



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

E&L NO. 13 OF 2013

Formerly Civil Appeal NO. 186 OF 2011

MARINDICH BIWOT.....1ST APPELLANT

KIKOSGEI BIWOTT.....2ND APPELLANT

VS

JACOB KIRWA KEMBOI.....RESPONDENT

(Being an appeal arising from the judgment of A.B Mong'are Resident Magistrate Eldoret in Eldoret CMCC No. 990 of 2005, which judgment was delivered on 26th January, 2009)

JUDGMENT

The Appeal now before me for determination emanates from the judgment and the decree by the honourable A.B Mong'are Resident Magistrate in Chief Magistrates Court Civil Case No. 990 of 2005. By dint of the plaint dated 8th day of November 2005 the Plaintiff/Respondent sought for **a declaration** that parcel of land known as Uasin Gishu/Mafuta/205 vests on the plaintiff's, **a permanent injunction** restraining the Defendants, their servants, agents or assigns from any way dealing, interfering with the plaintiff's quiet possession, use enjoyment and to unlawfully ploughing, planting, Constructing and or to do any act that is inconsistent with the plaintiff's right as a **proprietor of the land Parcel Namely Uasin Gishu/Mafuta/205 and an order for eviction against the defendants severally and jointly as the plaintiff has the vesting proprietary interest and or rights in the aforesaid parcel of land and costs plus Interest.**

On the other hand the Appellants in their statement of defence dated 1st February 2006 denied the jurisdiction of the Magistrates Court over this matter and prayed for the dismissal of this suit. Before the hearing of this matter commenced, the Defendants/Appellants raised a Preliminary Objection on point of Law *vide* Notice dated 24th November 2005. In the said Preliminary Objection, the Defendants/Appellants stated ***inter-alia*** that the Magistrates Court lacked jurisdiction to entertain this suit. In view of the said Preliminary Objection the trial leaned magistrate in determining as to whether this matter was a preserve of the Land Dispute Tribunal by dint of section 3 of the Land Disputes Tribunal Act, Cap 303A, now repealed, held that the issues raised were not pertaining trespass *per se* and that there was an element of interference which disqualified this matter from falling under section 3(c) of the said Act. the ruling of the trial court was delivered on 10th June 2006. The matter was later set down for hearing and at the conclusion of the case, the learned trial magistrate passed the following judgment on the 26th January, 2009:-

“In the case of Obiero vs. Opiyo it was held that the first registration of land under the Registration Of Titles Act and the Registered Land Act are all in favour of the proprietor

absolute and indefeasible ownership which cannot be defeated even by allegations of fraud. Section 27 of the Registered Lands Act offers upon the plaintiff indefeasible title which cannot only be interfered with by even court as provided for under section 159 of R.L.A Cap 300.

For the above reasons I find that although the plaintiffs seem to have been on the land theirs was illegal stay. They slept over their rights and they were overtaken by events. As it were the law supports the plaintiffs claim. The plaintiff has proved his case on a balance of probability. I find for him and enter judgment for him as prayed in the plaint with costs.”

As a result of the foregoing judgment, the the appellants preferred the instant Appeal. on the following grounds, to wit;

- 1. THAT the Learned Magistrate erred in law fact when she failed to appreciate that court lacked jurisdiction to hear the matter**
- 2. THAT the Learned Magistrate erred in law and in fact when she failed to appreciate that the appellants had no capacity to be sued.**
- 3. THAT the Learned Magistrate erred in Law when she held that the appellants had not proved any fraud and or illegality against the Respondent.**
- 4. THAT the Learned Magistrate erred in law and in fact when she held that the appellants were illegally in occupation of the suit land.**
- 5. THAT the case was not proved on a balance of probabilities.**

The Appellant's counsel relied on the written submissions dated 21st October 2014 and filed in court on 22nd October 2014. Counsel faulted the trial court for failing to uphold the preliminary objection that had been raised earlier. Counsel submitted further that the said preliminary objection ought to have been upheld and that the trial court lacked jurisdiction by dint of the provisions section 3(c) of the Land Disputes Act, Cap 303A, Laws of Kenya. Counsel argued that the Respondent/Plaintiff had acquired the said land by fraud. The Respondent relied on his written submissions dated 8th December 2014 and filed in court on the same date.

The Respondent's counsel has argued that the Appellants submissions that the dispute fell within the provisions of the Land Dispute Tribunal is misplaced and untenable in law. Counsel submitted that the Respondent was th registered owner of the suit land and produced the title deed in court as evidence. Counsel relied on and cited the case of *Wepukhindi & Another vs. Francis W. Biket, Appeal Case No. 157/2001* where the appellate court held that the Land Dispute Tribunal did not have jurisdiction to interfere with the Registered land and that ownership therefore cannot be subject of tribunal dispute. He supported the trial court's findings to the effect that the Appellants had not proved fraud against the Respondent. He submitted further that the Respondent title being a first registration cannot be vitiated or defeated in the face of the alleged fraud. Counsel submitted that the Respondent in the trial proceedings proved his case on a balance of probabilities as the evidence in his favour was water-tight and judgment lawfully delivered in his favour.

I have considered the Appeal herein and the submissions by both parties and do find that the salient issues for determination are first, ***whether the Magistrates Court's had jurisdiction to deliberate on this matter*** and second, ***whether the plaintiff acquired the suit land by way of fraud***. This being the first appeal, over and again the courts have reiterated that the appellate court is bound to reconsider the evidence, re-evaluate it and make its own conclusions and secondly, the Appellate Court would not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acts on wrong principle in reaching its findings. In this regard it is trite law that the Appellate court can only interfere with the judgment of the trial court and hence make its own findings on the grounds that the findings of the trial court are based on no evidence or that the trial court has misapprehended the evidence and lastly, when the trial court acts on wrong principles in reaching its findings,

In the case of *Sumaria & Another vs. Allied Industrial Limited [2007] 2 KLR, pg 1-9, at pg 8*, P.K Tunoi, E.O O’Kubasu & W.S Deverell JJA, observed as follows;

“This being a first appeal we are obliged to consider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses-see *Peters vs Sunday Post Ltd[1958]EA 424*, *Selle & Another vs Associated Motor Board Co Ltd & Others [1968]EA 123* and *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982] 1 KAR 278*. In the last case *Hancox JA* (as he then was) put it thus at pg 292 of the Report:- ‘A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did’. The first holding in that case is also relevant namely that:- ‘The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally” (See *Sumaria & Another vs. Allied Industrial Limited [2007] 2 KLR, pg 1-9, at pg 8*)

In *Selle & Another vs. Associated Motor Boat Company Limited & Others [1968]EA, 123 at pg 126*, Sir Clement De Lestang VP, opined as follows;

“An appeal to this court from a trial by the High 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. In particular this court is not bound to follow the trial judge’s finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. (*Abdul Hameed Saif vs. Ali Mohamed Sholani (1955) 22 EACA 270*).”

In *Jabane vs. Olienja [1986]KLR 661, at pg 664*, Hancox JA noted as follows;

“I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and he findings of facts of he trial court in order to determine whether the conclusion reached on the evidence should stand – see *Peters vs. Sunday Post [1958]EA 424*. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did- see in particular *Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1KAR 278* and *Mwana Sokoni vs. Kenya Bus Services (1982-88) 1 KAR 870*” (See also L. Kimaru J. in *Sokoro Saw Mills Ltd vs. Grace Nduta Ndungu[2006]eKLR*)

In *Makube vs Nyamuro (1983) KLR 403*, the Court of Appeal reiterated as follows;

“A Court on Appeal will not normally interfere with the the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”

In *Peters v. Sunday Post [1958] E.A. 424* at p. 429 Sir Kenneth O’Connor P said:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to

determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

And in *Chemagong v. R* [1984] KLR 611 at p. 616 the Court of Appeal held;

“A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

The plaintiff in the trial court availed two witnesses. **Pw2, Jacob Kirwa Kemboi** the plaintiff in the trial court and the Respondent in this Appeal testified that he got the suit land measuring about 5 acres in the year 2002 from the Settlement Land Trustees. He stated that the land is registered in his name and he produced the copy of the title to that effect as exhibit No. 1. He testified that he did apply to the Trustees of Settlement who allocated him the said land after the original allottee had failed to meet the conditions thereof. He produced a response letter from the Trustees of Settlement as exhibit No. 2 **Pw2, one Eucabeth Ogega** testified that he is working with the Ministry of Lands Adjudication Land Settlement since the year 2003. he stated that the land in question was allocated to one Wilson Kimeto Kibiwott in 1982. He stated that the said Wilson Kimetto Kibiwott only paid 10% of the entire premiums which was equivalent to ksh. 625/=. It was his further testimony that the said Kibiwott was the first allottee however, he failed to comply with the conditions thereof until the year 2002. He stated that Kibiwott failed to comply with the conditions thereof and to that effect he produced the charge as exhibit No. 6. He stated further that as a result of failure to comply with conditions set by the Trustees of Settlement, the said suit land was re-allocated to the plaintiff *vide* an allotment letter that was produced as exhibit No. 3.

Defence called 3 witnesses. **Dw1; Kipkoge Biwott who was** the second defendant herein testified that the suit land in question belongs to his late father Wilson Kibiwot who passed on in 1999. he produced death certificate as an exhibit. He stated that the late Wilson Kibiwott occupied the said suit land since 1975 after being allocated the same by the government on paying the Ksh. 625 to Settlement Fund Trustees. The receipt of payment was produced as defence exhibit No. 2. He stated further that the said late Kibiwott was at the same time issued with a charge. He stated that the late Kibiwott paid some funds to Settlement Funds Trustees as from 1985 to 1994 as evidenced by the bundles of receipts that were produced as exhibits 4(a), b, c, d, e, f and g. And that he continued paying rent to County Council of Wareng. He stated further that there are younger children on the farm and that it is not true that they encroached on the land in the year 2005. It was his testimony that the title deed over the suit land in the name of the plaintiff is not genuine.

Dw2, Marindichi Kibiwott, the 1st Defendant testified that the late Wilson Kibiwott who died in 1994 was his brother. He stated that the deceased was residing on the suit land as a squatter and that was given the same by the Settlement. He stated that they are residing on the land and that they don't know where the plaintiff came from.

Dw3, Kipkosgey Toroitich testified that he is the Vice Chair of Mafuta Settlement Scheme. He stated that he knows Biwott Meruite and Wilson Kibiwott who are since died. He stated that they both lived on suit land since 1975. Initially it was 2½ acres but it was later increased to 5 acres. He testified that the late Kibiwott's sons live on the said suit land together with the Kibiwott's brother. He stated that the plaintiff does not live on the suit land and he that he doesn't know him.

In the instant case the disputed land is registered under Registered Land Act Cap 300 Laws of Kenya (repealed). According to the title that was produced in court as exhibit 1. The title herein was issued under the said Act in the name of Jacob Kibiwott Kemboi, the plaintiff/respondent herein. The land in question is known as UASIN GISHU/MAFUTA/205, measuring about 2.0 Ha.

Jurisdiction is everything and nothing can be said to be valid if the court of law deliberates on a matter without jurisdiction. Proceedings in a matter where the court has no jurisdiction and their out-come in my

view can not stand test of time, they are invalid *ab initio*. In *Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR, Civil Appeal No. 308 of 2012* the learned judges Kiage, Murgor, Sichale, J. Mohammed & Odek, JJ.A

“I am mindful of the case of Lillian ‘S’, [1989] KLR 1 in which this Court succinctly set out the principles and context for determination of jurisdiction. In that case Nyarangi, J.A stated, inter alia:-

“Jurisdiction is everything. Without it, a court has no power to make one more step....A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The above decision was also restated by the Supreme Court In the Matter of the Interim Independent Electoral Commission- Constitutional Application No. 2 of 2011 as follows:-

“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”
(As Per Odek JA)

Section 159 of the Registered Land Act, Registered Land Act(repealed) Cap 300 provided that 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, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act. ”

Section 3 (1) of the Land Disputes Tribunal Act Cap 303A Laws of Kenya (repealed) provided for the jurisdiction of The Land Disputes Tribunals in civil cases, thus disputes relating to the division of ,or determination of boundaries to land, including land held in common; a claim to occupy work land; or trespass to land.

This court finds that the dispute between the plaintiff and the defendant can neither be described as division of land nor a boundary dispute but a claim of ownership by the respondent. I agree with the trial magistrate that the dispute was not based on trespass per se but ownership and fraud. The learned Magistrate properly considered the respondent's title as first registration and therefore indefeasible. The upshot of the above is that the appeal is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF FEBRUARY 2015

OMBWAYO ANTONY

JUDGE