



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 34 OF 2018

PATRICK NJUGUNA GITAU.....APPELLANT

VERSUS

JOHN BETHWEL KARIUKI.....RESPONDENT

(Being an Appeal from the Judgment of Honourable Senior Principal Magistrate A.M Maina,

delivered on 23rd October 2018 in CMCC No. 92 of 2001)

JUDGMENT

The Appellant herein **Patrick Njuguna Gitau**, was the Plaintiff in **Thika CMCC No. 92 of 2001**, the Respondent **John Bethwel Kariuki** was the Defendant in the said suit. By an Amended Plaint dated **30th March 2016**, and filed on **30th March 2016**, the Plaintiff (Appellant) filed this suit against the Defendant(Respondent) and sought for orders that;

i) Permanent Injunction against the Defendant, his servants, agents, beneficiaries and or any persons claiming through him from entering, encroaching, constructing, barricading, occupying, trespassing, destroying, alienating or in any manner whatsoever dealing with Makuyu/Kimorori/Block 1/328 and or in any other way obstruct the Plaintiffs use of the afore referenced land parcel.

ii) An order that the Executive Officer –Thika Law Courts do execute all vesting instruments so as to effectuate transfer to the Plaintiff land parcel No. Makuyu/ Kimoriri/Block 1/328.

iii) That in the alternative to prayer (ii) above, the Court do order that there be grant of exemption of the provisions of the Land Control Act, Cap 302 in so far as consent to transfer the same is concerned and to dispense away with the production of the original title document to the land parcel abovementioned.

iv) Costs of the suit plus interest at such rates and for such period as the Court may grant.

v) Any other further relief as tis Court may deem appropriate.

In his statement of Claim, the Plaintiff (Appellant) averred that he bought the suit property from one **Francis Ngui (Deceased)**, in his capacity as the Administrator of the Estate of the late **Njoroge Kigia**, who had inherited the same and was therefore the owner with all the privileges and rights appurtenant thereto. That on **15th April 1998**, the Defendant trespassed and erected permanent structures on the suit property and illegally caused himself to be registered as the owner of the suit land. That by virtue of the Defendant's(Respondent's) willful trespass on the suit property, the Defendant(Respondent) has interfered with the usage of the suit property to which the Plaintiff has been deprived the peaceful and quiet enjoyment of the suit land and he has suffered loss . That the Plaintiff's, (Appellant's) attempt to take possession of the suit property were futile.

He particularized loss and damage as; being deprived the use and quiet enjoyment of the suit property; Defendant's (Respondent's) misuse of the suit property, threatening to deface and devalue the suit property. Possession without right; arbitrary employment of unlawful gimmicks, obstruction of user. Therefore leading him to suffer loss and damage . He particularized Special Damages as **Kshs.1,000/=**per calendar month from **15th April 2001** being mesne profits.

The suit was contested and the Defendant (Respondent) filed a Defense and Counter Claim dated **19th June 2012**, and denied all the allegations made in the Plaint. He averred that he was the original allottee of the suit property and was not aware of any tribunal case filed by the Plaintiff (Appellant) in Maragua Land Disputes Tribunal.

In his Counter Claim, he averred that the Plaintiff (Appellant) fraudulently transferred the title in the name **Patrick Njuguna Gitau**, who is in possession and that the said transfer is of no effect . He sought for orders that;

a) That the title in respect of title number Makuyu Kimorori/B1/328, be cancelled and the same revert in the name of the defendant and the said Patrick Njuguna Gitau, and his family be evicted from the said suit land.

b) Costs of Counter Claim.

c) Any other or further relief that the Honorable Court may deem fit and just to grant.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for himself and closed his case and the Defendant also testified for himself and closed his case.

PLAINTIFF'S (APPELLANT'S) CASE

PW1 Patrick Njuguna Gitau, adopted his witness statement dated **5th June 2016**. He further produced his list of documents dated **14th April 2016** and **29th June 2018**, as Exhibit 1 to 9. That **Francis Ngui** sold him the suit property vide sale agreement dated **2nd November 2005**, before his death. It was his testimony that he lives on the suit property and has constructed a house. That **John Bethwel Kiruku**, had been sued and the Land Disputes Tribunal at Maragua held that the Defendant was not a member of the group. That he conducted a search at the lands office and confirmed that the Deceased was the registered owner. That though there was a dispute at the **Land Disputes Tribunal (LDT)**, and an award was made, he was not a party to the said proceedings. That the title deed is from **Ngimu Farm**. Further that the green card shows that the Defendant was the owner of the land, when he bought the land. He further testified that he became aware of the dispute in **2014**.

DEFENCE (RESPONDENT'S) CASE

DW1 John Bethwel Kiruku, adopted his witness statement as his evidence. He further produced his list of documents as exhibits . That he bought the suit property in **1988**, and the same is registered in his name. That he had four share certificates showing he is a member of the Company. Further that a green card shows that the suit property was in his name and a letter confirming he is a member of **Ngimu Company** to wit **member No. 14** in the list of members. He denied being sued in **Maragua Land Disputes Tribunal**, and that the person who was sued was **John Bethuel Kariuki**, while his name is **Kiruku**.

He further testified that the share Certificate is his, but has the wrong name. That his file shows that the registered owner of the land is **Bethwel**. That the first time he went to the land, he balloted for was in **2010** and that he took ballot **328**. That his address in Certificate **7914** is **159 Nyahururu**, and that the Certificates all have different Postal addresses. It was his evidence that when he went to the suit land, he found a small house and a toilet. That he wrote a letter dated **13th January 1987**, indicating he had been paid some money . That his address is **839 Thika**, and that that is the same address in the letter addressed to him by the Company. That Box **1245 Thika**, is also indicated as his address. It was his further testimony that his sister was shown the land in the year **2000**.

That his title deed cancellation was overturned by Court and that his name has been spelt differently in different documents but that the same is still his name. That some of the Certificates are not sealed, but are signed by the Company. That the Company wrote to him different letters using different addresses.

After the *viva voce* evidence, the parties filed their written submissions and the trial Court entered Judgment in favour of the Defendant (Respondents herein) and stated;

“In summary, I find that the Plaintiff properly purchased the suit land from the late Francis Ngui, he as an innocent purchaser for value of the suit land. However, the said Francis Ngui was not the rightful legitimate owner of the suit land at the time of the sale, and therefore he had no capacity to sell land that did not belong to him. The Defendant on the other hand has been able to prove that he is the registered owner of the suit land. If at all there was an award by the land disputes tribunal, as alleged by the Plaintiff, then the same was not adopted as a Judgment of this Court.

Having found as above, I have no choice but to dismiss the Plaintiffs claim against the Defendant. I proceed to allow the Defendant's Counter Claim of prayer (a) .Having found that the Plaintiff was an innocent purchaser for value of the suit land. I direct that each party bears its own cost in this suit.”

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **26th November 2018**. The Appellant sought for the setting aside of the Judgment delivered on **23rd October 2018** by **Hon. A.M Maina Senior Principal Magistrate Thika**.

The grounds upon which the Appellant sought for the Appeal to be allowed are;

1.The Learned Trial Court erred in Law when it dismissed the Appellant's suit when documentary evidence in support thereof militated otherwise, that the Appellant was the bonafide owner of title No. Makuyu/Kimorori Block 1/328.

2. The learned trial Court erred in Law and in fact when it made a finding which was per incursion premised on the existing land aw principally the Land Act and the Land Registration Act.

3. The Learned Trial Court erred in Law and in Fact when it made an ambiguous finding that is neither supported by authentic and persuasive evidence capable of supporting the respondent's Counter Claim.

4. The Learned trial Court misguided itself when it held that the Appellant's claim was self-rejecting for want of material bonafide.

5. The Learned Trial Court erred in law when it gave evidence to the respondent witness purports without vouching and interrogating their authenticity .

6. The Learned trial Court misdirected itself by relying on uncorroborated evidence when facts and the land was in favour of the Appellants.

The Appeal was canvassed by way of written submissions and despite being given a further opportunity on **24th November 2020**, to file written submissions, the Appellant did not file his submissions.

The Respondent through the Law Firm of **Karuga Wandai & Company Advocates**, filed his written submissions on **15th July 2020**, and submitted that the Ruling produced by the Appellant which had been delivered by the **Land Disputes Tribunal**, could not hold water as there was no evidence that the Respondent was a party to the Ruling, it was never adopted as an Order of the Court and that the Court was not bound by the Ruling and therefore could not enforce it. That the Respondent tendered evidence to prove that he was the registered owner and the same was not controverted by the Appellant and that the Respondent's title was not challenged.

It was further submitted that the Appellant did not apply to the Court to cancel the Respondent's title and that if the Court were to grant Injunction Orders, it would have been presumed that there was an order given by the Court conferring ownership upon the Appellant. The Respondent relied on various decided cases and provisions of law and urged the Court to dismiss the Appeal.

