



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 1 OF 2019

BILLINGTON MBOLO.....APPELLANT

VERSUS

WILSON SAIDA OPIYO

CALTON OUMA

LUKE WESONGA..... RESPONDENTS

JUDGEMENT

The appellant being aggrieved by the aforesaid ruling and orders of Hon. Ongori, PM Vihiga ELC No. 72 of 2018 delivered on 4th December, 2018 puts forth the following grounds of appeal.

1. That the learned trial magistrate grossly erred in law and fact by failing to appreciate and find that the plaintiff's cause of action against the defendants offended the mandatory provisions of the Section 6 and 8 (1) of the Land control Act, and Section 45 (1) of the Laws of Succession Act.
2. That the learned trial magistrate erred in law and fact in his construction of the evidence adduced and his reliance of extraneous matters which had him to arrive at an erroneous finding and decision.
3. That the learned trial magistrate erred in law in misapplying the general principles in Mukhisa Biscuit Manufacturing Co. Ltd vs. West end distributors LTD 1969 E.A. 696 in determining the Notice of Preliminary Objection before him.
4. That the final orders have occasioned injustice to the appellant.

It is proposed the said ruling and orders be set aside and the plaintiff's suit be dismissed with costs. The appellant being aggrieved by the ruling and order rendered on the 4th day of December, 2018 by Hon. S. Ongeri, Principal Magistrate in the suit aforementioned, where the appellant's preliminary objection was dismissed with costs to the respondent, filed the appeal herein. The bone of contention being that the learned trial magistrate grossly erred in law and fact by failing to appreciate and find that the plaintiff's cause of action against the defendant offends the mandatory provisions of Section 6 and 8 (1) of the Land Control Act, and section 45 (1) of the law of Succession Act; that the learned trial magistrate erred in law and fact in his construction of the evidence adduced and his reliance of extraneous matter which had hid to arrive at an erroneous finding and decision; that the learned trial magistrate erred in law in misapplying the general principles in Mukhisa Biscuits Manufacturing Co. Ltd. Vs. West End distributors Ltd 1969 E.A. 696 in determining the notice of preliminary objection before him; that the final orders have occasioned injustice to the appellant. That the plaintiff has no locus standi to institute the suit herein pursuant to the suit offending the mandatory provisions of section 6 and 8 (1) of the Land Control Act where;

Section 6 of the Land control Act provides that the sale, transfer, lease, mortgage, exchange, partition or other disposal dealing with any agricultural land which is situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given consent in respect of that transaction in accordance with the act and no land control board consent was obtained being a controlled area.

And;

Section 8 of the same act further reiterates that an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within 6 months of the making of the agreement for the controlled transaction by any party thereto, in which case the plaintiff lacks locus to institute the proceedings filed herein, and the balance of convenience tilts in favour of the appellant and no Land Control Board consent was obtained with the prescribed period of 6 months.

Furthermore, by all accounts the land belonged to a deceased person at the time of sale and which pursuant to section 45 (1) of the Law of Succession act is fatally defective and an abuse of due process as the provision goes on to say that except so far as expressly authorized by this act or by an written law, or by grant of representation, under this act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person. That, title of bonafide purchaser for value cannot be put on the line owing to the respondent's insistence as there is no foul play to complain about.

The respondent's and appellant's cooperation as put by the appellant, was pegged on the terms and conditions of the sale agreement to purchase Kisa/Doho/636, whose acreage was to be an acre which by the agreement is not sufficiently indicated on the same agreement, there was no deposit made at the time of making the agreement, plus there is still the condition the appellant complete administering Kisumu High Court succession Cause No. 215 of 1996 in respect of his father's estate. Then the respondent later paid Ksh. 143,000/= and that was it. The appellant was ready to give the respondent Kisa/Doho/1113 but for some reason he was discontented.

That owing to a disagreement as stated under paragraph 13 and 14 of the appellant's replying affidavit dated 17th day of April, 2013 on account he was agitated and demanded more land and not Kisa/Doho/1113, the parties to contract had bad blood which further escalated owing to the respondent encroaching on 3 parcels of land belonging to other persons including the subject in dispute and who as can be deduced the owners are not the appellant. And even after being explained to, the respondent insists on claiming that he owned the said parcels as a matter of fact.

Further according to the appellant in his replying affidavit dated the 17th day of April, 2013, the appellant and his family sought to rescind the agreement made between the parties privy to contract by refunding the purchase price and all incidentals pursuant to filing succession, which is as can be deduced led to bad blood between the parties, and which is actually the remedy available to the respondent had the preliminary objection dispensed with the matter on the points of law raised in respect of the provisions raised herein. The respondent does not occupy or use the disputed parcel, the suit is incurably defective and a mischievous attempt to dispose of the suit.

Hences, the appellant prays that the appeal be allowed as prayed and the ruling of the lower court on dismissal of the preliminary objection and all consequential orders vacated and substituted with an order giving ruling to the appellant as prayed in the preliminary objection with an order for costs both in this court and court below it. And further on the principle grounds that this honourable court has the requisite powers to reevaluate and analyze the evidence afresh and come to its logical and independent findings. They relied the following authority of Isaac Ngatia Kihagi vs. Paul Kaiga Githui (2017) e KLR.

The respondents submitted that the preliminary objection is founded on contested facts as it is alleged the appellant refused to attend to the Land Control Board. The issue is late application for the consent. The respondents submit that in the circumstances of the instant case the doctrine of constructive trust and proprietary estoppel apply as the appellant received the entire purchase price which in fact is not disputed. They relied in the case of Willy Kimutai vs Michael Kibet (2018) eKLR.

This court has carefully considered the appeal and the submissions therein. *The ingredients of a preliminary objection are well established in the celebrated authority of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, were the court stated that;

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the case of David Karobia Kiiru v Charles Nderitu Gitoi & another (2018) eKLR the court held that;

“For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

Following the authority of *Mukhisa Biscuits (supra)* it would appear that the preliminary objections though raising pertinent issues of law do not in the circumstances pass the test of a sustainable preliminary objections. I find that the preliminary objection is founded on contested facts as it is alleged the appellant refused to attend to the Land Control Board. The issue is late application for the consent. I find that the learned Magistrate did not err in law or fact before rendering his decision. In *Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870*, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the ruling was judiciously arrived at and will not interfere with the same. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE