidence presented by the Appellant.

    b. The learned trial magistrate erred in law and fact by dismissing the suit with costs to the Respondents.

    c. The learned trial magistrate erred by failing to make a finding that the Appellant had proved her case on balance of probabilities and was entitled to the orders sought in the Plaint.

    d. The learned trial magistrate erred in law and fact by trying to implement a voidable agreement.

e. The learned trial magistrate erred in law and fact by failing to appreciate that the respondent did not have any property to sell the same having been encumbered by Kenya Power and Lighting Company and the Respondents having been compensated.

f. The learned trial Magistrate misdirected himself by making a finding that has left the Appellant with nothing the property sold being of no use to the Appellant and has therefore been defrauded.

g. The learned trial Magistrate erred in law and in fact by failing to make a finding that the Appellant was an innocent purchaser for value and misdirected himself and erroneously made a finding that the Appellant ought to have known of the encumbrance on the land.

h. The learned Magistrate erred in law and fact by failing to make a finding that the Agreement had a default clause and that it was very clear from the Agreement that the defaulting party was to pay the other party an amount equivalent to three times the purchase price plus the purchase price.

i. The learned Magistrate erred in law and the fact by ordering the Appellant to return ½ acre to the Respondent whereas the Respondents admitted in court that they had not since the conclusion of the sale questioned the transfer of the entire piece of land.

j. The Trial Magistrate erred in law by not taking judicial notice that the Respondent's counterclaim was an afterthought only brought by the Respondents to counter the genuine claim by the Appellant.

k. The learned Magistrate erred in law and fact by ignoring to consider the authorities relied on by the Appellant which authorities were in favor of the Appellant's case on equitable grounds.

l. The learned trial Magistrate erred in law and in fact by ignoring the clear clause in the sale Agreement that the property was to be sold free of any encumbrance, which encumbrance the Appellant discovered when she went to take possession of the suit property.

m. The learned trial Magistrate erred in law and in fact by not making a finding that the Respondents had been compensated by Kenya Power and Lighting Company and that they sold the suit property contrary to the terms of the Agreement that the land has been sold to other person and not allocated for a government purpose.

3. Based on the above grounds the Appellant prayed that the court sets aside the judgment of the learned trial Magistrate and substitute the same with an order allowing the Appellant's claim in the lower court with costs.

Brief background of the case

4. The Appellant filed suit through her plaint dated January 22, 2019 seeking a refund of the purchase price emanating from the purchase of a property known as Nyansiongo Settlement Scheme/525 (hereinafter referred to as the suit property) from the Respondents jointly and severally. In her Plaint, the Appellant averred that she entered into a sale agreement on December 12, 2017 for the purchase one acre of the suit property from the Respondents who were previously the joint registered owners of the same at a cost of Kshs 1,400,000.

5. Upon the surveyor visiting the land to determine the size of the property purchased, he discovered that there was an additional ¼ acre which the Respondents verbally agreed to sell to her at a cost of Kshs 350,000. However, upon taking possession of the suit property she discovered that the suit property

had been acquired by KPLC for wayleave purposes and that the Respondents had been compensated for the same thereby frustrating the completion of the said agreement.

6. It was her contention that the Respondents fraudulently entered into the sale agreement with full knowledge that there was no property to be sold. She alleged that she had fenced off and planted seedlings on the suit property before discovering that the property had already been acquired by KPLC. She was therefore forced to demand the sum of Kshs6,200,000 from the Respondents for breach of contract, a refund of the purchase price and the cumulative costs she had incurred in developing the suit property.

7. The Respondents filed a statement of Defence dated February 12, 2019 denying the allegations by the Appellant. They raised a counterclaim seeking a declaration that the Defendant only acquired 1¼ Acres of the suit property through purchase and prayed for an order of cancellation and rectification of the register as well as transfer of the subdivision of the suit property measuring ½ acre in favor of the Respondents.

8. In their Counterclaim, the Respondents averred they had only sold 1 ¼ acres of the suit property to the Appellants. They claimed that by the time they sold the said portion of the suit property which was by then registered in their names, the same had an easement which did not affect the portion of the property sold to the Appellant. They averred that upon the execution of the sale agreement, the Appellant had actual notice under Article 29 of the *Land Registration Act* of the existing easement as at the time of the sale and therefore proceeded to request for them to add her an extra ¼ of an acre out of the suit property to meet her expectations. They averred that instead of acquiring the purchased portion of the land and leaving out the unsold portion the Appellant fraudulently registered the entire suit property in her name thus depriving the Respondents of their land.

9. After hearing all the parties and their witness the learned trial magistrate delivered his judgement on May 26, 2021 in which he held that;

> " I therefore wish to conclude by stating that the plaintiff has not proved her case on balance of probability simply because there is nowhere that the defendants have frustrated, her side of the agreement. I will therefore dismiss the Plaintiff's suit. on the flipside, I find that the Defendant has proved her counterclaim that indeed she sold only one and quarter acre of piece of land to the Plaintiff and not the entire parcel. Therefore, the Plaintiff herein is supposed to return ½ acre piece of land to the Defendant. I therefore order as follows;
>
> i. The plaintiff only acquired 1 ¼ acres of Parcel of land known as L.R Nyansiongo Settlement Scheme/525
>
> ii. There be a rectification of the register so that out of L.R Nyansiongo Settlement Scheme/525 ½ an acre is in favor of the Defendant.
>
> iii. Cost of this suit be to the defendants

10. It is against the said holding by the trial court that the Appellant has lodged the Appeal.

11. On May 24, 2022, this Court directed that the Appeal be disposed of by way of written submissions and ordered the parties to file their submissions within 42 days from the date thereof and both parties have filed written submissions.

Issues for determination

12. Having considered the background of this case as highlighted above the pleadings filed in the lower court, the testimonies of all the witness, the documentary evidence produced before the lower court, the submissions of the parties in the lower court, the judgment of the trial magistrate, the grounds outlined in the Memorandum of Appeal and the submissions of the parties with respect to this Appeal, the sole issue for determination is whether the learned trial magistrate erred in law and fact by finding that the plaintiff had not proved his case on a balance of probabilities.

Analysis and determination

13. It is important to state at the earliest opportunity that the applicable law regarding the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In this particular case it was the sole duty of the Appellant to prove all the averments she made in relation to the suit she had presented before the trial court to the required standard which in civil cases is on balance of probabilities. In *Karugi & Another v. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added).

14. For this court to determine whether the learned trial Magistrate made an error when he ruled that Appellant had proved her case on a balance of probabilities, the court will have to examine the pleadings and the evidence presented by the parties before the trial court.

15. From my analysis of the pleadings and proceedings in the trial court, the Appellant's cause of action was was based on breach of contract by the Respondents. In his plaint the Appellant claims that she discovered upon taking possession of the suit property that the same had already been acquired Kenya Power and Lighting Company and the Respondents compensated and thus she was shortchanged.

16. She claims that despite the Respondents stating in the agreement that the suit property was free from encumbrances, they had failed to disclose that a wayleave existed on the suit property. She argued that this was a blatant breach of the contract that entitled her to a refund of an amount three times the purchase price as penalty for of contract breach together with the purchase price. The Appellant also demanded a refund of the monies she had expended in fencing the suit property.

17. In response to the Appellant's claim the Respondents denied any breach of the contract and stated that the portion of the suit property sold to the Appellant measured 1 ¼ acres which did not include the section that had been encumbered by the power lines.

18. During examination in chief, the Appellant testified that a search was done which showed that the suit property belonged to the 1st Respondent. She also stated that it was only after spending a sum of Kshs 250,000 in developing the property that she discovered that there were power lines occupying a width of 30 meters passing in the middle of the suit property.

19. During cross examination, the Appellant confirmed that she did not conduct a search on the suit property personally. She also stated that she visited the suit property prior to the sale and saw electric cables passing through the suit property. She further admitted that she did not have any report from

the surveyor who carried out the survey and that the said surveyor was not a witness in her case. She further admitted that she did not know her rights as a purchaser. She also admitted that she did not have any document restricting her from using the suit property from KPLC. She stated that she had fenced 1 ¼ acres being the property she had bought from the Respondent.

20. During re-examination by her counsel she clarified that she only became aware of the encumbrance when KPLC visited the suit property. She also averred that she was given a wrong search certificate which she had since misplaced.

21. After considering the evidence presented before him at the hearing of the case, the trial magistrate had to this to say;

> "…….the bone of contention between the parties is the wayleave in which the plaintiff indicates that the Defendant had been compensated for the same. This court would like to observe that the Plaintiff should be interested in what she bought from the defendant which was 1 ¼ piece of land and not the entire 2 acres parcel of land.
>
> Lastly, the plaintiff acknowledges having visited the said land before she made payments and therefore by her making payments to the Defendant it means that she had accepted the offer"

22. In his submissions, learned counsel for the Appellant contended that the learned trial Magistrate erred by not considering the evidence to the effect that the Respondents had fraudulently transferred the suit property to the Appellant with full knowledge that they did not have rights to do so given the property that that part of the property had already been acquired by KPLC.

23. On his part, counsel for the Respondents submitted that it was not a disputed fact that the parties herein entered into an agreement for the sale of a portion of the suit property. He further submitted that it was not disputed that the initial size that was purchased was 1 acre after which there was an addition of ¼ acre totaling to 1 ¼ acres. It was his contention that there was no dispute that only 1 ¼ was sold and not the entire suit property measuring 2.0 acres.

24. Counsel for the Appellant submitted that the Appellant had stated in her testimony in court that she visited the suit property before entering into the sale agreement for the additional ¼ acre. He contended that the Appellant had during the said visit seen the power cables that passed through the suit property as an easement.

25. He argued that the law under section 29 of the *Land Registration Act* presumes that the Appellant had notice of the of the wayleave by KPLC as an overriding interest over the suit property before purchasing it. He referred the court to the case of the *Estate of Sonria Ltd & another vs Samuel Kamau Macharia & 2 others* (2020) eKLR where the court of appeal observed that;

> "……the burden was upon the 2nd appellant to demonstrate that before he committed himself, he was satisfied from the register that Joseph Mwangi Nderitu, who was in the process of selling the suit land to him had the capacity as "the registered proprietor" at the time to transact and therefore capable of passing interest in the land to him. It is basic that interests appearing in the register rank in priority according to the order in which the instruments which led to their registration were presented to the registry. See section 42. (1) of the Registered *Land Act*. Section 31, on the other hand is emphatic that the register is the first reference point for a party wishing to purchase a registrable interest from a vendor because it will mirror all currently active registrable interests that affect a particular parcel of land. It states that;

"31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition"."

26. As accurately stated by counsel, it is clear that the issue in controversy is the discovery that there existed a wayleave on the suit property later after the agreement between the parties had been concluded and the suit property transferred to the Applicant. The Appellant in one of his grounds of appeal claims that the learned trial Magistrate erred in law and in fact by failing to make a finding that the Appellant was an innocent purchaser for value and misdirected himself and erroneously made a finding that the Appellant ought to have known of the encumbrance on the land.

27. Can it be said that the Appellant was an innocent purchaser for value without notice? As was held by the Court of Appeal in *Estate of Sonria Ltd & another vs Samuel Kamau Macharia & 2 others* (2020) eKLR, it was incumbent upon the Appellant to demonstrate that indeed she carried out due diligence before purchasing the suit property. It was incumbent upon her to conduct a search at the land registry as a first point of reference to confirm whether the suit property had any encumbrance before purchasing the same. In her own testimony she admitted that she did not personally carry out a search in respect of the suit property at the land registry and that the same had been carried out on her behalf by a person she did disclose. In fact, it was her testimony that she had misplaced the search certificate that had been carried out on her behalf which search she claimed was wrong as it only showed the 1st Respondent as the registered owner of the suit property.

28. During the hearing, the Appellant further admitted that the transaction was carried out by an advocate. The said advocate ought to have helped her carry out due diligence prior to purchasing the suit property. It is important to note that the Appellant involved a surveyor who helped her curve out the purchased portion from the suit property although she did not produce the surveyors report or call him as his witness. It is also interesting that the Respondent who is now claiming that she was not aware of the wayleave on the suit property admitted before the trial court that she indeed visited the suit property and saw the power lines and even asked to be added ¼ of an acre from the suit property at an extra cost.

29. In my view, there is no basis for the Appellant's claim that the trial court ought to have made a determination that the suit property was not available for sale because the same had already been acquired by the Kenya Power and Lighting Company. I say so because the Kenya Power and Lighting Company had only acquired a 30-meter wayleave over the suit property, which wayleave is clearly registered on the current register of the property.

30. The Appellant did not present any evidence before the trial court that the entire suit property had been acquired as a wayleave by Kenya Power and Lighting Company to enable the court to make such a determination. In fact, during cross-examination by counsel for the Respondents, the Appellant admitted that she did not have any documents to prove that she had been restricted from using the suit property by the Kenya Power and Lighting Company.

31. It is therefore clear that the Appellant failed to prove that the Respondents had breached any clause of the sale agreement between them. It is evident that the Appellant accepted the offer made to her by the Respondent by paying the agreed purchase price. It is also evident that the Appellant was afforded adequate opportunity to visit the suit property and had qualified persons including a surveyor and an advocate who aided her in effecting the transaction. From the evidence on record, it is clear that the Respondents granted vacant possession of the purchased property to the Appellant after which she proceeded to fence it without any interference from the Respondents. It is also not true that the Appellant has been left with any property given that the wayleave was just but 30 metres wide.

32. In view of the foregoing, the learned trial Magistrate arrived a correct finding that the Appellant had failed to prove her claim for breach of contract by the Respondents.

33. With regards to the second issue as to whether the Trial Magistrate erred by allowing the counterclaim, it is not in dispute that the Appellant in her testimony acknowledged that she only purchased a portion of the suit property measuring 1 ¼ (0.506 Ha). However, according to the search certificate which the Appellants produced before the trial court as her exhibit, the suit property which is currently registered in the name of the Respondents measures 0.80 Ha (1.977 acres). This clearly shows that the property currently registered in the name of the Appellant exceeds the portion she purchased by approximately 0.294 Ha (0.726 Acres). The response by the Appellant while being cross-examined by counsel for the Respondent is as follows:

> I have fenced 1 ¼ acre, if there is more land I have no objection the same reverting back to the Defendant.

34. From the above observation and the Appellant's own statement that she has no problem with the plot in excess of what she bought reverting to the Respondents, I do not find any reason to interfere with trial Magistrate's holding that the Respondents proved their counterclaim to the required standard. Having arrived at the said conclusion it was inevitable for him to order for a rectification of the register so that out of L.R Nyansiongo Settlement Scheme/525 the land that was in excess reverts to the Respondents.

35. The upshot is that the appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022.

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J.M ONYANGO

JUDGE