



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE NO. 8 OF 2013

EDWARD NJANE NG'ANG'A

SAMUEL MWANGI NG'ANG'A.....APPELLANTS

VERSUS

DAMARIS WANJIKU KAMAU

JOSEPH KAMAU MWANGI.....RESPONDENTS

JUDGMENT

Edward Njane Ng'ang'a and Samuel Mwangi Ng'ang'a (*hereinafter referred to as appellants*) sued Damaris Wanjiku Kamau and Joseph Kamau Mwangi (*hereinafter referred to as respondents*) in the lower court claiming that the suit land parcel No. LOC.9/KIRURI/2095 originated from a subdivision of land parcel number **LOC.9/KIRURI/206** and was registered in the names of the plaintiffs' mother in trust for the whole family. On or about 5th day of May 2011, the defendant transferred the suit land herein fraudulently to their names without the plaintiffs' knowledge, authority and/or consent who are the biological children to the sickly mother Ruth Wanjiku Ng'ang'a. The particulars of fraud were, cheating the plaintiffs' ailing mother who was sickly in diabetes to change the ownership of the suit land and unlawfully having access to the suit land ownership documents without plaintiffs' consent. Moreover attending land board without the due process and requirements and transferring the suit land to their names.

The appellants further averred that they had been in possession and/or occupation of the said land parcel and had developed the same with crops growing thereon to the date of filing suit as the source of income for their family. The appellant claimed therefore against the respondents for an order that the respondents title to the suit land be cancelled and reverted to the names of their mother for distribution.

The respondents filed defence whose import was that they denied that land parcel No. LOC.9/KIRURI/206 was registered in the name of the plaintiff's mother in trust for the whole family among the plaintiffs. Further they denied any fraud or sickness on the part of the Vendor, Ruth Wanjiku Ng'ang'a who was the appellant's mother.

The learned Magistrate heard the parties and their witnesses and directed herself that the issues for determination were:

1. ***Whether the Vendor had capacity to sell the land in dispute.***
2. ***Whether the processes for sale were followed.***
3. ***Whether there was any misrepresentation.***

Which direction I do find to have been proper in law. Further, the court found that no trust was shown and no joint proprietary was shown. The appellant's mother testified that she was never influenced or misrepresented and that the whole family knew the transaction. The purchase price was duly and fully paid and all processes were undertaken as required by law. The court came to conclusion that the suit by the appellants was an afterthought and dismissed the suit.

The appellants filed their appeal on 24.4.2013 on grounds that the learned Magistrate erred in law and in fact in **failing to give any adequate consideration to the Appellants case** and **failing to find that the suit property was family land** and the Appellants together with other family members have rights to the same that could not be wished away or ignored. Moreover that the learned Magistrate erred in law and in fact in **failing to find the said sale of the suit property was tainted with illegality** as the seller who is the appellant's mother suffers from mental/psychological sickness and prone to deception/manipulation as it happened in this case. It was the appellant's further ground that the learned Magistrate erred in law and in fact in **failing to find that the sale and transfer of the suit property was tainted with very serious irregularities** which when considered would render the said sale and transfer null and void and lastly, that the learned Magistrate erred in law and in fact by **deciding the case against the weight of the evidence** to the detriment of the Appellants.

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; when the findings of the trial court are based on no evidence; when the trial court misapprehends the evidence and when the trial court acts on wrong principles in reaching its findings,

In **Sumaria & Another vs. Allied Industrial Limited [2007] 2 KLR, pg 1-9, at pg 8**, the learned judges P.K Tunoi, E.O O'Kubasu & W.S Deverell JJ.A, observed that the first Appellate Court is obliged to consider the evidence, re-evaluate it and make its own conclusions, but in doing so, it must be remembered that it has neither seen nor heard the witnesses and that 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 and further, 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 also, **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 **Makube vs Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that 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.

While in **Tom Mboya Kombo vs. Nairobi Frame Industries [2008]eKLR, C.A At Nairobi Civil Appeal No. 347A of 2002**, the learned judges; Bosire, O'Okubasu and Aluoch JJ.A while referring to the case of **Joyce Mumbi Ngugi (Administratrix of the Estate of Celestine Mugi Maingi), deceased – vs – The Co-Operative Bank Of Kenya Ltd & Others Civil Appeal No. 214 Of 2004, (unreported)**, the learned judges reiterated that it is trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial judge particularly if such findings are based on the demeanor of witnesses as observed by the Judge and his general appreciation of the evidenced in the case. The said judges observed further that if a trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, then an appellate court is entitled to interfere even with his findings of fact. (See also **Crown Beverages Limited vs. Sendu [2006] 2 EA 43-48.**)

I have considered the written submissions of the appellant against the written submissions of the respondents and do find that the decision of the learned Magistrate was based on the evidence that was brought to court and therefore on this ground of the Memorandum of Appeal, I do find that the learned Magistrate gave adequate consideration to the appellants' case and found that the same was an afterthought. The evidence of DW2 was clear and unequivocal and the same was considered by the Magistrate.

The genesis of this dispute is the Order made by Senior Resident Magistrate, Kangema on the 10.1.2007 in Kangema Land Disputes Tribunal No. 7 of 2006 when the Executive Officer of the court was directed to sign all necessary documents to facilitate the subdivision and transfer of the suit land Loc.9/Kiruri 206. Land parcel No. Loc.9/Kiruri/2095 appears to have been created from Loc.9/Kiruri/206 and registered in the name of Ruth Wanjiku Ng'ang'a. It was imperative for the appellants to produce the proceedings and the award of the Kangema Land Disputes Tribunal to enable the court to understand the basis of registration of the said Ruth Wanjiku Ng'ang'a as the proprietor of the parcel of land. This evidence was necessary to assist the court to determine the issue of trust. Without the said evidence, the court properly determined the dispute on the basis of the title deed.

On the second ground, the court finds that there is no evidence on record that the parcel of land was family land as family land refers to land inherited from the forefathers. This ground has no basis and is dismissed.

On the 3rd ground, I have considered the letter dated 12.3.2012 indicating that the Vendor was a patient of Dr. Mary W. Kuria between 2003 and 2007 and thereafter referred her to Kenyatta Hospital against the evidence of the Vendor herself on 15.8.2012 and do find that the doctors report only covers the period between 2003 and 2009. No report was produced from Kenyatta Hospital as a follow up to the treatment on condition of Ruth Wanjiku Ng'ang'a. She appeared before the trial court and testified which means that her mental faculties were proper. This ground is also dismissed. This court finds that the appellants failed to prove before the trial court any irregularity in the transaction.

The upshot of the above is that the appeal is dismissed with costs to the respondents.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF JUNE, 2015.

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 9TH DAY OF JULY, 2015.

LUCY WAITHAKA

JUDGE