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123** where the **Court held that;**

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

"This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong".

It is not in doubt that both the Appellant and the Respondent lay claim to the suit property. That while the Appellant claims to have bought the suit property from **Francis Ngui**, who was the Administrator of his father's Estate, the late **Njoroge Kigia**, who was the original allottee of the suit property, the Defendant claims to be the original allottee of the suit land. What is further not in doubt is that the suit property originally belonged to **Ngimu Farm**, wherein it is claimed that both the late **Njoroge Kigia** and the Respondent bought the suit property.

The Appellant challenged the Respondent's title to the suit property while the Respondent also Challenged the Appellant's title to the property and sought for his eviction. It is trite that where a person's title to the property has been challenged, it then becomes incumbent upon that person to show their root as title. See the case **Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR**, held as follows:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

The Court therefore finds and holds that to be able to determine the Appeal the **issue for determination will be who has shown the root of their title.**

The Appellant in his evidence in the lower Court claim to have bought the suit property from **Francis Ngui Njoroge**, who was the Administrator of the estate of the late **Njoroge Kigia** and he produced in evidence a Sale Agreement dated **2nd November 2005**, which

indicated that the said **Francis Ngui** was the registered owner of the suit property. It then became incumbent upon the Appellant to show the root of **Francis Ngui's** title.

While giving his evidence, the Appellant produced two list of documents as his evidence. He produced the list of documents dated **14th April 2016**, and a Further List of documents dated **21st June 2018**. The said lists of documents contained a letter from **Ngimu Farm** dated **12th November 2014**, stating that the **Late Njoroge Kigia** was **Member No. 1169**, and owned **Block 1/328**. It further contained an award from the Land Disputes Tribunal, and a letter dated **6th April 1993**, stating that the Respondent was not their member. In his list of documents, the Appellant further produced transfer forms and a title deed that were acquired pursuant to a Judgment that has since been set aside.

It is therefore not in doubt that apart from the letter from **Ngimu Farm**, the Appellant did not produce in evidence any receipts that confirms payment, a share certificate nor a ballot paper to show how the **Late Njoroge Kigia** acquired the suit property.

On the other hand, the Respondent produced in evidence his list of documents that contained 12 documents amongst them a letter dated **27th March 2012**, from **Ngimu Farm**, confirming that he is the owner of the suit property, receipts for payment of the same, a list of members of the said **Ngimu Farm** indicating that **Plot No. 328**, belonged to the Respondent, Share Certificates, title deed and a Green Card further indicating the Respondent as the registered owner.

It is therefore this Court's considered view that while the parties failed to call any witness from **Ngimu Farm**, to confirm authenticity of each of the letters produced and while the two also produced in evidence the said letters without any objections to their authenticity, the Court was then obligated to determine which of the parties had produced in evidence enough documentation that show the root of his title.

While the Respondent produced in evidence share Certificates and receipts for payment of the same, the Appellant only produced a letter stating ownership without further evidencing how the ownership was acquired. The Court concurs with the trial Court that the Respondent was able to show the root of his title, while the Appellant did not explain how the **Late Francis Ngui**, acquired proprietorship as his registration was pursuant to a Decree that has since been set aside. The Court finds and holds that the Respondent was the party who showed the root of his title

This Court finds and holds that the Appellant having failed to show the root of his title, then the trial Court did not **err** when it dismissed his title. On the other hand, the Respondent having been able to show the root of his title, was entitled to all the right and privileges of the same. **Section 26(1)** of the **Land Registration Act** which provides;

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is very clear from the above that the law protects title to land, but there are two instances wherein such title can be challenged. The first is where the title is obtained by **fraud** or **misrepresentation**, to which the person must be proved to be a party. The second is where the certificate of title has been acquired **illegally, un-procedurally** or through a **corrupt scheme**. In this instance, having failed to provide root of his title, the Appellant's title must therefore be impeached.

Having now carefully **re-evaluated** and **re-assessed** the available evidence before the trial Court, and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

In a nutshell, the Court finds that the Appellant's Appeal is not **merited** and consequently the said Appeal is **disallowed** and/or **dismissed** entirely and the Judgment and Decree of the trial court is upheld. On the issue of costs, the Court finds the same is granted at the discretion of the court. Given the circumstances of the case, the Court directs that each party to bear its own costs of this Appeal

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 3RD DAY OF JUNE 2021.

L. GACHERU

JUDGE

3/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the appellant

No appearance for the Respondent

L. GACHERU

JUDGE

3/6/2021