



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CIVIL APPEAL NO. 7 OF 2014.

DOUGLAS ONYANGO OTOYO.....APPELLANT

=VERSUS=

EMILY AWORI

APPOLLO JOSHUA AWORI.....RESPONDENTS

(An appeal against the judgment in Busia CMCC. NO. 43 of 2007 by Hon. T. W. Cherere on 5th September, 2013)

J U D G M E N T

1. This appeal was filed by **DOUGLAS ONYANGO OTOYO**, hereinafter referred to as the Appellant. He has listed five grounds in the Memorandum of appeal dated 28th March, 2014 which are as follows;

“ 1. The trial Magistrate herein erred in law by not ascertaining that the case in contention was Res-judicata in the circumstance.

2. The trial Magistrate erred in law by entertaining a case which had been previously decided upon by her fellow Magistrate on 8th August, 2008.

3. The trial Magistrate failed to interpret that exhibits 5 and 6 of the proceedings are not mentioned in the judgment dated 5th September, 2013.

4. The trial Magistrate further erred in law by not getting concerned that a land sale agreement was in place when the Respondents paid Kshs.10,000/= vide Cheque No.020703 at Barclays Bank.

5. The trial Magistrate did not endeavour to rely on logistical knowledge that the issue of family law sustains that a party is supposed to be paid all his dues.”

The Appellant named **EMILY AWORI** and **APPOLLO JOSHUA AWORI** as the 1st and 2nd Respondent and will be referred as such hereinafter. The Respondents were represented by Mr. Ashioya Advocate in this appeal. The court gave directions on 6th November, 2014 that parties file written submissions. The Appellant filed his submission dated 4th January, 2015, and Respondents' counsel filed his dated 11th February, 2015.

2. This court is obligated to look at the evidence adduced before the trial court and re-evaluate it afresh and come to its own conclusions. While doing so, the court should bear in mind that it did not see or hear the witnesses at the time they testified [*see Selle –vs- Associated Motor Sport Company Limited* 1968 E.A.128]. Before the court embarks on that journey, it is important to take note that the Appellant was the Plaintiff in the Lower court matter and the Respondents were the Defendants. The Lower court records shows that the Appellant commenced the suit through the plaint dated 27th November, 2007 seeking for orders that;

‘ a) The Defendant to vacate all that parcel of land comprising Luchululu/Bukhulungu/577 in alternative satisfy the signed undertaking.

b) Costs of this suit’

The Appellant main basis of his claim against the Respondents is at paragraph 5 of the plaint where he averred as follows;

‘ 5. The Plaintiff avers that pursuant to a sale/purchase agreement between Emily Awori the Defendant vide an undertaking dated 19th May, 2006 undertook to pay all outstanding purchase price and/or 2nd Defendant vacate the impugned parcel of land Luchululu/Bukhulungu/577’

The Respondents failed to file defence and the Plaintiff was allowed to prosecute his claim through formal proof on the 11th July, 2008 when he testified as PW 1. He was represented by Mr. Jumba advocate and the Learned trial Magistrate set 8th August, 2008 as the date for judgment.

The Learned trial Magistrate Hon, M.W. Njagi Resident Magistrate, as she then was delivered the judgment on the 8th August, 2008 in favour of the Appellant in the following terms:

‘ I therefore enter judgment for the Plaintiff against the defendants jointly and severally for balance of the purchase price of Kshs.500,000/= together with interest thereof to run from 3rd May, 2006. The Plaintiff shall as well have costs of the suit.’

The Appellant then commenced execution proceedings, but on 14th November, 2008, the Respondents, through M/S. Ashioya & company advocates, filed a notice of motion seeking to among others set aside the judgment that had been entered. The application was served and when it came up for hearing on 19th November, 2008, Mr. Jumba and Mr. Ashioya advocates represented the Appellant and Respondents respectively. The court notes that the following consent was recorded on that date;

‘ By consent between M/S. Jumba for the Plaintiff, M/S. Ashioya for the Defendants, judgment entered herein and all consequential orders be set aside. The draft defence upon payment be deemed duly filed. Thrown away costs of Kshs.4,000/= be paid the Plaintiff.’

The Respondents then filed their defence and counterclaim and after several adjournments the hearing commenced afresh before Hon. T.W. Cherere, Chief Magistrate, on 15th August, 2013. The Appellant testified as PW 1 and called Wandera Wasike as his witness before closing his case. The 1st Defendant then testified as DW1 and the defence closed their case. The Learned trial Magistrate reserved the judgment for 5th September, 2013 when it was delivered. In the judgment the Plaintiff’s suit was dismissed and judgment entered in favour of the Defendant in accordance with their Counterclaim in the following terms;

‘ i) A permanent injunction do issue and is hereby issued to restrain the Plaintiff by himself, his workers and servants and whosoever claiming under him from interfering in any manner with L.R.NO.

ii) Costs of this suit and of the counterclaim shall be paid by Plaintiff to the Defendant.”

This is the judgment that aggrieved the Appellant and is the subject matter of this appeal.

3. ANALYSIS OF THE EVIDENCE.

a) The Appellant testified that he had sold land parcel Luchululu/Bukhulungu/577 to Sindika on 19th May, 2006 at Kshs.545,000/= . He stated that he was paid Kshs.10,000/= through a cheque whose copy he produced as exhibit 2. He also produced as exhibit 1 a document on the letter head of Emily Awori (1st Respondent) with a reference of payment of Erick Awori’s Land case No. 020 of 2005. The document is not signed by the Respondents herein and the 1st Respondent denied having entered into a land sale agreement with the Appellant. Her testimony was that the suit land belonged to her late father who got registered as proprietor on 9th April, 1977 and she produced a copy of the land register as exhibit to confirm that fact. She explained the payment of Kshs.10,000/= to the Appellant saying it was a gift after she learnt his kitchen had got burnt and that his wife was admitted in hospital.

b) The evidence adduced by the Appellant before the learned trial Magistrate failed to show that there was a valid land sale agreement between the Appellant and the Respondents. The evidence also fails to show that the suit land had ever been registered in the names of the Appellant from the date of first registration on 9th April, 1977. There was therefore no way the Appellant would have acquired capacity to enter into a sale agreement over the land which he did not own and could not pass title to.

c) The learned trial Magistrate in her judgment of 5th September, 2013 considered whether exhibit 1 was a valid sale agreement and found that it was an acknowledgement note for Kshs.10,000/= paid to the Plaintiff by one Prisca Koradi on behalf of the 1st Respondent. The learned trial Magistrate found as follows;

“ From the foregoing, I find the Plaintiff has not tendered any evidence that he sold the suit land to either Defendants or the late Erick Awori. In any case as at 2006 when the Plaintiff purports to have sold the suit land, it was already registered in the names of Apollo Joshua Awori.

It is inconceivable that Apollo Joshua Awori could have entered into a sale agreement with the Plaintiff for the suit land which he already owned.”

This court do not find any misdirection on the finding of the learned trial Magistrate on the facts or law as she properly analyzed the evidence presented and came to the only logical conclusion that the Appellant never owned the suit land and that there was no valid sale agreement on which he could have based his claim against the Respondents.

The Appellant is the one who had alleged the existence of a land sale agreement and had the duty to tender evidence and failed. The Learned trial Magistrate was therefore right and in order to dismiss the Appellant’s claim against the Respondents.

d) The evidence tendered by the 1st Respondent before the Lower court showed that the suit land was registered in the names of Apollo Awori since 9th April, 1977. It was therefore in order for the learned trial Magistrate to come to the finding that she did , that the Respondents’ counter claim had merit and that they were entitled to the injunction orders. This court finds no fault on this finding.

e) That in law, a counsel on record represents the appointing party and has authority to enter consent. The Appellant cannot therefore turn around and deny the existence of the consent to set aside the judgment that was entered into by the parties counsel to allow the Respondents defend the suit. It is

after the setting aside of the judgment dated 8th August, 2008 that the suit was heard with both parties represented and the judgment dated 5th September, 2013 delivered. The Appellant has never challenged the consent order of 19th November, 2008 to date. This court finds that grounds 1 and 2 of the appeal have no merit as the suit was not res judicata in view of the consent of 19th November, 2008 which reopened the hearing of the suit denovo.

f) The exhibit 5 is a letter dated 17th December, 2008 addressed to the Lower court by the Appellant seeking for proceedings and judgment of 14th November, 2008 in case No. 430 of 2007. I have perused the court record and there is no entry bearing the date of 14th November, 2008. This letter does not in any way change the evidence that the parties had adduced or the finding of the learned trial Magistrate. The Appellant also referred to exhibit 6 which appears to be a copy of a mutation form for Samia/Luchululu/Bukhulungu/1411 being subdivided to 1487 and 1488. The court do not find any relationship between the contents of the mutation form and the Appellant's claim that he had entered into a land sale agreement with Respondents over Samia/Luchululu/Bukhulungu/577 in 2006. There is therefore no merit on grounds 3 of the appeal.

g) The court has already concurred with the finding of the learned trial magistrate that the Appellant did not own the suit land and therefore had no capacity to enter into a valid land sale agreement. As such grounds 4 and 5 of the appeal have no merit as well.

4. FINDING.

That having found as above, the court finds that the appeal has no merit and issues the following orders;

- i). That the Appellant's appeal fails and is hereby dismissed with costs.
- ii). That the learned trial Magistrate judgment and orders of 5th September, 2013 are hereby upheld.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 7th DAY OF MAY, 2015.

IN THE PRESENCE OF;

APPELLANTPRESENT.....

1ST RESPONDENT..... PRESENT.....

COUNSEL.....MR. ASHIOYA.....

JUDGE.