



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC APPEAL NO. 71 OF 2018

DICKSON NGUMI & Another.....APPELLANTS

=VERSUS=

PHILIP OUMA AYOO.....1ST RESPONDENT

DANIEL KENYAMBI SIBWORI – SECRETARY GENERAL

D MORAA - CHAIRMAN

(Sued in their capacity as officials of Nairobi)

North Region Jua Kali Association.....2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. F W Andayi SPM delivered on 16th June 2014 in Milimani CMCC No. 32 of 2009)

JUDGEMENT

1. The 2nd Respondent Nairobi North Region Jua Kali Association is a registered Society under the Societies Act (The Society). The Society had land in between Komarock and Mowlem which it was giving out to its members. One of the society's members was Christopher Oketch Juma who owned plot Nos. 63 and 64. On 5th June 2002, Christopher Oketch Juma sold the two plots to the 1st Respondent. The two plots were transferred to the 1st Respondent on 8th March 2003 upon payment of transfer fees of Kshs.14000/=.The 1st Respondent was then given plot ownership certificate No. 219 in respect of plot 63.

2. The 1st Respondent never used to attend the society's meetings and never paid any amounts passed through the society's meetings. The society wrote a number of letters to the 1st Respondent who did not comply. In or around December 2007, the society repossessed plot No. 63 (suit property) from the 1st Respondent and sold it to the Appellants who took possession and started construction.

3. As the Appellants continued with construction on the suit property, the local chief came and asked them to stop any further construction on the ground that the suit property had an ownership dispute. The Appellants and the officials of the society later met with the society's officials who assured the appellants that the issue had been sorted out with the chief and that they should continue with the construction. When the Appellants resumed construction, they were served with court orders stopping them from carrying on any further construction until the suit which had been filed was heard and determined.

4. The dispute between the 1st Respondent on the one part and the Appellants and the 2nd Respondent on the other part was heard before the Lower Court. In a judgement delivered on 16th June 2014, the trial magistrate found in favour of the 1st Respondent. This is what prompted the Appellants to file this Appeal in which they raised the following grounds:-

1. That the learned Magistrate erred in law and in fact in failing to appreciate that the burden of proof lay squarely on the Plaintiff and failing to find that the 1st Respondent had not discharged the burden of proof.

2. That the learned magistrate erred in law by completely ignoring the fact that the Nairobi North Jua Kali Association , the owner of the entire parcel for land had repossessed the suit land therefore revoking the title in respect of the Respondent's interest in the suit property.

3. That the learned magistrate erred in law by failing to find that the Appellants were bonafide purchasers for value without

notice of the 1st Respondent's interest in respect of the suit property.

4. That the learned magistrate erred in law and fact in his general approach to the issues for determination and as a result arrived at a wrong conclusion.

5. That the learned magistrate misdirected himself in finding that there was no evidence to establish who was the rightful owner of the suit property yet he concluded that the plaintiff is entitled to ownership of the plot.

6. That the learned magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellants.

7. That the learned magistrate failed to appreciate the submissions of the learned counsel for the Appellants by finding in favour of the Respondent herein.

8. That the learned magistrate erred in law and fact by ordering the Appellants to pay costs whereas they were not to blame in this matter.

9. That in all circumstances of the case, the findings of the learned magistrate are insupportable in law on the basis of the evidence adduced.

5. The parties herein were directed to dispose of the Appeal through written submissions. These directions were given on 14th October 2019. The Appellants were to file their submissions within 21 days. The Respondents were to file theirs within 21 days of being served. The 1st Respondent filed their submissions on 24th February 2020. As at the time of writing this Judgement, the Appellants and the 2nd Respondents had not filed their submissions and if they filed their submissions, then the same are not in the file.

6. This is a first Appeal to this court. The duty of a first Appellate Court was well stated in the case of **Selle & Another Vs Associated Motor Boat Co Limited & Others (1968) EA 123** where it was held as follows:

“An appeal to this court from a trial by the High 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. 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 (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”

7. Before I address the merits of this appeal, I must deal with a preliminary issue which has been raised as regards the competency of the appeal herein. The counsel for the 1st Respondent contends that the record of Appeal does not contain a certified copy of decree appealed from and also does not contain proceedings. The counsel therefore argues that this Appeal is incompetent and should be struck out. In support of this submissions, he relied on the case of **Ndegwa Kamane t/a eKLR where Justice Ngaah** held as follows:-

“Coming back to this, appeal, there is no evidence that the Appellant ever applied for the decree appealed against, let alone filing it as part of the record of appeal. Without belabouring the point, this failure is fatal to the appeal, sheer failure to comply with the foregoing mandatory procedural provisions renders the appeal incompetent and of no consequence; it is hereby struck out with costs”.

8. Order 42 Rule 2 of the Civil Procedure Rules provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed”.

9. It is true that there is no certified copy of decree appealed from in the record of appeal. It is also true that the record only contains part of the proceedings but not all. A reading of Order 42 Rule (2) shows that where there is no certified copy of decree filed with the memorandum of appeal, a party can be allowed to file the same within the time given by court. The court is also obliged not to consider whether to reject the appeal summarily under Section 79B of the Civil Procedure Act until such certified copy is filed.

10. I have perused the court record herein. This Appeal was initially filed in the Civil Division of the High Court. It was only transferred to the Environment of Land Court on 10th December 2018. There is no evidence that the appeal herein was subjected to the provisions of Section 79 B of the Civil Procedure Act. Directions as to the filing of submissions were given on 14th October 2019. This being the case, it will be unfair to raise the issue of failure to include the certified copy of decree in the record.

11. There are certified copies of proceedings in the Lower Court File. It is not indicated when the proceedings were certified. Part of the proceedings which were made part of the record of appeal were certified on 2nd August 2016. The record of appeal was filed on 28th February 2018. This being the case, it was incumbent upon the court not to proceed further without ensuring that Order 42 Rule (2) of the Civil Procedure Rules was complied with. As this was not done, the Appellants cannot be blamed for this. In any case, Courts are enjoined in as much as possible to do substantive Justice without undue regard to procedural technicalities. The 1st Respondent has not indicated what

prejudice he will suffer or has suffered as a result of the Appellants failure to include all proceedings and certified copy of the decree in the record of appeal. I therefore find that the appeal is not incompetent.

12. The facts of the case before the lower court were fairly simple. There was no contention that it is the society which was selling or allocating land to its members. There was also no contention that the 1st Respondent bought two plots from Christopher Oketch Juma who was a member of the society. These two plots were transferred to the 1st Respondent upon payment of transfer fees to the society. I have gone through the proceedings in this matter as well as the Judgement by the trial magistrate. There is only one main issue for determination. This is whether the 1st Respondent's plot was properly repossessed and sold to the Appellants.

13. I have carefully gone through the Judgement of the trial Magistrate. He dealt with the issue at length and came to the conclusion that as the 1st Respondent was not a member of the society as he had not paid entry fee, he was not therefore bound by the society's constitution and that in any case, the letters which warned him of possible repossession never reached him and therefore the repossession was not proper. With respect to the trial Magistrate, this was a misdirection which made him arrive at a wrong conclusion.

14. There is evidence that when the 1st Respondent purchased the suit property from Christopher Oketch Juma, records held by the Society were changed into the 1st Respondent's name upon payment of transfer fee. This automatically meant that he had assumed the responsibility which had been placed upon Christopher Oketch Juma. He was given a plot ownership certificate. He was therefore bound as a plot owner to meet any charges for sewerage, security, construction of roads and other amenities as would be passed by the society's members during meetings.

15. There was evidence given by the society that they kept communicating to the 1st Respondent through the postal address given when he was purchasing the suit property. There was only one letter which was addressed to a wrong address. The society had in its meetings passed a resolution that any member who did not pay up membership fee or any other monies passed by the society, such member was to have his/her plot repossessed.

16. The Plaintiff never adduced any evidence to show that he had paid the monies which was required of him. There was evidence from the society that as at the time of repossession of the suit property, the 1st Respondent owed arrears of over Kshs.84,000/= . The tabulation of some of the monies owed was contained in Defence Exhibit 7.

17. The trial Magistrate seemed to think that there was no provision in the Society's Constitution on the position of persons purchasing plots from members. The magistrate argued that as there was no such provision, the 1st Respondent was not bound by the constitution. As I have said hereinabove, this was a grave misdirection. Once transfer of the plot was made in favour of the 1st Respondent, the 1st Respondent assumed all responsibilities of the previous member and there was no need to give any more membership fee.

18. The Trial Magistrate in his judgement seemed to shift the burden of proof to the Appellants and the Society. The burden was always on the 1st Respondent. The 1st Respondent did not discharge his burden and there is no way the burden would have shifted to either the Appellants or the society.

19. The 1st Respondent had given his postal address when he purchased the suit property. This is the address which was used to communicate to him. He did not leave his mobile phone number if any. There was no evidence that he changed his postal address and there was therefore no basis for the trial magistrate finding that the letters did not reach the 1st Respondent.

20. A constitution of any organization only stipulates the salient provisions. It does not indicate every detail. Like in the instant case, the society was not expected to indicate in the constitution what was to happen to purchasers from original members. These issues were addressed during the Annual General or Special General meetings as happened in this case.

21. From the analysis hereinabove, it is clear that the trial Magistrate arrived at a wrong finding. It does not make sense that if a party who purchases property from a member of an organization and does not pay membership fee but retains the purchased property he/she is not bound by the Society's or organization's Constitution. I allow the appeal with the result that the Lower Court's Judgement delivered on 16th June 2014 is hereby set aside and in place thereof an order is made dismissing the Respondent's suit in the lower court with costs to the Appellants. The costs of this Appeal shall be paid to the Appellants by the 1st Respondent.

Dated, Signed and delivered at Nairobi on this 5th day of May 2020.

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified that Judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

E.O.OBAGA

JUDGE