



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Appeal 127 of 2010**

**FRANCIS T. WABUKE ..... PLAINTIFF**

**VERSUS**

**FEISAL ABDUL BARRY ..... APPELLANT**

**JUDGMENT**

The appellant being dissatisfied with the finding of the chief Magistrate in Bungoma CMCC no. 385 of 2003 appealed to this court. He listed 13 grounds among them;

- i). the trial magistrate entertained a suit and he had no jurisdiction.
- ii). Entered a suit and decided in favour of a plaintiff who did not have locus standi.
- iii). Erred in failing to perceived the suit property had two different leases i.e 33 years and 99 years.
- iv). He failed to frame issues.
- v). he introduced into his judgment matters that were not conversed in evidence.

The appeal then proceeded by parties filing written submissions and i was then asked to give a verdict.

In his written submissions, Mr. Khakula learned counsel for the appellant has argued grounds 1,2,3,4, & 13 separately and 5 & 6 jointly with grounds of 7,8,9,10,11 & 12 also argued together.

The respondent also through his counsel Mr. Ocharo has made reply in the same format adopted by the appellant in their submissions, in reaching my determination, I will follow the sequence set out by the parties.

The first ground is the suit is incompetent and non-starter as the plaint was not signed by the plaintiff in contravention of the provisions of Order VI rule 14.

According to the appellant, the plaint was not signed by the plaintiff and he quoted Page 129 of the record where the respondent in his evidence admits he did not sign the plaint. However, I am in agreement with the respondents submission that the plaintiffs did not sign but it was signed by the donee of his power of attorney. The power of attorney was produced as evidence during the trial. The appellant during the trial did not question the authenticity or otherwise of it. The fact that it was produced by the donor makes it authentic. I do find this ground as lacking in merit and dismiss it.

Ground 2 questioned the jurisdiction of the court. This is a new issue raised at the appeal stage. I have perused the defence filed by the appellant on 6<sup>th</sup> June 2007. No mention is made of jurisdiction of the court. However since jurisdiction deals with crux of the matter, I will analyze and determine it. The respondent in reply submitted that what was sought were declaratory orders and that is what the trial magistrate granted in the judgment. The appellant quoted sec. 143 as read with section 159 of the RLA cap 300 (*repealed*) to support his submission on lack of jurisdiction. Section 143 (1) provides thus “ subject to section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, be made or omitted by fraud or mistake.

Sec. 159, “civil suit and proceedings relating to the title to..., shall be tried by the high court and where the value of the subject matter in dispute does not exceed twenty five thousand pounds by the resident magistrates court or where the dispute comes within the provisions of sec. 3 (1) of the LDT Act in accordance with that Act.”

My interpretation of the two sections is that jurisdiction is not exclusively taken away from the magistrate’s court. Section 143 refers to the ‘**court**’, while section 159 now differentiates by introducing pecuniary jurisdiction. The appellant did not in the trial in court below nor in his appeal distinguish why he felt the trial court lacked jurisdiction to entertain the suit. I find that in absence of such explanation,

the ground on jurisdiction is also dismissed.

Further a look at sec. 143 (1) gives court power to rectify register where title is found to be obtained by fraud or mistake which in the instant case was the subject in dispute before the trial magistrate. I do find that he acted within the law to determine the matter. I will analyze the authority cited by the appellant later in the judgment when dealing with merit or otherwise of the entire suit.

Ground 3 raises the issue of locus standi of the plaintiff in bringing the suit. The appellant submits that the respondent ought to have done substitution in the succession file where his father Abdul Barry – deceased was appointed administration of one Rama wife to Feisal Abdallah-deceased.

Plaintiff exhibit P3 and P1 are certified extract of the register in respect of parcel Bungoma/Township/6. In ex P3 the green card has entry recording Abdul Barry s/o Omar Ali as personal representative of Gazim Abdul Rab- deceased of Box 255, NaKuru. Similarly ex. P1a in entry no 2, on 20th December 1967 Abdu Barry s/o Omar Ali is registered as owner of the suit property. In my understanding of the law, it was proper only for the respondent to bring this suit as administrator of estate of Abdul Barry whose names appeared on the title at the time. Although the late Abdul Barry was carrying out the wishes of Rama as contained in her will, it appears the land records was not or didn't bear her names. If the respondent took out the letters of administration of her estate as is submitted by the appellant, he would still have required the grant in respect of his father's estate to file this claim. This ground also fails.

Ground 4 refers to the lease period of the plot which in my view is the substance of this appeal. According to the appellant, the suit property had been leased to Abdul Barry – deceased for 33 years w.e.f 1.1.1959 with the lease thus expiring on or about 1991. To the appellant, the trial magistrate erred in not realizing the initial lease of 33 years had expired and a new lease of 99 years was now issued to the appellant.

The appellant in explaining how he acquired the title produced before the trial court a sale agreement showing he purchased the suit land. He did not produce any document to show that either he nor the seller a Mr. Fred Namachanja acquired the lease directly from government as new lessee assuming the lease to the earlier lessee had expired. I doubt if it is open to him to incline himself with such defence if he did not establish it during the trial. The land registrar in his evidence to court stated that at the determination of the lease, the lease-holder before expiry would be given notice to surrender title. In the will produced, the deceased bequeathed rental incomes to be used in paying the teachers of the islam and take care of the mosque ( situate in Bungoma presumably). It therefore follows that the property was developed by the time the lease expired. The Constitution (including the repealed one) protects the right to property and the government would be breaching this right if it would give the plot to a different person without previous notice to lease holder taking into account the suit parcel was developed. In the case cited by the appellant of Nairobi Permanent Markets Society & 11 others VS. Salima Enterprises and two others C.A no. 185 of 1997, the court had this to say at page 5 ***“certificate of title is to be taken as conclusive evidence that the person named therein is proprietor and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved a party”***.

If the plot is developed, while the appellant was purchasing the property, he did not disclose whether he visited the ground and what this visit revealed. In the cited case, the respondents were mere licencees unlike the present respondent. The circumstances of the two cases are clearly different. I do therefore find that the expiry of lease period did not in itself deprive the respondent of his rights unless notice was served on him and he did not do anything to extend the lease. The respondent in his evidence said they applied for extension of the lease but had not received any feedback from the commissioner of lands.

The appellant merged ground 7 – 12 together in the submissions. They submitted that the trial court misdirected itself when he found that the plot was sold to Fred Namachanja who later sold it to the appellant and yet it is the lease that had expired. According to the appellant, after the expiry of the initial lease, the county council issued a new lease of 99 years. In his evidence during the trial, he did not produce any document to support this assertion. The mere production of a certificate of title does not itself explain the mode in which the land is acquired.

Counsel for the appellant submitted that lack of consent was not an issue as no complaint was lodged with the commissioner of lands. This in my finding is an issue of law for which the trial magistrate acted within to find the consent obtained (page 156 of record) was not the proper one. The appellant obtained

consent of the D.C yet this was not agricultural land as envisaged under Cap 302 Laws of Kenya. The appellant has only selected few sentences by the trial court however if the entire paragraph is analyzed wholesomely, he looked and used the evidence before him to reach his decision. The appellant has not demonstrated by Fred the actual misdirection of the learned magistrate. Perhaps had oral submission been offered, this may have been brought out clearly.

The last ground – no. 13 was in respect to the removal of a caution placed by the respondent or his agent. The appellant submits and I quote **“there was no evidence to prove fraud against the appellant. The trial magistrate misdirected himself in law and fact by holding that the removal of the caution was fraudulent.”** The respondent on their party submitted that they were never notified before the caution was removed hence supporting their allegation of fraud.

At page 156 paragraph, the magistrate found that even with the removal of the caution in the register, the parcel of land was not available to be allocated to Fred Namachanja. He did not make a finding that the removal of the caution was fraudulent as submitted by the appellant. What he found as fraudulent was the sale by Fred Namachanja to the appellant as he presented false information to the land control board and the manner in which the transfer process was done. To this end, criminal proceedings were commenced and the false information provided was in respect to the identity card of Fred.

In conclusion, I find the appeal as lacking in merit and the same is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED, DELIVERED AND READ in open court this 8<sup>th</sup> Day of April 2013.

**A. OMOLLO**

**JUDGE.**