REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 139 OF 19 (FORMERLY HCA 118/18 MERU)

JULIUS KATHURIMA K.....APPELLANT

VERSUS

JULIUS MWONGERA.....RESPONDENT

(**Being an appeal from the Judgment and Orders of Hon. Miss H.N. Ndungu Chief Magistrate Meru in CMCC No. 17 of 2012 delivered on 25th October 2018)**

JUDGMENT

Summary of Facts

By a plaint dated 23rd January 2012, the Appellant herein sued the Respondent for being illegally on his parcel of Land No. Ruiru/ Rwarera/1419 (herein after referred to as the suit property), destroying trees and leasing portions of the land without any colour of right or lawful justification. The plaintiff thus approached the court seeking orders for the eviction of the Respondent from the suit property and for a permanent injunction barring the Respondent from setting foot therein. In support of his claim, the plaintiff provided a copy of the sale agreement relating to the suit property, dated 8thFebruary 1993 and corresponding receipts for the payment of the purchase price of Kenya Shillings One Hundred and Twenty-Five Thousand (Ksh. 125,000). He also provided a letter from the Ministry of Lands dated 14th January 2010 and referenced SCH/LA/VOL.IX/086, signed by Jackson N Nyaga, (District Land Adjudication and Settlement Officer, Imenti North District) confirming that the suit property indeed belonged to him.

On 8th March, the Appellant filed seven issues for determination. These were:

1. Whether the Appellant was the registered and lawful owner of the suit property;

2. Whether the Respondent has any proprietary right over the suit property, equitable or otherwise;

3. Whether there were any contractual arrangements between the Appellant and the Respondent which is legally actionable over the suit property;

4. Whether the Respondent is justified in trespassing and occupying the Appellant's property;

5. Whether the Appellant is entitled to be granted an order of eviction and permanent injunction against the Respondent;

6. Who was responsible for the payment of costs in the suit.

The Respondent herein entered appearance on 12th February 2013 and filed his defense on 20th February 2013. An amended defense and counterclaim was filed on 21st August 2014. The Respondent denied the Appellants accusation, explaining that his presence on the suit property was lawful. His defense set out that the Respondent and the Appellant are in fact cousins, by reason of sharing a common grandfather, one Kithambo Mpuko. That upon the demise of their grandfather, the Appellant and one Joseph Mwiti were appointed as administrators and instead of giving the Respondent their share of the land, the two administrators transferred the land to themselves. When the Respondent and his siblings clamored for their share of the land, the Appellant offered them the suit property in exchange. That consequent to the exchange the Respondent and his siblings moved into the land and the Respondent's mother, upon her demise was buried on the suit property.

The Respondent called four witnesses in support of his case and the Appellant called two witnesses to buttress his version of events.

Judgement on the matter was delivered on 25th October 2018 in favour of the Respondent (defendant in that case). The court dismissed the Appellant's case and made orders declaring the Respondent to be the beneficial owner and ordering the Appellant to transfer the suit property to him.

On 16th December 2019, an order to move the matter from the High Court to the Environment and Land Court as the proper jurisdiction was made, thus moving the suit to the present court.

Issues for Determination

Aggrieved by the decision of the court, the Appellant filed his Memorandum of Appeal on 20th November 2018 listing six grounds of appeal:

> a. That the learned Chief Magistrate erred in Law and fact by failing to appreciate the evidence presented before her and thus came up with unsupported judgement on facts or the law.
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> b. That the learned Chief Magistrate erred in Law and facts in disregarding all the Laws of Kenya governing acquisition of land law and all the Laws and therefore her findings and decision was against the weight of the Law and facts.
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> c. That the learned Chief Magistrate erred in Law and Facts by dismissing the Appellant's suit and allowing the defendants counterclaim when there were enough facts and Law to support the plaintiff's claim and none at all to support the counterclaim.
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> d. That the learned Chief Magistrate erred in Law and facts by accepting evidence of an alleged oral contract involving issues of land never proved or existed and therefore her decision was against the clear provision of Contract Act.
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> e. That the learned Chief Magistrate erred in Law and facts in emphasizing her findings on issues of the Probate and Administration which were not properly before her and came up with a decision which was bad in law and cannot be allowed to stand
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> f. That the learned Chief Magistrate erred in Law and facts when he was considering the issues involving other properties belonging to a deceased person subject to HC Succession Cause No.22 of 2000 which was still on going and whose decision was yet to be made.

Submissions of counsels for the Appellant and Respondent

The Appellants filed their submissions on 25th September 2019, while the Respondent's filed theirs on 24th October 2019.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal and prayed that the decision of the Chief Magistrate be set aside and that orders of eviction and permanent injunction against the Respondent be issued.

The Respondent's submissions revisited the fact that there indeed had been an agreement to give him the suit property in exchange of the ¾ acre of land in LR Nyaki/Mulathankari/494 and invited the Appellant to explain the circumstances that would precipitate in his mother's burial on the suit property. The Respondent argued that he indeed has a beneficial right to the property on account of the agreement relating to the exchange of ¾ acre of land in LR Nyaki/Mulathankari/494 for the suit property. He prayed for the Appellant's appeal to be dismissed with costs to the Respondent.

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] 1KAR 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 the suit property. The Respondent indeed agrees that the suit property belongs to the Appellant. The Trial court in its judgement also highlighted the fact that the legal ownership of the suit property is vested in the Appellant. While the Appellant filed six issues for determination, it would appear that the central issue is whether indeed the Respondent acquired a beneficial interest in the suit property on account of the exchange allegedly engineered by the Appellant.

The Appellant, then plaintiff, had moved to the trial court for orders evicting the Respondent, then defendant, from the suit property. He led evidence in the nature of a sale agreement dated 8th February 1993, receipts for the entire amount of the purchase price of Kenya Shillings One Hundred and Twenty-Five Thousand (Ksh. 125,000), and a letter from Ministry of Lands dated 14th January 2010 and referenced SCH/LA/VOL.IX/086, signed by Jackson N Nyaga, (District Land Adjudication and Settlement Officer, Imenti North District) confirming that the suit property, then under adjudication indeed belonged to him. Having proved ownership, he went on to explain that the Respondent had moved into the property, cut down trees and began leasing out portions of the same. The Respondent is reported to have moved in on or about the year 2007 and the Appellant first issued a demand letter directing the Respondent to move from the suit property on 8th February 2011, consequent to filing suit on 24th January 2012.

It is clear from the timelines that the Appellant was not lax in protecting his interest in the suit property and the Respondent cannot be said to have acquired the property by adverse possession. As mentioned, throughout the proceedings and even in the judgement handed down by the trial court, the legal ownership of the suit property vested in the Appellant is not contested.

The question then of the Respondent's presence in the suit property, which the Respondent does not deny, is the crux of the case. The Respondent's case is that he has acquired a beneficial interest in the suit property as a consequence of an arrangement with the Appellant flowing from Succession Cause No. 22 of 2000 to swap the Respondent's inheritance of ¾ of an acre in LR No. Nyaki/Muthalankari/494 for the suit property. The Appellant denies any such arrangement with the Respondent. The burden of proving the existence of the arrangement, which essentially is the root of the case, then falls on the Respondent.

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 Respondent did not specify the place where the supposed arrangement was reached, did not call the parties present during the deliberations (the Respondent's siblings) and did not provide any document capturing the agreement for the swap of land. As cited by the Appellant, ***Section 3 of the Law of Contract Act***provides as follows in relation to contracts relating to the disposition of an interest in land:

> 1. 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—
>
> 1. Is in writing;

2. Is signed by all the parties thereto; and

3. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

The only shred of proof led to show that the Appellant had actually allowed the Respondent to settle on the suit property was the fact that the Respondent's mother had lived on the property and when she passed away, she was buried on the property. There are two conflicting accounts

relating to how the Respondent's mother ended up being buried on the suit property. According to the Sub Area, witness for the Respondent, the Respondent's mother had been brought to the Appellant's suit property in 2002 and had explained to the Sub-Area that the Appellant and another as joint administrators of the grand-father's property had disinherited her of the land in LR No. Nyaki/Muthalankari/494 and that the Appellant had promised to transfer the suit property to her and her children (including the Respondent). The Respondent's sister on the other hand, Elizabeth Tirindi, explains that her mother, and the Respondent's mother as well, had been rendered homeless in Kibera, Nairobi and that the Appellant, seeing she had nowhere to go had settled her on the suit property, allowed her to watch over the property, and allowed her burial on that property in 2007. Wherever the truth lies, the Appellant was able to explain how the Respondent's mother was buried on the suit property. In any case, the next portion of the analysis may render the question on the burial not very important.

The Respondent's explanation as to the land swap arrangement is that the Appellant, jointly with Joseph Mwiti were appointed as administrators of the estate of Kithamba Mpuko, the Respondent's and

Appellant's grandfather. It is the Respondent's case that the Appellant and the co-administrator fraudulently subdivided the land and transferred the land to themselves, to the exclusion of the other beneficiaries of the estate, one of whom is the Respondent. This is a very serious allegation and a breach of the trust bestowed on an administrator of a deceased's property.

Section 83 of the Law of Succession Act sets out the duties of a personal representative. ***Section 83(f)*** is instructive to the matter at hand:

Personal representatives shall have the following duties —

> (f) Subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

Section 95 (a) of the Law of Succession Act makes it an offence for any personal representative who, as regards the estate in respect of which representation has been granted to him willfully or recklessly neglects to get in any asset forming part of the estate, **misapplies any such asset**, or subjects any such asset to loss or damage.

From the foregoing, it is clear that the alleged fraud committed by the Appellant and his co-administrator in transferring the land to themselves constituted an offence. The Law of Succession at ***Section 76 (d) of the Law of Succession Act*** provides the procedure for the revocation of a grant as a recourse to a beneficiary who feels aggrieved by the lack of diligence in the administration of the estate of a deceased person.

The alleged arrangement for a land swap is founded on an illegality, which essentially allowed the Appellant and the co-administrator to grab unto themselves property intended to benefit the beneficiaries under the estate, and cannot therefore stand in law.

Given that the Respondent did not produce the grant or confirmation of grant demonstrating that the Appellant was infact appointed as an administrator, and nothing of the outcome of Succession Cause No. 22 of 2000 has been presented, the entire of the Respondents version of events is unsupported. It is clear that the agreement itself upon which the Respondent relies is steeped in illegality and cannot be allowed to stand in law.

The correct recourse for the alleged fraud perpetrated by the administrators lies in the Law of Succession Act as highlighted and not in an illegal arrangement to sanitize the offence by swapping portions of land.

Disposition

For the above reasons, I find that the learned Chief Magistrate erred in allowing for the sanitization of an alleged illegality perpetrated by the Appellant in grabbing the property meant to benefit other beneficiaries and basing her decision on a transaction illegal in law. The Respondent ought to have been directed to the proper forum to prosecute his case, being the Probate and Administration Court, in order to regain the allegedly grabbed property.

It is also my finding that the Respondent has not been able to prove a beneficial interest in the suit property and his version of events remain unsupported.

It is further my view that the decision of the trial court made on 25th October 2018 ordering for the transfer of the suit property to the Respondent is not based on any law or material evidence and the same is hereby set aside and substituted with an order evicting the Respondent from the suit property. I also issue a permanent injunction against the respondent, his family or agents from interfering or using the appellant's land. The costs of this Appeal and the costs in the lower court shall be borne by the respondent. 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. M/s Murithi for the Respondent

2. Appellant/Advocate-Absent

3. Fardowsa-Court Assistant