



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELCA NO. 5 OF 2017

SICILY WAWIRA NJIRU.....APPELLANT

VERSUS

GAKONO KATHAGA.....1ST RESPONDENT

PETER GITHINJI NJOKA.....2ND RESPONDENT

JOSEPH MURIITHI NJOKA.....3RD RESPONDENT

JUDGMENT

(An Appeal from the Judgment of Hon. Y.M. Barasa, Senior Resident Magistrate Kerugoya in CMCC No. 122 of 2013 Delivered on 9th June 2017)

Introduction

The Appellant had filed a suit before the Chief Magistrate's Court Kerugoya by way of a plaint dated 14th May 2013 against the Respondents herein seeking the following orders:-

- a. That the names of Gakono Kathaga, Peter Githinji Njoka and Joseph Muriithi Njoka be expunged from the register of BARAGWI/GUAMA/1181 and the original names of Sicily Wawira Njeru and Gakono Kathaga be reinstated in the said title.**
- b. Costs of the suit be provided for.**
- c. Any other relief as the Court may deem just to grant.**

The respondents/defendants filed an amended defence dated 3rd March 2016 denying the appellant's/plaintiff's claim in the plaint. The parties filed their compliance documents under *Order II Civil Procedure Rules* and the case proceeded for hearing. On 9th June 2017, the trial Court delivered its judgment whereby the plaintiff's suit was dismissed with costs.

Aggrieved by the impugned decision, the plaintiff preferred an appeal to this Honourable Court. The Memorandum of Appeal raises five grounds as follows:-

- 1. The learned magistrate erred in law and fact after failing to consider that the 1st respondent and the 2nd respondent colluded so that they could have a fair deal for sale.**
- 2. The learned magistrate erred in law and fact after failing to consider that the 1st respondent was the first one to sell the land to the 2nd respondent and the sale transactions could not have succeeded without involving the appellant because they were registered proprietors of land parcel No. BARAGWE/GUAMA/1181.**
- 3. The learned magistrate erred in law and fact after failing to consider that the appellant's signature was forged for the sale transaction to sail through.**
- 4. The learned magistrate erred in law and fact after failing to consider that the respondent took advantage of the appellant's illiteracy.**

5. The learned magistrate erred in law and fact after failing to consider that it is the 1st respondent who sold the land to the 3rd respondent using the names of the appellant.

Appellant's Written Submissions

The appellant through the firm of GORI, OMBONGI & COMPANY Advocates submitted that from the five grounds of appeal, it is not in dispute that there was a sale agreement between the parties to the exclusion of the plaintiff/appellant. The appellant argued that it is clear that the plaintiff/appellant was misled that she was signing an acknowledgment of Ksh. 10,000/= yet she signed a different document, actually an agreement stating that she was disposing off her land. The appellant further submitted that she was made to sign a sale agreement by a clerk in the firm of Rugaita Advocates. It was only later that she realized that the land had been registered in the name of the 3rd defendant/respondent then one Joseph Muriithi Njoka. The appellant also submitted that there was deliberate non-disclosure of relevant materials and/or information by the respondents which makes their evidence not truthful and cogent and that the same should not be considered by this Court.

The appellant also stated that the forensic report showed that the specimen signatures presented did not match that of the plaintiff/appellant which fact was disregarded by the trial magistrate. She submitted that throughout her testimony before the trial Court, she clearly stated that she was made to sign transfers, Land Control Board application forms and a sale agreement through misrepresentation. She also pointed out that she could not have agreed to sell her property at Ksh. 10,000/= but the trial magistrate disregarded her evidence as unbelievable.

The appellant further submitted that it is absurd that the learned trial magistrate misguided himself in finding that the appellant/plaintiff did not prove any fraud yet fraud had been pleaded and demonstrated in the plaint. In conclusion, the appellant submitted that the learned trial magistrate misapprehended the law and facts by basing the judgment on an inaccurate assumption and declined to consider credible and plausible evidence by the appellant.

Respondent's Submissions

The respondent through the firm of Maina Kagio Advocates referred to the first ground and stated that the appellant did not submit on how the 1st and 2nd respondents colluded to have a fair deal. They submitted that the presumption is that the first ground of Appeal was abandoned.

On the second ground of Appeal, the respondents submitted that from the evidence adduced by the 2nd respondent, it was clear that the 1st respondent who comes from the same village with him and who was the owner of the suit land was living alone and was elderly aged about 80 years of age. He stated that around 2012, the 1st respondent was sick and had to undergo an operation and approached the 2nd respondent so that he (1st respondent) could sell a portion of $\frac{1}{4}$ acres to him (2nd respondent). He submitted that the purchase price was agreed at Ksh. 160,000/= and an agreement was entered into on 5/11/2012. He further submitted that on the date of the agreement, a down payment of Ksh. 137,000/= was paid leaving a balance of Ksh. 23,000/= which was to be paid upon obtaining consent of the Land Control Board. He stated that immediately after the agreement was entered into, the 2nd respondent took occupation of the portion sold to him. He stated that there was nobody who objected and that it was only later that the 1st respondent learnt that the appellant was a joint owner of the land. He stated that according to the 2nd respondent, the appellant is a person who comes from the same village and wife of a man known as Simon Ndambiri. Upon learning of the joint registration, the 2nd respondent caused the appellant together with the 1st respondent to be summoned to the area assistant Chief and upon deliberations, it was agreed that the 2nd respondent receives the portion that he had purchased and that the appellant and the 1st respondent could share the remaining portion.

It is further submitted that the 2nd respondent later met with the 1st respondent in an advocate's office where the appellant was also in attendance in the company of the 3rd respondent. It is submitted that the appellant was desirous of selling her entitlement to the respondent. An agreement was then entered into between the appellant and the 3rd respondent. Sincerely, the appellant was accompanied by her husband Simon Ndambiri Karani who is a retired Agricultural officer who signed the sale agreement as the appellant's witness. He stated that the parties involved then filed the necessary forms for the Land Control Board and availed the documents necessary for the Land Control Board. The respondents also submitted that the parties thereafter attended the Land Control Board where consent was issued. Transfer forms was also filled and signed where the appellant's husband Simon Ndambiri Karani was her witness. The parcel of land was thereafter transferred and registered in the names of the respondents who had defined shares.

On the third and fourth grounds, the respondent submitted that those grounds cannot be true as the same contradicts the submissions of the appellant who had submitted that she signed the sale agreement among other documents but through misrepresentation. The respondents submitted that misrepresentation cannot be forgery and that the trial Court had properly observed in the judgment that the signatures and the thumb prints in the agreement and the transfer documents were not challenged.

On the fifth and last ground, the respondents submitted that the same has not been expounded in the submissions. They submitted that there are three respondents in this appeal and that it has not been stated which respondent took advantage of the appellant's illiteracy. To the contrary, the respondents submitted that it is the appellant who took advantage of the 1st respondent's age and illiteracy. They submitted that the appellant was not a wife to the 1st respondent and that they had never lived together. The appellant was somebody else's wife and who it appears was a party to the appellant's actions as the said husband, Simon Ndambiri Karani used to accompany the appellant all through during the sale and transfer process. They submitted that there was no basis why the appellant became a joint owner since she paid nothing to the 1st respondent for her to be a joint owner. They submitted that Simon Ndambiri Karani who is the husband to the appellant is a retired Agricultural officer is literate and was the secret hand behind the joint registration so as to defraud the 1st respondent of his land as he was sickly, old and illiterate. He submitted that the 1st respondent had no family and it goes without saying that the joint registration was intended to have the appellant get the whole land, finally.

Analysis and Decision

I have considered the record of Appeal and the submissions by both counsel for the appellant and the respondents. My mandate as the first

appellate Court is analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that as was held in the case of *Pil Kenya Ltd Vs Oppong (2009) K.L.R 442*. I now determine this appeal based on the five grounds enumerated in the Memorandum of Appeal as follows:-

Ground No. 1

The appellant has stated that the trial magistrate failed to consider that the 1st and 2nd respondents colluded so that they could have a fair deal for sale. The term collusion under the Black's Law Dictionary tenth Edition is defined as follows:-

“An agreement to defraud another or to do or obtain something forbidden by law”

The appellant in her plaint before the trial Court challenged the procedure relating to the consent of the Land Control Board which she averred were never followed and that the whole procedure was marred with fraud, forgery and irregularities. She pleaded and particularized the grounds of fraud, forgery and irregularities as follows:-

- i. Conspiracy and removing the name of the plaintiff from the register of title.
- ii. Presenting a document purporting the same to be a duly approved consent of the Land Control Board to the Registrar of Land.
- iii. Forgery of a document purporting the same to be on sale agreement.

The plaintiff testified on oath and called one witness namely Simon Ndambiri Karani. However, the signatures and thumb print appearing in the documents of transfer to the defendants, that is to wit; the application for consent, the consent of Land Control Board, the transfer forms and the sale agreement were not challenged. The only item that the plaintiff challenged and where a document Examiner filed a report was in respect of two documents which are an acknowledgment slip allegedly by the appellant/plaintiff in the sum of Ksh. 290,000/= and the second is a collateral agreement between the plaintiff/appellant and Joseph Muriithi in respect of the suit land parcel No. BARAGWE/GUAMA/1181. The trial magistrate also rendered himself on the document Examiner's report at the same page 141 of the records of Appeal and observed as follows:-

“As for the forensic document examination report, counsel for the defendants submitted that the issue of the payment of the balance of the purchase price was not pleaded in the plaint and that the two impugned documents did not form part of the transfer process”.

I agree with the observation by the trial magistrate that documents which were subjected to the document Examiner were not part of the documents for transfer of the land. Suffice to say that it is trite law that claims of collusion in relation to the transfer of land must not only be pleaded and particularized but the same must also be proved to the required standard. The trial magistrate in his judgment identified the issues for determination and the second issue is relevant to ground 1 of this appeal. Again in his judgment contained at 141 of the record of Appeal stated as follows:-

“Looking at the above developments and transactions, I have observed that the plaintiff actively participated in the transfer of the land parcel to the defendants. I do not believe the plaintiff's evidence that she borrowed a loan and was not aware she was entering into an agreement for sale as the agreement clearly indicates that Ksh. 10,000/= was paid upon execution of the agreement. The signatures and the thumb prints in the agreement and the transfer documents were not challenged”.

Ground No. 2

The second ground of the appeal is that the trial magistrate failed to consider that the 1st respondent was the first one to sell the land to the 2nd respondent and the sale transaction could not have succeeded without involving the appellant who was a joint owner of the suit land. The 2nd respondent was categorical in his testimony that he comes from the same village with the 1st respondent and that he was an elderly man aged 80 years and was living alone. The 2nd respondent also testified how sometime in the year 2012, the 1st respondent was sick and wanted to sell his land to pay for an operation. He then approached him and entered into a sale agreement for ¼ acre on 5/11/2012 at a price of Ksh. 160,000/=. A down payment of Ksh. 137,000/= was paid and the balance was agreed to be paid upon obtaining consent of the Land Control Board. The 2nd defendant thereafter took occupation of the parcel of land and no one objected. He stated that it was only later that the 1st respondent learnt that the appellant was a joint owner of the land where the 2nd respondent caused them to be reported to the office of the area assistant Chief. He testified that after deliberations, it was agreed that the 2nd respondent receives the portion that he had purchased and the appellant and the 1st respondent could share the remainder of the land.

The 2nd respondent further stated that they later met with the 1st respondent in an advocate's office where the appellant was also present in the company of the 3rd respondent and that the appellant was desirous of selling her entitlement in the suit land to the 3rd respondent. An agreement was then entered into between the appellant and the 3rd respondent. The appellant signed the agreement and witnessed by Simon Ndambiri Karani, a retired Agricultural officer who is the appellant's husband. The parties thereafter filled the necessary forms for the Land Control Board and attended the Land Board where they were issued with the consent. After all the statutory consents were obtained and the transfer forms duly signed, the land was duly transferred to the 3rd respondent. That made the trial magistrate to make the observations at page 141 to the effect that the plaintiff/ appellant actively participated in the transfer of the land parcel to the defendant. I find the trial magistrate properly directed his mind to the evidence and the applicable law in arriving in that decision. That ground also fails.

Ground No. 3

The appellant challenges the impugned judgment on grounds that the learned trial magistrate erred in law and fact by failing to consider that the appellant's signature was forged for the sale transaction to go through. Though the plaintiff/appellant pleaded and particularized fraud, forgery and irregularities in her plaint, she did not prove any of those allegations as against the respondents particularly the 3rd respondent. Fraud and forgery is a serious offence. The trial magistrate in the impugned judgment observed at page 142 of the record of Appeal as follows:-

“As I pointed out earlier, I did find that the plaintiff actively participated in the transfer of the land to the defendants. The disputed agreement and transfer documents were not referred for forensic examination so as to establish whether there was forgery, hence fraud on the part of the defendants. In my view, fraud has not been proved”.

I find the observation by the trial Court sound and correct. The issue of whether fraud or forgery has been committed can only be determined by a document Examiner. The appellant did not subject the documents of transfer of the suit property to a document Examiner. The third ground equally fails.

Ground No. 4

The appellant under ground four stated that the learned magistrate failed to consider that the respondent took advantage of the appellant's illiteracy. The instruments of transfer of the suit land parcel No. BARAGWE/GUAMA/1181 from the appellant to the 3rd defendant were produced by the parties in evidence. They include a sale agreement dated 25th March 2013. The same is executed by both the seller and the purchaser. The agreement is in compliance with the statutory requirements for disposal of an interest in land. The agreement was signed in the presence of witnesses. There is no statutory requirement that parties to the disposal of an interest of land should be literate provided that they understand the nature of the interest in land they are either disposing or purchasing. In the case under review, the appellant duly thumb printed on the sale agreement which was witnessed by one Simon Ndambiri Karani who she said was her husband. The other instruments of transfer include the application for consent to the Land Control Board, the consent to transfer, forms for transfer, Photostat copies and copies of National Identity Cards. All these documents were willingly and voluntarily signed and/or supplied by the parties in the presence of advocates who have not denied that they witnessed the appellant executing the same. The sanctity of a title issued to a proprietor of land by the Land Registrar cannot be subject to challenge except those provided ***under Section 26 of the Land Registration Act No. 3 of 2012***. I find that ground No. 4 also fails.

Ground No. 5

The fifth and last ground of this appeal is that the trial magistrate failed to consider that it is the 1st respondent who sold the land to the 3rd respondent using the names of the appellant. I agree with counsel for the respondent that that ground has not been expounded in the submissions. The sale agreement between the appellant dated 25th March 2013 which was produced as an exhibit before the trial Court clearly indicates that the appellant was jointly with the 1st respondent holding a portion of 0.23 Ha in the suit property and that the appellant was now desirous of selling 0.10 Ha. out of her share to the 3rd respondent at a consideration of Ksh. 300,000/=. The issue that it was the 1st respondent who sold the land to the 3rd respondent using her name cannot be true. The facts contained in the sale agreement are self-explanatory. Again this ground fails.

Decision

From my re-evaluation of the evidence in totality, I find that the trial magistrate properly evaluated and analyzed the evidence and the materials placed before him and arrived at a considered decision. As such, I find this appeal lacking merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

READ, DELIVERED physically and SIGNED at Kerugoya this 11th day of December, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Githaiga holding brief for Mr. Ombongi
2. Ms Wambui for Respondent
3. Mr. Mbogo, Court clerk.