



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 55 OF 2018

**FRANCIS MURIUNGI M'ARWITHA (legal representative of
M'ARWITHA M'ITIRITHIA).....APPELLANT**

VERSUS

GEORGE MUCHOMBA.....1ST RESPONDENT

RUFUS MWITA MUCHOMBA..... 2ND RESPONDENT

(Being an appeal of the Judgement of Hon. Caroline Kemei (SRM) delivered on 8/11/2018 in Githongo SRM ELC No. 19 of 2017 formally Meru CMCC 23 of 2013)

JUDGMENT

1. The appellant herein was the plaintiff in the subordinate court while the respondents were the defendants. The appellant instituted the suit vide a plaint dated 30/1/2013 where he sought the following orders;

a. "An order that the subdivisions registered as L.R No. ABOTHUGUCHI/RUIGA/2116 and 2117 be cancelled and the register be rectified to its original state.

b. Costs of the suit and interest.

c. Any further or better relief the honorable court may deem fit to grant".

2. The initial plaintiff, M'Arwitha M'Itirithia passed on during the trial and was substituted with his legal representative, a son by the name Francis Muriungi. Through the pleadings, the initial plaintiff had stated that in the year 2008, him and the respondents had discussed and agreed on the sale of 1 acre of land to the 1st respondent, to be exercised from LR. No. ABOTHUGUCHI/RUIGA/91. The price was settled at Kshs. 1 Million but the 1st respondent made it clear that he would pay the same after consent of the Land Control Board was granted. The 1st respondent made the plaintiff who was illiterate to thumb print some papers and nothing was followed or done about the sale. The appellant felt that the respondent had lost interest in the transaction and considered the deal as dead.

3. On or about 31/12/2012, the appellant received a report that the respondents had brought a surveyor to the suit land to survey and subdivide the land into two parcels Abothuguchi/Ruiga/2116 and 2117.

4. The respondents in their statement of defence contended that the 1st respondent did not discuss nor did he enter into any agreement with the appellant. However, the 2nd respondent, a son of the 1st respondent is the one who entered into a sale agreement with the initial plaintiff on 10/9/2007 for 1 acre for the consideration of Ksh. 160,000. The initial plaintiff signed the requisite documents by way of thumbprint. The parcel no. Abothuguchi/Ruiga/91 was then subdivided into two, whereby the 2nd respondent became the registered owner of parcel Abothuguchi/Ruiga/2116.

5. Vide a judgment delivered on 8.11.2018, the trial magistrate dismissed the case of the plaintiff triggering this appeal. The appellant has raised 9 grounds of appeal which can be summarized in one sentence; that the trial magistrate failed to appreciate that the alleged sale of land parcel Abothuguchi/Ruiga/91 by the initial plaintiff to the 2nd respondent was fraudulent.

Determination

6. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd**

[1968] EA 123.

7. **PW1 Francis Muriungi** is the son of the initial plaintiff. He testified that he was not aware of any sale agreement. They were additionally never called to the land control board. However, they received information that there was a surveyor on the land to which he went and reported the matter to the CID. He told the court that he did not know how the land was transferred to the 2nd respondent. He however indicated that he was not present when his father sold the land, and he was not aware of any payments made to his father.

8. In support of their case, pw1 had produced two documents as their exhibits which are the green cards found on page 32 and 33 of the record of appeal.

9. **PW2 Wilfred Mutuma Kingi** told the court that he is the grandson to the plaintiff and that he found a surveyor on the land while his grandfather was in Timau. The surveyor proceeded to run away and they reported the matter to the authority.

10. **DW1 George Musomba** told the court that he is a neighbor to the appellant and the father to the 2nd defendant. He confirms that the initial plaintiff agreed to sell one acre out of the suit land to the 2nd defendant at a consideration of Kshs. 160,000. The 2nd respondent paid Kshs. 35,000 to the appellant in their presence at the time of execution. Francis Muriungi (pw1) was then paid 5,000 for emergency through the wife of Dw1. The sum of Ksh. 20,000 was deposited in plaintiff's Meru central account No. 1180133 on 19/9/2008 and a further Kshs. 100,000 was later deposited.

11. **DW2 Rufus Mwita** stated that he was the one who negotiated for the sale of the one acre to be hived off from parcel Abothuguchi/ruiga/91 with the initial plaintiff in 2006. The agreed price was Ksh. 160 000 of which he paid the entire money. The sums paid by cash to the initial plaintiff amounted to Ksh. 40000 (sh. 35000 given to the initial plaintiff while sh.5000 was given to pw1). He deposited a sum of Ksh. 20 000 and Ksh.100 000 in the account of the initial plaintiff at Meru Central Farmer Sacco. Thereafter, he was issued with the title for land parcel No. Abothuguchi/Ruiga/2116.

12. In support of the defence case, Dw2 had produced the 7 documents in their list dated 19.10.2017 as their exhibits.

13. On 4/12/2019 the court gave directions for the appeal to be heard by way of written submissions. The appellant has argued that the trial court failed to take into account the appellant's evidence that the appellant had verbally discussed and agreed with the 2nd respondent to enter into a sale agreement where the appellant would sell an acre of Abithuguchi/Ruiga/91. That the payments by the 1st respondent were dependent on the appellant obtaining consent from the land control board in which he was to attend with his family. It was his submission that their family never went before any Land Control Board to obtain consent and no transfer documents were presented to show how the land was transferred.

14. It was further submitted that the trial court did not take into consideration that the plaintiff was an old and illiterate man.

15. The appellant also argued that the alleged handwritten document offends the provisions of the law of contract act and the same was written by a person who was not a family member nor an advocate. The signatures and thumbprints were not witnessed by independent witnesses and therefore there was no valid sale agreement.

16. The appellant contends that there is a gap between the time of the alleged sale agreement and when the titles emerged.

17. In support of the case for the appellant, the following cases were cited; **James Njenga Burugu vs. Christopher Kamau Burugu (2019) eKLR**, **Charles Kelsa Butichi vs. Albert Yugi (2011) eKLR**.

18. On the other hand, the respondents argued that the trial court understood the weight of the case and sufficiently discharged its mandate under the law. Further, that the appellant despite being old, entered into an agreement, received payments, and submitted all the completion documents and attended the land control board himself to obtain the consent to transfer. That all the evidence pointed out to the fact that the appellant had taken his share, but was out to obtain more.

19. It was further argued that there was an offer that was accepted, common intention to seek evidence by the payments received and that there was a contract which was handwritten and executed hence fulfilling the requirements of section 3 (3) of the Law of Contract Act. In support of their arguments, the respondents relied on the case of **Karmali Tarmohammed & Another v I.H Lakhm & Company [1958] EA** which held that offer and acceptance supported with consideration equates to a contract. That similarly the Court of Appeal in **Michira v Gesima Power Mills Ltd (2004) 1 eKLR** held that the fact that a contract is homemade and may appear to have deficiencies or unusual terms does not give room to the court to tamper with the agreement.

20. The respondents further argued that the appellant's contention that transfer documents were not produced is baseless. This is because all the completion documents and evidence of payments were produced in court as exhibits. Therefore, what the appellant said were mere beliefs, afterthoughts based on his claim that the value of land had appreciated and were never proved in evidence.

21. **Section 24** of the **Land Registration Act 2012 No. 3 of 2012** provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

22. **Section 25 (1)** of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

23. Additionally, Section 26 of the same Act provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except;

a) On grounds of fraud, or misrepresentation to which the person is proved to be a party; or b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24. The 2nd respondent was registered as the owner of the parcel of land Abothuguchi/Ruiga/2116 on 16.12.2008. It was therefore up to the appellant to prove to the court that the respondent acquired the said title by means of fraud, misrepresentation, illegality, unprocedurally or through a corrupt scheme.

25. It was however the appellant’s argument that the respondents took advantage of the appellant’s illiteracy and therefore failed to pay the full consideration, hence the subsequent subdivisions should revert back to the initial suit land. The appellants also contend that they were not involved in the alleged sale of the land.

26. **Section 107 of the Evidence Act** provides that

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

27. **Section 109** of the aforementioned act further provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

28. Thus he who alleges bears the burden of proving, see -**Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR.**

29. A perusal of the trial courts judgment indicates that the court thoroughly analysed the case well. On page 139 of the record of appeal, the trial court had stated as follows;

“Looking at the evidence tendered by the plaintiff’s witnesses, there was no evidence led to confirm that the 2nd defendant obtained signatures of the plaintiff fraudulently. Pw1 strongly believes that his father was duped/conned. He however had a duty to proof his allegations. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud.....”.

30. I find no compelling reasons to deviate from these findings.

31. The appellant has not pointed out the legal platform which required their family members to be present when the initial plaintiff was selling the land. **Section 9 (1) of the Land Control Act** sets out the conditions in which a consent for a land transaction may be refused by the board. None of those conditions include the failure to avail family members. In the case of **Joseph Njuguna Mwai & 2 Others vs. Samuel Itibi Kimani Thika ELC No.130 of 2017**, I was dealing with a situation where by the plaintiffs were challenging the alienation of a parcel of land by their father to their nephew averring inter alia that they were never consulted. I stated that ;

“Nowhere under the Land Control Act cap 302 Laws of Kenya is it provided that plaintiffs ought to have been consulted or ought to have given their consent in the alienation of the suit land”.

32. It was never in dispute that the plaintiff and the 2nd respondent entered into an agreement for the sale of 1 acre which was to be hived off from LR. No. ABOTHUGUCHI/RUIGA/91. The respondents gave plausible evidence as to how the purchase price was paid as follows; Kshs. 35,000 to the appellant at the time of execution. Francis Muriungi a son of the appellant picked Kshs. 5,000 from wife of 1st defendant, while Ksh. 20,000 and Ksh.100 000 was deposited in the plaintiffs account Meru central sacco. This evidence was never disputed by the appellant. The allegation by the appellant that the consideration to be paid for the one acre was Ksh 1,000,000 and not 160,000 is not supported by any tangible evidence. After all, both pw1 and 2 stated that they were not aware of the sale agreement and they did not in any way participate in the land transfer transaction.

33. In light of the foregoing analysis, I am inclined to agree with the lower courts finding and consequently I find that the appeal herein lacks merit and is therefore dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 1.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE