



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 35 OF 2019

KANDARA INVESTMENT LIMITED..... APPELLANT

VERSUS

RICHARD KIPTALAM BIENGO.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at

Thika delivered by Hon. A M Maina (SPM) on 6th November 2018, in Thika CMCC No.1066 of 2009)

BETWEEN

RICHARD KIPTALAM BIENGO.....PLAINTIFF

VERSUS

KANDARA INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

The Respondent herein **Richard Kiptalam Biengo**, filed Civil Suit No. 1066 of 2009, at the Chief Magistrates Court Thika. The claim was against the Appellant herein and he sought for;

I. A permanent injunction restraining the Defendant whether by its Directors, officials, agents, servants and/ or employees from interfering with the Plaintiff's user and enjoyment of LR No. Mitubiri/Wempa Block 1/6496.

II. Costs of the suit.

III. Any other relief that the honorable court may deem fit to grant.

In the said claim, the Respondent had averred that he was the registered owner of **LR No. Mitubiri/Wempa Block 1/6496**, and a title deed was issued to his name on **23rd October 2003**, and to his surprise, the Appellant through its Chairman, **Wilson Mburu Muchuku**, the Secretary **Nelson Ndaaru Ribiro** and Treasurer, **Francis Gachau Reuben**, wrote a letter dated **7th September 2009**, stopping the (Plaintiff) Respondent from trespassing on the said parcel of land. He had further averred that he is the bonafide and absolute holder of the title, together with all the rights and privileges appurtenant thereto.

The (Defendant) Appellant herein had filed its Defence dated **23rd February 2010**, and denied all the allegations made in the Plaint. The (Appellant) Defendant had averred that it is the registered owner of the suit property known as **LR No. Mitubiri/Wempa Block 1/6496**, and that on **25th September 2009**, it rightfully allocated the same to one of its members **Mary Njeri Mwangi**. It contended that the (Plaintiff) Respondent acquired the title deed by way of **Fraud**, and he was charged vide **Criminal Case No.441 of 2010**, for **forcible detainer**. It further contended that the (Plaintiff) Respondent's suit was incurably defective and the same ought to have been dismissed with Costs. It further filed an amended Defence and **Counterclaim** dated **3rd March 2016**, pursuant to the leave granted on **25th February 2016**.

The Respondent had filed a Reply to Defence dated **25th March 2010**, and reiterated the contents of his Plaint and he further filed a reply to the Appellant's (Defendant's) amended Defence and Counterclaim dated **29th March 2016**

The Respondent (**Richard Kiptalam Biengo**) who was the Plaintiff before the trial Court gave evidence and testified that he is a member of the Appellant's Company and has a share certificate. Further, he had produced a list of documents as exhibits 1-12. He had testified that he

got the land in the year 2003. However, he had lost his title in between the year **2007** and **2008** in the tribal clashes and he reported the loss to the Police, who issued him with a Police Abstract. It was his testimony that he got the land from **Mary Njeri Mwangi**, who sold to him her share.

However, it was his contention that previously the land was **No.3651**, and had the Number changed to **6496**, in the Lands office. It was his further testimony that he was arrested, arraigned in Court and convicted, but he was later acquitted on Appeal.

In cross examination, he testified that he had documents showing the land was his and that **Mary Njeri Mwangi**, sold him her share, but had not balloted. He further testified that the land in question belonged to **Kandara Investments Ltd**, and he got possession of it through the Chairman, who wrote to him several letters, one asking him to stop trespassing into the land.

In re-examination, he testified that the Chairman is the one who wrote the letter and stamped on behalf of **Kandara Investment Ltd**. He further testified that **Mary Njeri Mwangi**, had sold to him the land and that the Chairman wrote a letter to the **Land Registrar**, asking that he be issued with a title deed, as the issue was rectification of the title and not cancellation of title.

PW2 David Mugo Gakinyango, testified that he used to work together with the Plaintiff(Respondent) at **Kandara Investment Ltd**, as Commissioners. He further testified that the officials of the Appellant had never balloted and it was normal for members to sell off their shares. He further stated that **Mary Njeri Mwangi**, sold to the Plaintiff her land and the said **Mary Njeri Mwangi** was a member of **Kandara Investment Ltd**.

In cross examination, he testified that many people bought shares from members of the Appellant's (Defendant).

On the part of the Defendant(Appellant), one witness was called, **DW1 Nelson Ndaru**, who testified that he was the Secretary of **Kandara Investment Limited**, and further, he produced his list of documents dated **26th November 2011**, as exhibits. He stated that the land did not belong to the Plaintiff as he did not have a share certificate.

In cross examination, he testified that he had authority to represent the Defendant, as he is its Secretary and had not produced any documents to that effect. It was his further testimony that the Plaintiff's share certificate was a forgery and at one point, the matter was dealt with by the Police. He further contended that he was not aware that the High Court had cleared the Plaintiff of the forgery allegations.

After the *viva voce* evidence, the Plaintiff(Respondent) filed his written submissions and on **6th November 2018**, the trial Court entered Judgment in favor of the Plaintiff (Respondent herein) plus costs.

The Appellant (Defendant) was aggrieved by the above determination of the trial Court and **Decree** thereon and it has sought to challenge the said Judgment through the **Memorandum of Appeal**, filed on **2nd May 2019** The Appellant sought for the setting aside of the said Judgment delivered on **6th November 2018**, by **Hon. A. M Maina (SPM)**

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

- 1. The trial magistrate erred in law and fact in awarding land parcel number Mitubiri/Wempa Block 1/6496, to the Respondent against the weight of the evidence.**
- 2. The trial magistrate erred in law and fact in failing to note that the Respondent was not a share holder of the Appellant.**
- 3. the trial magistrate erred in law and fact in failing to note that the Respondent did not vote for the subject land and had no ballot as per the Appellant's requirements.**
- 4. the trial magistrate erred in law and fact in failing to find fraudulent acts by the Respondent, in obtaining registration of the subject land title.**

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of Muihia & Mutai Co. Advocates**, filed its written submissions dated **26th August 2020**, and urged the Court to allow the Appeal. It was submitted that the Respondent did not produce any share certificate in his own name, hence he was not a shareholder of the Appellant's Company and that the Respondent was not a member, but was buying the subject matter from a member **Mary Njeri Mwangi Wakabera**. It further submitted that the said vendor did not ballot, whereas balloting is what gives effect to ownership. The Court was urged to allow the Appeal and set aside the decision of the lower Court.

The Respondent on the other hand through the **Law Firm of Lusigi & Associates Advocates**, filed his written submissions dated **10th of March 2021**, and submitted that the Appeal should be dismissed with costs. It was further submitted that the Secretary brought a suit on behalf of the Company without a Company's resolution and that the Respondent was a shareholder of the Appellant's Company as evidenced by a share certificate produced and further, it was submitted that the Appellant never produced any evidence to rebut the Respondent's membership.

This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the written submissions by the Counsels and finds as follows;-

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”.

The Court has carefully considered the Memorandum of Appeal, the written submissions by the parties, the evidence in the subordinate Court and the Court finds that the issue for determination is ***whether the Appeal herein is merited.***

For the Court to determine whether the Appeal is merited, it must determine whether the trial Court arrived at a wrong Conclusion. It is not in doubt that both the Appellant and the Respondent are laying claim to the suit property.

The title being held by the Respondent was challenged by the Appellant specifically on fraudulent allegations. While the Appellant claims to be the registered owner of **LR No. Mitubiri/Wempa Block 1/6496**, which was excised from **LR No. Mitubiri/Wempa Block/10729**, the Respondent claims to have bought the suit property from one **Mary Njeri Mwangi**, who was a member of **Kandara Investment Ltd**.

In the case of Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR, the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

It is not in doubt that one **Mary Njeri Mwangi**, was a member of the Appellant’s Company. It is also not in doubt that the suit property was registered in the name of the Appellant. The Appellant herein claims to have allocated the suit land to one **Mary Njeri Mwangi**. The Appellant has contended that the Respondent has never been a member and that the share certificate held by him was acquired fraudulently.

However, the Appellant has not produced evidence in Court to show its Legitimate lists of all its members and/or share certificate holders. Further, it has alleged that the Respondent never balloted, hence ownership cannot suffice. It was incumbent upon the Appellant to table evidence of how members would ballot by either producing and attaching regulations/by laws governing members or the laid down procedure on how members would transfer share(s). The Appellant failed to exercise its obligation and there was no reason for this Court to disregard the Respondent’s evidence.

The Respondent has argued that DW1 had no authority to testify as the Secretary of **Kandara Investment Limited**. He also stated in the hearing that the Chairman who is one of the Directors was in attendance during Court proceedings. The Court has not been shown any authorization and/or the Secretary’s authority to act for the Company. As regards the necessity for a Company Resolution to back the institution of the suit, **Hewett, J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** held as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a Company, there should be a company resolution to that effect..... As regards litigation by an incorporated Company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

It is this Court’s considered view that **Article 159(2)(d)** of the **Constitution of Kenya 2010**, should not be used by litigants as a panacea to all irregularities and procedural technicalities. The Courts have cautioned that the same should not be used to trash procedural provisions as the rules are the handmaidens of justice. Therefore, it is irregular for **DW 1** to appear without express authorization from the Company.

On the other hand, the Respondent testified that he bought the suit property from **Mary Njeri Mwangi**. To buttress his case, he produced a share certificate dated **5th December 2002**, in his name. He further produced a letter dated **16th May 2003**, from **Kandara Investment Limited, addressed to the Land Registrar, confirming that he is a member who holds certificate No.11590**, that proved that the Respondent was a shareholder at the Company.

With the above evidence, the Appellant is estopped from contravening facts already admitted. The Court is fully satisfied that indeed the Respondent was able to prove the root of his title.

The Appellant, having failed to prove the root of **its** title, then it follows that the said **Kandara Investment Limited**, could not have passed a good title. This Court is thus satisfied that the Learned **trial Magistrate** correctly held that the title held by the Respondent was proper.

Having now carefully considered the available evidence, as tendered before the trial Court, having evaluated the said evidence and coming to its own independent conclusion, this Court finds and holds that the **trial Magistrate** did **not err**, nor **misapprehended** the facts, law and evidence on record.

Consequently, the court finds that the instant Appeal is **not** merited and the same is **dismissed** entirely with costs to the Respondent herein.

Judgement accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuyiki