



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 225 OF 2013

HARRISON KARIMI MUCHIRA APPELLANT

VERSUS

WILSON MWANGI WAMURI RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 24TH SEPTEMBER, 2007 BY HON. A.K. ITHUKU – R.M. AT KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT CIVIL CASE NO. 420 OF 2004)

JUDGMENT

This is an appeal against the judgment of A.K. ITHUKU (R.M) delivered on 24th September, 2007 in which he dismissed the appellant’s suit claiming vacant possession of plot No. INOI/KERUGOYA/2225 from the respondent in Kerugoya Senior Resident Magistrate’s Court Civil Case No. 420 of 2004. In that suit, the plaintiff (appellant herein), sought orders of vacant possession of the plot in dispute from the defendant (respondent herein) on the basis that he (plaintiff) had on 13th January, 2002 entered into a sale agreement with the defendant in which the defendant agreed to transfer to the plaintiff the plot in dispute at a consideration of Ksh. 400,000/= but that although the plaintiff had paid the full purchase price as agreed, the defendant had refused to give him vacant possession. In the course of the trial, a third party was enjoined in the proceedings and after hearing all the sides, the trial magistrate delivered a judgment in which he found that there was no evidence of any sale agreement between the plaintiff and the defendant and therefore dismissed the plaintiff’s claim but found that the interested party had proved having bought 1/8 acre out of the dispute property and accordingly entered judgment for him to that effect.

The plaintiff proceeded to file this appeal against that judgment and has put forward the following grounds:-

1. *That the learned magistrate erred in law and in fact in deciding that the land parcel No. INOI/KERUGOYA/2225 is not owned by the plaintiff*
2. *The learned trial magistrate erred in law and in fact by deciding that the land parcel No. INOI/KERUGOYA/2225 was acquired by the plaintiff through fraud*
3. *The learned magistrate erred in law and in fact that did (sic) not buy the said land legally*
4. *The learned magistrate erred in law and in fact by not considering the title deed and search certificate produced by the plaintiff as prove (sic) of ownership over the said parcel of land*
5. *The learned magistrate erred in law and in fact by deciding that the sale agreement of the said land was illegal*
6. *The learned magistrate erred in law and in fact by not giving the plaintiff the orders sought in the plaint*

7. The learned magistrate erred in law and in fact that the interested party proved his case on a balance of probability

When the appeal came up before me for directions, the respondent, though served, did not attend and did not file any submissions. I therefore only have the submissions of Mr. Mwai advocate for the appellant.

As was stated in **SELLE AND ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS 1968 E.A 123**, it is my duty in considering this appeal to re-evaluate and re-examine the evidence as a whole and subject it to a fresh examination in order to form my own independent view of the case and in so doing, I must remember that I did not have the advantage of hearing and observing the demeanour of the witnesses.

The first ground raised herein is that the trial magistrate erred in law and in fact by deciding that the land parcel No. INOI/KERUGOYA/2225 is not owned by the plaintiff (appellant herein). During the trial, the appellant informed the trial magistrate that he bought the land subject matter of this appeal following an agreement entered into between him and the respondent on 13th January, 2002 and paid Ksh. 250,000/= out of the full purchase price of Ksh. 400,000/=. The appellant was un-able to produce the original sale agreement as the lawyer who drew it did not testify and his attempt to produce a copy of the said agreement was rejected. On his part, the respondent stated that he did not enter into any such agreement and that infact the land in dispute belonged to his mother JOSEPHINE WAMBUI and was only transferred to him on 14th August, 2002 and that the said sale agreement was a forgery as he never signed it. In dismissing the appellant's claim in the lower Court, the trial magistrate laid emphasis on the fact that no sale agreement had been produced and therefore any contract for the sale of land was un-enforceable by virtue of the provisions of **Section 3 (3) of the Law of Contract Act** which requires that a contract for the disposition of an interest in land must be in writing and signed. In his evidence in the trial Court, the respondent testified that he normally signs his documents. In his evidence in chief, he stated as follows:-

"I am the defendant herein. INOI/KERUGOYA/2225 is mine. The land was previously owned by my mother JOSEPHINE WAMBUI. Shewas registered in 1999. It was originally INOI/KERUGOYA/751. It was transferred to me on 14th August, 2002. I did not sell the land to the plaintiff. I did not receive any money as alleged. I usually sign my documents. The documents referred to are forged. On 14th April, 2004, I came to learn the land had been sold. I lodged a caution. I complained to the D.O. and Land Registrar. The plaintiff was summoned but did not attend. I reported to Kerugoya Police Station. The matter is still pending at the Station".

On his part, the appellant testified that he met the respondent on 13th January 2002 who offered to sell him the plot subject of this appeal and that they entered into a written agreement at the offices of an advocate by the name Gacheche Wa Miano where he paid the respondent Ksh. 250,000/= out of the agreed purchase price of Ksh. 400,000/=. He therefore obtained a title to the property. As I have stated above, the original sale agreement was never produced. However, in the record of appeal, counsel has annexed a copy of the said agreement dated 13th January, 2002 which bears a thumb print of the alleged vendor i.e. the respondent. The respondent stated in his evidence at the trial that he normally signs his documents and indeed I have seen a replying affidavit dated 18th October, 2007 signed by him. Clearly therefore, the respondent signs his documents and does not thumb print them. It follows therefore that the sale agreement that formed the basis of the transfer of the plot subject of this appeal from the respondent to the appellant was a forgery and was therefore not an agreement as envisaged by the **Law of Contract Act**. Although the appellant had a title to the property in dispute issued to him on 2nd June, 2004, the same could only have been obtained through fraudulent means.

That is not all. It is clear from the Green card that the plot subject of this case was registered into the names of the respondent's mother one JOSEPHINE WAMBUI on 22nd January, 1999 and was only registered into the respondent's names on 28th August 2002 and the title issued to him on 17th March, 2004. It follows therefore that on 13th January, 2002 when he is purported to have sold the land to the

appellant, he had no capacity to do so as the land was registered in the names of his mother. Any disposition of the same to the appellant could only have been through fraudulent means. The trial magistrate was therefore entitled to make the finding that he did that the appellant obtained registration of the property subject of this case through fraudulent means. He cannot be faulted on that finding. That disposes off the first ground of appeal.

As regards the other grounds which are reproduced above as No. 2 to 7, it is clear from the above that the appellant could not have legally bought the property in dispute as there is clear evidence of fraud since there was infact no sale agreement as envisaged under the law.

On the ground that the trial magistrate erred in not considering the appellant's title deed and search certificates, it is of course true that under **Section 27 of the Registered Land Act** (now repealed) under which the property in dispute was registered, such registration vests in the person so registered the absolute ownership of the said property. However, under **Section 143** of the repealed Registered Land Act, such registration can be cancelled if it is established that the same was obtained through fraud. In this case, the respondent was able to lead evidence to establish fraud and the trial Court was entitled to make the orders that he did in dismissing the appellant's claim and also to draw the decree that he did on 2nd October, 2007 cancelling the registration of the appellant as the proprietor of L.R No. INOI/KERUGOYA/2225.

I accordingly find no merit in this appeal which I hereby dismiss and as there was no participation by the respondent in this appeal, I make no order as to costs.

It is so ordered.

B.N. OLAO

JUDGE

10TH OCTOBER, 2014

10/10/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Wachira for Mwai for Appellant – present

No appearance for Respondent

COURT: Judgment delivered this 10th day of October, 2014 in open Court.

Mr. Wachira for Mr. Mwai for Appellant present

No appearance for Respondent

Right of appeal explained.

B.N. OLAO

JUDGE

10TH OCTOBER, 2014