



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL APPEAL NO. 2 OF 2016

(Being an appeal from the Judgment and decree of Hon. C. I. Agutu

RM in Busia CMCC No. 49 of 2015 delivered on 8/2/2016)

CLEMENTINA ADERO OYUGI APPELLANT

= VERSUS =

FREDRICK APOLLO MWAMU..... RESPONDENT

J U D G E M E N T

1. The appellant who was the plaintiff in the court below being dissatisfied with the whole of the judgement of the trial magistrate in Busia CMCC No. 49 of 2015 raised the following grounds against the said judgement;

(i) That, the learned Resident Magistrate erred in Law and Fact by failing to appreciate that the suit land L.R. No. BUKHAYO/MUNDIKA/8911 was agricultural land, and as such it required consent of the Land Control Board for any kind of transaction to be carried over it.

(ii) That, the learned Resident Magistrate erred in Law and Fact by dismissing the appellant's suit against the weight of evidence on record.

(iii) That, the learned Resident Magistrate erred in Law and Fact by holding that there was no breach of agreements on the part of the respondent/defendant yet the acreage to be exchanged did not conform to one mentioned in the agreement.

2. Following is brief summary of the case filed in the subordinate court. Vide a plaint dated 9th February 2014 the plaintiff pleaded that on or about 27/7/2013, the defendant and herself got into an agreement of sale and exchange of land. That the plaintiff was to give the defendant a plot measuring 50ft by 100ft curved from L.R. No. Bukhayo/Mundika/8911 while the defendant was to give the plaintiff 1.5acres of land in Kanyaner and also pay her Kshs.50,000. The plaintiff contended that the land she was shown did not measure up to 1.5acres and it did not have a title. Consequently, on 30/8/2014 they entered another agreement that the defendant was to give her ¾ acres but which agreement the defendant failed to honour necessitating the filing of this suit.

3. The appellant asked the court to allow this appeal and grant the following prayers:

a) That the judgment of the lower court be quashed.

b) That judgment be entered for the Appellant as was prayed for in the lower court case.

c) That costs of this appeal and of the lower court be awarded to the Appellant.

d) Any other relief deemed fir and just to grant.

4. The Respondent denied that claim by filing his statement of defence dated 2nd April 2015 and put the Appellant to strict proof. The Respondent pleaded that the suit did not disclose any cause of action and denied entering the Appellant's land fraudulently.

5. The Appellant gave her testimony on 12/10/2015 when she stated that the respondent had secretly built on her land L.R. Bukhayo/Mundika/8911 and produced a copy of the title deed as **Pex 1**. The Appellant averred that she was neither shown any land at Kanyaner measuring 1.5acres nor any title deed. That she went to the village elder and an undertaking was drafted that she was to be paid Kshs.350,000/= which amount was not paid therefore she demanded (**Pex 4**) that the Respondent be removed from her land. In cross-

examination the Appellant admitted receiving Kshs.40,000 from the defendant but denied that Benard Oyugi received Kshs.10,000 with permission of the appellant from the defendant. This marked the close of the Appellant's case.

6. The Respondent called two witnesses in support of his defence. He confirmed that they entered into an exchange of land agreement and Benard Otieno Oyugi was the go-between. That he gave out Kshs.40,000 (**Dex 1**) and if they did not agree, he was to pay the Appellant Kshs.350,000. The Respondent stated that Benard Otieno collected the balance of kshs.10,000. The Respondent admitted he did not have a title deed for the land in Kanyaner but gave the plot number as Ukwala 657. That he had not surveyed the Kanyaner land but it is big. He also said he had not appeared before any Land Control Board. The Respondent denied breaching their agreement.

7. The Respondent's witness called Benard Otieno Oyugi is a son to the Appellant. DW2 confirmed receiving Kshs.10,000 with full knowledge of the Appellant. Mr. Otieno averred that when the Respondent started building on their land (Bukhayo/Mundika/8911), he informed the Appellant and the Appellant had no problem. According to DW2, it was the Appellant who was on the wrong. This marked the close of the Respondent's case.

8. The trial magistrate after considering the evidence adduced; the pleadings and the submissions concluded that the Appellant had failed to prove her case on a balance of probabilities. She therefore dismissed her case with costs. The Appellant is unhappy with this finding on account of the reasons set out on the memo of appeal. I will proceed to analyse each of the grounds to see whether or not the trial magistrate erred as pleaded.

9. The first ground was that the trial court erred in failing to appreciate that the transaction required Land Control Board consent. The title from which the plot measuring 50ft by 100ft is registered in the name of the Appellant. The Appellant argues that this being agricultural land, the transaction became void for lack of Land Control Board consent. It is the Appellant who initiated the suit in the court below. She pleaded that their transaction be declared void for lack of L.C.B consent. The Respondent during cross-examination admitted they had not appeared before any Land Control Board.

10. From the pleadings and the evidence of the plaintiff, the issue of lack of consent was not disputed. The trial court did not consider the issue of the absence of consent though raised in the pleadings and in the submissions. It is trite law that contested issues ought to be determined however in my view the absence of the letter of L.C.B was not a contested issue as neither of the parties were seeking registration of titles to their respective acquired plots.

11. The second ground of appeal was that the trial court erred in dismissing the Appellant's suit against the weight of evidence on record. The Appellant sought for orders to evict the Respondent for getting into her land without any colour of right and or consent and before he honoured the agreement for the exchange of land. It is not contested that besides the Kshs.50,000 paid to the Appellant, the Respondent was to give her land measuring 1.5 acres. By an agreement dated 30/8/2014, the size of the land to be given to the Appellant was reduced to $\frac{3}{4}$ acres. In his defence, the Respondent stated that the Appellant knew he was building on the suit land as he used to deposit building materials at her home. He did not state whether or not he had put the Appellant into possession of the land at Kanyaner. The Respondent in cross-examination stated that he had not surveyed the land he was giving the Appellant.

12. From the evidence adduced, I am persuaded to find that the Respondent partially met his obligation when he paid the Kshs.50,000. Once he settled on the Appellant's plot as per the agreement, the burden shifted on him to show that the parcel of land at Kanyaner was at the disposal of the plaintiff. Instead, he only endeavoured to prove that he had paid the sum of Kshs 50000 however he did not demonstrate that he identified and showed his plot to the Appellant whether 1.5acres or $\frac{3}{4}$ acres as per their agreement. There was an option to pay the Appellant Kshs 350000 if there was no land given at Kanyaner which money seems not to have been paid. The trial court was thus in error not to find for the plaintiff on this limb.

13. Is the Appellant entitled to the orders sought in the appeal? She indeed is entitled to get back her land since the exchange was not completed nor was she paid Kshs 350000 as agreed between themselves. The Appellant submitted that the Respondent's remedy was provided for in Section 7 of the Land Control Act. Therefore if she is getting back her land, she must refund the Respondent the Kshs.50,000 paid to her.

14. In conclusion, I find merit in the appeal and allow it on the following terms:

i) The Appellant is granted orders of eviction as prayed in the plaint. However the Respondent is given THREE (3) months to surrender vacant possession of L.R BUKHAYO/MUNDIKA/8911 in default eviction shall issue.

ii) The Appellant shall refund the Respondent the sum of Kshs.50,000 paid to her before executing the eviction order. In the event the Respondent vacates the land voluntarily, he can execute for the sum of Kshs.50,000 within 30 days of him surrendering vacant possession.

iii) Given the background of this case, it is my considered opinion that each party meets their respective costs of this appeal and those in the court below.

Dated, signed and delivered at BUSIA this 21st day of October, 2020.

A. OMOLLO

JUDGE