



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

APPEAL NO. 7 OF 2019

PETER PHILIP NYUMU.....APPELLANT

VERSUS

SAID SALEH SAID 1ST RESPONDENT

AWADH SALEH SAID 2ND RESPONDENT

(Being an appeal against the judgment of Hon. G. Kiage, Resident Magistrate, delivered on 7 February 2019,

in Mombasa CMCC No. 1472/2008)

JUDGMENT

(Appellant having sued the respondents alleging that the respondents sold to him a house through their authorized attorney; trial court holding that the power of attorney was invalid as it was never executed by the registered proprietors of the land and declining to give validity to it; appellant aggrieved and filing appeal to this court; court finding that the power of attorney (if valid) was limited to collection of rents and to sue; no power to sell the land; in any event, the land where the house being sold was located being registered in names of three persons two of whom did not donate any power of attorney to the seller; no evidence that what was sold had already been ascertained to be the share of the donor of the power of attorney; such sale cannot therefore be valid in absence of the other registered proprietors; appeal dismissed)

1. The appellant, as plaintiff, through a plaint filed on 1 July 2008 commenced suit against the respondents. He averred that on 5th December 2007 he purchased from the respondents, dealing through their duly constituted attorney, a house without land on Plot No. 426/1/MN for Kshs 750,000/=. He complained that since the purchase he has been unable to take possession or collect rent, by reason of persistent interference by the respondents. The appellant thus sought a permanent injunction to restrain the respondents from interfering with the suit property or the tenants therein. The plaint was subsequently amended on 14 July 2009 to add an alternative claim for a refund of Kshs. 750,000/= and loss of income from 1 January 2008 at Kshs. 20,000/= per month till the date of judgment. The respondents filed defence which they later amended. They denied having ever given any consent or authority for the alleged sale and asserted their right to be in charge of the property. They pleaded that the purported power of attorney had been revoked. They also denied receipt of the amount of Kshs. 750,000/=. They asked that the appellant's suit be dismissed.

2. The evidence adduced by the appellant was that on 5 December 2007, he purchased the suit property from one Abubakar Rahul Ndira (deceased) who had a Power of Attorney from the respondents. He did not deal directly with the respondents and he did not know them. The 1st respondent testified on behalf of the respondents. He testified inter alia that Abubakar was given authority to be caretaker and had no authority to sell. He pointed out that the registered owners of the property were the 2nd respondent, and two other persons, Omar Funzi and Charity Taylor, and Abubakar could not sell without their authority. He testified that the registered owners never sold the property and were never paid. He added that the purported Power of Attorney was fraudulent and was revoked.

3. In his judgment delivered on 9 February 2019, the Honourable trial Magistrate narrowed down on two issues; whether there existed a valid power of attorney at the time of the sale for the appellant to obtain good title and secondly whether in the prevailing circumstances the appellant is entitled to a refund of the purchase price and loss of income claimed. The trial court held that the power of attorney was ineffective, for the reason that the names of its donors differed with the names of the registered proprietors of the suit property. He proceeded to dismiss the appellant's suit. Aggrieved, the appellant has preferred this appeal.

4. Although six grounds are cited, the gist of the appeal is that the Honourable trial Magistrate was wrong in holding that the Power of Attorney was invalid, and that he failed to appreciate that what was being sold was not the suit property but a house without land, so that the identity of the registered owners was irrelevant, and further, that the respondents admitted ownership of the house sold. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Mwakisha for the appellant and Mr. Omwenga for

the respondents.

5. In his submissions, Mr. Mwakisha, learned counsel, pointed out that in the defence, the respondents admitted being the land owners and the owners of the house. Counsel submitted that the power of attorney was a general power of attorney over the respondents' properties. He also questioned whether one can revoke a power of attorney which he purports was never donated. He added that the power of attorney was revoked on 11 December 2007 yet the sale was on 5 December 2007. He submitted that though the land is registered in three names, that of the respondents and one Charity Cherutich Taylor, this does not negate that the respondents had ownership of the land where the house stood.

6. For the respondents, Mr. Omwenga, learned counsel, submitted that the search of the suit land shows that it was owned by three persons neither of whom donated the power of attorney to Abubakar. He refuted that the sale was one for a house without land and referred me to the sale agreement, pointing out that nowhere does it say that this is a sale of house without land. He further submitted that in the pleadings, the appellant asked for a permanent injunction to restrain the respondents from the suit property and at no time did the appellant seek for orders in respect of a house without land.

7. I have taken into consideration all of the above and hold the following view.

8. The issues herein more or less rotate on the validity, or otherwise, of the power of attorney dated 17 March 1993. If the same is valid, and permitted the sale of the suit property to the appellant, then the respondents must be tied to the sale agreement in issue. If it is not, then the appellant's case must remain dismissed. It is therefore important that we critically analyse this Power of Attorney. I have had a very careful look at it. It is of course dated 17 March 1993. At the introductory part, it states as follows :-

Said Saleh Said... and Awadh Said Saleh... appoint Abubakar Rahul Ndira... to collect rents and sue on my behalf...

9. The first question I ask myself is whether, assuming that the Power of Attorney is genuine (for it was described as fake by the respondents), it gave Abubakar the power to sell the suit land or any house within the suit land. My answer is no. This was not a general power of attorney as submitted by Mr. Mwakisha, but a specific power of attorney, to collect rents and sue on behalf of the donors, and I would limit that right to sue to the power to collect rents. I am aware that within the body of the power of attorney, there are the words "and further to buy and sell movable or immovable property" but this power to buy and sell movable or immovable property is not any authority or power to sell the suit land. It is all tied to the power to collect rent and nothing more. Abubakar could not therefore use this power of attorney to sell the suit land or any house on the suit land (assuming that this was a sale of house without land). On that basis alone, this appeal must fail.

10. The trial Magistrate was also not wrong in disregarding the power of attorney on the basis that it was not executed by the owners of the land. The power of attorney was signed by Said Saleh Said and Awadh Said Saleh, the respondents herein. The land is registered in the name of Awadh Bin Saleh 5/9 share, Omar Bin Funzi 2/9 share, and Charity Cherotich Tylor (as administrator of Maria Sylvia Taylor) 2/9 share. The holding is of undivided shares. No evidence was ever presented that the owners had already shared whatever is developed on the land and that it had been specified who owns what on the ground. It follows that in absence of this, any sale of the land, or anything developed on it, could only be done with the consent of all the registered proprietors of the land. It doesn't help the appellant to state that the respondents pleaded that they are the owners of the land and owners of the house. Registration and ownership of land is not through pleadings but through documentation. Thus if one sues a defendant who has no title, and seeks specific performance, it matters not that in his pleadings the defendant pleads that he is the title holder of the land. The court can never issue the order of specific performance so long as the title holder is not the one sued and it is irrelevant that the defendant admits ownership. If that was not the position, then persons could collude to have a suit filed where a fraudulent person admits being owner and land is transferred without the knowledge of the title holder. In our case, a proper sale of the land or anything developed on the land, unless the shares were ascertained, could only be done with the consent of all the three proprietors of the land. Thus, even assuming that the power of attorney was valid and allowed a sale, there not being any authority to sell from Charity Cherotich Tylor and Omar Bin Funzi, and there not being any evidence that the house being sold was the actual share on the ground of the mentioned seller, the purported sale could not be given effect. As I have mentioned, no evidence was presented about the shares on the ground. Neither did the sale agreement state whose share it was that was being sold. It never specified whether what was sold was the 5/9 share of Awadh Bin Saleh, or the 2/9 share of Omar Bin Funzi, or the 2/9 in name of Charity Cherotich Tylor.

11. I find no fault with the decision of the trial Magistrate. There is no need of saying more.

12. This appeal fails and it is hereby dismissed with costs.

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA