



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELCA NO 28 OF 2018**

**GITAU MUCHANE.....APPELLANT**

**VERSUS**

**AGNES WAIRIMU KINYANJUI.....RESPONDENT**

**(Appeal from the Judgement and decree of the Learned Hon A. M. Maina SPM**

**delivered on the 23/10/2018 in CMCC NO 690 of 2011-Thika)**

**JUDGEMENT**

1. In its Judgment delivered on 23/10/2018, the trial Court allowed the Respondent's suit in the following terms;

**a. The Defendant through himself, agent's servants and or employees be ordered to vacate from the Plaintiffs Plot No RUIRU WEST BLOCK1/366 (suit land) forthwith and to demolish the structures and to be permanently prohibited from trespassing upon the suit land.**

**b. Costs of the suit.**

2. Dissatisfied with the said Judgment, the Defendant/Appellant preferred this appeal vide the memorandum of appeal dated 15/11/2018 on grounds that;

**i. That the Learned Magistrate erred in law and in fact in finding that the Plaintiff is the registered owner of the plot known as RUIRU WEST BLOCK 1/366.**

**ii. That the Learned Magistrate erred in and in fact by failing to consider the legal issues raised in the pleadings, evidence adduced in Court and submissions before her when delivering the judgment.**

**iii. That the Learned Magistrate erred in law and fact by finding that the parcel of land known as RUIRU WEST BLOCK 1/366 is not of a leasehold nature.**

**iv. That the Learned Magistrate erred in law in finding that the Defendant was not the registered owner of the plot known as RUIRU WEST BLOCK1/366.**

3. The Appellant filed his record of appeal dated 28/1/2019 and filed on 29/1/2019.

4. To place the appeal in context, a brief summary of the trial Court case in Thika CMCC No. 690 of 2011 is necessary. The Plaintiff led evidence that the suit land initially belonged to her late father, Kinyanjui Mathigu, a shareholder at Githunguri Ranching Co. Ltd. That her late father gave the land to her mother before her demise to hold in trust for the Plaintiff who was then a minor. In turn, her late mother also gave the Plaintiff's step-father necessary documents conferring the Plaintiff ownership of the suit land. That the Githunguri Ranching Co. Ltd subsequently showed her the suit land and issued her with a title deed, the basis of her claim.

5. The Plaintiff produced copies of her title deed, certificate of official search dated 12/5/2020, the green card, share certificate issued by Githunguri Ranching Co. Ltd, a bundle of payment receipts and the ballot marked Pex. 1-5.

6. On the other hand, the Defendant denied the Plaintiffs claim vide his statement of defence dated 9/1/2012. He maintained that he was the

owner of the suit land having bought it from John Wango Njoroge, a shareholder at Githunguri Ranching Co. Ltd. That he was issued with a share certificate and an allotment letter upon making necessary payments. That if the Plaintiff had a title for the suit land the same was fake and fraudulently issued.

7. In his testimony, he stated that he had been living in Tanzania for about 16 years during which period he enlisted his wife and sister's help in buying land. That they identified a piece of land in Githunguri Ranching Co. Ltd owned by John Wango who allegedly acquired the same in 1993. That he verified Wango's share certificate at Githunguri Ranching Co. Ltd before entering into a sale agreement dated 8/5/2009 for the purchase of the suit land. That the purchase price was Kshs. 450,000/= out of which he paid Kshs. 390,000/= via a banker's cheque. He then proceeded to pay for various clearances and was issued with a clearance certificate. Moreover, that he proceeded to Survey of Kenya to confirm the existence of the suit land and thereafter he received an offer by way of subdivision approval that required him to accept the same on conditions. That he accepted and paid the requisite payments for land rent and got a lease. The Original title and the lease were marked as DEX No 1.

8. In cross-examination the Defendant was unclear on whether or how he conducted due diligence on the suit land. He insisted that he personally went to Githunguri Ranching Co. Ltd but due to lapse in time, he admitted that he could not recall the details. Notably, he informed the Court that when he placed building materials on the suit land, he realized the Plaintiff had already filed her suit against him.

9. Upon hearing the suit, the Learned Hon Magistrate delivered the Judgement allowing the Plaintiffs claim on 23/10/2018 in terms as set out in para 1 above. She rendered her determination thus;

**“I find that the Plaintiff herein was issued with a title deed of the Registrar on 14.7.2004. A certified copy of the title's green card confirms that she was issued with the title deed on 14.7.2004, a fact further confirmed by a certificate of official search dated 17.5.2010, the Plaintiff was still the registered owner of the suit land.**

**The Defendant's certificate on the other hand was issued by the Registrar on 9.10.2012. As earlier pointed out, the Defendant did not produce as exhibit any other document demonstrating how he ended up being issued with the said certificate. It is also worth noting that the list of documents dated 9.1.2012 does not contain any of the documentation mentioned therein....**

**... Having considered all the above mentioned factors, I find that the Plaintiff is the registered owner of the suit land, having been so registered on 14.7.2004. I find that at the time the Defendant was purchasing the suit land, applying for registration and being registered as the owner of the suit land, the Plaintiff was already an owner. I find that this a case of double action and appropriate action should be taken against the responsible officials of Githunguri Ranching Company.”**

10. Aggrieved by the decision of the Learned Hon Magistrate, the Appellant filed this appeal on 4 grounds as set out in para 1 of the Judgment.

11. The parties elected to canvass the appeal by way of written submissions which I have carefully read and considered.

12. The firm of **Chege Wainaina & Co. Advocates** filed submissions dated 6/9/2021 on behalf of the Appellant. He recapped the factual background of the case leading to this appeal. He faulted the trial Court in finding that he did not file his bundle of documents as indicated in the List of Documents dated 15/5/2013. He submitted that to the contrary he filed his bundle of documents together with a supplementary list and bundle of documents as contained at page 31-55 of the Record of Appeal. That the said documents bear the Court registry stamp as duly filed and further received by the Respondent's former counsel, Gathii Irungu Advocate.

13. Additionally, the Appellant submitted that it is questionable that the said documents would be missing while the Court as well as the Respondent's Advocate did not raise the same. That in light of the provisions of the Civil Procedure Rules, 2010 pretrial conference is meant to confirm that parties have filed and exchanged statements and documents to be relied upon in a trial. That the trial Court ignored his elaborate evidence that explained how he acquired a certificate of lease as opposed to a certificate of title. He relied on the case of **Robert Ngaruiya Chutha v Joseph Chege Ndung'u [2017] eKLR** that touched on a property from the same mother title. That the Respondent failed to adduce evidence of how the suit land was allegedly bequeathed to her by her late father.

14. The Respondent through the firm of **Kaingati Kamonjo & Co. Advocates** filed submissions dated 31/8/2021. He supported the impugned Judgement and reiterated the role of an appellate Court as held in the case of **Mbogo & Another vs Shah [1968] EA**. That for the said judgment to be set aside, the Appellant must demonstrate that the Learned Magistrate's decision was erroneous resulting in total miscarriage of justice. He urged that the Appellant was not a bona fide purchaser and his purported title was acquired fraudulently. Reliance was placed on the cases of **Sai Office Supplies Ltd vs Rosemary Alivista Luseno & Anor. [2004] eKLR** and **Alberta Mae Gacie Attorney General & 4 others [2006] eKLR**.

#### **Analysis and Determination**

15. Having read and considered the record of appeal, the lower Court file, the written submissions of the parties and all the material placed before me the issues for determination center on;

- a. Whether the Respondent is validly registered as the owner of the suit land.
- b. Whether the Learned Magistrate considered the legal issues raised in the pleadings and the evidence adduced in delivering the decision.
- c. Was the suit land leasehold or freehold.

16. 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 which states as follows;

**“(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power-**

- (a) to determine a case finally;**
- (b) to remand a case;**
- (c) to frame issues and refer them for trial;**
- (d) to take additional evidence or to require the evidence to be taken;**
- (e) to order a new trial.**

**(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”**

17. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

**“...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this 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...”**

18. Accordingly, to enable me determine the appeal, I will re-evaluate the evidence that was presented before the lower Court in arriving at the decision of this Court.

19. In re-evaluating the decision of the lower Court, I have heeded to the principles set out in the case of **Mbogo & Another vs Shah [1968] EA** where the Court held as follows;

**“an appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”**

20. In answering the first issue, the Appellant denied the Respondents claim vide his statement of defence filed on the 11/1/2012 and stated that he purchased the land from John Wango, a shareholder of Githunguri Ranching. That as part of his due diligence he sought the documents from the seller which he stated were in Court in form of a bundle. That after verifying the ownership of the land he entered into a sale agreement with the said John Wango. That he made payments to Githunguri ranching for which he obtained various receipts leading to being issued with a share certificate. That later he received an offer through a subdivision scheme approval dated the 5/6/2009 through the Ministry of Lands where he accepted the same and made the relevant payments, receipts of which he claims to have produced in Court in support of his case. The Appellant averred in his evidence that if the Respondent had a title the same was fake and fraudulently acquired.

21. I have carefully perused the original file in the lower Court and it is evident that the Appellant entered appearance on the 29/11/2011 through the law firm of **Chege Wainaina & Co. Advocates**. On the 1/1/2009 the Appellant filed the following documents; statement of defence, Defendant's statement, and Defendants list of documents and Defendants list of witnesses all dated the 9/7/2012. What is evident is that the documents listed in the Defendants list of documents were not attached and or annexed.

22. Come the hearing date on the 5/6/18, after the Respondent had closed her case, the Appellants counsel sought an adjournment on the ground that his client had not carried the originals of the documents he wished to rely in support of his case. At the hearing the Appellant produced DEX No 1 which comprised of the original title issued on the 9/10/12, the receipt and the lease registered on even date.

23. I have carefully reviewed the submissions of the Appellant in line with the record as well as the record of appeal and find that the documents listed on pages 33-50 were not produced in the lower Court at all. The Defendants bundle and supplementary list of documents dated the 15/5/2013 are not on the lower Court record, all I have sighted are the original title receipt and the lease, marked DEX 1.

24. The Appellant faulted the trial Court and the Respondent for not raising the issue of the missing documents during trial. Respectfully, that is not the role of neither the Court nor the opposing counsel to raise. I cite dictum of the Court of Appeal case of **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR** it was stated that;

**“... so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings...that Secondly in our system of adversarial litigation, the Court performs the role of umpire; it does not have an inquisitorial function.”**

25. In the absence of those documents the Appellant relied on the title and the lease produced and marked as DEX No1. That being the case the Appellant failed to explain the root of his title. In the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** the Court held that ;

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”**

26. It follows therefore that the documents that the Appellant wishes to rely on in his appeal were not produced in the lower Court. The Court was therefore denied the opportunity to consider the same and they cannot now form a basis of an appeal. I have carefully reviewed the record of appeal and unable to see any leave sought and granted to the Appellant to adduce new evidence on appeal. The Court will not consider them at this stage.

27. The arguments advanced by the Appellant in his submissions that the Learned Magistrate failed to consider the documents are not correct. There is no evidence that the documents were annexed. In the end, I am of the view that the Appellant has failed to establish any misdirection on the part of Learned Magistrate’s Judgment.

28. I will now turn to the issue of the tenure of the titles held by the parties. The Appellant contends that the trial Court erred in holding that the suit land was not of a leasehold tenure. The Repealed Registered Land Act (RLA) Cap 300 was the applicable law at the time of the impugned transaction. The Respondent’s green card indicated that the suit land was registered in her favor on 14/7/2004. On the other hand the Appellant’s certificate of lease was registered on 7/10/2012 and as the learned Magistrate rightly observed no other documents was produced to show the prior registration/origin of the suit land.

29. Moreover, **Sections 27 and 28** of the Repealed Registered Land Act Cap 300 were to the effect;

**27. Subject to this Act**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.**

**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register: Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.**

30. Lastly **Section 30(2)(a)** of the Land Registration Act provides that;

**“(a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease.”**

31. I have carefully reviewed the evidence and note that both parties trace the root of their instruments of title and the suit land to Githunguri Ranching Co. Ltd, the original owner of the land. The Court was not afforded the documents of ownership by the said company or the process and documents relating to the subdivision of the land. Suffice to say that the company owned large tracks of land which were disposed to its members through share certificates and ballots. The land having been owned by a private Company, it is not clear to the Court how the Appellant got to be allocated the land by the Government, land which was essentially a private land. It is regrettable that the Appellant did not explain to the lower Court the basis of the documents found in pages 44, 45, 51 and 53 of the Record of Appeal.

32. It is also instructive that though the Appellant has attempted to attack the title of the Respondent on the ground that it should have been a certificate of lease and not a title on account of it being a resultant subdivision from the larger parcel owned the Githunguri Ranching, the Appellant failed to table the subdivision plans and approvals for the Court to make an informed decision on the same. The averments were not substantiated.

33. The Respondent’s claim was in respect of the suit land that according to her was illegally occupied by the Appellant. In support of her case she produced the original Title deed issued to her on the 14/7/2004, Original share certificate No 830 issued to her on the 2/4/2003 (transferred from the share certificate No 4734 of 4/10/83), certified copy of the green card from the suit land showing that she is the registered owner as at 14/7/2004, certificate of official search dated the 17/5/10. Ballot No 366 in the name of Kinyanjui Mathigu, receipt dated the 24/3/82 in the name of Kinyanjui Mathigu being for surveys fees, receipt dated the 13/4/1982 in the name of Kinyanjui Mathigu for

completion of shares, an assortment of receipts issued to Margaret Njeri Kinyanjui, the mother of the Respondent issued on various dates on account of further survey fees, and receipt dated the 13/7/2007 issued in the name of the Appellant being clearance certificate from Githunguri Ranching with respect to the suit land.

34. Further she produced a copy of the original title deed issued on 14/7/2004 in her name, certificate of official search dated 17/5/2010, certified copy of green card and assorted receipts for payment dated as early as 13/4/1982 in the name of Kinyanjui Mathigu. Other receipts were in the name of Margret Njeri Kinyanjui and the Plaintiff herself. In addition to that, the Respondent produced a share certificate from Githunguri Ranching Co Ltd dated 2/4/2003.

35. The Appellant did not object to production of the said Respondent's exhibits.

36. It is trite that he who alleges must prove. The burden of proof as laid out in Section 107 of the Evidence Act is on a balance of probabilities in civil cases. It is the view of the Court this burden lay with the Respondent.

37. Moreover **Section 26** of Land Registration Act (LRA) states;

**“26. Certificate of title to be held as conclusive evidence of proprietorship**

**(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.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

38. Section 25(1) of the Land Registration Act is clear that;

**25. Rights of a proprietor**

**(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.”**

39. Going by the record, the Appellants did nothing to impugn the title of the Respondent least of all by filing a counterclaim. In view of the forgoing provisions and evidence admitted in Court, it is my view that the Respondent proved her claim on a balance of probabilities.

40. Recently, the Court of Appeal in the case of **Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR** stated that the existence of a title deed per se only raises a rebuttable presumption of ownership of land. That the existence of two documents of title in respect of one parcel of land is not only highly irregular and anomalous but is also forbidden by law.

41. Accordingly, I find no error on the part of the trial Court's reasoning in upholding the Respondent's title over the Appellant's lease.

42. In the end the appeal lacks merit. It is dismissed with costs in favour of the Respondent.

43. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**DELIVERED ONLINE IN THE PRESENCE OF;**

**MUCHANE GITAU ADVOCATE IS ABSENT**

**KAMANJO FOR THE RESPONDENT**

**MS. PHYLLIS MWANGI – COURT ASSISTANT**