REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO 21 OF 2019

CHRISTOPHER NGENO.....APPELLANT

VERSUS

EUNICE LANGAT.....RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court at Molo (Hon. E. Nderitu)

delivered on 27th August, 2019 in Molo CMCC ELC Suit No.405 of 2017)

J U D G M E N T

1.The instant appeal arises from the judgment delivered at the Chief Magistrate's Court Molo in Molo CMCC ELC Suit No. 405 of 2017 on 28th August, 2019 by Hon. E. Nderitu CM. In the suit before the subordinate court, the appellant herein was the defendant and the respondent herein was the plaintiff. The respondent in the lower court instituted the suit claiming she was the owner of land parcel Nakuru/Tinet

Kabongoi settlement Scheme/1524 ("the suit property") and that the appellant had trespassed thereinto. She sought an order for the appellant to be restrained by way of permanent injunction from trespassing or in any other manner interfering with the suit property.

2. The appellant filed a statement of defence in the lower court where he denied he had trespassed onto any land belonging to the respondent. He asserted that the disputed suit property was allocated to his wife by the clan elders on 5th July,1997 and averred that the Respondent had fraudulently acquired title to the said land. The appellant averred the suit against him was misconceived and disclosed no cause of action against him. He prayed for the dismissal of the suit with costs.

3. The learned Trial Magistrate after hearing the parties and their witnesses held that the respondent (Plaintiff) had proved her case against the Appellant (Defendant) and granted the respondent the prayers sought in the plaint. The trial magistrate also made an order of eviction against the appellant, his servants and agents from land parcel Number Nakuru/Tinet Kabongoi Settlement Scheme/1524.

4. The appellant being aggrieved by the judgment has a appealed to this court and set out 4 grounds of appeal in his memorandum of appeal as hereunder: -

> *1. The Honorable learned magistrate erred in law and fact by finding that the appellant had illegally trespassed onto the Respondent's parcel of land.*
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> *2. The honorable learned magistrate erred in law and fact by granting an order for eviction against the respondent when the same was not part of the reliefs sought by the respondent in her plaint.*
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> *3. The honorable learned magistrate erred in law and fact in that she disregarded and failed to consider the weight of the evidence of the appellant and his other witnesses.*
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> *4. The honorable learned magistrate erred in law and fact by failing to consider the submissions filed by the appellant.*

5.The appeal broadly challenges the learned trial magistrate's findings of fact and law on the basis of the evidence presented and further faults the learned trial magistrate for granting an order of eviction when the same had not been specifically prayed for in the plaint.

6. This court being the first appellate court is under a duty and indeed is obligated to re-evaluate the evidence adduced before the trial court in order to determine whether the determination made by the trial court was justified. The court is not bound by the findings of fact and law

reached by the trial court and is at liberty to make its own findings and/or reach different conclusions upon evaluation and reconsideration of the evidence. The court of appeal enunciated this principle in the case of ***Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123*** where the court stated as follows:-

> *"An appeal to this court from a trial by the high Court is by way of retrial and principles upon which this court act 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 conclusion 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 of 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 EACA 270"**)*

7. To contextualize review and consideration of the grounds of appeal it is necessary to set out albeit, briefly, the evidence proffered by the parties at the trial. During the trial both the Appellant and the Respondent testified and called witnesses in support of their respective cases.

8. The Respondent who was the plaintiff in the lower court testified as PW1 and called 2 witnesses. She testified that she was an Ogiek from the Kimeleng clan. She gave evidence that she was given land by the Government and that she was issued title for land parcel Nakuru/Timet /Kabongoi/1524 in 2005 after paying Kshs.6300/= on account of title processing fees; she produced in evidence a copy of the title issued to her on 12th October 2005. The respondent explained that after she was allocated the land she took possession, constructed a temporary house in which the caretaker was staying. She stated she cultivated the land until 2010 when she became unwell. She testified that the appellant trespassed onto the suit land in 2015 and her caretaker informed her prompting her to make a report to the local chief but the appellant refused to appear before the chief. The respondent further explained she reported to the police but they did not do anything. It was then the respondent consulted her advocate who sent out a demand letter before filing the suit. The respondent in her evidence further explained that the appellant owns the land adjacent to hers and that he took advantage of her absence after she fell sick to encroach onto her land.

