REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 99 OF 2011

NJUGUNA KIGERA.....APPELLANT

VERSUS

JAMES NDERITU WAIRUKU.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. A B MIONGARE

(SRM) DATED 10TH MAY 2011 IN NYAHURURU PMCCC NO. 120 OF 2004)

JUDGEMENT

1. The matter before the trial court revolved around the ownership pf land parcel number **LAIKIPIA SALAMA /MARUKU BLOCK 4/560** in which the respondent had accused the appellant of fraudulently obtaining title to the same. The said parcel of land was a resultant sub division of parcel number **748** allotted to the respondent by **Kieni farmers company limited (**who were the 2nd respondent) where he was a shareholder.

2. In the pleadings before the lower court the respondent accused the appellant of trespassing on the said land and having registered himself illegally with a full knowledge that he was not a shareholder at the said land buying company and that he took advantage of duplication of numbers after survey exercise and had himself as the registered owner of the said land.

3. When the matter came up for trial the respondent satisfied the court that indeed there was duplication of numbers and that the survey office had ordered the lands registrar to carry out changes on the register so as to have the respondent registered as the true proprietor.

4. It was further the evidence of the appellant at the trial court that he obtained the said parcel of land from the company courtesy of one Gachara Thagara. There was no such documentary evidence indicating such transfer to the appellant whether by the chairman or the resolutions of the company.

5. As a consequence, and based on the evidence presented, the trial court found that indeed the appellant had illegally had himself registered as the owner of the parcel and ordered the cancellation of the title deed and have the same revert to the respondent.

6. When this appeal came up for hearing there was no representation on the part of the respondent although there was an affidavit of service date 12th May 2021 which showed that he had been served. The parties had been directed to file their written submissions which the appellant alone complied.

7. The appellant filed this appeal on two basic grounds, namely, on the issue of jurisdiction and first registration. The appellant submitted that the trial court failed to appreciate that it did not have jurisdiction to entertain the matter as it was dealing with a title cancellation which was only a preserve of this court.

8. He relied on the case of **SAID BIN SEIF V. SHARIFF MOHAMED SHATRY (1940) 19 KLR** in which the court found that the issue of jurisdiction could be raised at any time whether at the trial level or during the appeal. On that score he urge the court to allow the appeal entirely.

9. On the issue of first registration the appellant argued that the title deed held by the appellant was the first of its kind and as per Section 143 (1) of the now repealed Registered Land Act the same could not be cancelled. The trial court by ordering its cancellation erred and ought to be set aside. That the issue of fraud requires a higher standard of proof a fact which the appellant did not discharge.

ANALYSIS AND DETERMINATION.

10. The court has perused the evidence on record which in my view does not contest much on how the appellant came into possession of the land and the title. What is clear is that he was not a shareholder at the land buying company and as can be deduced from the evidence it was the company's chairman who gave him the land.

11. Secondly there was duplication of the numbering of the parcels during the sub division exercise and that is why the District Land Registrar wrote to the District Surveyor vide the letter dated 6th November 2003 to carry out the changes in land parcel number **SALAMA /MURUKU BLOCK 4/560.**

12. The land registrar on 15th December 2003 wrote that.

> ***"As per your request, I have changed no 560 in R I M sheet no.3 to 1394 and 560 in sheet no 1 to remain***."

13. The other allegations of the appellant trespassing on the said land and carrying out some construction was not disputed.

14. Did the trial court have jurisdiction to handle the matter? The appellant does not think so. He argued that it was the preserve of the high court alone. He said that despite the fact that the issue was not raised during trial save at the level of submissions the court was obliged to have considered.

15. It is true that the issue of jurisdiction can be raised at any one time and there have been plethora of decisions by this court and the appellate courts one of them is the case of **KABITAO KARANJA VS. AG (CIVIL APEAL NO. 310 OF 1997** relied on by the appellant.

16. **Section 2** of the now repealed **Registered Land Act** defines the court as that which has jurisdiction as provided under **Section 159** of the said act.

17. **Section 159** indicates that it is the high court which is seized of jurisdiction to determine issues touching on ***title possession of land or title to the ease etc. and where the subject matter does not exceed 25 thousand pounds.***

18. Whereas therefore it is the high court which has jurisdiction to deal with issues regarding registered land it appears that the magistrate court like the matter at hand had similar jurisdiction provided it was within its monetary jurisdiction. The above section talks of "***25 thousand pounds***".

19. If that was the case it is easy to conclude that the court to the extent that nobody challenged its jurisdiction at that trial level had jurisdiction to handle the matter. The land as per the green card produced was 1.3 ha or thereabouts. Its value was not known as it never arose. It is therefore more probable than not that it had the ability to handle it.

20. This was alluded to by the court in the case of ISSAC **MAINA MURATHE Vs. JESIDAH WANJIRU MURATHE [2010] e KLR**, for instance, where hon. lady justice W. Karanja, J. (as she then was) addressed the issue of the tribunal's jurisdiction as follows;

> ***"This jurisdiction does not therefore extend to determining ownership of land and cancellation of title deeds. The tribunal had no jurisdiction to interfere with these rights. Issues of ownership of registered land and alteration or cancellation of title deeds is strictly within the domain of the High Court and the subordinate court in a few instances depending on the value of the land.***
>
> ***The orders made by the Tribunal/Provincial Committee though well intentioned were therefore*** *ultra vires* ***the law and the same are null and void for all intents and purposes." (****Underlining mine).*

21. The court similarly in ***JOTHAM AMUNAVI Vs. THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOR Kisumu Civil Appeal No. 250 of 2002 (unreported)*** *on the same line stated as follows;*

> ***"It is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3(1) of this Land Disputes Tribunal Act.***
>
> ***By Section 15 of the RLA such a dispute can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction."(*** *underlining mine).*

22. The court consequently had the jurisdiction to determine the matter and indeed it found that the appellant had illegally registered himself as the owner of the suit land. All the facts and evidence point to this.

23. On the issue of first registration this court does not believe the line of argument taken by the appellant. It is agreed that there was a problem with the survey work as evidence by the correspondences between the District surveyor and the Land registrar over parcel number 560. This was as a result of the subdivision of land parcel number 748 and which the appellant conceded that it belonged to the respondent.

24. In view of the above facts the court could not and for this matter turn a blind eye on the fraud perpetrated by the appellant and the 2nd appellant chair. It is not enough to wave the title and argue that I am a first registered owner and my title is indefeasible by virtue of the provisions of **Section 143(1) of the Registered Land Act.** The process of acquisition of the same must and ought to be interrogated. In this case the process was void and that is why the trial court arrived at its findings.

25. For the forging reasons and especially the two grounds which the appellant relied on in this appeal, the court does not find any merit over the same. The appeal is dismissed with no orders on costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 8TH DAY OF JULY 2021.

H. K. CHEMITEI.

JUDGE