



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA CASE NO. 126 OF 2019

JOSEPH M'MUGAMBI APPELLANT

VERSUS

ISAIAH MBAABU..... 1ST RESPONDENT

SAMSON MIRITI MBAABU 2ND RESPONDENT

JUDGMENT

(Being an appeal from the Judgment of Hon. A.G. Munene (S.R.M.) delivered on 28TH

December, 2018, in Maua CMCC. No. 34 OF 2012)

JUDGMENT

1. The appellant appeals against the judgment delivered on **28.12.2018** on grounds that, the trial court erred: in finding a prayer for injunction had been established contrary to known principles for grant of a permanent injunction; showed open bias against the appellant; finding the suit proved; failing to find the suit res judicata; usurping jurisdiction he did not have to rectify a title and order for a retransfer; finding the 2nd respondent erroneous contrary to law and lastly found the suit proved contrary to the law and adduced evidence.

2. This being 1st appeal the court under **Section 78** of the **Civil Procedure Act** is expected to rehear, reassess and re-appraise itself on the pleadings, evidence and the findings and come up with its own conclusions so as to ascertain whether or not the lower court reached a right decision while at the same time aware the lower court had the benefit of seeing the witnesses and their demeanor.

A. PLEADINGS

3. Through a plaint dated **3.2.2012** the 2nd respondent sued the appellant and the 1st respondent alleging fraudulent sale and transfer of his ancestral land namely **Land Parcel No. Athiru/Gaiti/1251**. He sought for permanent injunction, rectification of the register and re-transfer of the land to himself.

4. The appellant denied the claim claiming he was lawfully sold the land by the 1st respondent (2nd defendant's father) in 1996 to educate his son, denied the land was family land, alleged further the 1st respondent had seven other parcels of land to which the 1st respondent had directed the 2nd respondent and his family to move to and lastly pleaded res judicata on account of **Maua CMCC 52 of 1999**.

5. The 1st respondent entered appearance through M/s Nyamokeri Ombachi advocates who eventually ceased representing him w.e.f 29.4.2015. Initially the firm of C.K. Riungu advocates entered appearance for the 1st respondent during which time the 1st respondent swore an affidavit on 2.3.2012. Eventually there was a change of advocates vide a notice dated 21.8.2012 by M/s Nyamokeri Ombachi & Co. Advocates.

6. Following directions to comply with **Order 11**, the 2nd respondent filed a list of documents dated 2.3.2015, the appellant filed case summary dated 16.7.2015, list of issues dated 10.7.2015 and 1st respondent statement dated 10.2.2015 which the 1st respondent eventually disowned in his testimony.

7. On the side of the 2nd respondent he filed issues for determination dated 2.3.2015 and witness statements filed on 6.12.2012. After M/s Nyamokeri & Ombachi Advocates respectively ceased representing the 1st respondent, the record is not clear if he filed any defence and or request was made for entry of judgment against him.

B. EVIDENCE

8. The 2nd respondent testified as PW1, adopting his witness statement dated 6.2.2012 and produced a transfer, ruling in **Maua CMCC 52 of 2019** and a bundle of receipts for the refund of purchase price to the appellant as exhibits P exh 1, 2 and 3. He prayed for the rectification of the register.

9. In **cross-examination**, PW1 insisted he was in school between 1994 – 1996, school fees was paid by the 1st respondent; denied the land was sold to educate him; admitted his mother was not a party to the suit; insisted the appellant had another land; claimed they have been on the land even in 1996 and insisted after the Maua court ruling for a refund, he paid the entire sum hence he was unaware of the alleged second transaction. It appears the 1st respondent was not present in court and did not cross-examine **PW1**.

10. **PW2** adopted witness statement dated 22.10.2004. In cross examination he insisted the 1st and 2nd respondent's family had been on the suit land since 1970 in which the appellant was their neighbor though he resides in a different parcel of land. Lastly PW2 alleged the 1st respondent had bought the suit land from one George Akurungu.

11. DW1 (1st respondent) disowned his witness statement dated 10.2.2015 but admitted he had at one time sold land to the appellant for Kshs. 250,000/= though he could not recall the Parcel Number.; He admitted the appellant sued him for a refund in Maua Law Courts after his family objected to the sale. He confirmed a refund was of Kshs. 43,000/= paid to the appellant before Mr. Nyagaka advocate, settling the matter.

12. In **cross-examination** DW1 confirmed the appellant was refunded the money as directed by the Maua Court and in particular he told the court his son and daughter in law were the ones who cleared the debt.

13. In **cross-examination by the appellant** DW1 admitted entering into an agreement but he could not recall before which advocate but later on refunded the money to the appellant after he sued him. He insisted he wanted the appellant evicted from the land after the sale was cancelled by the court. DW1 denied executing any transfer, as well as seeking money for a second transaction.

14. DW2 (appellant) adopted his statement dated **10.9.2012**. He stated DW1 sold the land to him for **Kshs. 30,000/=** in order to pay school fees for PW1. He admitted there was a civil case out of which money was paid in court, but was later refunded to him. He insisted upon refund DW1 resold parcel **No. 1215** to him for **Kshs. 43,895/=**. He told the court he utilizes the land though DW1's mother had a house therein. He admitted the said wife was a party in the previous suit.

15. In **cross-examination** by the 2nd respondent, the appellant told the court the agreement did not disclose the reason for sale as school fees, alleged the agreement was witnessed by one Elijah Ndichu, and that there was a 2nd agreement upon refund. Lastly he alleged he had documents for the transfer but did not produce them.

16. Parties eventually put in written submissions dated 15.12.2018 and 19.11.2018.

17. In his submissions the 2nd respondent urged the court to be guided by **James Mathenge Munyiri –vs- District Land Registrar & 2 Others [2018] eKLR** on rectification of the title and retransfer. On the other hand the appellant submitted the sale and transfer was lawful; claimed he purchased the land on 10.3.1996 as per his exhibits hence the cause of action was time barred.

18. The appellant by submissions dated 17.8.2020 states the 2nd respondent did not discharge the burden of proof as required under **Sections 107, 108 & 109** of the **Evidence Act** on the issue of permanent injunction, maintains the suit was res judicata, the doctrine of estoppel was applicable and the suit was time barred. He relies on **John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport & Infrastructure and 3 Others [2015] eKLR, Kenya Commercial Bank Ltd –vs- Benjoh Amalgamated Ltd [2017] eKLR; E.T –vs- Attorney General & Omondi –vs- National Bank of Kenya Lt. & 2 Others [2001] eKLR 579.**

19. On the other hand, the 2nd respondent through submissions dated 4.10.2021 submits the 1st respondent's defence should be delinked from the applicant's defence, fraud was proved as the 1st respondent denied the alleged re-sale and transfer in 2008, the appellant didn't produce any transfer or land control board consent in his favour; urged the court to find the doctrine of res judicata was not applicable. He maintained **Section 80** of the Land Registration Act mandated the court to rectify a register and submitted there was no material or facts to establish bias on the part of the trial court. He relied on **James Mathenge Munyiri –vs- District Land Register & 2 Others [2018] eKLR and Joseph Gitari –vs- Muthui Chomba & 7 Others [2018] eKLR.**

C. ANALYSIS AND FINDING

20. It is trite law issues flow from pleadings. In the instant case, the respondents claim under paragraph 6 of the plaint was based on customary trust & fraud. They claimed the appellant was not an innocent purchaser for value without notice and stated they had been in occupation since 1970.

21. Upon service the appellant and the 1st respondent put in a joint defence. Critically looked, the appellant took cover under the 1st respondent and did not specifically deny or raise any issues against the specific allegations levelled against him by the 2nd respondent.

22. The appellant filed his witness statement on 13.8.2018 and a supplementary list of documents dated 10.8.2018. He later on produced D Exh 1- 4 among them an agreement dated 28.11.2018, sale agreement dated 16.3.1996, land proceedings dated 5.8.2001 and ruling made on 5.2.1999.

23. D exh 1 (sale agreement) falls short of the requirements of the Law of **Contract Act Cap 23 Laws of Kenya**. There are no witnesses to the agreement. The 1st respondent eventually disowned his witness statement and denied ever selling or transferring land to the appellant.
24. Secondly the **D Exh 1** confirms the refund of **Kshs. 43,595/=** out of the **Maua Civil Case No. 52 of 1999**. The appellant's exhibits contradict all his oral testimony. **D Exh 2** talks of a sale in 1996. **D exh 2** was declared invalid and a refund made in Maua Law suit. The 1st respondent would have had no capacity to re-enter another agreement with the appellant to re-purchase the same land.
25. In any event and as I have said above, **D Exh 1** does not meet the test of law as it does not even define with specificity the land the appellant was re-purchasing. Similarly the appellant did not produce any transfer form, land control board consent forms, or minutes from the Land Control Board and a copy of the title deed to establish when and where the 1st respondent transferred the land to him. Similarly the appellants defence is silent on all these issues and which were crucial to his claim if any; over the land.
26. Consequently my findings are that grounds 1, 3, 5, 6 and 7 lack merit and hereby rejected.
27. Turning to the issue of res-judicata, whereas the appellant pleaded res judicata at paragraph 7 of the defence, he did not adduce any evidence to demonstrate it either as a preliminary issue or at the hearing. That notwithstanding, paragraph 5 of the plaintiff's list of issues dated 2.3.2015 captured the issue. The appellant's list of issues dated 10.7.2015 did not raise such an issue.
28. Be that as it may, during cross examination by the appellant, the 1st and 2nd respondents were categorical the case at Maua Law Courts was brought by the appellant against the 1st respondent and his wife for a refund of the purchase amount in 1996. Plaintiff's exhibit 2 and 3 are clear the issues were for a refund and which was settled by the appellant accepting refund hence settling the matter
29. The appellant did not testify and produce pleadings and judgment showing the issues were similar, the subject matter was the same, the parties were the same and a competent court determined the same issues to finality; in terms of **Section 7 of the Civil Procedure Act**.
30. D Exh 1 contains a clause that Kshs. 43,395/= was out of the Maua Civil case. Further the appellant in his testimony stated the second agreement was after the Maua case was settled and that he returned the money to the 1st respondent to re-purchase the land. The appellant is therefore estopped in law from denying these elementary facts. My finding is also that the issues raised before the trial court had not been determined elsewhere.
31. Coming to the issue that the claim was time barred, the appellant did not plead the claim was statute barred. The 2nd respondent's suit was based on fraud. Key elements of fraud are a false representation of a fact, with intention that the other party should act on it and the other party did act on it. In *Vojay Marjaria –s- Nausighn Madhusingh Darbar & Another [2000] eKLR* the court held fraud must be specifically pleaded and particulars must be given.
32. The 2nd respondent gave the date he discovered fraud as 2010 and moved to court in 2012 which is within the 12 years period. The appellant failed to produce the transfer forms or the title deed to show when he was registered as the owner of the land. D Exh 1 talks of a sale agreement of 2008. Obviously therefore he cannot purport to talk of 1996 yet the agreement of 1996 had been nullified by the court in the Maua suit. The appellant cannot turn around and allege the plaint herein is based on an agreement made in 1996.
33. Similarly once the 1st respondent took to the witness stand and denounced his earlier witness statement and incidentally the joint defence, he also denied there was a second agreement with appellant. This meant the defence by the appellant was left standing on quicksand and on very shaky grounds. The appellant did not produce any forensic evidence to back his assertions if any, that there was a valid agreement accompanied by transfer and control board forms authored and or executed by the 1st respondent.
34. Consequently the particulars of fraud in the plaint were confirmed true and stand proved as held in the Court of Appeal in *Gladys Wanjiru Ngacha –vs- Theresa Chepsaat & 4 Others [2013] eKLR and in Mutsonga –vs- Nyati [1984] KLR 435.*
35. In his written submissions the appellant seeks the court to find that both his evidence and pleadings were ignored by the trial court. In *Kenya Pipeline Co. Ltd –vs- Glencore Energy (U.K.) Ltd [2015] eKLR*, the Court of Appeal held courts should not assist those who would breach, violate or defeat the law then turn to seek its aid.
36. In *David Siranga Ole Tukai –vs- Francis Arap Muge & 2 Others [2014] eKLR*, the court held an illegal contract is contrary to public policy and should not be enforced and a court should not be made an instrument of enforcing obligations alleged to arise out of a transaction which is illegal.
37. The court in Maua Law Courts, invalidated the sale of 1996, and supervised the refund to the appellant. He now immediately turns back and wants the same court to validate a sale agreement which if enforced would make a court's decree stale. The court cannot assist him defeat the law and make a mockery of its earlier orders.
38. As regards bias in *Galaxy Paints Co. Ltd. –vs- Falcon Guards Ltd. [1999] eKLR* it was held that allegations of bias must be based on cogent evidence perceived or otherwise. The trial court had not handled a similar matter. The court gave all the parties enough time to prepare and present their case. There was no application for recusal made by the appellant's counsel on record. There is no evidence of partiality and or impropriety raised. The appellant does not say when it started and how it manifested itself. This ground of appeal lacks basis and is hereby rejected.
39. Due to the foregoing reasons, the appeal lacks merit. The same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17TH DAY OF NOVEMBER, 2021

In presence of:

Kaberia Arimba for 2nd respondent

1st respondent in person absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE