



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC APPEAL NO. E001 OF 2021**

**HINDIA IBRAHIM ADAN.....1<sup>ST</sup> APPELLANT**

**THE COUNTY GOVERNMENT OF WAJIR.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ABDI HASSAN SAMATAR.....RESPONDENT**

**(Being an appeal from the judgement of the principal magistrate Elc Court**

**at Wajir delivered by the Honourable Mugendi Nyaga SRM**

**dated 23<sup>rd</sup> December 2020 in Elc Suit No. 8 of 2018)**

**JUDGEMENT**

1. Being dissatisfied with the decision of the principal magistrate Elc Court at Wajir delivered by the Honourable Mugendi Nyaga SRM dated 23<sup>rd</sup> December 2020 in Elc Suit No. 8 of 2018 the appellant has appealed before this Honourable Court raising fifteen (15) grounds of appeal that can ostensibly be summarized as follows;

**(i) That the trial magistrate erred in law and in fact by declaring the Respondent is the owner of the suit plot R6322 whereas the Respondent had not provided particulars of ownership of the suit plot.**

**(ii) That the trial Magistrate erred in law and fact in failing to appreciate that Plot No. R6322 ceased to exist at the time of filing the suit and therefore the Orders emanating therefrom are inconsequential.**

**(iii) That the trial Magistrate erred in law and in fact in failing to appreciate that the Respondent claimed to have bought the suit plot from the vendors who had no legal rights and standing to sell.**

**(iv) That the trial magistrate misdirected himself in law by failing to appreciate the allegation of fraud was not supported by any factual basis and that by invoking the principle of *lis pendens* to fill the gaps and inconsistencies in the Respondents case.**

**(v) That the trial magistrate erred in failing to appreciate that the 1<sup>st</sup> Appellant is the owner of the suit Plot No. W941 and the same had never been transferred to the Respondent.**

2. The matter was listed for directions on 8<sup>th</sup> July 2021. By the consent of the parties the Court directed that the appeal be canvassed by way of written submissions. Both parties have since filed their written submissions.

3. The 1<sup>st</sup> appellant submitted that the trial Magistrate failed to consider that he was the first to be registered as the owner of the suit premises and would consider the evidence of the Respondent at the expense of that of the Appellant. He submitted that the purported vendors did not execute any instrument conferring ownership of the plot to the Respondent. That the purported vendors acknowledged that they had no right to sell the suit plot. He also submitted that there was no proof that the 2<sup>nd</sup> Appellant approved the transfer. That the acts of the Respondent were a deliberate act to dispossess the suit premises belonging to the appellant, He cited the case of **Mzee Wanje and Others v AT Saikwa (1984) KLR 284**.

4. On the letters issued to the appellant confirming ownership. He submitted that the trial magistrate's insistence on the letter without proof

of title was prejudicial to the 1<sup>st</sup> Appellant. That the court misled itself when finding that payment of rates was evidence sufficient to adduce ownership in the place of a title deed or certificate of title. He cited the provision of **Section 26 (1) Land Registration Act**.

5. The 2<sup>nd</sup> Appellant only submitted on the issue of Costs. It submitted that prior to the institution of the suit no demand and/or notice of intention to institute the suit was served upon it. He also submitted that the allegations of fraud and illegalities were not proved against it. That while the court was exercising its discretion the same was unjustified since the 2<sup>nd</sup> Appellant was not found to have delayed the litigation or obstructed the same. He cited the provisions of **Section 27 (1) of the Civil Procedure Act** and the case of; **Jacklyn Wanjira Njeru vs. Equity Bank Limited and another (2020) eKLR**

6. The Respondent submitted that both the appellant and Respondent pleaded specific facts in their pleadings and the onus of proving the said allegations lay on all on a balance of probabilities. That while both the Appellant and Respondent testified the 2<sup>nd</sup> Appellant did not adduce any evidence in support of his claim and that of the 1<sup>st</sup> Appellant. In this regard he cited the provisions of **Section 107 and 108 of the Evidence Act and the case of Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**.

7. On damages for loss of user the Respondent urged this court to award the claim even if the same had not been granted by the trial court. He submitted that he had an actionable claim of trespass and that he had equally proved his claim on damages. He cited the provisions of **Order 42 Rule 32 of the civil Procedure Rules and Halsbury's 4<sup>th</sup> Ed. Vol 45 at para 26, 1503**

### Analysis and Determination

8. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

**“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 Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).**

9. The Respondent herein was the plaintiff in the trial Court. The 1<sup>st</sup> appellant was the interested party whereas the 2<sup>nd</sup> Appellant was the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant never took part in the proceedings.

10. The Respondent initiated the suit vide plaint dated 15<sup>th</sup> December 2018 amended on 9<sup>th</sup> September 2019 seeking a declaration that he is the registered owner of the land known as R632 and that the purported sale to the 1<sup>st</sup> Defendant was/is fraudulent, illegal and vitiated by law. He also sought a permanent injunction to restrain the 1<sup>st</sup> defendant its agent's servants and representatives from transferring, charging and/or encumbering on the land R6322, an eviction order to issue against the 1<sup>st</sup> Defendant and general damages for loss of user for the parcel known as R6322.

11. The Appellants both filed their respective defence on 16th October 2019. The matter proceeded for hearing on diverse dates.

12. **Pw1, the Respondent herein** adopted his statement. It was his testimony that on or about 1<sup>st</sup> November 2014 by a written Agreement he bought the suit premises from **Asha Ibrahim Adan** and **Yakub Ibrahim** for a sum of Kenya Shillings Seventy-Five Thousand (Kshs. 75,000/=) and took possession of the same. That he proceeded to pay the pre-requisite fees and charges and had the property registered in his name.

13. That on diverse dates in November 2016 the Defendant trespassed on the land and took possession with the help of the local police and leadership. That at the time he had intended to put up some residential houses, do farming and had started digging a bore hole for irrigation when the 1<sup>st</sup> Defendant forcibly took possession of the suit land. That he was therefore deprived of the use of the suit premises hence his seeking damages for the loss.

14. The Respondent produced the agreement between him and Asha as Exh1, receipts paid to the 2<sup>nd</sup> Appellant for Land rates (Pexh2), clearance certificate (Pexh3), receipt for site visit of physical planning (Pexh 2c), registration form and receipt of Kshs 18,000/= for allotment letter (exh 2d) deposit slip, letter from lands registry Wajir, certificate of clearance (exh 3a), letter confirming ownership of plot No. R6322 (exh 3b) letter from the chief stating that the land was sold to the 1<sup>st</sup> Defendant.

15. He further testified that on being informed that the land had been sold to the 1<sup>st</sup> Defendant he wrote complaint letters to the ODP, Commission on Administrative justice & Knchr (exh 5).

16. In cross-examination he conceded that he bought the land from Asha during the clan skirmishes and that the agreement was drafted by the Area chief. He also stated that the measurement of the suit premises was determined from the letters of ownership. The area chief confirmed that the land was 100t x 100ft. That no surveyor visited the suit premises, he told the court that the case in the tribunal pitted him and the 1<sup>st</sup> Defendant but he did not concede to the offer granted by the tribunal for repayment of the purchase price. On the difference between W941 and R6322 it was his testimony that W941 is the surveyor number while R6322 is the plot number.

17. In re-examination he testified that he used the agreement and the registration form to get the plot number.

18. **DW1, the 1<sup>st</sup> Appellant herein** also adopted his statement dated 16<sup>th</sup> October 2019. In his statement he stated that he acquired the property in the year 1992. The same measured 50x100ft. That he left the property to his relatives Asha Ibrahim and Yakub Ibrahim Adan. That he has been in quiet possession of the same and had the property registered in his name by the 2<sup>nd</sup> Appellant in the year 2013 where he was issued **Plot No. W491**.

19. That due to clan skirmishes Asha and Yakub were displaced in the year 2014. That prior to their displacement, he later came to learn, they sold the property to the Respondent.

20. He denied issuing any consent to Asha and Yakub to sell the suit premises and stated that he only came to learn of the aforesaid sell when he visited the suit premise in the year 2015 with the intention to fence and sell it to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant would however abandon the sale after learning about the disagreement.

21. That he tried to resolve the dispute with the elders which came to the determination that the sale was irregular and as such the Respondent was only entitled to a refund of the purchase price at Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=) but the Respondent denied the elders decision and he therefore proceeded to commence the suit in the trial court.

22. He told the court that both the Asha and Yakub had conceded to the 1<sup>st</sup> Appellant that they were not legitimate owners of the suit premises and has illegally sold the plot to him. That he had agreed to pay to the 1<sup>st</sup> Appellant the sum of Kshs. 150,000/= since it was his relatives who had conceded to the illegality.

23. He produced the registration form as Dexh 1, receipt of Kshs, 1000 for site visit (Dexh2), minutes of Garre Elders (Dexh3), Ruling of the land tribunal (Dexh4), minutes of Madarasatul-Saad (Dexh5) letter from Wajir County Government on ownership of the plot (Dexh6), Photographs of the plot (Dexh7) letter from Area confirming plot belongs to the 1<sup>st</sup> Appellant (Dexh8),

24. In cross-examination and re-examination, he was categorical that the suit premise is Plot No. W941 measuring 50ftx100ft. He conceded that apart from the Kshs. 1000 for the site visit he never paid any other amount. That the land system shows that he was the first t

25. **DW2 Mohamed Ibrahim Mohamed** testified that he settled in Wagberi in the year 1992. That his plot and that of the appellant are four plots apart. It was his testimony that the 1<sup>st</sup> Appellant land measured 50ft x 100ft. that to the best of his knowledge the 1<sup>st</sup> appellant had not sold off the suit premises. He confirmed that he was present during the proceedings held by the elders who directed Asha and Yakub to pay back the Respondent.

26. **The 2<sup>nd</sup> Appellant** filed its statement of defence on 16<sup>th</sup> October 2019. It stated that the suit premises the Respondent had sought to transfer to his name as per their records is registered as Plot No. W491 and in the name of the appellant herein. that since the Respondent had failed to produce any agreement or consent from the registered owner it declined to transfer the same to him. The 2<sup>nd</sup> Appellant further contended that the Respondent had equally failed to prove that Asha Ibrahim and Yakub Ibrahim Adan had authority to convey ownership rights from the registered owner. The 2<sup>nd</sup> Appellant denied any allegation of conniving with the 1<sup>st</sup> Appellant to deny the Respondent his claim to the suit premises.

27. The 2<sup>nd</sup> Appellant however did not call any witnesses.

28. The trial Magistrate after deducing the evidence of both parties and their written submission held as follows;

**“Without evidence the 2<sup>nd</sup> Defendant cannot declare the interested party as the owner of the suit property. Especially after receiving payments from the plaintiff and issuing him with ownership documents. The interested party only holds a registration form, On the other hand, the plaintiff has a letter confirming him to be the registered owner of the suit property. The sellers of the suit property were not called as witnesses by the interested party. Therefore, the submissions that they were licensees is not supported by any evidence.**

**The upshot of the above is that I find that the plaintiff has proved on a balance of probabilities that he is the legal owner of the suit property.**

**On damages for loss of user I find that no evidence was tendered by the plaintiff to prove that anyone had trespassed onto the land. For that reason, I will not make an award under that head.**

**In light of the above I enter judgement in favour of the plaintiff and make the following Orders;**

**a. That the plaintiff be and is hereby declared as the registered owner of all that parcel of land known as R6322.**

**b. A permanent injunction be and is hereby issued restraining the interested party either by herself, her agents and or servants from transferring, charging or in any way encumbering the parcel of land known as R6322.**

**c. Cost of the suit to be paid by the 2<sup>nd</sup> defendant....”**

29. I shall consider the grounds of appeal from the premise of the summarized grounds. **Ground (i) and (iii)** relate to ownership of the suit premises. I have considered the parties evidence and the trial courts determination. I have taken due consideration of the fact that both parties

had letters from the 2<sup>nd</sup> appellant confirming their ownership of the suit premises.

30. I have however noted that the appellant was *first in occupation* of the suit premises. This fact has not been denied by the Respondent. The respondent has admitted in his evidence that he bought the same from the relatives of the appellant. It is clear to this court that the aforesaid representatives did not have capacity to sell the aforesaid property especially considering the purported sale was allegedly conducted during the land skirmishes in Wajir in 1992. This is replicate in the trial court proceedings, the meeting of the elders and the tribunal.

31. The trial magistrate stating that the defendant had not called them to provide evidence and to prove they were licensee's clearly shifted this burden from the plaintiff to the defendant. It was upon the Respondent to conduct due diligence to ascertain ownership of the suit premises.

32. It is a maxim of equity that where there are equal equities, the first in time prevails. In the case of **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others** [2015] eKLR, the Court of Appeal cited with approval the High Court case, **Gitwany Investment Limited v Tajmal Limited & 2 others** [2006] eKLR where the court stated that:

**“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”**

See also; **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another** [2021] eKLR

33. The trial Magistrate was therefore in error as I have stated earlier to shift the burden of proof to the Respondent herein.

34. **Ground (ii) and (iv)** relate to the indifference in the plots numbers. The appellant states that the suit premises ought to be plot No. W941 whereas the Respondent claims that the Plot No. is R6322. This indifference would have been cleared by the 2<sup>nd</sup> Appellant. The Respondent sought to distinguish W941 being the surveyor number while R6322 being the plot Number but there was no evidence to prove this fact. The burden of proving this indifference lied on the Respondent.

35. **On Ground (iii)** I agree with the appellant. The doctrine of *lis pendes* was not raised by the respondent in the trial court. The allegations of fraud were not proved in the trial court. The appellant herein was not a party to the Agreement between the respondent and the third parties. The respondent did not prove the fact that the appellant took part and/or facilitated the alleged fraud actuated by his relatives. This much was not considered by the trial Magistrate.

36. I therefore find that the trial court was in error in declaring the Respondent as the registered owner of all that parcel of land known as R6322.

37. I find merit in this appeal. The appeal herein succeeds. The suit in the trial court is hereby dismissed.

38. Cost of the appeal awarded to the 1<sup>st</sup> Appellant. The same to be borne by the Respondent.

**DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Mr. Ayieka holding brief Stephen Wanyoike for 1<sup>st</sup> and 2<sup>nd</sup> Appellant
2. Mr. Marube for Respondent
3. Fardowsa; Court Assistant