



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA CASE NO. 2 OF 2019

FRANCIS KARIUKI MAINA.....1ST APPELLANT

LUKE MACHARIA MAINA.....2ND APPELLANT

VERSUS

PETER KURIA MUCHOKI.....RESPONDENT

(Being an Appeal from the judgment and order of Honourable P.M.

KIAMA – R.M. – Wanguru Dated 27th September 2016 in PMCC No. 5 of 2015)

JUDGMENT

The Appellants, Francis Kariuki Maina and Luke Macharia Maina were aggrieved with the judgment by Hon. P.M. Kiama – Resident Magistrate issued on 27th September 2016 and filed a Memorandum of Appeal on the following five (5) grounds:

- (1) The trial magistrate erred in law and fact in dismissing the defendant’s case against the plaintiffs who were registered tenants of the rice holding No. 284 (B) and 284 (C) Tebere Section Unit 9.***
- (2) The trial magistrate erred in law and fact by failing to consider that the respondent did not call witness as had stated.***
- (3) The learned trial magistrate erred in law and fact by failing to consider the appellants and respondent had consented in a Memorandum of Understanding.***
- (4) The learned magistrate misdirected himself in entering judgment over rice holding which the respondent had not cleared the payment of the balance of purchase price.***
- (5) The trial magistrate erred in law and fact by failing to consider that the respondent lacked locus standi to present and prosecute a suit of a rice holding which he had transferred to himself without the consent of the appellants.***

This Appeal arises from a suit filed by Peter Muchoki, the Respondent herein before the Principal Magistrate’s Court being CMCC No. 5 of 2015 (Wanguru). In a plaint dated 19th January 2015, the Respondent had sought the following orders:

- (a) That the defendants surrender and give vacant possession of rice holding No. 284 (B) and 284 (C) Unit 19 Tebere Section of the National Irrigation Board – Mwea Irrigation Settlement Scheme to the plaintiff and in default, forcible eviction do issue.***
- (b) An order of permanent injunction do issue restraining the defendants by themselves, servants, agents or anyone claiming under them from entering, cultivating, blocking access to, leasing, charging, selling or in an unlawful way interfering with the plaintiff’s quiet possession and enjoyment of his rice holding No. 284 (B) and (C) Unit 19 Tebere Section of the National Irrigation Board – Mwea Irrigation Settlement Scheme.***
- (c) Refund of Ksh. 68,700 by the 2nd defendant with interest at Court rates with effect from 6th November 2014 until payment in full.***
- (d) Costs of the suit and interest above at Court rates.***

The gist of the plaintiff’s/Respondent’s claim are the two rice holdings being No. 284 (B) and 284 (C) where the two were legal licencees

before selling them to him at a price of Ksh. 500,000/= each. The Respondent/plaintiff further averred that he entered into a sale agreement of the two rice holdings with each of the Appellants/defendants whereby he paid a deposit of Ksh. 350,000/= each and the balance of Ksh. 150,000/= was to be paid upon the defendants vacating the suit premises. The Respondent further averred in his plaint that upon presenting transfer documents in respect of rice holding No. 284 (B) Unit 19 Tebere Section to the Senior Manager, it turned out that the land had been offered as security by the 2nd defendant/Appellant at Bingwa Sacco Ltd – Wanguru Branch and the sum of Ksh. 218,700/= remained outstanding and un-cleared. The plaintiff averred that he paid a further sum of Ksh. 218,700/= which remained un-cleared on behalf of the 2nd defendant to Bingwa Sacco Ltd which the 2nd defendant acknowledged receipt and undertook to refund the balance of 68,700/= but has failed and/or refused to date.

During the hearing before the trial magistrate, the plaintiff/Respondent testified as PW1. He stated that on 14th March 2014, some people wanted to sell him a piece of land being rice holding situated at Tebere Section being rice holding No. 284. They prepared a sale agreement with each of the parties. He produced the first sale agreement with the 2nd defendant/Appellant. He stated that he paid a deposit of Ksh. 350,000/= and the balance was to be paid after the transfer was done. As regards the 2nd plot being rice holding No. 284 (B) belonging to Francis Kariuki Maina it was not transferred to him. He stated that Luke Macharia (2nd defendant/Appellant) owed a debt to Bingwa Sacco which he had to clear on his behalf in the sum of Ksh. 218,700/= thereby over-paying him the sum of Ksh. 68,700/=. He produced the agreement as Plaintiff's Exhibit No. 1 & 2 respectively. The plaintiff also produced the lease agreements showing that the two parcels were previously registered in the names of the defendants as leases Plaintiff's Exhibit 3 (a) & 3 (b) respectively. The plaintiff further stated that the two parcels were transferred to him by the Manager, National Irrigation Board and issued with cards. He produced them as Plaintiff's Exhibits 4 (a) & (b) respectively. However, he stated that he has not entered the two parcels of land because the defendants refused to surrender them to him. Instead, the defendants/Appellants wrote him a letter which they wanted to agree amongst themselves first. His lawyer wrote them a demand letter. He also produced the two letters as Plaintiff's Exhibit 5 (a) and (b) respectively. The plaintiff also stated that they entered into a Memorandum of Understanding with the defendants/Appellants to vacate the suit premises after one month which he also produced as Plaintiff's Exhibit 6 (a) & (b) respectively.

1ST DEFENDANT/APPELLANT'S CASE

The 1st defendant/Appellant testified in the lower Court and admitted that he sold his rice holding to the plaintiff and received the sum of Ksh. 350,000/=. However, the 1st defendant stated that his wife who was not there heard later that he had sold the land and told him that the land should not be sold. He stated that his wife is the one who blocked the sale of the land at the National Irrigation Board office.

2ND DEFENDANT/APPELLANT'S CASE

The 2nd defendant did not offer any defence to the plaintiff's claim or call any witness(s). In his judgment delivered on 27th September 2016, the trial magistrate analyzed the evidence presented and entered judgment in favour of the plaintiff in terms of prayers A and B of the plaint but disallowed prayer No. C. The costs of the suit was awarded to the plaintiff.

2ND APPELLANT'S SUBMISSIONS

The 2nd Appellant Luke Kariuki Maina submitted that he was not involved in the transfer of the rice holdings to the Respondent. He stated that the transfer was fraudulent and that there was no consent from the Appellants to effect any transfer in favour of the Respondent. He stated that since his wife had objected to the transfer of the rice holding thereby frustrating the agreement, the Respondent's remedy was a refund of the purchase price. He stated that the procedure followed by the National Irrigation Board in transferring the rice holdings to the Respondent was secretive, fraudulent and not transparent. He stated that the Respondent had agreed to be refunded the purchase price but surprisingly, the trial magistrate proceeded to order for surrender/vacant possession of the rice holdings. He submitted that the 2nd Respondent was never given an opportunity to prosecute his defence but the trial magistrate proceeded on 26th July 2016 to close the defence case.

He submitted that the trial magistrate did not make a finding that in disposal of the rice holding, violated *Section 28 (a) of the Land Registration Act* in that there was no spousal consent in the sale of the rice holdings. He cited the following cases:

(1) *Isaac Muciri Githinji Vs David Wainaina Gachoka ELC No. 85 of 2016 (Kerugoya)*.

(2) *National Bank of Kenya Limited Vs Pipe Plastic Samkolit (K) Ltd & Another (2002) E.A. 503*.

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Kiguru Kahigah & Co. Advocates submitted that the Appeal is fatally incurably defective and incompetent in that the Appellants have not extracted and filed a formal certified copy of the decree from the judgment of the lower Court dated 27th September 2016. The learned counsel also submitted that the Appeal lacks merit in that there is insufficient evidence to prove that the Appellants did not sell their land No. 284 (B) and 284 (C) to the Respondent for an agreed consideration vide sale agreement dated 14th March 2014. The learned counsel further submitted that the Appellants never pleaded specifically that the rice holdings were transferred to the Respondent by National Irrigation Board fraudulently and that no particulars of fraud were pleaded as required by the law and that no counter-claim was filed to challenge the Respondent's ownership status of the rice holdings. As regards the spousal consent under *Section 28 (a) of the Land Registration Act*, the learned counsel submitted that the parcels of land herein are rice holdings within a National Irrigation Scheme owned by the National Irrigation Board and the relevant law applicable is the *Irrigation Act Cap. 347 Laws of Kenya* and not the *Land Registration Act*.

The Respondent further submitted that the trial magistrate properly directed his mind and that the sale agreements between the parties had already been executed and land duly transferred to the Respondent lawfully and what remained outstanding was a claim for vacant possession. He distinguished the two cases cited by the 2nd Appellant as relating to different legal issues not related to the proceedings herein.

ANALYSIS AND EVALUATION

I have re-analyzed and re-evaluated the evidence adduced by the plaintiff/Respondent and the 1st Appellant/defendant before the trial Court. I have also re-evaluated the documents produced by the parties in evidence and the judgment by the trial Court. I have equally interrogated the applicable law. The claim by the Respondent before the trial Court which is also the subject of this Appeal are rice holdings No. 284 (B) and 284 (C) respectively. Rice holdings are properties of the National irrigation Board which are governed under the ***Irrigation Act No. 14 of 2019*** which repealed the Irrigation Act Cap. 347. Since this dispute arose prior to the repeal of the Irrigation ***Act Cap. 347***, the applicable law will therefore be the ***Act Cap. 347 (repealed)***. The ***Irrigation Regulations, 1977*** provides the manner in which Irrigation Schemes are regulated and managed in the Settlement Schemes. Under those regulations, the Cabinet Secretary concerned is given powers to appoint a Committee for any scheme responsible for advising the person in charge of a particular Irrigation Scheme on the general administration of the Scheme in accordance with the Government policy. ***Section 4 of the Irrigation (National Irrigation Schemes) Regulations, 1977*** provides that unless a person is the holder of a valid licence granted to him by the manager with the approval of the Committee or is the authorized dependant of such licensee, he is guilty of an offence. The Respondent has produced a licence card for holding No. 284 B & C Tebere Section Unit 19 measuring 2 acres dated 30/10/2014. The Regulations do not authorize or provide for the disposal of an interest by a licensee through a sale. However, the sale agreements by the Appellants of their interest in the licence to holdings No. 284 (B) and 284 (C) are deemed as Nominees which was approved by the Committee under ***Regulation 7 (2) of the Irrigation (National Irrigation Schemes) Regulations, 1977***. Once the Committee approved the proposed nominee by the authorized licensee, a licence is issued thereof. The 1st Appellant admitted having sold his interest in rice holding No. 284 (C). He cannot therefore use spousal consent under ***Section 28 (a) of the Land Registration Act*** as the subject of this suit is licence being a property of the National Irrigation Authority and not a private property governed under the Land Registration Act. The Appellants did not file a counter-claim in their defence against the Respondent for the rice holdings or the payments of the purchase price. In any event, the sale agreement which they entered with the Respondent and which was produced in evidence provided that the balance of Ksh. 150,000/= was payable during transfer. The Appellants should have known that in an adversarial system where the winner takes it all, the trial Court was either to give judgment in favour of the plaintiff or dismiss it.

I am satisfied that the trial magistrate considered the materials placed before him and properly analyzed and directed his mind to those materials and the applicable law. This appeal therefore fails and the same is hereby dismissed with costs to the Respondent.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 19TH DAY OF JUNE, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Muchangi holding brief for Kahiga for Respondent
2. Mr. Ombachi for Appellants
3. Mbogo – Court clerk.