



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 5 OF 2020

MARTIN MUEMA MUSYIMI.....APPELLANT

VERSUS

ESTHER WANGECHI MAIYANI.....1ST RESPONDENT

NAIROBI CITY COUNCIL.....2ND RESPONDENT

FRANCIS WACHIRA GACHANJA.....3RD RESPONDENT

JUDGEMENT

1. The Appellant lodged this appeal against the judgment of the Learned Magistrate, Honourable Mburu, Senior Principal Magistrate, delivered on 5/4/2019 in Milimani Chief Magistrates Court Commercial Case No. 1965 of 2012. The 1st Respondent filed that suit against the Appellant and the 2nd Respondent seeking a declaration that she was entitled to exclusive and unimpeded right of possession and occupation of plot number C1-140 in Kayole within Nairobi County (“the Suit Property”). The Appellant applied and was allowed to join the 3rd Respondent as a third party to that suit. The Learned Magistrate heard the case and entered judgement in favour of the Plaintiff, who is the 1st Respondent in this appeal.

2. The Appellant faulted the Learned Magistrate for finding that the auction was void and for holding that the 2nd Respondent did not give sufficient notice yet according to him the notice was served through the diary (sic) adverts. The Appellant contended in the Memorandum of Appeal dated 10/4/2019 that the Learned Magistrate considered extraneous issues and ignored the documents furnished by the Appellant, the 2nd and 3rd Respondents regarding the issue of repossession. He urged that the Learned Magistrate failed to exercise his discretion judiciously and added that no remedy was given to the purchaser who had developed the Suit Property.

3. When the appeal came up for highlighting of submissions on 10/11/2020, the 1st Respondent’s Advocate informed the court that the record of appeal prepared by the Appellant did not contain all the documents which were produced before the trial court. The court granted leave to the parties to file a supplementary record of appeal. The matter came up for mention on several occasions to confirm the filing of the supplementary record of appeal. It took a while for the supplementary record to be placed in the court file owing to the restrictions in accessing the court registry as a measure adopted to curb the spread of covid -19.

4. Parties filed submissions which the court has considered. The Appellant submitted that he bought the Suit Property from the 3rd Respondent who presented to him documents in respect of the land. He submitted that those documents were confirmed and verified by the 2nd Respondent. He claimed that that was done after he had entered into a sale agreement dated 29/7/2010 and was given documents including receipts for the payments which the 3rd Respondent made to the 2nd Respondent. He submitted that those documents formed part of the record of appeal.

5. The Appellant submitted that the Suit Property was sold vide the minutes of the 2nd Respondent following the recommendation of the Director of Housing Development. He contended that the 1st Respondent failed to produce evidence of payment of rates which was mandatory on being allocated a plot and that that was what caused the 2nd Respondent to repossess the Suit Property and re-allocate it other interested developers. He maintained that the repossession was done procedurally and made reference to a notice that was in the record of appeal. The document he was referring to which was at pages 104 to 105 of the record of appeal are the minutes of the 2nd Respondent.

6. He stated that after making payments to the 2nd Respondent, the 3rd Respondent gave him a power of attorney dated 18/8/2010 to deal with the Suit Property. He was of the view that the 1st Respondent could only be compensated by the 2nd Respondent. The Appellant went further to urge that the 1st Respondent had only produced receipts dated 19/8/1985 and 31/3/1987. He more or less relied on the investigations which were conducted in the matter in support of his contention that the 1st Respondent lost her claim to the Suit property after it was repossessed. He stated that he had developed the Suit Property and that he ought to be allowed quiet and peaceful possession of that

land.

7. He argued that the Learned Magistrate erred when he made a finding that the 2nd Respondent did not give notice to the 1st Respondent yet the delay of 23 years by the 1st Respondent was not only inordinate but it was not explained. He reiterated that due diligence was followed in the repossession of the 44 plots including the Suit Property and that a minute was issued to that effect. He argued that the 1st Respondent should have started by first setting aside the minutes. In addition, he submitted that the Learned Magistrate erred by failing to consider the minute for repossession and the notice, and by expunging some records from the court proceedings.

8. The 1st Respondent submitted that there was no dispute about the fact that she was allocated the Suit Property in 1987. She relied on the receipts dated 24/11/2010 as evidence of the payments she made in 2010. She pointed out that the 2nd Respondent's witness had stated at the trial that the deadline for payment of rent was the 31st day of December of the year the rent fell due. She maintained that no rent was outstanding since she had paid it in November 2010. In her view, the Learned Magistrate rightfully found that a notice should have been issued to her and that none had been given. She emphasised that the 3rd Respondent could not have passed a good title to the Appellant.

9. The 2nd Respondent submitted that the 1st Respondent started defaulting in her rates payment from 2000 until 2010 when the 2nd Respondent convened a meeting to discuss the rates defaulters. It submitted that on 2/2/2010 at 14.30 the 2nd Respondent through its Housing Development Committee resolved that all plots that had arrears would be repossessed and re-allocated if the defaulters failed to clear their arrears within a specified period. It submitted that notices were first issued and the defaulters were given timelines to comply failing which the 2nd Respondent was to repossess the plots without any further notice.

10. The 2nd Respondent submitted that the 1st Respondent had defaulted for more than seven years and that she did not bother to pay the arrears and that at the end the Housing Development Committee resolved to repossess some plots which included the 1st Respondent's plot. The 2nd Respondent submitted that the Suit Property was repossessed and lawfully sold to 3rd Respondent. The 2nd Respondent maintained that it issued a proper notice contrary to the finding by the Learned Magistrate. It relied on the Committee's minutes' book where it urged that the notice was captured. It submitted that the notice was produced by its witness but the court of its own motion expunged the notice from the court record. To buttress its case, the 2nd Respondent contended that the 1st Respondent admitted in her evidence that she used to receive letters from the 2nd Respondent informing her of what was required of her and the payments she was to make to the 2nd Respondent.

11. The 2nd Respondent reiterated that the 1st Respondent was in arrears and relied on the minutes of its Housing Development Committee. It urged that the 1st Respondent had failed to prove that she paid the arrears for 2006 to 2009. It faulted the Learned Magistrate for finding at paragraph 5 of his judgement that the 1st Respondent had defaulted and then concluding that the 2nd Respondent had failed to prove through documentation the extent of her default.

12. The 2nd Respondent relied on Section 17 of the Rating Act on how a rating authority was to deal with defaulters after serving a notice. The 2nd Respondent submitted that the notice was served upon the 1st Respondent through the *Daily Nation*. The 2nd Respondent relied on Section 12 of the Land Act on the allocation of public land. The court notes that that Act came into force in 2012 and is not helpful to the 2nd Respondent's case.

13. The 2nd Respondent maintained that it was never served with the booklet which the 1st Respondent produced before the trial court. It added that it was barred by the court from cross examining the 1st Respondent in relation to her documents.

14. The 3rd Respondent submitted that he participated in the auction that was advertised and that he purchased the Suit Property from the 2nd Respondent and was given the requisite documents of ownership. He relied on the note from the 2nd Respondent's Director of Legal Affairs confirming that the signature appearing on the documents was genuine. He maintained that he had power to transfer the Suit Property to the Appellant. He relied on Section 43 of the Land Act which requires transfers to be effected by instrument in the prescribed form. He urged the court to set aside the judgement.

15. The issue for determination is whether the court should allow the appeal. In order to determine that issue, the court must establish whether the Suit Property was repossessed after the 1st Respondent had been given notice by the 2nd Respondent to regularize her account. The court notes from the judgement that the Learned Magistrate mentioned that the 2nd Respondent's witness informed the court that it was not necessary for a notice to be issued to the 1st Respondent because she was a defaulter. The court noted that no newspaper advert was produced before the court. Further, that the purported advert which was not admitted did not bear the name of the newspaper or the date of the publication.

16. There is a contradiction between the evidence that was adduced by the 2nd Respondent's witness before the trial court and its submissions in which it indicated that the notice was served on the 1st Respondent vide the *Daily Nation*. According to the Learned Magistrate what was presented before him did not bear the name of the newspaper. The 2nd Respondent did not give the date of that advertisement. There is no evidence that the date the Suit Property was repossessed and when the auction conducted were given in the trial before the Learned Magistrate.

17. Rule 27 of Order 42 of the Civil Procedure Rules gives an appellate court jurisdiction to allow additional evidence to be produced on appeal where the trial court refused to admit evidence. The 2nd Respondent could have applied to have this court admit into evidence the notice it claimed it issued in the *Daily Nation* if it wished to rely on it in this appeal to prove that the notice was indeed given to the 1st Respondent before the Suit Property was repossessed and re-allocated to a third party.

18. The 2nd Respondent's witness indicated in his witness statement that the plot was allocated to the 3rd Respondent immediately after he paid Kshs. 50,000/= on 29/7/2010. If that was the case then it was inconceivable for the Appellant and the 3rd Respondent to have entered into a sale agreement on the same date or for him to have given the power of attorney on 29/7/2010. The minutes of the Housing Development Committee which the 2nd Respondent relied on indicated that the 1st Respondent was in arrears of Kshs. 7268/=. The booklet which the 3rd Respondent produced had alterations on it at the top where the plot details were indicated with some plot number being crossed out and a different plot inserted. It also indicates the rates were to be paid from 21/4/2010 which would be three months before the plot was re-allocated to the 3rd Respondent.

19. Looking at the proceedings before the Learned Magistrate during the trial, it is apparent that the 1st Respondent produced the booklet in evidence. There is nothing on the record to show that the 2nd Respondent objected to the production of that booklet during the hearing.

20. The court is not satisfied that service of the notice to repossess the plot was served on the 1st Respondent. The Rating Act which the 2nd Respondent placed reliance on has a procedure on how service is to be effected on a rates defaulter. There is no evidence that that procedure was employed in this case. There is evidence that the 1st Respondent made payments to the 2nd Respondent in 2010. The 2nd Respondent could have declined to accept the payments if indeed it had repossessed the Suit Property and allocated it to a third party.

21. The appeal lacks merit and is dismissed with costs to the 1st Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2021.

K.BOR

JUDGE

In the presence of: -

Mr. David Osoro for the Appellant

Mr. John Gachie for the 1st Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2nd and 3rd Respondents