



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 14 OF 2018

AGRIPINA KHATI..... APPELLANT

VERSUS

RICHARD LIVONDO WIRANGA

EMILY NABANGALA MWIKHALI..... RESPONDENTS

JUDGEMENT

The appellant being dissatisfied with the judgment aforesaid wishes to appeal on the following grounds:-

1. The respondents did not prove their case on the balance of probability.
2. The learned trial magistrate shifted the burden of proof to the appellant.
3. The learned trial magistrate presided over the case without jurisdiction.
4. The learned trial magistrate erred in allowing the respondents' claim when the evidence on record did not support the respondent's claim.
5. The learned trial magistrate failed to take into account the merits of the case.

The appellant prays that the appellant's appeal be allowed with costs.

The respondents submitted that they did prove their case on balance of probability. The respondents on page 35 of the proceedings testified that he is the owner of the suit land parcel and produced a copy of the title deed as exhibit No. 1 as well as copy of green card as exhibit 2. He also testified that he obtained the land regularly as he obtained land control board consent as well as consent to transfer. The appellant herein filed a counterclaim praying for the land to be transferred into her name yet she did not show as an individual she had purchased a portion of the said land parcel. That the appellant's claim lied as she alleged the deceased husband had purchased the same. She failed to produce a grant in her name representing the estate of the deceased and thus she is barred from raising any claim on behalf of the estate of the deceased.

They submit that the public trustee who was enjoined as the 2nd defendant in the suit failed to participate in the proceedings and thus failed to prosecute its case on behalf of the estate of the deceased. The respondent's averment that the appellant had encroached on the land parcel sometimes in 2002 was never challenged. The respondent demonstrated in court that he has a title deed to the said suit land parcel acquired legally and thus the absolute owner of the suit land parcel. The appellant never challenged the legality of the title deed as she did not have the capacity for failure to take out grant in the estate of the deceased, as well as the public trustee who was the holder of the grant in the estate of the deceased failed to challenge the same. In Nakuru Environment and Land Court Land Case No. 71 of 2014 Kiplangat Shelisheli Mutarakwa vs. Joseph Rotich Kones (2018) eKLR it was stated that the fact that the plaintiff holds title is prima facie evidence that he is the proprietor of the suit land as provided for under section 26 of the Land Registration Act, Act No. 3 of 2012.

This court has carefully considered the appeal and submissions therein. On ground 3 of the appeal it states that the learned trial magistrate presided over the case without jurisdiction, as the matter involves Land parcel No Isukha/Mukhonge/112. This in essence puts the jurisdiction of the said matter exclusively on the Environment and Land Court. Pursuant to the Constitutional mandate granted under Article 162 (2) of the Constitution. Parliament enacted the Environment and Land Court Act Chapter 12 A of the Laws of Kenya wherein section 12 (2) (d) stipulates as follows;

1.

2. In exercise of its jurisdiction under Article 162 (2) of the Constitution, the court shall have power to hear and determine disputes relating to the environment and land, including disputes

....(d) relating to public, private and community land and contracts, chores in action or other instruments granting any enforceable interest in land: and.

In the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* (2017) eKLR the court held that;

“By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases”.

This court of appeal decision was delivered at Nairobi on 19th day of October, 2017. The trial court magistrate delivered this judgement subject of the appeal on 11th January 2013. The case was filed in 2002.

After the enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15th December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto. Of relevance to this judgment were amendments made to The Environment and Land Court Act, Act No. 19 of 2011 (the ELC Act) with a view to conferring on the Chief Justice the mandate to transfer Judges from the specialized courts to the High Court and vice versa, and clothing Magistrates courts with authority to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. The relevant sections are as follows;

“26. Sitting of the Court

(1) The Court shall ensure reasonable and equitable access to its services in all Counties.

(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.”

Amendments were made to Section 101 of the Land Registration Act which was amended by inserting the words *“and subordinate courts”* immediately after the expression *“2011”* and Section 150 of the Land Act that was amended by deleting the words *“is vested with exclusive jurisdiction”* and substituting therefore the words *“and the subordinate courts as empowered by any written law shall have jurisdiction.”* The Magistrates Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15th December 2015. It was to commence on 2nd January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

“A magistrate's court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations.”

The appeal *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* (2017) eKLR arose from the judgment of the High Court (Emukule, Chitembwe, Thande, JJ) delivered on 11th November 2016 in which the court decreed that Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015;

“in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and the use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void.”

This means that magistrate’s court had jurisdiction at that time to entertain land matters prior to the amendments in 2015 discussed above. The case was filed in 2002. I therefore find that the Trial Magistrate had jurisdiction to entertain this matter.

On ground 1,2,4 and 5 of the appeal, the Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground 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.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

I have perused the records of the lower court and it is a finding of fact the 1st respondent is the registered proprietor of Land parcel No Isukha/Mukhonge/112. The respondent produced the title deed and the green card as exhibits. The appellant testified that her deceased husband Christopher Mwikhali Mwinaka and the respondent Richard are brothers. That they bought the suit land parcel No Isukha/Mukhonge/112 jointly. That the title only came out in the name of Richard which was fraudulent. I see no evidence of fraud on the part of the respondent. The title deed was registered in his name when the said Christopher Mwikhali Mwinaka was alive. The appellant’s testimony was not corroborated by any other witness. Indeed I agree with the trial magistrate that the respondent proved his case on a balance of probabilities

In the case of *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH OCTOBER 2020.

N.A. MATHEKA

JUDGE