



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC APPEAL NO 9 OF 2018

AGNES NYANCHAMA.....1ST APPELLANT

ALLOYS MOSETI.....2ND APPELLANT

VERSUS

JACKLINE NYABOKE OMBONG'I.....RESPONDENT

(Appeal from the judgment and decree of the Magistrate's Court (Hon. Nathan Shiundu Lutta, SPM)

dated the 29th day of August 2018)

JUDGMENT

1. This appeal arises from the judgment of a suit in the subordinate court where the Respondent instituted a suit against the Appellants. The Respondent alleged that on 17th April 2010 she entered into an agreement for sale of Land Parcel No. KISII MUNICIPALITY BLOCK 1/160 ('suit land') measuring 0.0679 Ha where the 1st Appellant agreed to sell the suit land to the Respondent at a consideration of Kshs 450,000/-.

2. According to the Respondent the 2nd Appellant received Kshs 400,000/- vide a bank transfer through his Account No. [...] at Co-operative Bank, Kisii Branch and Kshs 50,000 which was in cash at the offices of Minda & Co Advocates.

3. The Respondent claims that the Appellants had falsely represented to the Defendant that the suit land belonged to the 1st Appellant and that the 1st Appellant had the authority to sell and they purportedly availed the 'title' to the land. The Respondent alleged that when she presented the said title to the Municipal Council of Kisii for integration of her name into the system, she discovered that the suit land did not belong to the 1st Appellant but to a local trading company. She was informed by the Municipal Council that the suit land constituted a road reserve and that a tarmac road passed through the land. After confronting the Appellant's regarding this new discovery, the Appellants agreed to refund the Kshs 450,000/- to the Respondent. The Respondent alleged that the appellants' actions were fraudulent as they deliberately misrepresented to her that they owned the suit land. As damages the Respondent sought for Kshs 450,000/- together with Kshs 200,000 being the penalty stipulated by the agreement, special damages of Kshs 27,898/-, interest and cost of the suit.

4. The Appellants in their statement of defence advanced that they executed all the transfer documents in favour of the Respondent and the suit land was duly transferred to the Respondent's name. According to the 1st Appellant she did not falsely represent herself as the owner of suit land as she availed the original lease at the time of sale and not a title deed as claimed by the Respondent. The 1st Appellant also claimed that the Plaintiff ought to have conducted a search at the relevant Lands Office to ascertain ownership and further apply for a map from the survey office to confirm the physical location of the suit land. She also alleged that she had fully discharged her obligations under the contract and that in any event the Respondent had failed to repudiate the contract.

5. At the hearing before the subordinate court the Respondent testified as Pw1 and adopted her witness statement. On cross examination she testified that her father had applied for the title search over the land. She also told court that the land was initially in the name of the 2nd Appellant who is the husband to the 1st Appellant.

6. Zacheus Ombongi (Pw2) who witnessed the execution of the agreement for sale testified that the property was registered in the name of the 1st Appellant and that the 2nd Appellant informed them that she had authority to sell. He testified that later at the county office they were informed that the land belonged to someone else. On cross examination he testified that the Appellants did not give good title. He testified

that the title was later reversed back to the 1st Appellant.

7. The 1st Appellant testified as Dw1 and gave evidence that the suit land belonged to her and that she sold it to the Respondent. She also testified that she had not sought to have the land transferred back to her name. On cross-examination she testified that she had been informed that the land had reverted back to her. She testified that the land was a gift from her father and that she did not know how he obtained the land. She also acknowledged that the Respondent gave her the money.

8. The 2nd Appellant testified as Dw2 and informed the court that the 1st Appellant was his sister. He recalled that the 1st Appellant sold land to the Respondent and that Kshs 400,000 was deposited into his account. On cross examination he maintained that the suit land was transferred to the Respondent. He testified that the search shows that the land is in the 1st Appellant's name but he was not involved with the reversal.

9. The trial court found that the parties had entered into an agreement for sale. The trial court also found that the Respondent was entitled to damages as the Appellants had breached the terms of the contract by failing to fulfill their obligations.

10. The Appellants dissatisfied with the findings of the trial court has lodged this instant appeal based on the following grounds;

1. The learned Magistrate erred in law and misdirected himself fundamentally in not holding that the 1st Appellant had performed, completed and discharged her obligations in the contract.

2. The learned trial magistrate erred in law and misdirected himself fundamentally in not holding that the contract had been extinguished.

3. The learned trial magistrate erred in law and in fact in not holding that the Respondent fraudulently and unlawfully retransferred land parcel No Kisii Municipality/Block I/160 back to the name of the 1st Appellant.

4. The learned trial magistrate erred in law and in fact and misdirected himself fundamentally on the issue of the alleged fraud committed by the Appellants when non (sic) was proved to the required standards.

5. The learned trial magistrate erred in law in awarding the Respondent damages based on a default clause when no such applicable default exists in the written agreement.

6. The learned trial magistrate erred in law in awarding damages of Kshs 200,000/= pursuant to the default clause when no notice was served making time the essence of the contract.

7. The learned trial magistrate erred in fact and misdirected himself fundamentally in holding that the Respondent had proved her case on a balance of probability against the 2nd Appellant when no cause of action was proved against him.

8. The learned trial magistrate erred in law and in fact in arriving at a decision against the weight of evidence on record.

11. When the appeal came up for directions, the parties were directed to file written submissions and both parties filed their submissions which I have considered.

12. The Appellants in their written submissions argued that they had complied with the terms of the contract, executed all the necessary documents, obtained consent and clearance certificate from Kisii Municipal Council and consequently the land was registered in the Respondent's name. It was submitted that once the agreement for sale was executed, the Respondent acquired a beneficial interest in the suit property. It was advanced that prior to entering the sale contract; the Respondent had done an official search and was issued with an official search certificate on 17th March 2010 confirming that the 1st Appellant was the registered owner. Subsequently the Respondent on 19th April 2010 paid Kisii Municipal Council outstanding rates of Kshs 19,888/- and Kshs 3,000/- for a clearance certificate which was mandatory for the transfer.

13. It was submitted that the Respondent did not plead fraud as required by Order 2 Rule 10 (1) of the Civil Procedure Rules, 2010 and neither did she prove fraud to the required standard. They relied on the **R.G Patel v Lalji Makanji [1957] EA 314**, **Koinange & 13 others v Koinange [1986] eKLR**, and **Mutsonga v Nyati [1984] EA 425** in support of their case. It was submitted that time was not of essence and that the Appellants were not liable to pay damages of Kshs 200,000/- to the Respondent.

ANALYSIS AND DETERMINATION

14. Having considered the Appellants' submissions, the appeal before me and the evidence before the subordinate court, I find that the following issues are not in dispute:

a) That the 1st Appellant and Respondent entered into an agreement for sale of the suit land on 17th April 2010.

b) That the Respondent paid Kshs 400,000/- as part of the purchase price to the 2nd Appellant through Real Time Gross Settlement System (RTGS) on 19th April 2010 through his Cooperative Bank Account.

c) That Kshs 50,000/- was paid upon execution of sale agreement and this was confirmed by the 2nd Appellant in his testimony before the lower court.

d) That the Respondent on 19th April 2010 paid rates amounting to Kshs 19,898/-. The Respondent also paid Kshs 3,000/- and obtained a clearance certificate. On both receipts evidencing payment the name AGNES NYANCHAMA M is entered as the customer's name.

e) That the suit land was transferred to the Respondent and the Respondent was issued with a Certificate of Lease. The entry number 3 indicates that the land was registered in the Respondent's name on 17th April 2010 and a Certificate of Lease issued on 22nd April 2010

15. The Respondent was therefore under the obligation to prove on a balance of probabilities that the Appellants had falsely represented to her that the land was owned by the 1st Appellant. The Respondent in her plaint listed the particulars of fraud to be as follows;

“(i) Deliberately misrepresenting and purporting ownership of LR NO. KISII MUNICIPALITY BLOCK 1/160

(ii) Fraudulently obtaining Kshs 450,000/- from the Plaintiff.”

16. The 2nd Appellant testified as Pw2 and recalled that on 22nd April 2010 the land office issued a new certificate of lease in the name of the 1st Appellant for the suit property. However, the Kisii Municipal Council was not ready to amend its records from Agnes Nyanchama M to Jackline Nyaboke Ombogi for reasons that Plot No. 1/160 was separately registered in the name of Mwamosioma Trading Co. and Agnes Nyanchama M. They were also informed that a tarmac road had consumed a large part of the land. They produced into evidence a letter of allotment dated 11th March 1976 issued to Mwamosioma Trading Co. They also produced rates demand notes directed to Mwamosioma Trading Co. There was a further rates demand note issued to Mwamosioma Trading Co. in 2004 which indicated that the entity was in arrears totaling to Kshs 360,750/-.

17. The Appellants maintain that the land in dispute belongs to the 1st Appellant the same having been registered in her name. It was not demonstrated by the Respondent that that the Appellants were aware of the allotment letter issued to Mwamosioma Trading Co. at the time they entered into the agreement for sale. Although the Respondent availed the letter of allotment and rates demand notes that were issued to Mwamosioma Trading Co, the records at the lands registry according to the certificate of official search dated 31st January 2011 and 15th February 2018 reveal that the suit land is in the name of the 1st Appellant. This was explained by PW2 who testified that upon discovery of the inconsistency he informed the Land's Office of his findings and they reversed the transaction. The Appellants to this end produced a certificate of lease that was dated 29th April 2010 in the name of the 1st Appellant. The Land Registrar pursuant to **section 79 of the Land Registration Act** has the power to rectify the register or any instrument in the following cases;

“79. Rectification by Registrar

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all affected parties; or

(c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.

(2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

(3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

(4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—

(a) the process of investigation including notification of affected parties;

(b) hearing of the matters raised; and

(c) the criteria to be followed in coming up with the decision.”

18. In this case it is not clear how the land was transferred from the initial allottee Mwamosioma Trading Co. to the 1st Appellant. The Respondent having alleged fraud was bound to prove the same to the required standard. The Court of Appeal in the case of ***Kinyanjui Kamau vs George Kamau [2015] eKLR*** set out the standard for proof in fraud cases;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

19. Other than giving evidence that the land was initially allotted to Mwamosioma Trading Co. there was no evidence that the land was registered in their name. Fraud was therefore not established for reason that the title to the suit land did not revert to Mwamosioma Trading Co. Similarly, there was no evidence tendered to show that the Appellants were involved in having the land fraudulently registered in the 1st Appellant's name. **Section 79 (4) of the Land Registration Act** requires that Appellants who were the affected parties to be notified before the title could be rectified by the Land Registrar. In **Bidika Mzungu Mlewa v Land Registrar Kilifi & another [2018] eKLR** the court held as follows;

“14. In my mind, the rectification required herein has not been ordered by a Court of Law under Section 80 of the Land Registration Act and must therefore be subject to the rules of natural justice including the notification of the affected parties as stipulated under Section 79(4) of the Act. Having failed to enjoin and/or notify the affected parties of the intended rectification and/or revocation of their titles, this Court is unwilling and will decline to grant the Orders sought.”

20. The Appellants have argued that they were never notified of any rectification as they did not sign any transfer to have the land revert back to the 1st Appellant.

21. In order to prove its allegation against the Appellants, the Respondent ought to have enjoined the Land Registrar in these proceedings or called the Registrar as witness as the land registry is charged with the duty of keeping a proper record of the register and the Land Registrar would have been a vital witness to give evidence pertaining to entries made against the title of the suit property. The Land Registrar would further have ascertained whether the said allotment was by the Commissioner of Lands.

22. Having found that the Respondent failed to prove the allegations of fraud to the required standard, I find the appeal meritorious to some extent. However, since the Appellants have not denied that they received the purchase price of Kshs. 450,000/= from the Respondent, it would be unconscionable for them to keep the land as well as the money as this would amount to unjust enrichment. Consequently, I allow the appeal in part, set aside the judgment of the lower court and substitute it with an order that the 1st Appellant refunds the sum of Kshs. 450,000/= paid by the Respondent.

The costs of this appeal and the court below are awarded to Appellants.

Dated, signed and delivered at Kisii this 19th day of November 2020.

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J.M ONYANGO

JUDGE