



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL APPEAL NO. 2 OF 2015

HUDSON MOFFAT KAMAU.....APPELLANT

VERSUS

PETER MWANGI.....RESPONDENT

JUDGEMENT

1. Being dissatisfied with the judgement of the Honourable Ms. S. Atambo, Principal Magistrate, made on 28/2/2014 in **Milimani CMCCC No. 885 of 2006**, the Appellant brought this appeal on the grounds set out in the Memorandum of Appeal filed on 24/3/2014. These include that the learned magistrate failed to analyse and consider the evidence adduced by the Appellant; the learned magistrate erred by holding that the Appellant was not the owner of the suit land; and that the learned magistrate erred by relying on the evidence of the defence witnesses without an expert witness being called to prove the forgery of the certificate of title.

2. Parties filed submissions. The Appellant agreed that the learned magistrate made a correct finding of law when she stated that the affidavit sworn by Stanley Ritho was tendered in evidence and the defence did not object to it. The Appellant submitted that he proved on a balance of probabilities that he took possession of plot number 41 after purchasing it from one Stanley Ritho Mwathi. He submitted that the trial court ought to have gone by the documentary evidence he adduced which included the sale agreement dated 2/1/2005, the affidavit sworn by Stanley Ritho Mwathi on 25/5/2006 and the letter written by the said Stanley Ritho Mwathi dated 21/7/2006 without requiring oral evidence to corroborate the contents of these documents by either Stanley Ritho Mwathi or Maina Njogui. Maina Njogui is said to have witnessed the sale agreement between Stanley Ritho Mwathi and the Appellant.

3. The court has looked at the judgement delivered by the Honourable S. Atambo, Principal Magistrate, attached to the record of appeal. The learned Magistrate relied on the evidence of the 3rd and 4th Defendant's witnesses who were officials of Embakasi Patanisho Juakali Association who testified that they did not sign the Plaintiff's certificate of ownership and who also confirmed that the documents the Defendant relied on emanated from their office. She took cognisance of the fact that both parties were in agreement that the suit land initially belonged to Stanley Ritho Mwathi as shown in the register produced by the defence witnesses. The Magistrate noted that neither of the parties who claimed to have purchased the suit plot from Stanley Ritho Mwathi called him as a witness.

4. The trial court noted that the Appellant ought to have called Mr. Ritho Mwathi to confirm the averment in the affidavit which the Appellant relied on and to also confirm that the transfer took place in line with the written sale agreement between him and the Appellant. The court noted that it was of utmost importance for the Plaintiff to clear the issue of the process of the transfer from Stanley Ritho Mwathi to the Appellant, on a balance of probabilities. The learned magistrate noted that even though the 3rd and 4th defence witnesses disowned the certificates of ownership relied on by the Plaintiff, they were unable to comment on it authoritatively since no expert witness was called.

5. The learned magistrate also relied on the evidence of these two defence witnesses who clearly stated that Stanley Mwathi was not the Project Secretary of Embakasi Patanisho Juakali Association as indicated on the letter relied on by the Plaintiff. The Plaintiff did not deny that the two witnesses were officials of Embakasi Patanisho Juakali Association.

6. The learned magistrate noted that the Plaintiff ought to have called Maina Njogui who witnessed the sale agreement the Appellant was relying on if he was not able to call the seller, Stanley Mwathi. She noted that there were many questions begging for answers as to whether the Plaintiff bought the plot from Mr. Stanley Mwathi.

7. The court has looked at the documents produced by both the Plaintiff and the Defendant before the trial court. Both the Appellant and the Respondent claim to have bought the Suit Property Stanley Mwathi.

8. The sale agreement produced by the Plaintiff stated that Mr. Stanley Ritho Mwathi had sold plot number 41 to the Appellant. The identity card numbers were not filled. The document merely mentions the sum of KShs. 120,000/= without indicating whether it was already paid or how it was to be paid. The document is not executed and just states at the bottom that the transaction was done in Nairobi this 2 January (sic) 2001 and the date 30th is crossed out. The letter dated 21/7/2006 produced by the Appellant was signed by Stanley Mwathi was addressed to whom it may concern.

9. When this evidence is contrasted with the sale agreement dated 5/7/2006 vide which Lilian Kariuki who claims to have bought the suit plot from Stanley Mwathi and later sold it to the Respondent, it is not clear to whom Stanley Mwathi plot number 41.

10. This court must consider the evidence that was adduced before the trial magistrate and draw its own conclusions bearing in mind the fact that it had neither seen nor heard the witnesses. The court is not bound to follow the trial magistrate's findings of facts if it appears that she clearly failed on some point to take account of particular circumstances or probabilities in arriving at her decision.

11. The Appellant relied on the case of *D.T. Dobie and Company (K) Ltd v. Wanyonyi Wafula Chebukati [2014] eKLR* on the issue of proof in civil cases in which Lady Justice M. Kasango quoted the decision in *Miller v. Minister of Pensions [1947]* where it was stated that it must carry a reasonable degree of probability but not so high in a criminal case. The evidence must be such that the tribunal thinks it more probable than not for the burden to be discharged. If the probabilities are equal, it is not. Proof on a balance of probabilities means a win however narrow, a draw is not enough. In a case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the required standards will not have been attained.

12. The question this court has to determine is whether the trial court failed to take into account particular circumstances of probabilities in arriving at its decision. From the evidence adduced by both parties before the learned magistrate where both parties claimed to have purchased the suit plot from Mr. Stanley Ritho Mwathi, it is hard to decide one way or the other which evidence to accept. The appellant bore the burden of proof and would lose if the required standard was not attained.

13. After considering the evidence adduced before the trial magistrate this court agrees with the finding of the trial magistrate that the Appellant failed to prove his case on a balance of probabilities. The appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 5th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Odera holding brief for Mr. Odera for the Appellant

Mr. Jaoko for the Respondent

Mr. V. Owuor- Court Assistant