REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 30 OF 2019

MARCO OBITA.....APPELLANT

VERSUS

BENJAMIN KITHEE CHAMIA.....1ST RESPONDENT

PATRICIA MWENDE NZILU.....2ND RESPONDENT

(Being an Appeal from the Ruling of Senior Principal Magistrate's Court

at Mavoko in Civil Case No. 906 of 2015 delivered on 13th June, 2019 by

Hon. L. Kassan -Snr. Principal Magistrate)

JUDGMENT

1. The Appellant instituted this Appeal before this Honourable Court vide a Memorandum of Appeal dated 4th July, 2019 and filed before this Court on 5th July, 2019. It was served accordingly and the 1st and 2nd Respondents engaged Advocates who are now on record.

2. Being aggrieved by the Ruling of the trial court at Mavoko SPM Civil Case No. 906 of 2015 delivered on 13th June, 2019, the Appellant has raised the following issues for determination by this court.

a) That the trial Magistrate erred in law by granting Mandatory injunction orders without taking viva voce evidence of Parties.

b) That the trial Magistrate erred in law and fact in assuming that since the Plaintiff/Respondent had processed the title they were in advantageous position to the Appellant who had been in possession of the land since December, 2007.

c) That the trial Magistrate erred in law and fact by disregarding the Affidavits of the registered owner of the land, Teresia Nduku Mwaluko, who confirmed that she had sold two (2) acres of the land to the Appellant out of 3/32201.

d) That the trial Magistrate erred in law and fact by failing to interrogate the Plaintiff's/Respondent's evidence why they were pursuing four (4) acres and yet their agreement for Sale was for ten (10) acres.

e) That the trial Magistrate erred in law and fact by failing to appreciate that both parties to the suit had a claim and the involvement of a Surveyor was necessary to establish the beacons and the correct site for each Party.

f) That the Trial Magistrate erred in law and fact by failing to realize that the Appellant was the first person to buy and settle on Mavoko Town Block 3/32201 and has done massive investment on the property before the Plaintiff/Respondent came in 2009.

g) That the trial Magistrate erred in law and fact by failing to realize that the Appellant and Respondent land are adjacent to each other and the same are fully fenced with no interference.

h) That the trial Magistrate erred in law and fact in failing to find that the oral evidence/testimonies of the Appellant/Respondent were relevant before giving final orders.

i) That the trial Magistrate misdirected himself in failing his awarding what the Respondent had submitted disregarding the

Appellant's submission on record and the Supporting relevant case laws.

I) The Appellant's Case:

3. Upon being served with the pleadings by the Respondent, the Appellant filed a Statement of Defence dated 20th November, 2015, a List of Witnesses and List of documents dated 21st October, 2015 and a Replying Affidavit sworn on 19th November, 2015.

4. The pleadings filed by the Appellant shows that on or about 8th December, 2006, Mr. Damain Musyoka entered into a Sale Agreement with the Appellant for the purchase of land measuring 2 acres for a total sum of Kenya Shillings Ninety Thousand *(Kshs. 90,000.00)* which he paid in installments.

5. The Appellant deponed that he was allocated his parcel of land by Mr. Musyoka and his brother, one Mr. Cosmas Muema Mwaluko, in the presence of the Surveyor, one Mr. Isaac Oduong Asuo. According to the Appellant, he fenced the said land and has been living on the land since December, 2007. The Appellant deponed that on 12th March, 2015, he received a letter claiming that he had entered into the Respondent's land.

II) The 1st and 2nd Respondents' case:

6. The Respondents filed the suit in the lower court by way of a Plaint dated 21st October, 2015. In the Plaint, the Respondents sought for the following orders against the Appellant:-

a) A declaration that the Respondents are entitled to exclusive unimpeded right of possession and occupation of the property known as Land Reference Number Mavoko Town Block 3/ 32201 and the Appellant is a trespasser thereon.

b) A Mandatory Injunction compelling the Appellant to demolish and/or remove the illegal structures erected on the property known as Mavoko Town Block 3/32201 and deliver up vacant possession of the Suit property to the Respondents failing which he be forcefully evicted.

c) They also sought for costs at Court rate.

7. Together with the said Plaint, the Respondent filed a Notice of Motion Application dated 21st October, 2015 seeking mainly for a Mandatory Injunction order compelling the Appellant to demolish and/or remove the illegal structure erected on the property known as Mavoko Town Block 3/32201, and to deliver up vacant possession of the suit property to them, failing which he be forcefully evicted. The Respondents also sought for the OCS Ruai Police Station to be directed to assist by providing security to the Court bailiff. The Respondents also sought for costs of the Application.

8. On 21st October, 2015, the above stated Application was heard and certified as urgent. A date for *'inter-partes'* hearing was fixed for 6th November, 2015. In the pleadings, the 1st and 2nd Respondents averred that they were the registered owners of all that property known as Mavoko Town Block 3/32201 measuring 0.76 Hectares (*hereinafter referred to as* "*the suit property*")*.*

9. According to Respondents, sometimes in January 2009, they purchased the suit property from its owner and upon paying the agreed purchase price, it was transferred to them. They deponed that on 11th November, 2014, they were issued with a Title Deed by the Land Registrar.

10. It's the Respondents' case that between December 2014 and February 2015, the Appellant unlawfully entered into the suit land and started delivering building materials, constructing a chicken pen and other semi- permanent structures on the suit land. The Respondents pleaded that the actions by the Appellant were tantamount to trespass on their land and hence there was need for his eviction and vacant possession of the suit land granted to them.

III) The Proceedings:

11. On 4th July, 2018 the trial Court directed that all the parties file their written submission as a way of disposing off the Notice of Motion Application dated 21st October, 2015. Thereafter, on 31st August, 2015, upon confirming compliance by the parties, the trial court reserved a date for Ruling on 18th October, 2018. Indeed, on the material date, the court delivered its Ruling in favour of the 1st and 2nd Respondents as follows:-

"From the foregoing I find as it is in evidence that the Plaintiff is the registered owner of the land no. Block 3/32201 as in his application. The alleged Sale Agreement between the Defendant and one Mr. Damain is too feeble to challenge a title deed. This is a case that required instant justice and to that effect I allow the application as prayed. Each Party to bear its own costs."

I) The Appeal

12. The Appeal proceeded by way of written submissions.

The Appellant's Submissions:

13. The Appellant filed its written Submissions dated 11th December, 2020 together with several authorities to support its Appeal. The issues raised by the Appellant have been summarized under the following subheadings:

(a) Whether the trial Court erred in law by granting mandatory orders without taking viva voce evidence of the parties.

14. The Appellant submitted that the trial Court did not allow him and his witnesses to litigate his case in full to enable him bring out all the evidence on the matter and be cross-examined by the Respondents; that the trial court proceeded to deliver a Ruling in favour of the Respondents solely by reason of them being in possession of the Certificate of Title to the suit property without establishing the process that was followed to obtain it and that the Respondents were not entitled to the relief sought which was in the manner of a Mandatory Injunction.

15. The Appellant submitted that the said orders would virtually dispose off the entire suit at the interlocutory stage. He relied on the Court of Appeal decision of ***"Maher Unissa Karim vs. Edward Oluoch Odumber (2015) eKLR"*** to support this framed issue.

(b) Whether the trial Magistrate erred in law and in fact by assuming that since the Respondent were in possession of the title they were more advantaged than the Appellant.

16. The Appellant submitted that the process and ownership of the suit property had numerous errors, discrepancies and contradictions, including:

a) The fact that the Appellant bought and paid for the property hence was an innocent purchaser for value and was issued with a Certificate of ownership to the property;

b) The Respondents allege to have purchased the suit properties which were adjacent to each other two (2) years later after the Appellant had purchased it and taken possession of it;

c) Failure by the Respondents to disclose the vendor to the suit property;

d) Failure to produce the Letter of Consent from the Land Control Board nor duly executed transfer forms;

e) Failure to allow the evidence of key and important witnesses;

f) Disregarded the affidavits of the registered land owner;

g) Failure to interrogate the Plaintiff/Respondents' evidence as to why they were pursuing four (4) acres and yet their Agreement for Sale was for Ten (10) acres and;

h) Failure to appreciate that both Parties had a claim and the involvement of a surveyor was necessary to establish the beacons and the correct site for each party.

The 1st and 2nd Respondents' submissions:

17. The 1st and 2nd Respondents filed their written submissions on 17th March, 2021 and Further submissions, which was occasioned by the incorrect arrangement of the pages in the Record of Appeal. The issues raised by the 1st and 2nd Respondents from these set of submissions can be summarized as follows: -

a) Whether the record of Appeal is incompetent and ought to be struck out

18. The Respondents submitted that the Appeal by the Appellant is incompetent and fatally defective as it does not have a formal court order on which it is precipitated; that the attached Ruling was incomplete and that the law envisages that the Appellant mandatorily extracts an order or decree and that without these two, it leaves it to speculations.

19. To buttress their case on this point, Respondents cited the provisions of Order 42 Rule 2 of the Civil Procedure Rules, 2010 and relied on the Court of Appeal case of ***Chege vs. Suleiman (1988) eKLR*** and the High Court case of ***Paul Kurenyi Leshuel vs. Ephantus Kariithi Mwangi & Another (2015) eKLR***.

20. They further submitted that in lieu of the certified copy of the order or decree, the Appellant ought to have demonstrated the effort they made to obtain the order by attaching a letter addressed to the trial court requesting for it. To that end, it was submitted, the Appeal was fatally incompetent and should be struck out with costs.

b) On the Powers of Court to grant Mandatory Injunction without taking viva voce evidence.

21. The 1st and 2nd Respondents submitted that the grant of an injunction was discretionary and that as a general rule, the appellate court would not interfere with the exercise of the discretion by the trial court even if it would have come to a different conclusion while sitting as a trial court. On this assertion, they relied on the Court of Appeal decision of ***Joseph D.K Kimani & Anor vs. Simeon Chege Kamangu (2016) eKLR***.

22. The Respondents also relied on the decision of the Court of Appeal in ***United India Insurance Co. Ltd and others vs. East African Underwriters (Kenya) Ltd (1985) KLR 898*** where the court held that an appellate court can interfere with the discretion of the lower court: Firstly, where the Judge misdirects himself in law; secondly, where the Judge misapprehends the facts; thirdly, where the Judge takes account of consideration of which he should not have taken account of; fourthly, when the Judge fails to take account of consideration of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.

23. While relying on the case of ***Kenya Breweries Ltd & Anor vs. Washington O. Okeyo (2002) eKLR***, counsel submitted that viva voce evidence is not a mandatory requirement for granting of Mandatory Injunctions; that the trial Court looked and took into consideration all the facts and evidence presented before it and came to a reasonable conclusion and that the evidence produced in the affidavits of all the parties to the suit were enough to discharge the burden of proof that was incumbent on the Respondents and which triggered the grant of orders of Mandatory Injunction without the need for viva voce evidence.

b) Whether the trial Court erred by assuming that since the Respondents were in possession of the title deed they were more advantageous than the Appellant.

24. Under this heading, the 1st and 2nd Respondents submitted that it was not in dispute as to whether or not the Appellant purchased the land from the family of Teresia Nduko Mwaluko; that the land was to be excised from the original title being land no. Mavoko Town Block 3/2424 and that what was in dispute was whether or not the portion purchased by the Appellant was land title Mavoko Town Block 3/32201.

25. To buttress their submission on this issue, the Respondents referred the court to the provisions of Section 26 (1) (b) of the Land Registration Act No. 3 of 2012 which states as follows:

> *"26. (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, un procedurally or through a corrupt scheme."*

26. They submitted that they provided evidence before the trial court showing that they were issued with a valid Certificate of Title for the suit land which in itself was to be taken by the trial Court as *"prima facie"* evidence that they were the absolute and indefeasible owners of the suit land.

27. The 1st and 2nd Respondents submitted that they produced all the relevant transfer documents; that at no point did the Appellant nor his witnesses challenge the authenticity of the title deed nor the transfer forms which showed the registered owner and that the Appellant produced a survey report which showed the parameters of the suit land being a two (2) acre piece of land adjacent to a four (4) acre parcel of land making up six (6) acres which they paid for.

28. The Respondents asserted that the trial Court considered all the evidence and the affidavits of all the witnesses before arriving at the conclusion which it did; that it was not in dispute that the Appellant and the Respondent had an interest in the original parcel being Mavoko 3/2434 and that it is clear that the Respondents got their portion of land hived off from the original parcel and transferred to them as Mavoko 3/32201, which was six (6) acres in total.

29. On the other hand, it was submitted, the Appellant does not have a defined portion that was curved out of the original title and to resolve that issue, he should look for the vendor, Teresia Nduku Mualuko, to get his portion of land or a refund of the purchase price.

30. The 1st and 2nd Respondents further submitted that the trial Court could not purport to seek for an independent surveyor to establish boundaries to land belonging to each of the parties as the Appellant never produced evidence showing that he was the registered owner of any portion of land adjacent to the suit land which was registered in the Respondents names.

31. They additionally submitted that they had conducted a physical inspection before purchasing the suit land and found the land to be vacant; that the Appellant never pleaded fraud nor produced evidence of fraud or misrepresentation of which the Respondents were involved. The Respondents submitted that the Appeal should be dismissed with costs.

Analysis and determination:

32. To begin with, this court is conscious of its duty as the first Appellate court in this matter. It is the duty of this court to re-evaluate and access the evidence adduced in the trial court. However, the court is also reminded that as an appellate Court, it will normally not interfere with the trial Court's finding of facts, unless the trial court's decision is not based on evidence or is based on a misapprehension of evidence or facts or if the trial is shown to have acted on wrong principles. In ***Selle & Anor vs. Associated Motor Boat Co. Ltd and others (1968) EA 123***, it was held as follows:-

> *"I accept counsel for the Respondents proposition that this Court is not bound necessarily to accept the findings of fact by the Court from a trial by the High Court is by way of re-trial 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 bounding necessarily to follow the trial Court Judge findings of facts of it appears either that he was clearly failed on some point to take account of particular circumstances or probability 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."

33. The issues for determination in this Appeal are as follows:

a) Whether the record of Appeal is incompetent and ought to be stuck ou.t

b) Whether the trial Court erred in granting Mandatory injunction orders at the interlocutory stage.

c) Whether the parties are entitled to the relief sought in this Appeal.

d) Who will bear the costs of the Appeal?

Whether the record of Appeal is incompetent and ought to be stuck out

34. The Respondents submitted that the Appeal by the Appellant is incompetent and fatally defective because the Record of Appeal does not have a formal order. They submitted that the exhibited Ruling was incomplete because it provides that "the application is allowed as prayed" and does not give specific orders. The Respondents submitted that the Appellant ought to be specific in what he is seeking in his Appeal and that the law envisages the extraction of an order or decree and that without these two, it leaves the court to speculations.

35. The issue of whether an Appellant must include a decree or an order of the court in the Record of Appeal was addressed by Njoki Mwangi J. in the case of ***Elizanya Investments Limited vs. Lean Energy Solutions [2021] eKLR*** as follows:

*"Order 42 Rule 13(4) (f) of the Civil Procedure Rules, 2010 is specific that what is required at the appellate stage is the Judgment, order **or** decree appealed from. In the present case, the appellant attached a copy of the lower court Judgment in compliance with the said provisions. It is discernible from a reading of the above provisions that it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court.*

*In the case of **Nyota Tissue Products vs. Charles Wanga Wanga & 4 Others** [2020] eKLR, when addressing the issue of failure by an appellant to file a decree, the court stated thus-*

"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the Appeal in these circumstances."

*I am of the view that the use of the conjunction **"or"** means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the Judgment appealed from.*

36. In the case of ***Nahashon Mutuku Ndungu vs. Anthony Kusu Wambua, Machakos ELC Appeal Case number 39 of 2019,*** this court agreed with the above position as follows:

"The provision of Order 42 Rule 13 (f) of the Civil Procedures Rules does not make it mandatory for a party to include a Decree in the Record of Appeal. The law allows the Appellant to file a Decree or a Judgment. However, considering that the appellate court can only arrive at a fair decision in respect to an impugned Judgment, it is mandatory for the Judgment of the lower court to be exhibited in the Record of Appeal. In the absence of a Judgment, the appellate court can do no better than strike out the Record of Appeal. That is not the position in this matter."

37. Pursuant to the provisions of Order 42 Rule 13 (f) of the Civil Procedure Rules, the term *"Judgment"* used in that Order should be substituted with *"Ruling"* where applicable. The Appellant having annexed the impugned Ruling, which allowed the Respondent's Notice of Motion, did not have to extract the orders of the lower court. The reading of the Ruling and the Notice of Motion that gave rise to the Ruling is enough for the purpose of Order 42 Rule 13 (f) of the Civil Procedure Rules.

Whether the trial Court erred in granting Mandatory injunction orders at the interlocutory stage.

38. To properly provide an accepted analysis under this heading, this court is compelled to define *"Mandatory Injunction"*. The Black's Law Dictionary defines *"Mandatory Injunction"* to mean:

"...an injunction that orders an affirmative act or mandates a specified course of conduct. It is also termed "Affirmative Injunction" while "Permanent Injunction" is defined as an injunction granted after a final hearing on the merits."

39. A mandatory injunction is granted, not under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as it is in the case for temporary/interim injunction, which is to prevent or restrain a wrongful act from happening, but under Sections 1, 1A, 3 and 3A of the Civil

Procedure Act Cap 21. Legally, a mandatory injunction requires a person to do a certain specific thing. It's the substance of the order that makes it mandatory and not the positive wording.

40. The circumstances under which the court would grant a Mandatory Injunction was stated by the Court of Appeal in the case of ***Kenya Breweries Ltd vs. Washington Okeyo (2002) EA 109*** as follows:-

> *"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application."*

41. The suit in the lower court is in respect to the transfer of land to two parties. Originally, the land known Mavoko Block 3/2434, was owned by Teresia Nduku Mwaluko. It is not in dispute that she sub-divided it into two portions – Mavoko 3/32201 and 3/32202. It is alleged that she said parcels of land to both the Appellant and the Respondents.

42. The Appellant took possession of the portion of land he bought in December 2007 and caused construction of some structures on the land. Subsequently, in the year 2009, the Respondents also took possession of the land and caused some constructions on the land. On 11 th November, 2014, the Respondents were issued with a Title deed for the whole parcel of land known as Mavoko Block 3/32201.

43. It is not clear to this court what became of Mavoko Block 3/32202. In the given circumstances, and before taking viva voce evidence, it cannot be stated categorically that the Appellant is a trespasser to the land he purportedly purchased, and on which he had put up structures. Indeed, considering that Teresia Nduku denied selling to the Respondents the entire suit land, the legality of the sale of parcel of land known as Mavoko Town Block 3/32201 should have been ventilated at full trial.

44. Ideally, land matters are extremely emotive and sensitive in nature. In Kenya, land is a source of production and a livelihood. As a result, land tends to generate protracted, emotive and sensitive disputes particularly on matters pertaining to ownership.

45. While applying the principles stated in the ***Kenya Breweries Ltd*** case *(supra)* to the facts of this case, this court has completely failed to deduce *"the special circumstances, or if the case is clear and one which the court thinks it ought to be decided at once"* as envisaged by the trial court. The trial court ought to have provided the parties ample time to adjudicate their case before arriving to the conclusion that the Appellant should be evicted from the suit property, and his structures demolished.

46. Having analyzed the pleadings filed in the lower court, all the parties ought to be allowed to adduce both oral and documentary evidence to enable the court make a determination of both factual and legal issues, including the circumstances under which the original parcel of land Mavoko Block 3/2434 was sub-divided and how the resultant sub-divisions were dealt with by the owner.

47. The trial court will also have to determine the surveying and mutation process; the exact measurements of the land that was purportedly purchased by both parties; the beacons and the position of the land; the process of the sale of the suit property; if the requisite consents and approvals were obtained and more importantly the allegations of fraud, mistake or misrepresentation raised by the parties.

48. For these reasons therefore, I hold that the Appellant is entitled to the prayers sought in the Appeal. The Appeal is allowed as follows:

> ***a. The Ruling of 13th June, 2019 and the subsequent orders by the trial Court in Mavoko SPMCC No. 906 of 2015 are hereby set aside.***
>
> ***b. The costs of the Appeal to be borne by the 1st and 2nd Respondents.***

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE