



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 20 OF 2018

(FORMELY CIVIL APPEAL NO 12 OF 2004)

MARTHA MACHARIA.....1ST APPELLANT

MUMBI MACHARIA.....2ND APPELLANT

VERSUS

KAMAU MACHARIA.....RESPONDENT

(An appeal from the judgment of the Senior Principal Magistrate's Court at Nakuru,

Nicholas O. Ateya Esq., dated the 1st December 2003 in CMCC No.1195 of 2001)

J U D G M E N T

1. This is an appeal against the judgment of Nicholas O Ateya Esq Senior Principal Magistrate delivered on 1st December, 2003 in Nakuru CMCC No.1195 of 2001. In the suit before the subordinate Court the respondent claimed ownership of land parcel **Nakuru Municipality Block 2/752** (the suit property) and sought the eviction of the appellants therefrom and an order for payment of mesne profits. The appellants denied they were in unlawful occupation of any house on the suit property owned by the plaintiff the Respondents in this appeal and asserted that the land belonged to their late father and that they were in occupation as beneficiaries of their late father's estate in equal right as the plaintiff.

2. After the learned trial magistrate heard the case he entered judgment in favour of the respondent holding that the suit property belonged to the respondent and that the appellants had no right to it. The trial magistrate ordered the appellants to be evicted from the suit property and directed that the appellants pay mesne profit of Kshs5,000/= per month from date of filing the suit until the date of their eviction.

3. The appellants being dissatisfied and aggrieved by the judgment appealed to this Court and vide a Memorandum of Appeal dated 12th November 2004 set forth the following grounds of appeal:

1. The learned Magistrate erred in fact and in law by holding that the Appellants could not be beneficiaries of the pieces of land in dispute and the rental houses.
2. The learned trial Magistrate erred in law and fact by failing to appreciate evidence of the appellants.
3. The learned trial magistrate erred in law and fact by accepting all the prayers in the judgment claimed by the Respondent.
4. The learned trial magistrate erred in fact and in law by failing to deliver a reasonable judgment based on evidence adduced before him.
5. The learned trial Magistrate erred in Law by deliberating a matter which even the evidence produced during the hearing showed clearly that the appellants were genuine.
6. The learned trial Magistrate erred in law and in fact by arriving at concession that the Respondent had proved his case on a balance of probability

4. As is the norm this being a first appeal this Court is obligated to reevaluate the evidence presented before the lower Court to determine

whether the lower Court's determination/decision was justified having regard to the evidence. In its evaluation of the evidence this Court is entitled to come to its own conclusion but the Court has to bear in mind that it had no opportunity to see the witnesses when they testified to assess their demeanor. This Principle was well enunciated in the case of *Selle & Another –vs- Associated Motor Boat co. Ltd & Others (1968) EA 123* where the Court of Appeal stated thus:-

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court---is by way of retrial and the Principles upon which this Court acts in such an appeal are well settled. Briefly put they're 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 ...”

5. The seven grounds of appeal set out in the appellant's memorandum of appeal basically challenge the trial Magistrate's evaluation and findings of fact on the basis of the evidence presented before him. The grounds of appeal therefore can be conveniently considered together. Before making an assessment whether or not the trial magistrate's decision was justified and/or well founded. It is necessary to review and consider the evidence that was before him.

The Evidence

6. The Respondent who was the plaintiff before the lower Court testified that he was the registered owner of the suit property. It was his evidence that he was given the property by his father in 1992. He was registered as owner on 15th December 1992 and was issued with a title deed. His father died in 1998. The Respondent stated that he had developed rental houses on the suit property. He stated his father had allowed one Wanjugu Wa Ndegwa mother of the appellants to occupy one of the houses on his (Respondent's) plot. He stated the Appellants mother was not married to his father. He said her husband known as Mbutia was residing in Nyeri. He stated the Appellants were not residing in his plot with their mother but moved into the plot in 2001 after their mother died. The respondent stated the appellants refused to vacate from the plot after the funeral of their mother. He stated he would have been renting the house they were occupying then at Kshs.6,000/= per month .

7. In cross examination the Respondent maintained he never knew the relationship between his father and the Appellants mother. He denied the appellants were his sisters. He stated the Appellants mother was not paying rent and he did not know why his father never asked her to pay rent .The Respondent stated that his father gave him plot No.752 as a gift and that he never paid any money for it. He further stated that the original plot was plot No.310 before it was subdivided to create plot Nos 751 and 752. He stated that plot No.751 belonged to his brother, Peter.

8. PW2 Daniel Wandiba was the respondent's father's brother and he testified that his brother, Macharia Ikua had informed him he was to subdivide his plot No.310 into two portions for his sons, Kamau and Peter but stated he did not know when the subdivision was done. He stated the Respondent's father only had two wives .Nyambura and Wanjiru. He denied any knowledge of the appellants.

9. PW3 Jane Wanjiru in her evidence stated she had been a tenant in the suit property from 1966. She stated the property belonged to the Respondent's father one Machari and that in1990 he subdivided the same between his sons Peter Macharia and Kamau Macharia (respondent). She stated Wanjugu (appellants mother) was not a wife of the Respondent's father.

10. The Appellants case before the lower Court was that they were daughters of Macharia Ikua and that Wanjugu their mother was Macharia Ikua's (respondent's father) third wife. Their evidence was that their mother had been residing on the suit land property as the wife of Macharia Ikua. The appellants stated they were occupying the houses on the property as of right as beneficiaries of their late father's estate. They denied they were mere tenants in the suit property.

11. The 1st appellant Martha Macharia in her evidence affirmed that Macharia Ikua died in 1998 and that Kamau Macharia was registered and issued title for plot No.752 on 15th December 1992. She also affirmed that plot No.752 was not included as one of the assets left by Macharia Ikua (deceased) in High Court Succ. Cause No.146 of 2002. She further indicated their names were not listed amongst the beneficiaries of the deceased estate.

12. The learned trial magistrate upon evaluation of the evidence tendered before him came to the conclusion that the Respondent was legally registered as the owner of land parcel **Nakuru Municipality Block 2/752** and found the Respondent's claims against the appellants established. The learned trial magistrate summed up his findings thus : -

“From the evidence and the documents produced by both the plaintiff and the defendants, I am satisfied that Plot No.Nakuru Municipality Block 2/752 was duly registered in the name of the Plaintiff on 15th December 1992 and the plaintiff obtained the title deed he produced herein as (Exhibit No.10. This is further confirmed by the certificate of search produced by the plaintiff herein as (Exhibit No.2). So when the Plaintiff's father died in 1998 this plot had already changed hands and was the property of the plaintiff. Therefore the same plot could not now form part of the estate of the deceased to be included in the succession cause in respect of the properties which were in the names of the father of the plaintiff at the time of death of the plaintiff's father. There is no claim that the plaintiff obtained the Title Deed fraudulently and there is no Counterclaim from the defendants for the cancellation of this Title for any other valid reason. I am therefore satisfied that Plot Number Nakuru Municipality Block2/752 lawfully is the property of the plaintiff Kamau Macharia whether the defendants are his half-sisters or strangers is immaterial and does not affect the plaintiff's title to this plot. I therefore find that the plaintiff has proved his claims against the defendants as required by the law.”

13. Upon evaluation of the evidence presented before the learned trial magistrate there is clear evidence that before her death, the mother of the appellant was residing in one of the rental units within plot No.752 and had so resided over a considerable length of time. She was residing on the property without paying any rent courtesy of the Respondent's deceased father who was the owner of the original plot No.310 before it was subdivided to create plot Nos.751and 752. However the relationship between the Respondent's father and the Appellants

mother was unclear. The appellants position was that their mother was a wife of Macharia Ikua father of the respondent. The respondent was emphatic that she was not a wife of his father. There was no proof that the appellants mother was indeed a wife of Macharia Ikua. No evidence was led to prove a customary Kikuyu marriage before the learned trial magistrate and the magistrate never made any finding on the issue.

14. The evidence led before the learned trial magistrate further showed that the Respondent was registered as owner of land parcel Nakuru Municipality Block 2/752 on 15th December 1992 and held title to the land as illustrated by the copy of title, search and abstract of title (green card) produced in evidence. The respondent explained that he was given the plot by his father after he subdivided the original plot No.310 into two portions. The other portion 751 was given to his brother Peter. The appellants contention that the transfer and registration of plot No.752 in the name of the respondent was fraudulent was not borne out by any evidence. The abstract of title (green cards) for land parcels 751 and 752 tendered in evidence show that the plots were created out of the subdivision of plot No.310 and that Macharia Ikua (deceased) was registered as the owner of plot No.751 on 15th December 1992 while Kamau Macharia (respondent) was registered as the owner of plot No. 752. The deceased Macharia Ikua had every right to subdivide his plot No 310 and to give to his son a portion of the same if he wished. The evidence of the transactions as per the abstract of title are consistent with the Respondent's evidence that when his father subdivided his plot he gave to him one portion being plot No.752.

15. There is no evidence of any fraudulent dealing by the respondent to be registered as owner of the suit property. The appellants appeared to place premium on the fact that consideration of Kshs.70,000/= was indicated on the abstract of title in alleging fraud. The Respondent explained that he was gifted the property by his father and that he never paid for it. It is unfortunate that the instruments of transfer that was used to process the transfer in favour of the Respondent from his father was not availed in evidence. It is noteworthy, however, that such documents are lodged with the Land Registrar and remain in his custody. The Land Registrar was not called as a witness to produce any documents in his custody. The Court however takes judicial notice that transfer by way of "gift" would not be tax exempt and that the transfer is liable to be assessed stamp duty on the market value of the property and therefore it is possible the consideration of Kshs70,000/= was the value assessed by the collector of Stamp duties on the instrument of transfer .

16. Be it, as it may be, the appellants had not pleaded fraud in their defence and no particulars of fraud were pleaded as the law requires and no fraud was proved at all on the part of the respondent .

17. The learned trial magistrate in my view properly found and held that the respondent was lawfully registered as the owner of land parcel **Nakuru Municipality Block 2/752** and that as such registered owner he had absolute and indefeasible rights of ownership. His title could only be challenged if it was proved that he had obtained the title fraudulently and it was shown that he was party to such fraud.

18. In the Court below the appellants contended they were entitled to the suit land as beneficiaries of their late father's estate. The uncontroverted evidence was that Macharia Ikua who the appellants alleged was their father, a fact however disputed by the respondent, died in 1998 while the respondent was registered as owner of the suit land in 1992. The evidence adduced showed that Macharia Ikua transferred the property to his son in 1992. The transfer was effected during the lifetime of Macharia Ikua and consequently the property could not form, part of his estate when he died in 1998 and in my view was rightly omitted as one of his assets liable for distributions to the beneficiaries of his estate in the succession case. Thus even if it was to be found Macharia Ikua (deceased) was the Appellants father, land parcel **Nakuru Municipality/Block 2/752** would not constitute part of his estate in intestacy the same having been devolved during the deceased lifetime.

19. The Respondent as the registered owner of the suit property was properly entitled to request the appellants to vacate from the suit property following the demise of their mother who had been allowed onto the property by the Respondent's late father. The licence enjoyed by the appellants mother to occupy the plot ceased with her death and in my view could not be automatically transferred to the appellants. The respondent was entitled to assert his rights over his property which as observed did not constitute part of his late father's estate through whom the appellants were staking claim. The Appellants had no valid claim over the property and therefore had no lawful reason to continue in occupation of the Respondent's property.

20. I am therefore upon evaluation of the evidence and the record satisfied that the learned trial magistrate arrived at the correct findings on the facts and the law and there would be no basis to fault his decision. The appeal is without any merit and the same is dismissed with costs to the respondent.

Judgment dated signed and delivered at Nakuru this 27th day of February 2020.

J M MUTUNGI

JUDGE