



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO 12 OF 2019

(FORMERLY H.C. CIVIL APPEAL NO 134 OF 2013)

SARAH WANJIRU.....1ST APPELLANT

KENYA KAIRI FARMERS CO. LTD.....2ND APPELLANT

VERSUS

NJOKI NJENGA.....RESPONDENT

(Appeal from the judgment and decree of Hon. J Mwaniki PM dated 16th July 2013, in Nakuru Chief Magistrate's Court Civil Case No. 2126 of 2005, Njoki Njenga -vs- Sarah Wanjiru and Kenya Kairi Farmers Co. Ltd.)

J U D G E M E N T

1. This is an appeal against the judgment and decree of Hon J. Mwaniki, PM delivered on 16th July 2013 in Nakuru CMCC No. 2126 of 2005. By the judgment the learned Magistrate declared the Respondent to be entitled to plot No.320 Kenya Kairi and the sale and/or registration of the plot in the name of the 1st Appellant by the 2nd Appellant to be null and void. The learned magistrate further ordered a perpetual injunction, restraining the Appellant's from in any manner whatsoever interfering with the Respondent's use and possession of the said plot. The Respondent was also awarded the costs of the suit before the lower Court.

2.The Appellants who were the 1st defendant and 2nd defendant respectively in the suit before the lower Court, being dissatisfied and aggrieved by the judgment and the decree of the lower Court, have appealed to this Court Vide the grounds contained in the memorandum of Appeal dated 16th August 2015 and filed in Court on the same date. The Appellants have set out the following grounds of appeal in the Memorandum of Appeal:-

- 1. That the learned Magistrate erred in law in issuing declaratory reliefs when the Court had no jurisdiction to hear and determine declaratory suits.**
- 2. That the learned Magistrate erred in taking it upon himself that he had jurisdiction to hear and decide a case where title of land was concerned and to ultimately issue orders for cancellation of a valid title deed.**
- 3. That the learned Magistrate erred in law in declaring a valid title deed null and void without considering the facts, evidence and the materials placed before him.**
- 4. That the Court has no jurisdiction to make the orders it made and to cancel title deed.**

3. The four grounds of appeal can simply be condensed into two grounds; that the Court lacked the jurisdiction to entertain the matter and/or to make the orders that it made; and that the learned Magistrate erred in making a finding that the title in favor of the 1st Appellant was null and void having regard to the facts, the evidence and materials placed before him.

4. This is a first appeal and this Court is therefore obligated to re-evaluate the evidence tendered before the trial Court and to come to its own conclusions. See the case of *Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123*. In the case the Court of Appeal expounded the principle as follows:-

“—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 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---

The Evidence by the parties

5. The case before the lower Court was briefly that the Respondent who was the plaintiff claimed that she was as a shareholder of the 2nd defendant (now 2nd appellant) allocated by the 2nd appellant plot Nos 320 and 321 which were adjacent to her other plot no 185 within the 2nd Appellant's farm at Gilgil. The Respondent further claimed the 2nd Appellant subsequently fraudulently sold and allocated to the 1st Appellant plot No.320 which the respondent had already occupied.

6. The Appellants in their defence filed in the lower Court refuted the allegations by the Respondent and stated that the 1st Appellant had been legally and lawfully allocated plot No.320 and has validly acquired title to the land.

7. The Respondent's evidence before the lower Court was briefly that she was a member of Kenya Kairi Farmers Co Ltd (2nd Appellant) and that she had been allocated two plots (shambas) Nos 320 and 321. She stated her husband was allocated plot

No.185 which was where they reside and farm. She stated she had occupied and had fenced plot No.320 and that she grazed her cattle thereon. It was her further evidence that by reason of having had plot 185 as the initial plot they were entitled to be given another plot which was plot No.320. The Respondent gave evidence that the company had resolved to sell the rocky portions of the farm to non-members and that is how the 1st Appellant was sold a plot but rather than the Company showing her another plot, they decided to show her plot 320 and to move her (the respondent) to another plot No.309 which she was opposed to as she had already taken occupation of plot No. 320 and had fenced the same with her other plots 185 and 321. The respondent affirmed that the 1st Appellant has a title for plot No.320 but it was her assertion that the title was not procured regularly by the 1st Appellant.

8. The Respondent's witness Paul Chege Mwaura (PW2) a former Vice - Chairman of the 2nd Appellant testified that the Company had agreed to allocate members parcels of land in the good areas parcels measuring 3½ acres and plots of 1½ acres (as extra plots) in the rocky area next to their land. He stated plot 320 and 321 were next to the Respondent's land (plot 185). He said when the plots were allocated they did not have numbers though the beacons were shown to the members. PW2 admitted in cross examination that not all plots were next to a rocky area and consequently members could be allocated plots which were not next to the arable plots they had been allocated. He stated he left office in 1992 and acknowledged the 1st appellant became a member of the Company before he left office. He further admitted the 1st Appellant had plot 320 although he had not shown her that plot. It was his further testimony that there was no register for the persons who he showed plots. He said the 1st appellant was supposed to get a plot in the rocky areas.

9. The 1st Appellant gave evidence as DW1. She stated that she bought land from the 2nd appellant in 1994 and was issued with a receipt by the Company (**PEX1**). She stated she had occupied plot No.320 since 1994 and that she had constructed a house on the land. She further stated her plot is adjacent to the Respondent's plot 185 and that she is the registered owner and was issued title on 14th February 2005 for the same.

10. DW2, John Muchiri Kibet testified that he was the Vice Chairman of the Company from 1993. He stated that the respondent was a member of the Company by virtue of her husband's shareholding. He stated that the Company allowed non shareholders to buy land in the Company to inject funds in the Company when the Company fell into financial distress. DW2 stated the 1st Appellant purchased a plot No.320 as indicated in the membership register which he produced as **"DEX3"**. He stated the 1st Appellant occupied plot No.320 in 1993/1994 and has built on the plot. He further stated the Respondent's plot was plot No.309. He explained that the Respondent wanted plot No.320 because it borders her plot No.195 (should be 185). He stated the 1st Appellant did not get title to plot No.320 fraudulently. In cross examination DW2 stated that the original members got plots of 3 ½ acres in the good areas of the farm. He further stated the plots sold to non-members were on the rocky area and that the register he produced as **"DEX3"** contained the names of all those who purchased the plots in the rocky areas and ran from plot 283. He affirmed as per the register the Respondent's plot was 309 while the 1st Appellant's was 320.

Submissions, issues and determinations

11. On the basis of the foregoing evidence the learned trial magistrate reached the decision that he did which is the subject of the challenge in the instant appeal. The parties argued the appeal by way of written submissions; the 1st appellant filed initial submissions on 1st March 2019 and supplementary submission on 23rd October 2019. The 2nd Appellant did not file any submissions and associated themselves with the submissions filed by the 1st Appellant. The Respondent filed her submissions on 28th March 2019 and supplementary submissions on 31st October 2019. I have duly considered the submission and the authorities referred to by the parties in their respective submissions

12. As stated earlier in this judgment the grounds of appeal are easily distillable into two:-

i. Whether the Magistrate's Court had jurisdiction to handle the matter; and,

ii. Whether the learned Magistrate appropriately evaluated the evidence to reach the decision he did.

(i) Jurisdiction of the Court

13. The appellants have submitted that the magistrate's Court did not have the jurisdiction to deal with the matter. The appellants have submitted that it was only the High Court that had power to cancel title to land and relies on Section 143 (I) and Section 159 of the Registered Land Act, Cap 300 Laws of Kenya (now) repealed. The instant suit was instituted in the lower Court in 2005. The disputed property was registered in the name of the 1st Appellant on 14th July 2005 under the Provisions of the Registered Land Act, Cap 300 Laws of Kenya and therefore the applicable law was the law as provided under the Registered Land Act Cap 300 Laws of Kenya

Section 159 of the Registered Land Act provided for the jurisdiction of the Courts as follows:-

Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, Land Disputes Tribunals Act in accordance with the Act.

14. Under Section 3 of the Registered Land Act, "the court" is defined thus **"except as otherwise expressly provided, means the Court having jurisdiction in the matter in question by virtue of section 159"**.

15. My understanding of Section 159 of the RLA reproduced above is that the Resident Magistrate's Court had jurisdiction to try and determine matters involving title to land or any interest in land where the value of the land did not exceed Kshs500,000/=. The Land Disputes Tribunal Act, 1990 section 3 had no application as the dispute related to registered land and the validity of the title held by the 1st Appellant was in issue. Even though the judgment of the lower Court was after the repeal of the Registered Land Act, Cap 300 Laws of Kenya, the applicable law still remained, the Registered Land Act.

16. The transition clauses in the Land Registration Act, 2012 which replaced the Registered Land Act, and the Land Act, 2012 are clear that the law applicable in regard to interests and/or rights that accrued before their enactment, was the law in force immediately before the new law came into force.

17. Section 106 (2) and (3) of the Land Registration Act 2012 provides:-

(2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts.

(3) For the avoidance of doubt—

(a) any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act; and

(b) the memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which the memorandum was first registered.

. Section 162 (1) of the Land Act, 2012 provides:-

162 (1) Unless the contrary is specifically provided in this Act, any right, interest, title power or obligation acquired, established, coming into force, or exercisable before the commencement of this Act shall continue to be governed by law applicable to it immediately prior to the law applicable to it immediately prior to the commencement of this Act.

18. The record shows the appellants had taken a preliminary objection on the grounds that the lower Court lacked jurisdiction by virtue of Section 3 of the Land Disputes Tribunals Act No.18 of 1990 arguing that it was the Tribunal who had jurisdiction to hear the matter and, secondly that the lower Court, lacked the pecuniary jurisdiction owing to the value of the land. The preliminary objection was properly disallowed by the trial Court in my view. I have earlier in this judgment stated that under section 159 of the RLA the magistrates Court had jurisdiction to try matters relating to title to land and/or any interests in land provided it fell within its pecuniary jurisdiction. Indeed it was the Tribunals established under the Land Disputes Tribunals Act, 1990 who had no jurisdiction to deal with disputes relating to title to land.

19. As concerns the pecuniary jurisdiction of the trial Court it is evident that the disputed property was offered for sale to the 1st appellant for a paltry Kshs10,000/=. It was at a rocky site and as the trial magistrate observed no valuation report was availed. The land was less than 1½ acres (0.54 Ha) and evidently its value could not have exceeded Kshs.500,000/=. The pecuniary limit of the Resident Magistrate's Court.

20. The 1st Appellant in her submissions had further submitted that following the enactment of the Environment and Land Court Act, 2011 and the establishment of the Environment and Land Court (ELC) the exclusive jurisdiction to deal with land matters was vested in the ELC. The 1st Appellant in the premises contended the lower Court continued handling the matter without jurisdiction and consequently the

judgment rendered was a nullity. With respect this submissions is without merit. The Environment and Land Court Act, 2011 under Section 30 Provided transitional provisions as follows:

30 (1) All proceedings relating to the Environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same Court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

21. The Hon Chief Justice in fact issued practice directions dated 9th November 2012, which were published vide Gazette Notice No.16268. The Provisions under Section 30 of the Act and the Practice Directions quite evidently enabled the subordinate Courts and the High Court to continue hearing any land matter where hearing had commenced. In the instant matter the record shows the lower Court commenced hearing the case on 17th December 2007 when the Respondent and her witness' evidence was taken.

22. It is my determination in the circumstances that the lower Court properly exercised jurisdiction to determine the matter. That disposes the issue as relates to the Court's jurisdiction to entertain the matter and I now turn to consider whether the learned trial Magistrate properly appraised the evidence.

(ii) Evaluation and analysis of the evidence.

23. The 1st Appellant has contended through her submissions that the trial Magistrate misdirected himself in his evaluation and assessment of the evidence resulting to him reaching an erroneous decision both on the facts and the law. Earlier in this judgment I set out in outline the evidence adduced by the parties before the Lower Court and it now behoves upon me to re-evaluate the evidence to determine whether on the basis of the evidence the lower Court reached the correct findings of fact and the law and whether he was justified to make the decision that he did.

24. The Respondent's assertion was that she has paid for two plots and that she was allocated plot Nos 320 and 321 which were adjacent to her plot No.185. It is not disputed that the 1st appellant did also buy a plot from the 2nd appellant. Both the respondent and the 1st appellant produced receipts as exhibits to show that they purchased land from the 2nd Appellant. Of note however, is that the receipts issued to the respondent and the 1st appellant did not identify the plot in respect of which the payment was made and/or receipt issued. The witness called by the Respondent, a former vice Chairman indicated that the plots purchased in the rocky area, had no numbers though the purchasers were being shown the plots. He was clear that those who had the initial plots of 3 ½ acres (the shareholders) were entitled to have the rocky plot near or adjacent to their plot. In his evidence PW2 stated **"General meeting resolved that one should have the extra 1 ½ acre next to their plot—Those who were near the rocky parts had to get one next to his plot"**

25. The respondent's position was that the 1st appellant was irregularly allocated plot 320 and that the title for the plot issued in her name was not fraudulently obtained.

26. For her part the 1st appellant asserted that she lawfully and procedurally purchased plot 320 and that the title for the plot issued in her name was not fraudulently obtained.

27. The 1st appellant asserted that she lawfully and procedurally purchased plot 320 and the title deed was issued to her regularly. She claimed she was a bonafide purchaser for value and her title was indefeasible in terms of Sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya.

28. The witness DW2 called by the 1st Appellant was the Vice Chairman of the company and he confirmed both the Respondent and the 1st Appellant had purchased plots on the rocky part and stated that the respondent's plot were 309 and 321 while the 1st appellant's plot was 320. He affirmed that the 1st Appellant had built on plot 320. DW2 produced a register **"DEX3"** which contained the names of all those members who had purchased plots in the rocky area. The register carried the names of members and their designated plots running from plot No.283. As per the register plot 309 was allocated to NJOKI NJENGA MINGI the Respondent and plot 321 was allocated to PAUL NJENGA MINGI who was the Respondent's husband. The register showed plot 320 was allocated to SERAH WANJIRU MIGWI the 1st Appellant. The witness further produced the survey map (**"DEX4"**) which showed the layout of the plots. The map shows plots 320 and 321 are adjacent to each other and are both opposite plot 185 owned by the Respondent's husband. Plot 309 is further on and opposite plot 321 and only an access road separates the two. DW2 stated in his evidence that Respondent wanted plot 320 because it is adjacent to plot 321 and near plot 185 both of which belong to them (the respondent).

29. The evidence by DW2 corroborated the undisputed evidence that the original shareholders were to be allocated a plot in the rocky area that was next to their original bigger parcel. The survey map produced as **"DEX4"** shows plot 185 owned by the Respondent's husband was near plot 321 which was allocated to the Respondent's husband. The register **"DEX3"** confirms that plot 321 was allocated to the Respondent's husband. That was in conformity with the company policy that the original shareholders be allocated the 1 ½ acres plots in the rocky area next to their plots. The Respondent and the 1st Appellant were not original shareholders and merely bought plots when they were offered by the Company to non-shareholders and they could therefore be allocated plots whenever they were available. The register maintained by the Company which was not disputed showed how the plots were allocated. As per the register the 1st Appellant was allocated plot 320. It is in respect of this plot that a title was processed and issued to her. There is no evidence to show the respondent was allocated plot 320. The register (**DEX3"**) indicates she was allocated plot 309. No evidence was led to show that the register was not authentic. Review of the register does not show that the register was interfered with in any manner.

30. A scrutiny of the receipts produced in evidence by the Respondent shows a bunch of the receipts were issued in 1992, 1993 and 1994 while another bunch were issued in 2004 and 2005. Infact receipt No.280 for Kshs3700/= is dated 1st September 2005 and is shown to be payment in respect of "Rocky area fee". The 1st appellant made payment for her plot on 13th September 1994 as per the receipt for Kshs.8,000/= issued to her. Title was processed and issued to her in regard to Title Number **Gilgil /Karunga Block 8/320**(Kenya Kairi) on 14th July 2005. On the evidence a deduction can be made that the plot the Respondent paid for in 1992, 1993 and 1994 was plot 321 which evidently is near plot 185 which belonged to her husband. The Respondent completed paying for the second plot after the 1st Appellant had already purchased her plot and had been issued title for the plot .The 1st Appellant paid for her plot in 1994 and was issued title for the same in July 2005.

31. On the evidence adduced before the lower Court, I am satisfied that the learned trial magistrate materially misdirected himself in the evaluation of the evidence and the determination he arrived to was unjustifiable having regard to the evidence. In the case of **Kiruga – vs- Kiruga & Another (1988) KLR 348** the Court held that :-

“An appeal Court cannot properly substitute its own factual findings for that of a trial Magistrate unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong”

32. In the present matter as I have observed, the learned Magistrates finding was not backed by any evidence and in my view the learned trial magistrate was plainly wrong in his determination.

33. The 1st appellant upon being registered and issued with title to the land acquired ownership rights. The title in terms of section 27 and 28 of the Registered Land Act Cap 300 Laws of Kenya (repealed) conferred on the 1st Appellant absolute rights of ownership which were indefeasible unless it was demonstrated that the registration was fraudulently obtained within the meaning of section 143 of the repealed Act.

Conclusion and decision

34. No fraud was alleged against the 1st Appellant and no fraud on her part was proved. There was no evidence of fraud on the part of the 1st Appellant to warrant the title issued to her to be annulled as ordered by the trial magistrate. The decision by the trial Magistrate to award plot No. 320 to the respondent and to cancel the registration of the 1st appellant as the owner of the plot was not supported by any evidence and cannot stand. I accordingly allow the appeal, set aside the judgment of the learned trial magistrate and substitute thereof an order dismissing the plaintiff /Respondent's suit with costs to the defendants/appellants. The costs of the appeal are awarded to the 1st Appellants.

35.Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERD AT NAKURU THIS 6TH DAY OF FEBRURY 2020.

J M MUTUNGI

JUDGE