REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

APPEAL NO. 18 OF 2019

JACINTA KANOCIA MAILUTHA.....APPELLANT

VERSUS

NAFTALY KOOME.....1ST RESPONDENT

DANCAN KIRIMI MWAMBIA.....2ND RESPONDENT

HENRY KARURYU MWAMBIA..3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the Judgment and Orders of Hon. A.G Munene, Senior Resident Magistrate Maua in Civil Case No. 92 of 2013 delivered on 31st December 2018)

JUDGMENT

By a plaint dated 30th July 2013, the Appellant herein sued the 1st Respondent for being illegally on her parcel of Land No. Amwathi/ Maua/8168 (herein after referred to as the suit property), originally situated at Iriene area of Maua Municipality adjacent to the Meru-Maua highway. The Appellant averred that the 1st Respondent had colluded with the 2nd, 3rd and 4th Respondents to move the location of the suit property on the map from Iriene Area to Kithetu Area in the outskirts of Maua Municipality. The effect of the relocation of the suit property on the map, explained the Appellant, was to relocate her to a parcel of land worth about Ksh. 40,000, while the suit property was worth approximately Ksh. 2,000,000 due to its prime location next to the highway. The Appellant produced a copy of the sale agreement for the purchase of the suit property dated 07th July 1994 as well as a copy of the resultant Title Deed issued on 18th May 2011. She averred that the suit property was excised from parcel no. Amwathi/Maua/4600 and noted that the 3rd Respondent was a witness to the purchase. Upon purchase, the Appellant proceeded to erect a barbed wire fence around the property and kept re-fencing over the years on account of the damage caused to the posts by the swampy conditions of the suit property. On or about September 2012, the Appellant was informed that the 1st and 2nd Respondents herein had pulled down the fence around the suit property. She referred the matter to the Njuri Ncheke Council of elders and they made a finding that the suit property belonged to the Appellant. Upon inspecting the survey maps, the Appellant discovered that the location at which the suit property was located had been registered as Amwathi/Maua/15226 in the name of the 1st Respondent and her property had been relocated about 2km away to a place called Kithetu at Kithama.

By this time, the Appellant noted that the 1st Respondent had already began excavating the suit property in preparation for construction. On 31st July 2013, the Appellant moved to court and obtained an order of injunction barring the 1st Respondent from continuing with the construction pending the determination of the matter.

The 1st Respondent entered appearance and filed his defense on 6th August, 2013. He averred that he bought land Parcel No. Amwathi/Maua/15226 from Duncan Kirimi Mwambia on 13th February, 2012 and the resultant Title Deed issued on 11th January 2013. He averred that his property is situated in Kaliene Area of Maua and not Iriene as suggested by the Appellant. That upon purchase he fenced the property and obtained the necessary permits and approvals from the Municipal Council of Maua to develop the property on 21st March, 2013.

The 1st, 2nd and 3rd Respondents entered appearance and filed a joint statement of defense on 8th August 2013. The gist of their defense was that the 2nd Respondent had sold land to the 1st Respondent for value in 2012 and that the Appellants allegation of the collusion to swap the location of her property was misinformed.

The 4th Respondent entered appearance on 2nd September 2013 and filed his statement on 16th January 2014. He confirmed that as per the adjudication records and area list, Amwathi/ Maua/15226 had for all time been registered in the name of the 1st Respondent and Amwathi/ Maua/8168 in the name of the Appellant, jointly with her husband. He denied any swapping of the location of the two properties.

Hearing was set down for 2nd April 2015 and judgement issued on 31st December 2018 in favour of the Respondents. The trial court found that the Appellant had not succeeded in proving the elements of conspiracy to alter the registry map sheets and had not led evidence to show how the 1st Respondent was involved in the alleged conspiracy. The court noted that the 4th Respondent had also not been served notice as is required in law prior to institution of the suit. The suit was therefore dismissed with costs and the interim orders prohibiting the 1st Respondent from developing his property.

Submissions of counsels for the Appellant and Respondent

Aggrieved by the decision of the trial court, the Appellant filed her Memorandum of Appeal on 17th January 2019. On 30th January 2019, she also sought and was granted a stay of execution of the orders issued by the trial court.

The Appellant filed her submissions on 1st September 2020 and the 1st, 2nd and 3rd Respondents filed theirs on 5th October 2020.

The Appellants submissions faulted the trial court for not considering the fact that she had successfully proved conspiracy on the part of the Respondents to relocate her property to a worthless location. She reiterates that the 3rd Respondent witnessed her purchase of the property at its location along the Meru-Maua highway. She also noted that the Agreement between the 1st and 2nd Respondent is dated 13th February 2012 while the Title Deed indicated that the transfer was done on 18th May, 2011. The Appellant prays for a finding in favour of her ownership of the suit property at its original location

The Respondent's submissions revisited the fact that the 1st Respondent had bought the property from the 2nd Respondent for value, had conducted a search prior to purchasing the same and was in the process of lawfully developing his property. The 1st Respondent prays for the stay to be dismissed and the Appeal dismissed as well.

Issues for determination

Whether the Appellant succeeded in proving a conspiracy by the 1st, 2nd, 3rd and 4th Respondents calculated to exchange the location of her property on the map and consequently on the ground.

Legal Principles

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal. There are numerous authorities on the subject, a few of which are set out below:

In ***Selle Vs Associated Motor Boat Co. [1968] EA 123*** the legal parameters and considerations for guiding a court of first appeal were set out as follows:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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."

In **Peters Vs Sunday Post Limited [1958] EA 424,** it was held that:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and

> importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

Lastly, the Court of Appeal in ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1 KAR 278*** pronounced itself thus:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. It is not in contention that the Appellant is the legal owner of parcel No. Amwathi/ Maua/8168 and the 1st Respondent the legal owner of parcel No. Amwathi/ Maua/15226. Both the Appellant and 1st Respondent have produced their respective Title Deeds in support of ownership. In addition, The testimony by the 4th Respondent supports the respective registration and ownership of the two parcels of land.

The contention is on the location of the two parcels of land. The Appellant insists that her parcel of land is in Iriene Area of Maua along the Meru-Maua highway. The 1st Respondent avers that his property is in Kaliene Area of Maua. It is the Appellant's assertion that, on review of the survey map, her property has since been moved to Kithetu Area, approximately 2 kilometers from where it ought to be and explains the relocation to be occasioned by the collusion and conspiracy of the Respondents.

The burden of proving the relocation of the Appellant's property, which essentially is the root of the case, then falls on the Appellant.

Section 109 of the Evidence Act sets out the evidential burden of proof in the following words:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person unless it is provided by any law that the proof of that fact shall lie on any particular person"

The trial court noted, correctly, that the Appellant had not supplied the survey map as at the time of the purchase of her property for comparison with the current survey map in order to establish whether there indeed has been a swapping, movement or alteration of the map.

The Appellant also insists that the effect of the relocation is to situate her property at a place with a market value of about Ksh. 40,000 instead of the original location with a market value of around Ksh. 2,000,000.00. Again, no valuation report has been presented in support of this allegation.

The Appellant also points to an anomaly in the sale agreement versus the date upon which Title to the 1st Respondent's property was issued. The agreement is dated 13th February 2012 and the Title issued on 11th January 2013.

The Appellant also asserts that land Parcel No. Amwathi/ Maua/12226 was originally registered in the names of the 2nd Respondent but again, falls short of proof of the assertion.

Disposition

It is my considered view that from the foregoing, it appears that the Appellants assertions remain unsupported and on a balance of probabilities, her case cannot stand. I therefore find that this appeal fails and the orders staying execution are hereby set aside. The costs of this appeal shall be borne by the Appellant. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Ngungiri for the 1st, 2nd and 3rd Respondents

2. Appellant/Advocate-Absent

3. 4th Respondent/Advocate-Absent

4. Fardowsa- Court Assistant