REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 11 OF 2018

IBRAHIM GATOBU..... APPELLANT

VERSUS

MWICHWIRI FARMERS CO. LTD.....RESPONDENT

(Being an appeal from the judgement of Hon. H. N. Ndungu in Civil Case No. 172 of 2015 at Meru delivered on 17.8,2017)

JUDGMENT

1. On 15/6/2015 the appellant herein filed a suit in the Chief Magistrates court at Meru, Civil Suit No. 172 of 2015 against the respondent seeking orders that the respondent allocate him land or compensate him with money that could buy the same acreage. It was the appellant's case that, he is a member of the respondent with shares worth 2 acres. The appellant was under the impression that he had been allocated Land Reference N. TIMAU/TIMAU/BLOCK 3/256 but was evicted by another person who was allocated the said land. The appellant wrote to the respondent to allocate him land, but there was no fruitful response. Due to the respondent's failure to fulfill his obligations the appellant has suffered loss and damage.

2. The suit proceeded unopposed. During the hearing of the suit the appellant testified that he bought shares worth Kshs. 2,000 from the respondent and was issued with a receipt dated 8/8/1976 and thereafter got 2 acres of land at Mwichwiri reference No. 256. He was shown the land but it turned out to be another person's parcel.

3. The matter was heard to its conclusion and in her judgement dated 17/8/2017 the honorable chief magistrate found that the evidence before her was not sufficient to raise a presumption that what is claimed is true and therefore went on to dismiss the case and discharge the interlocutory judgement which was in place

4. Having been aggrieved by the said judgement the appellant filed his appeal on 3 grounds;

a. That the trial magistrate erred in law and in fact in dismissing the appellants case against the weight of evidence.

b. That the trial magistrate erred in law and in fact by setting aside a judgement which had been regularly obtained when she had no jurisdiction in the Civil Procedure Act and rules to do so.

c. That the trial magistrate erred in law and in fact by rejecting the appellants evidence which was uncontroverted.

5. This appeal was canvassed vide written submissions where the appellants argued that the trial court imposed a higher burden of proof in a civil matter when it failed to take into account the receipts as proof of payments which were uncontroverted. Additionally the trial court did not set out the issues for determination as required by Order 21 Rule 4 of the civil procedure rules and in support they cited the case of AL-MALIK BROTHERS MOTORS LIMITED VS. JACKILINE KEMUNTO ONDARI & ANOTHER, KISII HCCA NO. 120 of 2006 (unreported).

6. It was further submitted that it was wrong for the trial court to set aside an interlocutory judgement which had been regularly obtained by the appellant taking into account that the appellant proved their case on a balance of probabilities.

Determination

7. I have carefully considered the entire record as well as the submissions proffered by the appellant and the issues arising for determination are: ***whether the trial magidtrate erred in setting aside the interlocutory Judgment and whether appellant proved his case on a balance of probabilities?***

8. This being a first appeal, it is the duty of this Court to evaluate afresh the evidence recorded before the trial court in order for it to reach its own independent conclusion. In **Selle and Another v. Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123** it was held 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 demeanour of a witness is inconsistent with the evidence in the case generally……."**

Interlocutory Judgment

9. The appellant contends that it was erroneous for the magistrate to set aside the interlocutory judgment which had been regulary obtained. The court therefore has to determine, whether the action taken by the trial magistrate was proper. The question to determine is what is the place of interlocutory judgement in land matters. This issue was aptly captured by **Judge Munyao** in **Beatrice Wanjiru Kimani VS John Kibira Muiruri (2016) Eklr** where he stated as follows:-

> **"I have considered the matter. The claim herein is not a liquidated claim or a claim for general damages. If it were a liquidated claim, and no defence is filed, Order 10 Rule 4 would apply. The same provides as follows :-**
>
> **(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No.13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**
>
> **(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails,or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim".**

The judge went on to state that:-

> **" If it were a claim for general damages, Order 10 Rule 6 would apply and interlocutory judgment could be entered".** The said provision is drawn as follows**:-**
>
> **"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be. It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory judgment….."**,

10. In the case of **Solomon Mwobobia Nkuraaru v. Jacob Mwiti (2015) eKLR** the court stated that:

> **"The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only".**

11. What resonates from the aforementioned cases is that interlocutory judgement does not apply in land matters. Thus even if interlocutory judgment had been entered in civil case NO,172 of 2015 Meru CMCC, the same was of no consequence. It matters not that the magistrate had proceeded to set aside the interlocutory judgement since the plaintiff's claim in that suit was for allocation of land. In any event, the magistrate had found that the plaintiff had not proved his case to the required standard hence, the interlocutory judgement which had been entered could not have remained in place.

Prove on a balance of probabilities

12. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of **Kirugi & Ano. -Vs- Kabiya & 3 Others [1987] Klr 347,** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

13. In the case of **D.T DOBIE & COMPANY (K) LTD VS WANYONYI WAFULA CHEBUKATI [2014] Eklr** the court cited with approval the decision of **Denning J in Miller Vs Minister Of Pensions [1947]** where it was held that;

> **"The degree is well settled .It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A**

draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

14. In the case before the lower court, the trial magistrate cited the case of **Samson and Maitai and another VS African Safari club limited and another 2010 Eklr** where **Emukule J** had stated that;

"Proof refers to evidence which satisfies the court as to the truth or falsify of a fact…… the burden of proof lies on a party who asserts the truth of an issue in dispute." .

15. The magistrate had also made reference to the case of **Rosaline Mary Kalungu VS National Bank of Kenya ltd Milimani commercial and admiralty division suit No.1336 of 2001 (Judge Havelock).**

16. Guided by these authorities the magistrate found that the evidence presented by the appellant was not sufficient to raise a presumption that what he claimed was true. The magistrate had found that the receipts relied upon by the appellant were faint and uncertified and that the claim of the plaintiff dated back 1976.

17. Usually in land buying companies, the process under which one acquires an interest in land is rigorous going through various steps. A person will buy shares from a land buying company to become a share holder and he is then issued with a share certificate, balloting is done for one to be placed at a particular site and various payments are made culminating in survey and eventual issuance of title deeds- See case of **William Kibera Waiganjo VS Njeri Muchangiru Thika ELC No.414 of 2017.**

18. I have keenly looked to the documents which the appellant relied on in support of his case. His claim is anchored on having paid money for shares in the respondent's company. One receipt is dated 18th August 1976 for payment of Ksh.2,000 in respect of shares while another is dated 8th August 1980 for survey fees. There's no evidence to indicate the nature and extent of the interest in land that the appellant acquired from the respondent in so far as these two documents are concerned. It also turned out that when the appellant claimed land parcel No.256 through the case CMCC No.340 of 2007, it was determined that he did not own this land.

19. I find that the trial magistrate properly analysed the evidence and arrived at a correct finding. **I therefore find that the appeal is not meritorious. The same is dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Ms. Otieno for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE