REPUBLIC OF KENYA

IN THE ENVIRONMNET AND LAND COURT

AT MOMBASA

ELC NO. 97 OF 2015 (FORMERLY HCC 58 OF 2010)

1. SANDRA GRIMMETT

2. PHILLIP GRIMMETT.....APPLICANTS

VERSUS

BENEDICT NDIGIRIGI GICHUHI.....DEFENDANT

JUDGMENT

Introduction

1. In this case, I am required to write a judgment based on the evidence of the applicants taken by Tuiyott J on 8th February, 2012, 30th July 2012, 1st November, 2012 and 20th December, 2012. I only took the evidence of the respondent on 3rd October, 2018

APPLICANTS' CASE

2. By the Originating Summons dated 1st March 2010, the applicants have sought the following prayers:

> **1. That the respondent be compelled to surrender Certificate of Titles in respect to Plot Nos.4463, 4464, 4465 SEC. III MN**
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> **2. That on failure to surrender the certificates to titles in PLOT NOS.4463, 4464, 4465 SEC III.MN, the Registrar of Titles Mombasa, do cancel and/or nullify the certificates of titles issued in the names of Benedict Ndigirigi Gichuhi**
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> **3. That the Registrar of Titles, Mombasa, do register the transfer in CR. 38258 SUBDIVISON NO.4463 SECT III MN, CR 38259 SUBDIVIISON NO.4464 SEC III MN and CR 38260 SUBDIVISOIN NO.4465 SECT III MN signed by the said Benedict Ndigirigi Gichuhi to Sandra Grimmett and Philip Grimmett.**
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> **4. That the Registrar of Titles, Mombasa, do issue provisional certificate of title in both names of Sandra Grimmett and Philip Grimmett as in the said transfer.**
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> **5. That the production and presentment of original certificates of titles for plots 4463, 4464 and 4465 be dispensed with.**
>
> **6. That the costs of this original summons be provided for.**

3. The summons is based on and supported by the affidavit of Sandra Grimmett sworn on 1st March 2010 and on the following grounds:

> **a. That the respondent has already signed the transfers to the said plots in favour of the applicants**
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> **b. That there was a case HCCC 184/09 brought by the applicants against the respondent which was amicably settled out of court by the parties. The gist of settlement was that the respondent will transfer the plots to the applicants.**
>
> **c. It is fair and just if the applicants are registered as the owners of the said property**.

3. In the supporting affidavit, the applicants aver that sometimes in the year 1989 they met the respondent and they became friends and even supported the respondent and his son financially and the respondent assisted the applicants who are husband and wife to acquire property in

Kenya for purposes of putting up a retirement home. That in or about the beginning of the year 2005 the applicants orally agreed with the respondent that the respondent would assist the applicants to purchase three plots, to wit, subdivisions Nos. 4463, 4464 and 4465 SECTION III/MN (hereinafter referred to as the "suit properties") in order to build the said home thereon. That pursuant thereto, the respondent introduced the applicants to Ms. Lowsea Investments Limited, the agent for Agricultural Handling Services Ltd the then registered owner of the suit properties. The applicants aver that they were advised by the respondent that the land falling within an agricultural zone and being subject to the provisions of the Land Control Act Cap 302 of the Laws of Kenya, the same could not then be registered in the applicants names as they were foreigners pending their incorporation of a holding company or appointment of a nominee to whom the same would be transferred eventually. That the applicants therefore agreed with the respondent that the three (3) plots be registered in the respondent's name.

4. The applicants state that pursuant to the said agreement, they purchased the suit properties at the price of Kshs.450,000 each and the applicants paid the entire purchase price. That the said properties were then conveyed in the name of the respondent who at all material times knew was merely for the sake of convenience and appearance. The applicants aver that thereafter, the 1st and 2nd Applicants pooled their savings and put up a bungalow constituting of two units and paid for the cost of constructing the same and the outgoings, including fees for the building plans and for installing utilities on the premises. That all along, they were depositing money into their savings account number 11-33-2710113931 which the respondent was authorized to operate for purposes of withdrawing money to pay the vendor, the contractors, and thereafter to pay bills while the applicants were away in Europe. The applicants state that part of the money was sent directly to the respondent to effect the said payments.

5. The applicants further aver that on or about 28th May, 2009, the respondent who had been taking care of the premises moved out after the applicants came back from Europe. That due to threat by the respondent to grab the applicants' property, the applicants moved to court on 10th January, 2009 through HCCC No. 184 of 2009 Sandra Grimmett and Philip Grimmett –v- Benedict Ndiririgi Gichuki, and the court issued an interim order to stop him from selling the said property. That since they have lived together and understand each other, they were advised by their lawyer that the matter could be settled out of court. That the respondent agreed to surrender the certificate of title and be given Kshs.70,000/= upon signing of the transfer to transfer the plots in the applicants names. The applicants aver that their advocate in the aforesaid case HCCC 184 of 2009 advised them that the respondent signed the transfer and he was to surrender the title for registration in the plaintiffs' names and they agreed to sign a consent to withdraw the case from court as the respondent was to deliver the title to the applicants' advocates. That three months since the said case was withdrawn and the respondent had not released the title deeds to the applicants or their advocate and instead threatened to sell the properties despite him having signed the transfer in the applicants' favour. It is the applicants' contention that the issue of ownership does not arise as the respondent had transferred culminating in the agreement to the withdrawal of HCCC No.184 of 2009 from court. The applicants aver that it is in the interest of justice that the title be issued in their names as they stand to lose all that they have worked for.

7. Sandra Grimmett the 1st applicant herein testified as PW1 and was also cross-examined by Mr. Odhiambo advocate for respondent and re-examined by Mr. Birir. She testified that the 2nd applicant is her husband and they are UK citizens and reside in Mtwapa. She testified that she came to live in Kenya in December 2006. She stated that they met the respondent in September, 1989 at the beach and he was selling safaris, and they went on safari with him that year and again in 1994, 1996 and every year after that. That in the end of 2004, they decided that they were ready for retirement and so wanted to buy land and build a retirement house. PW1 testified that they purchased the three suit properties which were adjoining each other at Mtwapa and paid for them between February 2005 and May 2005. That because they were not around, they asked the respondent to pay for them, and gave him an ATM card to withdraw money from Barclays Bank, Bamburi and when he had withdrawn a substantial amount, he would take it to Lowsea Investment and pay for the plot. That whilst they were in Kenya, they paid some of the balance. She stated that the money was drawn from the applicants account in England. PW1 testified that they were told by an agent by name of Njenga, the owner of Lowsea investment and the respondent that the plots could not be in applicants since they were visitors in Kenya. That the three plots were registered in the respondent's name. That they then build a bungalow and a perimeter wall and gates to secure the property. She stated that the respondent was overlooking the construction, though in 2005 and 2006, the applicants visited Kenya to see the progress of the building. PW1 stated that they moved in in December, 2006, though the house was still incomplete. That the respondent moved into the smaller unit where he lived without paying rent since they used to assist him and paid for his rent since 2003. She stated that they had an altercation and the respondent left on 20th May 2009 never to return back. That the respondent never transferred the plots to the applicants and realized the title deeds were missing after the respondent had moved out. That they panicked when someone came to the house claiming that the house was up for sale. The is when the applicants saw their lawyers (Apollo Muinde) and they placed caveats on the plots. That suit HCCC 184 of 2009 was filed and they later reached an agreement and signed a consent on 19th November, 2009 withdrawing the suit on the understanding that the respondent would surrender the titles to the applicants in exchange for being paid Kshs.70,000/=. PW1 produced the duly signed transfers dated 21.11.2009 in respect to Plot Nos.4463 (P.Exhibit 1(a)), transfer for Plot 4464 (p.exhibit (1) (b) and for plot 4465 (p.exhibit 1(c). That the transfers were signed after the case HCCC 184 of 2009 was marked as settled. That the case was withdrawn but the respondent refused to give them the titles to complete the transfer, hence this suit.

8. The 2nd applicant, Philip Grimmett testified as PW2 and was also cross-examined by Mr. Odhiambo, advocate for the respondent. He stated that he was 63 years old and an Englishman living in Mtwapa. That he came to Kenya in 1989 and met the respondent at Bamburi Beach. That once they went back to England they communicated with the respondent through letters, became very good friends and they treated him like a son, taking him out and giving him money and generally helping him. That they even paid for his house rent. PW2 generally reiterated the evidence given by PW1 who is his wife that they bought the suit properties and put up a house. That the respondent who was staying in one of the units took the titles and he later agreed to return them on being paid Kshs.75,000 but the respondent never returned the titles. That they had filed HCCC No.184 of 2009 claiming for the return of the titles, and a consent was filed in court to the effect that the matter had been settled. That on signing the transfers, the applicants paid the sum of Kshs.70,000 to the respondent. He stated that they now want the titles back. PW2 was cross-examined by Mr Odhiambo for the respondent and re-examined by Mr. Birir for the applicants.

RESPONDENTS CASE

9. The respondent filed a replying affidavit sworn by himself on 12th March 2010 in which he denied the Applicants claim. He however, admitted meeting the applicants in September 1989 and he booked them a tour to Tsavo East, Tsavo West and Amboseli National Parks and accompanied them as a tour guide. He denied agreeing to or assisting the applicants in acquiring property in Kenya including the suit

properties and further denied receiving any form of assistance from them. He averred that he was in gainful employment with a stable income. It was his contention that he purchased the suit plots using his own resources with some little assistance from his relatives and paid Lowsea Investments Limited the consideration for the said plots. That there was no agreement between applicants and the respondent that the three plots be registered in the respondent's name. He stated that the applicants requested him that they put up a bungalow with two units on the properties and they were to occupy one unit while he occupied the other unit. He admitted receiving money from the applicants but argued that the same was for construction of the bungalow but not for the purchase of the plots. The respondent stated that he was forced out of the suit premises due to unfavourable environment. He denied intending to sell the properties, adding that it was the 1st applicant who brought in many prospective purchasers to view the property. He stated that he did not agree to surrender the certificate of title in exchange for Kshs.70,000 upon signing of the transfer. He further stated that the applicants wanted him to sign the transfer but he refused and they reported to the police who allegedly forced him to sign the transfer but did not put the date or write down the PIN number. He added that his PIN number was written by the 1st applicant who had and still had the documents which were left in the premises. That the 1st applicant also put his photographs which she printed from her computer. That he did sign the transfer under duress and threat from the police who threatened to charge him with a criminal offence if he did not sign the transfers. He denied G. N. Gakuo advocate was at the police station. It is also the respondent's contention that the suit herein is res judicata in view of the previous suit HCCC NO. 184 of 2009.

10. DW1 Benedict Ndigirigi Gichuhi, the respondent herein testified that he lives in Diani and that he is a tour operator. He adopted his witness statement filed on 25.4.12 as his evidence –in- chief. He stated that the suit properties are in his name and that he has the certificate of title. He confirmed that there was another case, HCCC No.184 of 2009 over the same properties, but which by consent of the parties was marked as settled. He denied appearing before Gakuo advocate to sign transfers. He stated that when the properties were purchased, the agreements were done in his name as purchaser. The respondent testified that the applicant lodged a complaint against him in Mtwapa police station and he was charged with stealing but was acquitted in 2012 by a Kilifi Court. He stated the consent signed in HCCC No. 184 of 2009 did not state that he transfers the properties and added that the applicants have no right to ask him to transfer the properties based on the consent. He denied that the applicant transferred money to him, stating that it was from his tour operation which he has done since 1987. He stated that the applicants literally kicked him out of the property. The respondent testified that he met the applicant and were his clients and took them on Safari from 1989. That in 1997, he started a relationship with the 1st applicant and produced photographs as D-exhibits 1. That their relationship went on until 2009 when the applicants filed a case against him. He maintained that his source of income is tour operations and does not agree to transfer the parcels of land to the applicants. DW1 was also cross-examined by Mr. Birir advocate for applicants and re-examined by Mr. Odhiambo advocate for respondent. When cross-examined by Mr. Birir DW1 stated that the applicant were his friends and had constructed one unit of the property. He maintained that the applicants never asked him about purchasing land.

SUBMISSIONS

11. In their written submissions filed on 7th February , 2019 the applicants advocates, Birir & Company Advocates summarized the evidence tendered by the parties and termed the evidence of the respondent a bizarre Mish Mash blatant lies and half-truths. That he never produced any books of accounts and neither did he demonstrate that he had a work permit to work in England so as to earn colossal sum of money to buy land and build a magnificent house. He submitted that it was ludicrous for the respondent to allege he had an account in England but none in Kenya where he stated he ran a thriving business. The applicants' counsel urged the court to treat with a punch of salt the respondent's assertion that PW1 was a trustee of his account. That it was also ridiculous for the respondent to admit signing the transfers through coercion yet he conceded that the applicants constructed one of the units on the property and that same belongs to them. Counsel submitted that the applicants proved that indeed they paid money to buy the land and used the respondent since they knew him and because as foreigners, they did not have personal identification numbers. That the respondent did not deny that the applicants had an input in building the house, but confined his interest to the ownership of the parcels in which the house was built. The applicants' counsel relied on the case of **Hanny Hartmann –v- Edward Mganga Mbogo, HCCC No. 22 of 2007 (Mombasa)** and **HCCC No. 284 of 2007 Marge Grounston –v- Baya Abraham Wanje**, and submitted that the applicants have proved their case and deserve, the prayers sought in the Originating Summons herein.

12. On their part, Odhiambo & Company Advocates for the respondent filed their written submissions on 13th March 2019 in which they also gave a summary of the case of both parties. it was their submission that the order and rule cited by the applicants is not applicable and not relevant and therefore the suit is bad in law and an abuse of the court process. It was further submitted that Order 37 rule 3 of the Civil Procedure Rules is not applicable because the relationship of the parties was not that of a vendor and a purchaser. That no sale agreement was produced by the applicants that they bought the plots from the respondent. It was submitted that since the subject matter in HCCC 184 of 2009 and orders sought therein were the same as in this case, the applicants ought not to have filed a fresh case but go back to HCCC 184 of 2009 for interpretation of the consent and thereafter proceed with execution. It was further submitted that the applicants failed to call Mr. Gakuo Advocate and other persons mentioned to corroborate their evidence, and in particular that the consent was to the effect that the respondent was to transfer the plots and that the respondent voluntarily executed the transfers in the presence of Mr. Gakuo Advocate. The respondent further submitted that the orders if granted by the court will be in futility and cannot be effected /executed because the applicants are not citizens of Kenya and under Article 65 of the Constitution and Land Statutes provide that a citizen (sic) cannot be registered as proprietor of a freehold land. The both applicants admitted that they are not citizens and therefore the Registrar of Titles will not comply with court order should the same be granted. That the court should therefore not grant the orders sought. In conclusion, the respondent's advocate submitted that the applicants have not proved their case on a balance of probabilities, that the case is an abuse of the court and bad in law in that it is res judicata. They urged the court to dismiss suit with costs to the respondent.

DETERMINATION

13. The court has carefully considered the pleadings, the evidence adduced and the rival submission. I find the following as the issues for determination:

i. Whether the suit is res judicata

ii. Whether the suit is bad in law and an abuse of the court process.

iii. Whether the applicants have proved their case on a balance of probabilities.

iv. Whether the applicants are entitled to the reliefs sought.

14. The respondent has submitted that the suit herein is res judicata because the subject matter and orders sought herein and in HCCC 184 of 2009 which was by consent of the parties marked as settled, are the same. The court has noted that from the record, by a chamber summons application dated 12th March, 2010 and filed on 15th March, 2010, the respondent herein sought to have the suit herein struck out on the grounds that the suit is res judicata and is an abuse of the court process. That application was based on the grounds that the very same properties that are the basis of the instant suit were the same and the parties were also the same. That application was heard and determined. By ruling dated and delivered on 25th August, 2010, the court (J.B. Ojwang J as he then was) dismissed the respondent's application with costs. In that ruling, the learned judge held that the instant originating summons was not res judicata. The court further rejected the respondent's contention that the suit herein is an abuse of the process of the court. That ruling was never reviewed or set aside and remains in force. In view of that ruling this court cannot therefore revisit the issues that the instant suit is res judicata and an abuse of the court process. If I were to do so, I would be sitting on appeal over the decision of a court with concurrent jurisdiction, and I am afraid I cannot do that. The issue is already settled by the ruling of 25th August, 2010. If anything, the issue being raised now by the respondent is res judicata as it raises issues which had been substantially adjudicated upon by a court of competent jurisdiction.

15. It has also been submitted by the respondent that the suit is bad in law and an abuse of the court process because the order and rule cited by the applicants is not applicable and not relevant. The respondent's counsel submitted that the originating summons was brought by the applicants pursuant to Section 3 (sic) of the Civil Procedure Rules. Counsel submitted that Section 3A provides that nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court. That Order XXXV (now Order 36) deals with summary procedure of the court and Rules 3 of the said Order provides that sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days. Counsel submitted that the order in particular provides for summary procedure where a plaintiff seeks judgment for a liquated demand with or without interest or the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit has been forfeited for non-payment of rent or for breach of averment, or against persons claiming under such tenant or against trespasser. He therefore submitted that the order and rule cited by the applicant is not applicable and not relevant and therefore the suit is bad in law and an abuse of the process of the court.

16. The respondent's counsel further submitted that originating summons is provided for under Order 37 of the Civil Procedure Rules and Rule 3 states that a vendor or purchaser of immovable property or their representatives respectively may, at any time or times take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation, or any other question arising of or, connected with contracts of sale (not being a question affecting the existence or validity of the contract). Counsel submitted that Order 37 Rule 3 is not applicable because the relationship between the applicants and the respondent was not that of a vendor and a purchaser.

17. Order 51 Rule 10 of the Civil Procedure Rules provides that an application shall not be refused for merely failing to state the order, rule or statutory provisions under which an application is made. It provides as follows:

> **"1. O (1) every Order, rule or other statutory provision under or by virtue of which an application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
>
> **(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

18. The Supreme court in **Hermanus Philips Stern –v- Giovanni Gnecchi – Ruscone (2013)eKLR** when considering an application made without citing the relevant provision of the constitution, held:

> ***"The question then is, whether the omission is fatal to the applicant's case. It is trite law that a court of law has to be moved under the correct provisions of the law. We note that this court is the highest court of the land. The court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The court is alive to the principles to be adhered to in the interpretation of the constitution, as stipulated in Article 259 of the constitution. Consequently, the failure to cite (the relevant provision) will not be fatal to the applicant's cause."***

19. **Odunga J in Republic –v- Anti-Counterfeit Agency & 2 Others Ex-parte Surgippharm Limited (2014) eKLR** held:

> ***"However, in light of the provisions of Article 159 (2) (d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the court of a jurisdiction where such jurisdiction exists***."

20. Going by the above authorities, it follows therefore that the failure of the applicants to cite the correct provisions and instead citing the wrong provisions of the law under which the originating summons was brought did not render the originating summons fatally defective. The strict compliance with form should not be adhered to at the altar of substance. The Court of Appeal in the case of **Gulam Miriam Noordin –v- Julius Charo Kavisa (2015)eKLR** held inter alia, that the change in the court's approach to this question has been dictated by the need to do substantive justice. The respondent's contention that the applicants' suit is bad in law does not therefore hold.

21. On whether the applicants have proved their case on a balance of probabilities and whether they are entitled to the reliefs sought, it is evident that the applicants and the respondent met in 1989, became friends and established good relationship with each other to the extent that they even lived together in the suit premises, though in different units. The applicants testified that they not only engaged the

respondent's tour operation services to visit various parks, but also treated him as a son, supported him financially and even invited him to England which he visited. It is the applicant evidence that it was through the trust they had with the respondent that they used him to purchase the suit plots using the respondent's name. In this case, the applicants have produced evidence to show that they sent money from England to the respondent. It is their case that the money sent was for both the purchasing of land and building a house thereon. The respondent admitted that the applicants constructed one unit of the house on the suit premises and stated that he constructed the rest by himself. The question that arises is under what circumstances the respondent would allow the applicants to construct a house on his property, if indeed the plots were solely his.

22. The respondent admitted the he signed the transfers of the suit properties, but stated that he was coerced to do so. There was also no dispute that there was a case HCCC No. 184 of 2009 brought by the applicants against the respondent which was amicably settled out of court by the parties. The applicants case is that the settlement of the suit was that the respondent would transfer the suit plots to the applicants. That the respondent has already signed the transfers to the said plots in favour of he applicants after the consent in HCCC No.184 of 2009 give credence to the applicants explanation that the issue of ownership of the suit plots as belonging to the applicants is no longer in doubt. The respondent's averment that he was coerced to sign the transfers in my view is not believable. The respondent has also not given a sound explanation as to how his photographs which were attached to the transfer forms came about. His explanation that the photographs were procured by the 1st applicant from her computer is not plausible. In my view, the same were availed by the respondent himself and voluntarily and is now trying to deny the obvious. Further, it is worth to note that although the respondent testified that he was literally kicked out of the suit property, the respondent has not made any claim, by way of counter claim to regain possession and occupation of the suit property. I doubt that a true owner of property would move out without taking any legal steps to regain the same including filing a counter-claim in this suit.

23. From the evidence on record, I am persuaded the applicants did avail money to the respondent and the money was used by the respondent to purchase the suit plots and finance the construction thereon. The applicants have demonstrated that the respondent convinced them to use his name to acquire the property because they could not as foreigners own property on their own. The respondent's insistence that he is the absolute registered owner of the suit plots is not backed by any evidence of his source of funds to buy the properties, unlike the applicants who presented accounts from which the money was drawn, including money sent to the respondent. The respondent even conceded that the applicants constructed a house on the suit parcels of land. It is my finding that the applicants could not go to the extent of developing a property which was not theirs, and likewise it is doubtful whether the respondent could have allowed them to do so.

24. In the result, I do find that the applicants have proved their case on a balance of probabilities and the originating summons dated 1st March, 2010 is hereby allowed in terms of prayers (1), (2), (3), (4) and (5) thereof. Costs of the suit are awarded to the applicants to be borne by the respondent.

25. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 26th day of May, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE