



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO. 2 OF 2017

ISAAC MOKAYA MUNDE.....APPELLANT

VERSUS

KENNEDY OMOMANYI ONGERI.....1ST RESPONDENT

NYAMIRA COUNTY GOVERNMENT....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant herein Isaac Mokaya Munde filed this appeal against the judgment of Honourable E. K Nyutu, Principal Magistrate Nyamira dated 4th August 2017 in Nyamira PMCC No. 223 of 2009. In the said suit the Respondent filed suit against the Appellant claiming that he was the proprietor of all that parcel of land known as Plot No. 43C measuring 25 feet by 100 feet situated at Kebirigo market. The Respondent's case was that on 7th April 2008 the Appellant trespassed on the suit property and started operating a hotel business in the shop constructed thereon for his own benefit thereby denying the Appellant the use thereof and occasioning him loss and damage. The Respondent sought an eviction order against the Appellant, a permanent injunction to restrain the Appellant from interfering with plot no. 43C Kebirigo market as well as mesne profits.

2. The Appellant filed a Further Amended Defence and Counterclaim in which he denied the Respondent's claim and denied that there is plot known as Plot No. 43C at Kebirigo Market owned by the County Council of Nyamira. He further stated that if the Respondent had any documents relating to the suit property, then the same were forgeries. The Appellant contends that his family has lived on the suit property since time immemorial and it is therefore his ancestral land though the said parcel of land is registered as trustland. He maintains that the plaintiff is not entitled to a permanent injunction to restrain the him from interfering with the suit property.

3. In his Counterclaim the Appellant states that Kennedy Omomanyi Onger (Plaintiff in the main suit) together with Munde Omayo Maina (deceased) fraudulently presented himself as the owner of the suit property and had the same sub-divided by the Town Council of Nyamira before the said Munde Omayo's share was transferred to the Respondent. He seeks a declaration that the actions of the Defendants in the counterclaim are null and void and an order of permanent injunction to restrain the Defendants in the counterclaim from interfering with his peaceful occupation of the suit property.

4. The Respondent filed a Further Reply to the Amended Defence and Counterclaim in which he denies the allegations of fraud levelled against him and prays that the counterclaim be dismissed with costs.

5. The 4th Defendant to the counterclaim filed a Reply to the Defence and Counterclaim stating that it had been wrongly enjoined in the suit as no reasonable cause of action had been disclosed against it. It denied the allegations of fraud attributed to it.

6. The suit was set down for hearing on several dates between 6th April 2011 and 25th November 2016 when the Defendants closed their case.

From the evidence on record it is common ground that land parcel number WEST MUGIRANGO/BONYAMATUTA/841 was registered in the name of Gusii County council. It was subsequently transferred to Nyamira County Council. The said parcel of land was held in trust by the County council. The Respondent (Plaintiff in the lower court) testified that he bought a portion of the suit property from the late Munde Omayo who was the first allottee from the County Council. The said Munde Amayo applied for sub-division of the plot from the Town Council of Nyamira after which he sold a portion known as Plot No. 43C to the Respondent. The Respondent was unable to take possession of the plot as the Appellant was in occupation thereof. The Plaintiff produced documents including a sale agreement and minutes of the Town Council of Nyamira to show the procedure that was followed to create Plot No. 43C.

7. On his part the Appellant testified that he was the son of Munde Amaiyo Maina and he was in occupation of Land Parcel No. WEST MUGIRANGO/BONYAMATUTA/841 where he was running a hotel. He testified that the suit property was their ancestral land. He denied that the plot had been sub-divided and maintained that it was still intact. According to him plot No. 43C does not exist. He called the Land Registrar and County Surveyor who testified that according to the records in their custody Land Parcel No. WEST MUGIRANGO/BONYAMATUTA/841 had never been sub-divided. They also stated that Kebirigo market was not on Land Parcel No. WEST MUGIRANGO/BONYAMATUTA/841.

8. The court delivered its judgment on 4th August 2017 in favour of the Plaintiff and issued an order of vacant possession of the suit property within 60 days against the Defendant as well as an order of permanent injunction to restrain the Defendant from invading plot no. 43C Kebirigo Market. The Defendant's counterclaim was dismissed with costs.

9. Being aggrieved by the said judgment the Appellant filed this appeal on the following grounds:

- i. That the learned trial court erred in law and in fact in arriving at the finding that it had the necessary and lawful jurisdiction to hear and determine the suit when she did not have.
- ii. The learned trial Magistrate erred in law and in fact when she failed to make a finding that there was no plot known as plot No. 43C KEBIRIGO MARKET.
- iii. The learned trial Magistrate erred in law and in fact when she made a finding that L.R NO. WEST MUGIRANGO/BONYAMATUTA/841 belonged to the defunct Town Council of Nyamira, when in actual sense it belongs to the defunct Nyamira County Council.
- iv. The learned trial Magistrate failed to make a legal finding that the defunct Town Council of Nyamira had no powers to deal with L.R NO. WEST MUGIRANGO/BONYAMATUTA/841
- v. The learned trial Magistrate was very wrong in ignoring the evidence of the County Land Registrar and Surveyor in her judgment
- vi. The learned trial Magistrate was wrong in holding that L.R NO. WEST MUGIRANGO/BONYAMATUTA/841 was sub-divided a fact she knew was false.
- vii. The learned trial Magistrate erred in law in holding that L.R NO. WEST MUGIRANGO/BONYAMATUTA/841 formed part of Kebirigo market when in fact Kebirigo market land is L.R NO. WEST MUGIRANGO/BONYAMATUTA/839
- viii. The learned trial Magistrate was wrong in holding that the 1st Respondent was the owner of plot no. 43C which plot did not exist on the ground
- ix. The learned trial Magistrate erred in law and in principle failed to appreciate the evidence on record and thus reached a wrong decision
- x. The judgment of the learned trial Magistrate was against the weight of evidence

10. The appeal was canvassed by way of written submissions and both parties filed their submissions. This being a first appeal, the court is enjoined to reconsider the evidence on record, evaluate it and draw its own conclusions. The court must however caution itself that it had neither seen nor heard the witnesses and must therefore give allowance for it. The findings of the lower court must nevertheless be given due deference unless they fall foul of proper evaluation in line with the evidence on record or the trial court is found to have acted on wrong principles in reaching the findings he did. This was so held in the case of **Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1KAR.**

ISSUES FOR DETERMINATION

11. I have considered the grounds of appeal, the submissions of learned counsel as well as the judgment of the trial court and applicable law and in my view the critical issues for determination are:

1. Whether the court had jurisdiction to hear the suit
2. Whether plot no. 43C was lawfully created out of land parcel No. WEST MUGIRANGO/BONYAMATUTA/841 and if so, if it belongs to the Respondent
3. Whether the Appellant is a trespasser on plot No 43C.

ANALYSIS AND DETERMINATION

12. With regard to the first ground of appeal counsel for the Appellant submitted that the court lacked jurisdiction to hear the suit. His submission is based on the provisions of section 159 of the Registered Land Act Cap 300 (repealed) which provides that Magistrates courts cannot hear cases whose value exceeds twenty five thousand pounds (Kshs.500,000). The issue of the court's pecuniary jurisdiction to deal with the instant suit was the subject of Kisii Civil Appeal No. 57 of 2012 where Justice Okong'o held that the court had jurisdiction. Therefore, this court cannot revisit the issue as that would amount to sitting on appeal on a decision of a judge of concurrent jurisdiction.

13. Most of the evidence centered on the ownership of and how plot no. 43C came into existence. The plaintiff testified that he had purchased a portion of land parcel No. WEST MUGIRANGO/BONYAMATUTA/841 measuring 50 feet by 100 feet from Munde Amayo. He produced several documents including a certificate of official search showing that the suit property is registered in the name of Nyamira County Council, a landsale agreement between him and one Munde Amayo Maina dated 18th February 2008, Minutes of a meeting of the County Council of Nyamira held on 28.5.2008 and 18.5.2009 and a plot card for plot no. 43C issued by the Town Council of Nyamira

14. The Plaintiff called 3 witnesses from the County Government of Nyamira who previously worked with the Town council of Nyamira. They testified that Munde Amayo had applied for the sub-division of the suit property into 6 portions, one of which was plot no. 43C.

15. On the other hand, the Defendant testified that he was the son of Munde Omayo. He stated that land parcel No.WEST MUGIRANGO/BONYAMATUTA/841 was family land which had been donated for construction of a native beer club, but the club ceased to exist in 1978 and the land reverted to the family though it was registered in the name of Nyamira County Council. He stated that he had been in occupation of the land for more than 12 years and the land was not sub-divided. He denied that plot no. 43C existed. He was not aware that his father had sold it to the Respondent although his father had filed a case against him in which he sought to evict him from the land.

16. The Land Registrar and County Surveyor who testified as a defence witnesses stated that L.R NO. WEST MUGIRANGO/BONYAMATUTA/841 had not yet been sub-divided. They said they were relying on the maps and records in their custody which showed that the land was still intact. According to the evidence of the Land Registrar, the Nyamira Town Council did not have the capacity to sub-divide land belonging to the County council.

17. In arriving at his decision that the Plaintiff had proved his case against the Defendant, the trial Magistrate relied on the documents produced by the Plaintiff. She found that the procedure followed by the Town Council of Nyamira in approving the sub-division was authorized by the law under the Local Government Act (repealed).

18. With all due respect the learned trial Magistrate fell into error when she wholly relied on the evidence of the Plaintiff and disregarded the evidence of the Defendant. Having evaluated the evidence on record, I am of the view that the learned trial Magistrate did not give due consideration to the expert evidence of the Land Registrar and County Surveyor. The Land Registrar who testified as DW1 stated that Nyamira Town council did not have the mandate to sub-divide the suit property as it fell under the jurisdiction of the Gusii County Council. Furthermore, the Land Registrar and County Surveyor categorically stated that land parcel no. L.R NO. WEST MUGIRANGO/BONYAMATUTA/841 was still intact and there were no records to show that it has been allocated to an individual or sub-divided.

19. The Government Land Act (repealed) provides for a very elaborate procedure for allocation and sub-division of town plots for commercial purposes which involves approvals from different government departments and culminates in the issuance of a letter of allotment and certificate of lease. In the instant case the Plaintiff has held a plot card since 2008 with no record at the Lands office to show that he is the owner of the said plot. In my humble view, a plot card is not a document of title and one cannot rely on it to assert their right to property. Section 99 of the Government Land Act provides that all transactions affecting registered land must be registered. The evidence on record shows that the suit property was never allocated to Munde Amayo as he had no letter of allotment or certificate of lease, and therefore he could not have passed any title to the Respondent.

20. Having held that the Respondent had no title to the suit property, his claim for trespass against the Appellant could not be sustained. In the same vein, his prayer for injunction was not merited. In view of the foregoing I am inclined to agree with counsel for the Appellant that the decision arrived at was against the weight of evidence.

21. Having said that, I am of the view that the Appellant did not prove the fraud set out in the counterclaim to the required standard. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Case. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

20. In the instant case, even though the Respondent pleaded fraud and outlined the particulars of fraud in the counterclaim, his evidence was insufficient to prove fraud.

21. I therefore allow the appeal and substitute the judgment of the lower court by dismissing both the suit and counterclaim. Each party shall bear their own costs.

Dated, signed and delivered at Kisii this 6th day of March 2020.

J.M ONYANGO

JUDGE