



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 3 OF 2017

(FORMERLY NAKURU HIGH COURT CIVIL APPEAL NO. 240 OF 2013)

JOHN WAIHAKA KARANJA.....APPELLANT

VERSUS

JOSEPH MWANGI GICHUKI.....RESPONDENT

(Being an appeal from judgment and decree of Hon. F. Kombo SPM delivered on 22nd November 2013 in Nakuru CMCC No. 672 of 2010)

JUDGMENT

1. This is an appeal from judgment of Hon. F. Kombo SPM delivered on 22nd November 2013 in Nakuru CMCC No. 672 of 2010. The appeal was initially filed as Nakuru High Court Civil Appeal No. 240 of 2013. The High Court transferred the appeal to this court on 10th November 2016 and it then became ELC Case No. 3 of 2017.

2. The respondent herein filed the subordinate court case on 16th June 2010 against the appellant. He averred that he purchased the parcel of land known as **Kiambogo/Kiambogo Block 2/16920** (the suit property) on 3rd June 2008 from one Josephine Wanjiru Njogu and subsequently became registered proprietor thereof on 5th August 2008. He averred further that upon transfer, he took possession and remained in possession at all material times. In the year 2010, the appellant entered the land and constructed a temporary shelter without his (respondent's) consent. He therefore sought judgment against appellant for an eviction order, costs of the suit and interest.

3. The appellant responded to the respondent's claim by filing a defence and counterclaim. He denied that the respondent ever purchased the suit property from Josephine Wanjiru Njogu and that the respondent ever obtained good title for it. He averred that on the contrary, it is he who purchased the suit property on 18th August 2004 from Josephine Wanjiru Njogu and Francis Njau Njogu and that at that time, the property was yet to be given a new title and was known as **Plot No. 3** being a subdivision of **Kiambogo/ Kiambogo Block 2/929**. He further averred that if the respondent purchased the suit property from Josephine Wanjiru Njogu then the transaction was fraudulent. He therefore urged the subordinate court to dismiss the respondent's case and to enter judgment against the respondent as follows:

a. A declaratory order that the suit land herein belongs to the defendant (now plaintiff).

b. An order restraining the plaintiff (Now the 1st defendant) from interfering in any manner whatsoever with the defendant (now plaintiff) quiet enjoyment of the suit land.

c. An order of cancellation of the title deed issued to the plaintiff (now 1st defendant) in respect of Kiambogo/Kiambogo Block 2/16920.

Alternatively:

d. An order that the defendants do jointly compensate the defendant (now plaintiff) with an amount equal to the current market value of the suit land together with the developments thereon.

e. Costs of this suit plus interest on (d) & (e) herein.

4. After hearing the case, Hon. F. Kombo SPM delivered judgment on 22nd November 2013 in which he granted the respondent an eviction order plus costs as prayed and dismissed the appellant's counterclaim with costs.

5. Being dissatisfied with the judgment, the appellant filed this appeal seeking orders that the judgment be set aside and that the counterclaim be allowed. He listed the following grounds of appeal:

1. That the learned magistrate erred in law in finding that the respondent had proved his case to required standards whereas the evidence tendered by the respondent was insufficient.

2. That the learned magistrate in law in finding that the respondent was the lawful owner of the land in dispute hence granting orders for eviction and the same was notwithstanding the trite law of law of sale of land and acquisition thereof.

3. That the learned magistrate erred in law in dismissing the appellant's counterclaim notwithstanding compelling evidence tendered by the appellant.

6. The appeal was argued by way of written submissions. Appellant's submissions were filed on 29th June 2016 while the respondent's submissions were filed on 26th July 2016.

7. I have considered the pleadings, the evidence and the submissions that were before the learned magistrate. This being a first appeal, my role is to re-evaluate, re-assess and re-analyse the evidence and material that was before the subordinate court and draw my own conclusions being in mind that I have neither seen nor heard the witness. With that in mind, I will now consider the grounds of appeal sequentially.

8. Pursuant to ground 1 of the appeal, the appellant contended that the learned magistrate erred in law in finding that the respondent had proven his case. The respondent's case before the learned magistrate was straight forward. He purchased the suit property on 3rd June 2008 and became registered proprietor on 5th August 2008. Some time around the year 2010, the appellant entered suit property and constructed a temporary structure on it. He produced the sale agreement (Plaintiff's Exhibit 1), transfer form (Plaintiff's Exhibit 2), a copy of the title deed (Plaintiff's Exhibit 3), a demand letter dated 12th April 2010 asking the appellant to vacate the plot (Plaintiff's Exhibit 4) and a certified copy of the green card in respect of the suit property (Plaintiff's Exhibit 5b). On the other hand the appellant's case was that he bought the suit property on 18th August 2004 and that at that time the parcel number was **Kiambogo/Kiambogo Block 2/7929 Parcel No.3** and that he was living on the land as at the date of his testimony. He was never issued with any title deed. He produced the sale agreement dated 18th August 2004 as defence Exhibit 1. He also argued that the respondent obtained title to the suit property fraudulently.

9. From the onset, it is clear that the respondent has a title deed while the appellant does not. Consequently, the respondent is entitled to the privileges and protection accorded by **Sections 24 and 25** of the **Land Registration Act**. The sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) 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 or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1)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.....

10. While it is not in dispute that the suit property is a subdivision of **Kiambogo/Kiambogo Block 2/7929** as can be seen from the green card produced by the respondent, the appellant's contention that the suit property is the same parcel as **Kiambogo/Kiambogo Block 2/7929 Parcel No. 3** is not supported by any evidence. Going by the appellant's own evidence, it would appear that **Kiambogo/Kiambogo Block 2/7929** was subdivided into at least 3 parcels. It was incumbent upon the appellant to adduce evidence to show that the suit property is parcel No.3 and not any other. Proof of that assuming the appellant is right, could easily have been done by for example producing mutation forms. In absence of evidence showing that the suit property is the same one that the appellant bought, the learned magistrate finding that the respondent had proven his case cannot be faulted.

11. The appellant also argued that the respondent's sale agreement dated 3rd June 2008 was not valid since it was not signed by the vendor. A perusal of the said agreement however shows that it was signed on behalf of the vendor by her son Francis Njau Njogu. This arrangement was acceptable to all the parties to the said agreement. In any case, the vendor personally signed the transfer. The appellant's reliance on the provisions of **Section 3(3)** of the **Law of Contract Act** is equally misguided as the said section only concerns suits seeking disposition of interests in land. The said sub-section provides:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

12. It must be remembered that the respondent did not file a suit seeking the disposition of an interest in land. Instead, he filed a suit as a registered proprietor of land seeking an eviction order against an alleged trespasser. Consequently, **Section 3(3)** of the **Law of Contract Act** did not apply to his suit.

13. For all the foregoing reasons, grounds 1 and 2 of the appeal are dismissed.

14. Pursuant to ground 3 of the appeal, the appellant contended that the magistrate erred in law in dismissing his counterclaim notwithstanding compelling evidence tendered by him. I have already found that the learned magistrate was right in finding that the respondent had proven his case and in granting the eviction orders. In the face of those findings, there would have been no basis for the learned magistrate to grant a declaration that the suit property belongs to the appellant, or to order cancellation of the respondent's title or to grant an injunction against respondent as was sought in the counterclaim. Accordingly, ground 3 of the appeal is equally dismissed.

15. In the end, the appeal is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 3rd day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Langat holding brief for Ms. Njeri Njagua for Appellant.

Mr. Githui for Respondent.

Court Assistants: Gichaba & Lotkomoi