REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 'A' 24 OF 2013

AS CONSOLIDATED WITH ELCA NO. 'A' 173 OF 2013

IRENE NYAWIRA MUCHIRA.....APPELLANT

VERSUS

ANDREW K. RUIRIE.....RESPONDENT

JUDGMENT

BACKGROUND

This Appeal was consolidated with HCCA No. 173 of 2013 (Kerugoya) both being Appeals arising from the judgment delivered on 21st September 2011 in SPMCC No. 46 of 2002 (Kerugoya). In the original suit being SPMCC No. 46 of 2002, the Respondent who was the plaintiff had filed a suit against the defendant/Appellant seeking the following reliefs:

> **a. Declaration that he is the lawful proprietor of NGARIAMA/NYANGENI/470 and an order of mesne profits accruing since 16th January 2002 until date of the judgment.**
>
> **b. Eviction of the Appellant from NGARIAMA/NYANGENI/470.**

The defendant/Appellant filed a defence and counter-claim seeking the following orders*:*

> **i. Declaration that no Land Control Board consent was obtained before NGARIAMA/NYANGENI/470 was registered in the defendant's/Respondent's name.**
>
> **ii. Declaration that the registration of the plaintiff/Respondent over NGARIAMA/NYANGENI/470 was fraudulent.**
>
> **iii. Rectification of the Register by cancelling registration of the defendant/Respondent as proprietor of NGARIAMA/NYANGENI/470.**

The trial Court rendered itself and held that the plaintiff/Respondent is the lawful proprietor of NGARIAMA/NYANGENI/470 but the prayer for eviction and mesne profits were dismissed. The counter-claim was similarly dismissed. Being aggrieved with the said decision, both the plaintiff/Respondent and the defendant/Appellant filed their respective Appeals which have now been consolidated. It is now settled law that the duty of the first Appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions.

THE APPELLANT'S/PLAINTIFF'S CASE

The Appellant in his Appeal case No. 24 of 2013 has raised seven (7) grounds of Appeal as follows:

> **1. The learned trial magistrate erred in law and fact in making a finding that the Appellant did not prove fraud and conspiracy, yet by the Respondent's own admission while giving evidence on oath, the transaction involving the land did not appear in the minutes of the Land Control Board. The suit land being an agricultural land, the trial magistrate ought to have made a finding that consent of the Land Control Board is a mandatory requirement for the exchange and/or sale of the land.**

2. The learned trial magistrate erred in law and fact in correctly making a finding that the Appellant and her children live on the suit land and were not consulted during exchange/sale transaction, then make an erroneous finding that under Cap. 300, she (Appellant) ought not to have been consulted, whereas the trial magistrate had been supplied with a binding case law over the issue.

3. The learned trial magistrate erred in law and fact in failing to make a finding that considering the entire evidence on record, there is no evidence that proper and relevant consent of the Land Control Board as envisaged in law was obtained, and therefore the registration of the Respondent as owner of the suit land ought to be cancelled.

4. The learned trial magistrate erred in law and fact in making a finding that the award of the Land Disputes Tribunal in respect of distribution of the suit land was curious, yet no appeal was ever preferred against the decree emanating from the said award.

5. The learned trial magistrate erred in law and fact in not making a finding that there was conspiracy between the respondent and the former owner of the suit land, the husband to the Appellant, in that the alleged exchange took place very fast, and after the then registered owner lost the case involving the suit land.

6. The learned trial magistrate erred in law and fact in correctly making a finding that the Appellant and her children lives and utilizes the suit land for a long period of time, then make an erroneous conclusion that no trust was created.

7. The findings of the learned trial magistrate were against the evidence adduced.

From the evidence given on oath before the trial Court, the Appellant confirmed that Hesbon Muchira Karanja was her husband who left her in 1997. She also stated that the suit land parcel No. NGARIAMA/NYANGENI/470 is clan land and that it was allocated to her husband during land demarcation. She stated that she got married in 1960 and has been utilizing the suit land together with her husband and children since then. She stated that after her husband left, her son together with her filed a claim before the Land Disputes Tribunal being LDT No. 21/98 and after hearing the parties, the tribunal sub-divided the suit land as follows:

i. Irene Nyawira Muchira - 0.25 acre

ii. Ann Wanja - 0.25 acre

iii. Hesbon Muchira Karanja - 0.3 acre

She further stated that her husband preferred an appeal to the Provincial Appeals Committee who upheld the award and it was later adopted as judgment of the Court on 17th March 2000. PW2 who was the Appellant's son confirmed that he went to Gichugu and obtained minutes of December 2001 but the suit land did not appear on the list. The defendant/Appellant produced the following documents as Exhibits in her defence:

i. Title deed dated 16/01/2002.

ii. Sale agreement dated 15/01/2002.

iii. Green card indicating Hesbon Muchira Karanja was registered on 07/12/1993 by way of a gift and to the Respondent on 16/01/2002 by way of exchange.

PLAINTIFF'S/RESPONDENT'S CASE

The plaintiff/Respondent in his Memorandum of Appeal dated 26th July 2012 raised the following four (4) grounds:

1. That the learned magistrate erred in law and fact in failing to give the Appellant a chance to give their evidence.

2. That the learned magistrate erred in law and fact in failing to find that the Appellant had proved his claim for mesne profits on a balance of probabilities.

3. That the learned magistrate erred in law and fact in failing to find that costs follow the event and thereby failed to award the Appellant costs.

4. That the learned magistrate erred in law and fact in failing to find that the Appellant had proved his case and all claims on a balance of probabilities.

In his evidence before the trial Court, the plaintiff/Respondent stated that he entered into an agreement on 15/01/2002 to exchange his land parcel No. BARAGWI/GUAMA/1693 with parcel No. NGARIAMA/NYANGENI/470 belonging to Hesbon Muchira Karanja. He was to take possession of the land immediately after transfer was done. However, when he obtained the title deed on 16/01/2002, the Appellant being the wife of Hesbon Muchira Karanja refused to vacate. On cross-examination, the plaintiff confirmed that he had initially entered into a verbal agreement and that he attended the Land Control Board in December 2001 before executing the sale agreement.

ANALYSIS AND DECISION

It is now trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its own findings and conclusions. The Appellant who was the defendant before the subordinate Court had filed a statement of defence and counter-claim in which she had raised fraud as one of the issues in which she was challenging the plaintiff's/Respondent's acquisition of title to land Reference No. NGARIAMA/NYANGENI/470. There is no doubt in my mind that fraud is a serious matter which is not only civil but a criminal offence which require proof of a standard higher than the civil standard of balance of probabilities. **Section 26 of the Land Registration Act No. 3 of 2012** states as follows:

> **"The certificate of title issued by the Registrar upon registration or to a purchaser upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except:**
>
> **a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
>
> **b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.**

The defendant/Appellant in her statement of defence and counter-claim raised the following particulars of fraud ad against the plaintiff/Respondent:

> **a. Exchanging his land parcel No. BARAGWI/GUAMA/1693 with land parcel No. NGARIAMA/NYANGENI/470 belonging to Hesbon Muchira Karanja, defendant's husband to undermine execution of the order on LDT No. 21 of 1998.**
>
> **b. Not consulting the defendant who has a stake in the suit land before he (plaintiff) embarked on exchange and transfer process.**
>
> **c. Un-procedurally causing the exchange of the two parcels of land mentioned in (a) above to be effected.**
>
> **d. Conspiring with the defendant's husband to defeat the defendant's claim in LDT 21 of 1998.**

The defendant/Appellant testified in respect of land Disputes Tribunal Case No. 21 of 1998 (Kerugoya) in which the suit land parcels No. NGARIAMA/NYANGENI/470 which is the subject of this Appeal had been ordered to be sub-divided as follows:

1st wife – Irene Nyawira Muchira who was the defendant in that case and the Appellant in this Appeal was to get 1.2 acres. The 2nd wife Anne Wanja was to get 0.25 acres while Hesbon Muchira Karanja (husband) was to get 0.3 acres. The said Hesbon Muchira Karanja was dissatisfied with the award of the Tribunal and he preferred an Appeal to the Provincial Land Disputes Appeal Committee who upheld the decision of the Land Disputes Tribunal. These decisions by a competent tribunal has not been reviewed and/or set aside. The trial magistrate in his judgment acknowledged the findings of the tribunal and stated as follows:

> **"The findings of the LDT 21/98 are curious in that the upshots were not given before land is given to strangers – to the tribunal proceedings one Hesbon, one Anne Wanjala (who defendants state she does not know, but Court doubts) and herself. It is not shown whether the said Hesbon participated in the proceedings as the Court was not furnished with the same in order to make a finding that he conspired with plaintiff to defeat LDT 21/98. A decree is not enough. The Court cannot then make any declaration that no Land Control Board consent was obtained or that registration of plaintiff with the said land was fraudulent and last is that it was clan land. It thus cannot call for rectification of the register on the strength of the evidence before Court. The Court thus makes a declaration that the plaintiff is the lawful owner of the suit land as per the title deed furnished before it".**

Whereas the defendant on her defence and counter-claim stated that no relevant/necessary Land Control Board's consent was sought and obtained to enable the plaintiff be registered as the proprietor of land parcel No. NGARIAMA/NYANGENI/470, the trial magistrate erred in failing to consider that the purported transfer and registration of the plaintiff/Respondent was un-procedural and therefore unlawful, null and void. I also note that the defendant in her defence and counter-claim had raised a claim over the suit property on grounds that her husband Hesbon Muchira Karanja held the same in trust for himself and her together with their children which the trial magistrate failed to consider as having been proved on the required standard. It is also my view that the trial magistrate misdirected herself and failed to hold that the Land Disputes Tribunal No. 21 of 1998 had rendered itself on the suit property which was produced as Defence Exhibit No. 1. That ruling was not reviewed and/or overturned by a Superior Court. The learned trial magistrate misdirected herself in failing to consider a decree of the Court of competent tribunal which was adopted by a Court of competent jurisdiction.

When the plaintiff/Respondent purported to enter into an agreement with Hesbon Muchira Karanja who is the defendant's husband, the defendant who was in actual possession together with her children over the suit property were not consulted. It was reckless of the plaintiff to agree to buy property without establishing whether the same was vacant or not. If the plaintiff/Respondent exercised due diligence, he could have found that the Appellant who was in occupation had possessory rights which are protected by law. I find that the purported seller one Hesbon Muchira Karanja who is the defendant's/Appellant's husband un-procedurally caused the exchange of the two parcels of land parcel No. BARAGWI/GUAMA/1693 with land parcel No. NGIRIAMA/NYANGENI/470 to undermine execution of an order of a competent tribunal being LDT No. 21 of 1998. I also find that the transfer and registration of the defendant/Respondent as the proprietor of the suit land parcel No. NGARIAMA/NYANGENI/470 was un-procedural as consent of the Land Control Board was not sought and obtained.

In the case of ***Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) e K.L.R***, the Court held:

> **"First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holder from being deprived of their title by subsequent transaction ……"**

I agree with the holding by the learned Judge. Suffice to say that the Respondent is not without blame as he did not produce any proof that they obtained consent from the relevant Land Control Board before the suit property was transferred into his name. It is also imperative to note that the plaintiff purported to buy the suit property when he did not conduct due diligence to know whether the suit property was being sold with vacant possession. For all the reasons I have given herein above, I find this Appeal by Irene Nyawira Muchira merited and the same is allowed in the following terms:

> **1. The judgment of the learned trial magistrate be and is hereby set aside and be substituted with an order dismissing the plaintiff's suit and allowing the defendant's counter-claim.**
>
> **2. The costs of this Appeal and the lower Court be paid to the Appellant.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st day of February, 2020.