REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL NO. 15 OF 2019

NOOR SAID.....APPELLANT

-VERSUS-

MARY MWAWASI MANGA.....DEFENDANT

(Being an appeal against the Judgment and Decree of the Senior Principal Magistrate,

Hon. R.O Odenyo dated and delivered on 29 January 2015

in Mombasa CMCC No. 3901 of 2000)

JUDGMENT

(Original suit filed by the respondent in the Magistrate's court seeking to restrain appellant from interfering with her possession of the disputed property; respondent claiming that the late husband to the appellant had sold the property to her through a sale agreement; appellant's defence being that the property was never sold and the sale agreement was proved to be a forgery; appellant further asserting that the respondent was her tenant before the Rent Restriction Tribunal which ordered for eviction of the respondent; Magistrate entering judgment for respondent inter alia because the appellant did not prove ownership; appeal filed against that decision; wrong for the Magistrate to have shifted the burden of proof of ownership to the appellant; burden remained on the respondent to prove she was owner; basis of ownership was purchase through sale agreement; sale agreement being a forgery and could not therefore support the claim of purchase; issue whether respondent was tenant of appellant was already decided by the Tribunal and it was wrong for the Magistrate to revisit it; judgment entered for appellant).

1. It is a mockery of justice, that judgment was entered in favour of the respondent in this appeal, and as I will demonstrate shortly, this appeal must succeed. It will also be remiss of me, if I do not apologise to the appellant, who has waited for justice since this case was filed some 21 years ago. In fact, the dispute between the parties has probably been alive for about 40 years now. The case has also had its unsavoury and embarrassing downturns including the loss of the original lower court file. We prosecute this appeal using a reconstructed file, but justice, albeit belatedly, will ultimately be served upon the appellant.

2. The genesis of this case is a plaint that was filed on 29 August 2000 by the respondent, as plaintiff, before the Magistrate's Court in Mombasa. It was the case of the respondent that by an agreement dated 16 August 1985, she bought a Swahili-type house No. 568 on plot No. 21 Section XXX Chaani, Mombasa West (hereinafter referred to as "the suit property") from one Salim Awadh Suleiman, the late husband to the appellant. The respondent pleaded that after the purchase, she took possession of the suit property and lived therein. The respondent pleaded that the appellant sought to evict her from the suit property claiming that, she, the respondent, was in arrears of rent. In the plaint, she did mention that there had been previous proceedings between the parties in the Rent Restriction Tribunal – RRT Case No. 377 of 1996 on the question of rent over the house. In the plaint, the respondent sought for judgment against the appellant for the following :-

a) A declaration that the house No. 568 on Plot No. 21 Section XXX Chaani Mombasa West belongs to the plaintiff.

b) A permanent injunction restraining the defendant by herself, her employees or agents from evicting, levying distress, or in any other way interfering with the plaintiff's ownership and quiet enjoyment of the said property.

c) Cost of the suit

d) Any other orders that this court deems fit to grant.

3. The appellant entered appearance and filed her defence. She denied the contents of the plaint and put the respondent to strict proof. She

asserted that the respondent had been in occupation of the suit property as her tenant and/or her predecessor in title. She averred that she was the lawful owner of the suit property and that the respondent's claim to ownership of the land was unfounded. She pleaded that the respondent had already been evicted from the suit property upon execution of the Rent Restriction Tribunal's decree in RRT Case No. 377 of 1996.

4. I need to mention that together with the suit, the respondent filed an application for injunction to restrain the appellant from the suit property while the suit was pending. The application for injunction was allowed through a ruling delivered on 27 February 2002. The respondent has thus been in the suit premises since then.

5. The matter came up for hearing on 14 March 2007 when the respondent testified. She testified that she bought the suit property from Salim Awadh Salim (deceased). She testified that on 16 August 1985, the late Salim came to where she lived and he informed her that he wanted to sell the suit property which was located in her neighbourhood. She stated that they negotiated the price and agreed at Kshs. 20,000/=. She testified that the suit property was a Kiswahli type house with four rooms, two stores and a toilet and bathroom. She stated that they went to the area chief to draw an agreement. She mentioned that the agreement was written by a young Somali man; that she signed the agreement together with her witnesses, and the deceased also signed it. She testified that she paid the agreed price of Kshs. 20,000/= after signing the agreement. She had a copy of the purported agreement which showed that the purchase price was Kshs. 25,000/= which she explained was an error. In the agreement, the name of the seller was Salim Awadh Suleiman (not Salim Awadh Salim). This too, she said was an error.

6. The respondent continued that in December 1985, she gave the tenants in the premises a two months' notice to move out but that Mr. Salim reported her to the Chief where he denied selling the house to her and claimed that she was a tenant. The Chief did summon her and the authenticity of the alleged sale agreement was questioned. The matter was referred to the police who charged the respondent with the offence of forgery in *Mombasa Criminal Case No. 357 of 1993, Republic vs. Mary Manga Mwawasi*. She was convicted of the offence but acquitted on second appeal to the Court of Appeal. She had copies of the judgment which she produced. She proceeded to testify that while she was in prison, her people were evicted and she lost her documents. She did mention the case before the rent tribunal where she had been sued as a tenant, but she denied that she was a tenant.

7. Cross examined, the respondent testified that the house was constructed on land owned by the Municipal Council. She did not get consent from the Municipal Council for the sale. She testified that the agreement was in writing, but she did not pay the stamp duty to the Government. She testified that at the time of the execution of the agreement, the deceased came with Somali men and one of the men wrote the agreement. She testified that the agreement was reached before the chief. She further testified that it was a new area chief who reported her to the police, alleging forgery. She testified that in the rent case before the Tribunal, the Tribunal ruled that she had to vacate the house.

8. On re-examination, the plaintiff testified that she was buying a house and not land. After her testimony, the respondent closed her case.

9. The appellant testified as DW-1. She testified that the suit property was constructed by her late husband, Mr. Salim, and that the respondent is her tenant. She had a house development document from the Municipal Council of Mombasa to demonstrate that the house was allocated to her late husband. She testified that the plaintiff was a tenant albeit very uncooperative. She produced a rent receipt book to demonstrate that the respondent was indeed her tenant. She denied that the respondent purchased the suit property. She pointed out that she was arrested and convicted over the alleged sale agreement. She testified that she sued the respondent before the Tribunal and produced the proceedings. She added that pursuant to the order of the Tribunal, the respondent was evicted.

10. On cross examination, she testified that the suit property was never sold to the respondent and that the respondent came with forged documents claiming that the house had been sold to her. She explained that if she had bought the property the name (at the Municipal) would have changed.

11. DW-2 was one Mwijaa Badi Ahmed, who retired as Chief of Chaani Location in 2007. He testified that sometime in 1988, the late Mr. Salim came to his office to complain that the respondent, who was his tenant, had declined to pay rent, so he summoned her. He testified that the respondent said that she would not pay rent as the house belonged to her. He then summoned all the other tenants of the same building, and all of them affirmed that they paid rent to Mr. Salim as the landlord. DW-2 had a photocopy of a letter dated 18 July 1988, where the respondent admitted she was a tenant. He testified that the respondent, in the letter, also agreed to pay rent. The letter was however successfully objected to and was not produced.

12. DW-3, was one Fredrick Tsuma Mwamubhi, the then area chief of Chaani Location. He was to produce the document that was objected to above, but yet again the objection was sustained and at the end, he did not say much. The defence closed its case.

13. The trial court directed counsel to file written submissions which they did and eventually judgment was delivered on 29 January 2015. The trial Magistrate drew two questions for determination, being :-

> *(i) Who is the rightful owner of house No. 568 Plot No. 21 Section XXX in Chaani ?*
>
> *(ii) Who pays the costs ?*

He held as follows:-

> *"To answer the first question, I have revisited the documents produced by both parties as observed below. First what was purported to be sale agreement produced by plaintiff was neither an original nor was it stamped as required under the Stamp Duty Act.*
>
> *Secondly the copy of the judgment by the court of appeal is not helpful to the plaintiff's cause. This is because the judgment did not deal with who owns the property. On the contrary it only dealt with the issue of a defect in charging of the plaintiff.*

As for the notice produced by PW-1 to show that he gave the other tenant notice to vacate, it does not show that it was acted on, leave alone delivering it to the purported tenants. In the same vain (sic) *all documents produced by defendant as exhibits do not show conclusively that she is the owner of the plot. The two receipts from the Mombasa Municipal Council bear the names of the deceased husband but are just that receipts.*

The rent receipt book also produced by the defendant does not show who owns the property. Beside the deceased who is purported to have written on it would have been more competent to talk about its contents than the defendant. Besides the defendant admitted in cross examination that the book had been in her custody all along. What would stop her from manipulating he (sic) *entries in that book?*

From the above discourse the exhibits cannot point out either of the parties as the owner. However the property must belong to someone. I have looked at the entire evidence and noted thus;

First by her plaint in the rent restriction tribunal, the defendant purportedly sked for judgment against plaintiff for a sum representing rent de (sic) *from August 1987-August 1996. That is a period of 10 years. I find it inconceivable that a tenant would stay in a house for ten years without paying rent. That alone persuades me that the plaintiff must have been treated as the new owner of the property and that is why she was not expected to pay rent.*

Secondly, it has not been shown why, if defendant was the original owner she did not alter the record to put the property in her name. Indeed, the defendant only said that the house was constructed by her late husband to lay claim on the house.

Nothing has been shown to court to show that defendant has taken any step to validate her clams (sic) *to the property. On a balance of probability, I have come to a finding that the claim by the plaintiff is more credible than that by the defendant. As such I do enter judgment for the plaintiff against the defendant in terms of prayer (a) and (b) of the plaint.*

As for costs, I have considered the unfortunate circumstances the parties have had to endure for nearly one and half decade. I do fell (sic) that the heap costs (sic) on the losing party as is the norm may appear too oppressive. I order that each part pays their own costs"

14. Aggrieved by the judgment of the trial court, the appellant filed this appeal vide a Memorandum of Appeal dated on 2 March 2015. Her grounds of appeal are as follows:-

a) The Honorable Magistrate erred in law and fact by failure to consider material evidence and testimony from the appellant by refusing to admit the documentary evidence produced by the appellant.

b) The Honorable Magistrate erred in law and in fact by failure to consider material evidence and testimony from the appellant's witness thereby arriving at a wrong decision.

c) The Honorable Magistrate erred in law and in fact by awarding the respondent ownership of house NO. 568 on plot number 21 Section XXX Chaani Mombasa West without the respondent producing any documentary evidence.

d) The Honorable Magistrate erred in law and in Fact by awarding the respondent ownership of house No. 568 on plot No. 21 Section XXX Chaani Mombasa West by allowing the respondent to rely on a disputed document.

e) The Honorable Magistrate erred in law and in fact by issuing a permanent injunction against the appellant by herself , her employee or her agents from evicting, levying distress or ownership and quiet enjoyment of the said property without reasonable or sufficient grounds.

f) The Honorable Magistrate erred in law and in fact by failing to consider the law of natural justice and constitution by issuing ownership of a house to the respondent while the house belonged to the appellant all along.

g) The honorable Magistrate erred in law and in fact by failing to appreciate the fact that the respondent herein has been a tenant all along.

h) The Honorable Magistrate erred in law and in fact in failing to consider the evidence before him and in particular the Rent Restriction Tribunal ruling in the case of Noor Said vs Mary Mwawasi Manga, RRT No. 377 of 1996, and case of Noor Said vs Mary Mwawasi Manga, Civil case no. 5574 of 1996.

i) The Honorable Magistrate failed to appreciate the submissions by the appellant's counsel and finding it in favor of the respondent.

j) In all circumstances of the case, the findings of this Honorable Magistrate are insufficiently unsupported by law or factancy on the basis of the evidence adduced in court.

15. When the matter came for hearing, I directed that the appeal be canvassed by way of written submissions. I have taken note of these submissions together with the authorities cited. I hold the following view.

16. It is apparent from the pleadings that the respondent sued the appellant seeking to have the appellant stopped from interfering with her

possession of the disputed property. Her case was fully hinged on the claim that the suit property had been sold to her by the late husband to the appellant. There was no other basis upon which the respondent claimed the house. It follows that the respondent could only succeed at trial if she proved that indeed she purchased the suit property. Her claim of purchase was wholly founded on a sale agreement that she claimed to have entered into with the deceased on 16 August 1985. Now, that agreement was the subject of a forgery charge against the respondent. After trial, the respondent was convicted. She appealed to the High Court which sustained the conviction. She made a further appeal to the Court of Appeal which allowed the appeal and acquitted her. The judgment of the Court of Appeal is on record; it is *Court of Appeal Criminal Appeal No. 96 of 1996* and the same judgment is reported in the online Kenya Law Report as *Mary Manga Meshack vs Republic (1997)eKLR*. The facts of the case are well set out in the Court of Appeal judgment. In brief, the charge was that the respondent *"made a document purporting it to be a sale agreement made and signed by one Salim Awadh Suleiman agreeing to sell his house at Chaani, Mombasa, to her at a price of Kshs. 25,000/=."* The Court of Appeal found that the document may have been forged but that it had not been proved that it is the respondent who had forged it and it was on that ground that she was acquitted. The Court of Appeal further raised issue about the framing of the charge as she had not been charged with the alternative charge of uttering a false document. It was on that basis that the Court of Appeal acquitted her. The Court of Appeal never found that the document was not a forgery. I do not see how the finding of the Court of Appeal helps the respondent to prove that the document was genuine, and indeed in his finding, the trial Magistrate, correctly found that the judgment of the Court of Appeal did not assist the respondent to prove her case.

17. The fact of the matter remains that the document was dubious, and even assuming that it was not, its contents were never proved before the trial court to the required standard. The subject matter was a sale over land which is required under the Law of Contract Act to be in writing and to be attested (See Section 3 (3) of the Law of Contract Act). Section 71 of the Evidence Act was thus applicable. It provides as follows :-

71. Proof of execution of document required by law to be attested

> *If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:*
>
> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.*

18. No witnesses were ever called to prove that the sale agreement was executed by the deceased as claimed, yet, it was always the contention of the deceased that he never executed it. I have looked at the purported sale agreement which has the names of some four witnesses. None was called as a witness. It was never the evidence of the respondent that these witnesses are not alive and it was thus necessary, given the contestation about the document, to call the witnesses to prove that indeed the document was signed by the deceased. Without such proof, then it could not be held that the respondent has proved that indeed the sale agreement was genuine. And without the sale agreement being found to be genuine there would be no proof by the respondent that she indeed purchased the suit property from the appellant. Without proof of purchase, there is no way that it could have been held that she has proved her case to the required standard and her case would have to be dismissed.

19. What I find interesting is that the trial Magistrate actually found that the respondent had not produced sufficient documentary proof to support her case. But instead of dismissing her suit, the trial court went on a tangent and entered judgment for the respondent. The reasoning of the court was that because the appellant took 10 years to sue the respondent before the Rent Restriction Tribunal, then that was an indication that the respondent had bought the property. That reasoning is completely flawed. Simply because a person has taken 10 years to sue for rent cannot be proof that the person sued is the owner of the property. It was also wrong for the trial Magistrate to ignore the findings of the Rent Restriction Tribunal which found the respondent to be a tenant and issued orders for her eviction. If the Tribunal had already held that the respondent was tenant, on what basis was the trial court now sitting on appeal to refute that finding ? The finding of tenancy was conclusive of the fact that the respondent was the appellant's tenant unless that finding was reversed by the High Court. No evidence was tendered to demonstrate that the respondent had preferred any appeal to the High Court to contest the finding of the Tribunal that she was a tenant of the appellant.

20. In his submissions, Mr. Obara, learned counsel for the respondent, argued that the appellant did not demonstrate legal standing because the house belonged to Salim Awadh (now deceased). In respect of this case, this was irrelevant. One does not have to be a registered owner of land in order to be a landlord. The defence of the appellant was that the respondent was her tenant and she had no counterclaim seeking any order for a declaration of ownership of the property. The fact of tenancy was already proved by the Rent Restriction Tribunal and it was not for the trial court to try and assign ownership on either one of the two contestants in court. So long as the respondent, as plaintiff had failed to prove that she was owner of the house, no judgment could be entered in her favour, based on a failure by the appellant to prove ownership. The burden of proving ownership of the house never shifted to the appellant and was all along with the respondent. The submissions of Ms. N. A. Ali, learned counsel for the appellant, that the burden of proof was ever with the respondent, are thus on point. Even assuming that what the trial court found was that both parties had failed to prove ownership and thus the contest was a draw, the result ought to have been a dismissal.

21. Ms. Ali rightfully referred me to the case of *Ignatius Makau Mutisya vs. Reuben Musyoki Muli (2015) eKLR* where the court adopted the dictum of Denning J, in the case of *Miller vs Minister of Pensions (1947) 2 All ER 372* where he stated as follows on what is meant by proof on a balance of probabilities :-

> *"If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunals cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."*

22. That is what should have happened in this case if the trial court thought that both parties were unconvincing in demonstrating ownership of the land. In other words the Magistrate could not have held for the respondent on the basis that the appellant has not proved ownership.

23. I am aware that counsel in their submissions went at length in contesting documents that were marked for identification and not produced. I don't see the need of addressing those arguments in the circumstances surrounding this proceeding. What is clear is that the respondent has somehow continued being in possession of the suit property on the basis of a forged document. That is scandalous by itself.

24. It is clear to me that the Magistrate was wrong in arriving at the conclusion that the respondent had proved ownership of the disputed property. Her judgment must be set aside and it is hereby set aside. I substitute that judgment with an order that the respondent's case is dismissed with costs.

25. Before I close, one may ask, what happens to the property. The holding that of the Tribunal that the respondent is tenant of the appellant must be respected. The Tribunal had issued orders for the eviction of the respondent. She only continued with possession because of the order of injunction issued in her favour. Now that she has lost the case, she must vacate the premises forthwith. She must do so within 14 days of this judgment, and in default, she be forcibly evicted at her own expense. This is without prejudice to any right of the appellant to recover any mesne profits or rent that she may claim.

26. The only issue left is the costs of this appeal. They will follow the event. The respondent will pay the costs of this appeal to the appellant.

27. Judgment accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA