



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 37 OF 2017**

**MILLIAM MUTHONI MUTHAMI.....APPELLANT**

**VERSUS**

**NICHOLAS KELI MUANGE.....RESPONDENT**

**(Being an appeal against the Judgment and Decree of Honourable Mr. C. Obulusta**

**(Ag. Chief Magistrate) delivered on 19<sup>th</sup> September, 2013 in Milimani CMCC No. 5287 of 2010)**

**JUDGEMENT**

1. In this appeal, the Appellant challenges the judgement of the Hon. Mr. C. Obulusta (Acting Chief Magistrate) delivered on 19/9/213 regarding plot number 136 which was part of land reference number (L.R. No.) 18274 situated at Haco Estate, Njiru, Nairobi (“the Suit Property”). The Learned Magistrate dismissed the Plaintiff’s claim and found that the Defendant had a better title to the Suit Property. The grounds of appeal can be summarised as follows, that the Learned Magistrate erred in:-

- i. dismissing the Plaintiff’s claim based on Section 3 of the Law of Contract Act which the Defendant had not pleaded;
- ii. characterising the claim as one based on disposition of an interest in land yet the Plaintiff was seeking an injunction and damages;
- iii. dismissing the Plaintiff’s claim based on the absence of a sale agreement;
- iv. finding that Joseph Muchina executed the agreement on behalf of Hard Cornerstone Self Help Group without any basis or the existence of an agency relationship. Further, in finding that Mr. Joseph Muchina executed the sale agreement and received consideration in his personal capacity which constituted a valid sale agreement over the plot owned by Hard Cornerstone Self Help Group; and
- v. not finding that the Defendant purchased the Suit Property later than the Plaintiff and the Plaintiff’s claim over the land should have taken priority since the land would not have been available for alienation to the Defendant after being sold to the Plaintiff.

2. The appeal was initially filed at the High Court, Civil Division in 2013. It was transferred to the Environment and Land Court in October 2017. The matter came up severally in this court when the parties sought more time to file submissions.

3. Parties filed submissions which the court has considered. The Plaintiff contended that the Respondent did not raise the issue of Section 3 of the Law of Contract Act in its defence but only averred that he purchased the Suit Property from Hard Cornerstone Self Help Group. The Appellant contended that the Respondent was bound by his pleadings and so was the court, which is limited on the issues upon which it can pronounce itself. The Appellant contended that the issue of the production of the sale agreement was unprocedurally raised during the re-examination of the Respondent at the trial.

4. The Appellant contended that Section 3 of the Law of Contract Act dealt with dispositions over interests in land yet her suit did not relate to disposition or transfer of an interest in land. She maintained that her claim was not for the enforcement of a contract for the disposition of an interest in land against the seller, Hard Cornerstone Self Help Group. Rather, she had sought a permanent injunction and damages against the Respondent as a trespasser onto her land. The Appellant submitted that the dispute did not involve a purchaser and a vendor hence Section 3 of the Law of Contract Act was inapplicable to the circumstances of this case.

5. The Appellant faulted the Learned Magistrate for finding that both parties had produced ownership certificates from Hard Cornerstone Self Help Group and contradicting himself when he dismissed the Plaintiff’s claim based on the absence of a sale agreement which the appellant contended was not a question before the court.

6. The Appellant also faulted the Respondent for bringing up the issue that the Plaintiff ought to have sued Hard Cornerstone in his submissions yet he had not pleaded this in his defence. The Appellant maintained that her claim over the Suit Property was superior to that of the Respondent and was buttressed by the overwhelming evidence of possession and construction on the land before the Respondent trespassed on the suit land.

7. The Appellant pointed out that the sale agreement relied on by the Learned Magistrate was between Joseph Muchina and the Respondent, and not between Hard Cornerstone Self Help Group and the Respondent. Further, that the agreement was not signed by the other officials of Hard Cornerstone Self Help Group and showed that Joseph Muchina was the vendor and owner of plot numbers 136 and 137. She added that the purchase price was paid to Joseph Muchina and not to the seller.

8. The Appellant submitted that no evidence was tendered nor was it pleaded that Joseph Muchina was an agent of Hard Cornerstone Self Help Group or that he had authority to enter into that agreement in his personal capacity since the plot was owned by Hard Cornerstone Self Help Group and there was no evidence of its transfer to Mr. Joseph Muchina. The Appellant contended that the sale agreement relied on by the Respondent offended Section 3(3) of the Law of Contract Act for not being signed by the proper parties and was therefore unenforceable in relation to plot number 136.

9. The Appellant faulted the Learned Magistrate for applying Section 3(3) of the Law of Contract Act selectively to her case but not applying the same provision in the Respondent's case with regard to the sale agreement and the lack of capacity to execute that agreement. She also faulted the magistrate for overlooking her evidence of possession of the Suit Property and for failing to uphold her ownership certificate which was first in time while contending that it should have prevailed in equity. She added that since the plot had been sold to her when she was granted an ownership certificate on 19/6/2008, it was not available for alienation to the Respondent whose ownership certificate was issued on 25/9/2008.

10. The Appellant faulted the magistrate for raising the bar of proof in civil proceedings when he sought to establish whether the purchase price was paid and whether the Appellant should have joined the seller as a party to the proceedings. She contended that there was no dispute between her and Hard Cornerstone Self Help Group over the issuance of the certificate of ownership and that it was not necessary for this entity to be made a party to the suit. She surmised that she had proved her claim on a balance of probabilities.

11. The Respondent submitted that Patrick Karanja Ngugi was the registered lessee from the City Council of Nairobi over L.R. No. 18274 measuring 1.2 hectares. He sold the land to Hard Cornerstone Self Help Group vide an agreement dated 27/3/2007. Hard Cornerstone Self Help Group (the Group) did not transfer the land to itself but instead subdivided it into plots which it sold to purchasers including the Appellant and Respondent.

12. The Respondent submitted that the Learned Magistrate held that the Appellant had not produced a sale agreement to prove that she purchased the Suit Property and dismissed the Appellant's claim for trespass because the Respondent claimed ownership of the same plot. For the Respondent, that the issue was whether he could be accused of trespassing on the suit plot. He emphasised that parties are bound by their yet the Appellant was attempting to plead a case totally different from what was before the Magistrate. He added that the Appellant's case was for trespass and not who between the two of them had a better right to the Suit Property. He contended that the Appellant failed to prove trespass and that all the other issues which arose during the trial were collateral and not germane to the case.

13. He submitted that trespass to land occurs where a person directly enters upon another's land without permission or remains upon the land or places any object upon the land. He added that Hard Cornerstone Self Help Group which sold the plot in dispute to both the Appellant and the Respondent was an amorphous group which was not registered and that by the time this dispute arose the Group had folded its operations which is the reason none of the parties could join it as a party to the suit.

14. The Respondent contended that the Appellant neither produced evidence that she purchased the land through a sale agreement nor did she provide evidence that she paid the purchase price of Kshs. 300,000/=. That she only produced a receipt for Kshs. 5,000/= on account of the water connection. The Respondent contended that even though the issue of the lack of a sale agreement had not been pleaded, it arose naturally from the pleadings and the Appellant was cross examined on this issue. The Respondent submitted that he produced copies of the sale agreement and cheques for Kshs. 200,000/= which he paid to Joseph Muchina Macharia, the secretary of the Group. He explained that the Group did not have a bank account which is why the sale agreement was done in the Group's secretary's name.

15. The Respondent contended that on a balance of probabilities, it was he who had proved that he purchased the Suit Property. On the issue of the Appellant's claim being first in time, the Respondent in retorted that how was he supposed to know whether the plot had been sold to anybody else and that he could only rely on the word of the brokers cum sellers. He added that both he and the Appellant were victims of deceit by the brokers.

16. He urged that if the court were persuaded that both the Appellant and the Respondent bought the disputed plot and that they were both victims of deceit by the Group, none of the parties could blame the other and the interest of justice would demand that the court invokes Section 3A of the Civil Procedure Act and make such orders as may be necessary for the ends of justice by directing that the Suit Property be shared equally between the parties or that it should be sold and the proceeds shared equally. In essence he was asking the court to apply Solomonic wisdom in determining this dispute. The Respondent concluded that the Learned Magistrate was right in dismissing the Appellant's claim for trespass on the suit land and urged the court to dismiss the appeal and award him the costs for the appeal.

17. The issue for determination is whether this court should allow the appeal and set aside the judgement of the Learned Magistrate. It is not in dispute that the Group sold plot numbers 135 and 136 to the Appellant, and plot numbers 136 and 137 to the Respondents. Plot numbers 135, 136 and 137 are adjacent to each other with Plot number 136 lying in the middle. This is the plot in dispute for the Group sold it to both the Appellant and the Respondent.

18. The sale agreement dated 10/7/2008 which formed the basis for the Magistrate's determination was entered into by the Respondent and Joseph Muchina, and showed that the Respondent purchased the two plots at Kshs. 280,000/=. The Respondent did not enter into any sale

agreement with the Group, and he never produced any agreement. The payment of the purchase price was through a cheque drawn in favour of Joseph Muchina who is described in the sale agreement as the registered proprietor of plot numbers 136 and 137. The question is, who was selling land to the Respondent? From the evidence of the parties and their submissions it was the Group selling the plot and not Joseph Muchina who the Respondent claimed was the Group's Secretary. The Respondent submitted that the Group was an amorphous entity. No nexus between the Group and Joseph Muchina was established or any authority the Group gave this man to transact over the plot in dispute.

19. The court agrees with the Appellant that the Respondent did not meet the requirements under Section 3 of the Law of Contract Act as the Learned Magistrate found. There was no agreement between the Group and the Respondent yet the Respondent relied on the ownership certificates issued by the Group and went ahead to explain in his submissions that the Group was amorphous and did not have a bank account.

20. Looking at the documents tendered in evidence, the Group issued ownership certificates for plot numbers 135 and 136 dated 19/6/2008 to the Appellant. The Respondent produced an ownership certificate for plot number 137 dated 13/7/2008 and one for plot number 136 dated 25/9/2008. One would have expected that the ownership certificate for plot number 136 would bear a date similar or earlier than the certificate for plot 137. In the Respondent's case the certificate for plot 137 was issued before the one for plot 136 yet the sale agreement he produced showed that he purchased the two plots on 10/7/2008. There was no explanation for this.

21. Going by the ownership certificates issued by the Group to the Appellant and the Respondent, the Appellant's certificate in respect of the Suit Property was the first to be issued on 19/6/2008. It is not in dispute that the land belonged to the Group. Having sold plot numbers 135 and 136 to the Plaintiff and issued her ownership certificates on 19/6/2008, the Group could not possibly have sold plot number 136 to the Respondent after that. It is notable that neither the Group nor its official Joseph Muchina for that matter ever challenged the Appellant's ownership of plot number 135 which she acquired at the same time she acquired the Suit Property from the Group.

22. The Appellant's claim to the Suit Property is superior to the Respondent's claim. According to her evidence, she had taken possession of the Suit Property and commenced developments on it before the Respondent demolished the structures she had put up on the land in August 2010.

23. The court sets aside the judgement of the Learned Magistrate, Honourable Obulutsa delivered on 19/9/2013. The court grants prayer (a) of the Amended Plaint dated 29/11/2012. Since the entity that sold the Suit Property to the Appellant and the Respondent was to blame for the circumstances the parties found themselves in and it is no longer in existence, each party will bear its own costs for the suit and the appeal.

**Dated and delivered virtually at Nairobi this 2<sup>nd</sup> day of July 2020**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. Stephen Saenyi for the Appellant

No appearance for the Respondent

Mr. V. Owuor- Court Assistant