9. PW2 John Tuwel Alusei testified that he knew both the respondent and the Appellant as he served as an assistant chief for the area between 1994 and 2007. He affirmed that both the respondent were each allocated land by the government in 2005 and that the parcels they were allocated were adjacent to each other. The witness affirmed that the respondent was given plot No.1524 and the appellant plot No.1525. He explained that demarcation was done before the titles were issued and that the survey map that was used had been prepared in 2001.

10. PW3 Simon Kipngetich Kimetto testified that the respondent was allocated the subject suit property which she took possession of and constructed a temporary structure. The witness stated before allocation the land comprised part of government forest land.

11. The appellant testified as DW1 and it was his evidence that the suit property was allocated to his wife Stella Chemtai Ngeno in 1997 by the clan elders. He stated the Ogiek Community occupied the land around Kabongoi and hence the land upon demarcation was allocated to members of the Ogiek community to which he had his wife belonged. He stated he was allocated his plot No. 1485 which shares a common boundary with plot No.1524. He stated the clan elders gave his wife a note dated 5th July 1997 showing she had been allocated plot No.1524. He said he did not know whether the respondent belonged to the Ogiek community.

12. Dw2 Stella Chemtai Ngeno was the wife of DW1. She stated the suit land plot No.1524 belonged to her and that she was allocated the same by the clan as per the document dated 5th July 1997 which she tendered in evidence as **"DEX1".** She stated she and her husband had occupied and cultivated the land since she was allocated the same. She denied she knew the respondent and/or that the respondent was chased away from the land by the appellant at any time.

13. Dw3 and DW4 were neighbours of the appellant. Their evidence merely asserted that it was the clan that allocated land to members of the Ogiek Community in 1997 in respect of which titles were issued by the government in 2005. It was their evidence that it was DW2 who was allocated plot No.1524 that the respondent was laying claim to. The witnesses stated they were also allocated land as members of the Ogiek Community.

14. The learned trial magistrate upon evaluating the evidence tendered before the Court upheld the title issued to the respondent holding that no fraud and/or misrepresentation had been proved by the appellant that could vitiate the title held by the Respondent. The learned trial magistrate properly referred to the appropriate provisions of the repealed Registered Land Act, Cap 300 Laws of Kenya and the Land Registration Act, 2012 to illustrate under what circumstances a registered proprietor's title may be impugned and/or challenged.

15. By virtue of the transition provisions 104 to 108 of the Land Registration Act, 2012, titles that were registered under the repealed Registered Land Act were from the effective date of the and Land Registration Act, 2012 deemed to be titles registered under the new Act and the provisions of the Land Registration Act henceforth applied to such titles. Section 104 (I) of the Land Registration Act; 2012 provides: -

> *104(1) a register maintained under any of the repealed Acts shall on the commencement of this Act, be deemed to be the land register for the corresponding registration unit established under this Act .*

16. Section 106 (1) of the Act provides as follows: -

> *106. (1) on the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.*

17. The respondent before the lower court gave evidence that she was the registered owner of the suit property. She produced a copy of the title as an exhibit that showed she was indeed registered as owner of land parcel Nakuru/Tinet Kabongoi Settlement Scheme/1524

measuring approximately 2.00 hectares. The title was issued on 12th October 2005. Indeed, the appellant and all the witnesses affirmed that the government issued titles to all allottees in 2005. PW2 who was at the time the area Assistant chief confirmed the titles were issued in 2005 after verification. There can be no doubt that indeed the Respondent was allocated the land and was issued the title by the government. The Appellant's contention however was that the land was allocated by the Ogiek Community elders clan and relied on **DEX1** to support that assertion. Both the appellant and the respondent and the witnesses were all agreed that that the Kabongoi settlement Scheme where the land is situated formed part of government forest land. The government in the premises must have been involved in the allocation process. The former assistant chief, PW2, affirmed that there was a demarcation map prepared in 2001 and that the government allocated the land in 2005.

18. The only document that the appellant held to support his claim to the land was an alleged allotment letter dated 5th July 1997 by the clan elders. No evidence was led to show that the clan elders had been mandated by the government to undertake the allocation of the land. No allocation list if indeed there was any, was tendered in evidence. On the basis of the evidence it was not demonstrated that the clan elders had the capacity to make the allocations of what was in essence government land.

19. The respondent having been registered as the proprietor of the suit property was by virtue of section 24, 25 and 26 of the Land Registration Act, 2012 conferred and vested with absolute ownership rights to the land which were indefeasible and could only be challenged on grounds of fraud and/or misrepresentation; and/or if it was demonstrated the registration as proprietor was obtained unprocedurally, illegally or through a corrupt scheme. Section 26 (I) (a) & (b) of the Land Registration Act, 2012 makes provisions as relates to how a registered proprietor's title may be challenged.

20.Section 26 (1) (a) & (b) provides as follows: -

> (1) *The certificate of title issued by the Registrar upon registration, or 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 that 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.*

21.Although the appellant in his statement of defence pleaded fraud on the part of the respondent, no evidence whatsoever was adduced to prove the respondent acted fraudulently in being allocated the land and/or acquiring the title to the land. It is not enough for a party to allege fraud, it must be proved and the standard of proof of fraud is on a standard higher than proof on a balance of probabilities which is the norm in Civil cases. The trial magistrate properly dealt with this aspect and rightly held that fraud was not established to the required standard as against the respondent.

22. The appellant has averred in his grounds of appeal that the learned magistrate erred in granting an order of eviction when none was sought in the plaint. The appellant has placed reliance on the case of ***Mugo Gakenge -vs- Ephantus Karanja (2009) eKLR*** where **Okwengu J** (as she then was) in quashing an order for eviction that had been granted by the trial magistrate held that an eviction order had not been sought and was not pleaded in the pleadings . The judge in the case held that it was not open to the trial magistrate to arbitrate upon an issue which was not before him. In the present matter the issue arises whether or not the trial magistrate erred when he ordered the eviction of the appellant, his agents and servants from the suit property.

23. In the plaint filed by the respondent in the subordinate court, the respondent claimed she was the registered owner of the suit property and averred the appellant had unlawfully invaded and trespassed into her land parcel and thus deprived her of the use and enjoyment of the suit land. Under paragraph 7 of the plaint the respondent pleaded as follows:-

> *"The plaintiff therefore prays that this honorable court issues an eviction order directed at the defendant, his agents, servants, employees or whosoever to vacate land parcel number Nakuru/Tinet Kabongoi Settlement Scheme/1524, the property of the plaintiff."*

24. It is in the premises clear by the pleadings that the respondent had sought an order that the appellant vacates her parcel of land and/or should be evicted. She reiterated the plea in her evidence. The appellant all along was aware that the respondent wanted him to be ordered to vacate from the suit property and was therefore not being faced with a prayer that was not pleaded. Whereas there was no specific prayer for eviction sought in the prayers for judgment in the plaint, it was in my view a consequential order that flowed from the findings made by the learned trial magistrate. The trial court had made the determination, in my view correctly, that the suit property belonged to the respondent. The appellant was on the property and in order for a permanent injunction that the respondent had sought in the plaint and which was granted to take effect, the appellant had to be ordered to vacate from the suit premises.

25. The court would ordinarily not act in vain and will where appropriate make orders that would effectuate any final orders in a judgment. The order to vacate the suit premises and for the eviction of the appellant were necessary orders that flowed from the determination of the trial magistrate and the same was rightly made.

26. Having carefully re evaluated the evidence tendered before the lower court and having considered the appellant's grounds of appeal. I find no basis upon which I could fault the trial Magistrate's decision/determination. The appeal lacks merit and the same is dismissed with costs to the respondent

Judgment dated signed and delivered virtually at Nakuru this 1st day of July 2021.

J M MUTUNGI

JUDGE