



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 2 OF 2019

BETWEEN

GABRIEL KAMAU KIARIE T/A GABKA INVESTMENT.....APPELLANT

AND

GITAU KINGERE NJAU.....1ST RESPONDENT

STEPHEN MUGI KARIUKI.....2ND RESPONDENT

HUMPHREY WAGICHIO GATIMBEI T/A NDUIGA FAMILY PROPERTY

SELF HELP GROUP.....3RD RESPONDENT

NYAKINYUA INVESTMENT LIMITED.....4TH RESPONDENT

(An Appeal from the Order in the judgment of Honourable T.W Murigi , Chief Magistrate sitting at Thika Law Courts dated 10th December 2018 in ELC case No. 21 of 2013)

JUDGMENT

The Appellant herein **Gabriel Kamau Kiarie T/A Gabka Investment**, was the Plaintiff in Thika **CMCC No. 21 of 2013** The Respondents were the Defendants in the above stated suit. The Plaintiff had via a Plaint dated **30th May 2013**, sought for the following orders against the Defendants(Respondents);

- a. An order of injunction restraining the 1st, 2nd and 3rd Defendants from trespassing, entering, encroaching and /or dealing in whatsoever manner with parcel of land Number Ruiru/Ruiru east Block 2/1974.**
- b. A declaration that land Number Ruiru/Ruiru East Block 2/1974 belongs to the Plaintiff**
- c. Costs of the suit with interest**
- d. Any other order that this Honourable Court deem fit to grant.**

In his statement of claim, the Plaintiff averred that in **April 2006**, he entered into a Sale agreement with one **Francis Wakahu Theuri**, wherein he purchased the suit property under share certificate **No. 3895** and ballot Card **No. 1358 B** for a consideration of **Kshs. 160,000/=**. The Plaintiff (Appellant) averred that he took over vacant possession of the suit property upon execution of the said agreement and started cultivating it and has extensively developed it.

The Plaintiff(Appellant) further averred that in **September 2012**, the 1st, 2nd and 3rd Defendants(Respondents) trespassed , entered on and or encroached into the suit property and started to commit acts of waste without his consents. The Plaintiff (Appellant) contended that he later discovered that his property had been fraudulently transferred to the 1st, 2nd and 3rd Defendants(Respondents) names. He particularized fraud as; unduly influencing the 2nd Defendant (Respondent) to sign the transfer forms authorizing the transfer of the suit property, irregularly disposing off his ownership of the suit property, colluding with the office of the 4th Defendant(Respondent) where the 1st, 2nd and 3rd Defendants(Respondents) jointly and severally procured the transfer of the land the Plaintiff(Appellant)

owned and causing the registration of the Plaintiffs parcel of land to the 1st, 2nd and 3rd Defendants names.

It was the Plaintiff's contention that the Defendants actions were illegal and untenable in law and the process of procuring the transfer was tainted with fraud and despite demand and notice of intention to sue, the Defendants neglected to stop interfering with the suit property.

The Suit was contested and the 1st to 3rd Defendants (Respondents) filed a statement of Defence and Counter Claim dated **13th September 2013**. In their statement of Claim, the Defendants denied all the allegations made in the Plaint and stated that they were issued with certificates and ballots card by the 4th Defendant, where they were shareholders, and absolute and indefeasible title deed was procedurally issued to them. They contended that since they bought the suit property, it remains virgin as it was since **1995** and that it only had the naturally grown grass and that the property has never been cultivated/ developed and the attempt by the Plaintiff(Appellant) to trespass and subdivide it into several plots by installing beacons failed. It was the 1st to 3rd Defendants contention that they are rightful on the suit property, and the Plaintiff is in a mission to grab their land and infringe on their constitutional rights.

In their counter claim, the Defendants (Respondents) reiterated the contents of the statement of Defence and averred that the Plaintiff(Appellant) is interfering with their quiet possession and occupation of the suit property and that their ballot card issued by the 4th Defendant(Respondent) is **1358 A** which was procedurally registered for issuance of the suit property, while the plaintiff's is **1358B** which cannot stand the test of equal equities. They sought for orders that;

1. An order directing the Plaintiff and the 4th Defendant to deliver the original Title Deed for land parcel Ruiru/Ruiru East Block 2/1974 to the 1st, 2nd and 3rd Defendants

2. An order of permanent Injunction restraining the Plaintiff and the 4th Defendant their servants, agents and or employees or otherwise from entering, interfering, committing acts of waste and or in any other manner whatsoever interfering with the 1st to 3rd defendants peaceful and quiet possession, occupation and use of the suit land Title Deed for land parcel Ruiru/Ruiru East Block 2/1974 and or in any other manner altering the register of the said parcel or in any way interfering with the official records of the said parcel at the Thika Lands Registry.

3. Costs of this suit with interest.

After close of pleadings the matter proceeded by way of viva voce evidence wherein the Plaintiff testified for himself. Despite service the Defendants(Respondents) did not testify .

PLAINTIFF'S CASE

PW1 Gabriel Kamau Kiarie adopted his witness statement dated **30th May 2013**, and amended paragraph 1 to read male instead of female.

He further produced his list of documents as Exhibit. It was his testimony that he was claiming the suit property which he bought from Francis **Wakahiu Theuri** for **Kshs.180,000/=** in **2006**. That he found the 1st, and 3rd Defendants had started ploughing the land using a tractor and he reported the matter to the police.

That the land originated from **Nyakinyua Investment** and that **Wakahiu** bought the land from Hellen **Wanjiru waweru** . He further testified that the said Hellen took ballot No. **1356**, which was double meaning it was **2 acres** and that she had two **certificates** being **1358A** and **1358B**. That she sold to **Wakahiu** 1 acres which was **1358B**, which is **1974**, and she was left with **1358A** which is **1975**. He produced the bundle of payment receipts as **Exhibit 1** and testified that he is in occupation of the suit property.

Further that a confusion occurred when **Hellen** sold to the 1st and 3rd Defendants(Respondents) land No. **1975**, using a title from the lands office and that she sold **1358 A** and they were given a title that was meant for **1358B**. When he filed an Application for injunction, the 1st to 3rd defendants in their Replying Affidavit dated **21st August 2013**, sworn by the 1st Defendant, confirmed they held ballots **1358A** and he was holding **1358B**. The 1st and 3rd Defendants also swore a Replying Affidavit, dated **7th June 2013**, with regards to the title, and in the Affidavit the Defendants state that **1974** belongs to another person. He produced the said Affidavit as **Exhibit 2**.

The Defendant did not call any witness and the Plaintiff closed his case. The Plaintiff then filed written submissions and thereafter the trial Magistrate delivered her determination on **10th December 2018** and dismissed the Plaintiff's(Appellant's) suit and held that;

“In the present case the Plaintiff did not take any steps to prove the allegations of fraud against the Defendants. No evidence has been laid before the Court to prove the allegations of fraud. The Plaintiff has failed to prove that Francis Theuri who was selling on behalf of Ann had acquired the land from Hellen Wanjiru. There is no proof that Hellen sold the land to the Plaintiff. I find that he has not produced the same. In the end, I find that the plaintiff has not proved his case against the Defendants. His suit is dismissed with cost.”

The Appellant was aggrieved by the decision and by a Memorandum of Appeal dated **8th January 2019** , the Appellant herein brought this Appeal and sought for orders that;

- a. **The Judgment and the Decree of the Trial Magistrate in ELC Cause No. 21 of 2013 at Thika be set aside**
- b. **This Appeal be allowed with costs to the Appellant.**
- c. **Any other or further order be granted as this Honourable Court may deem just and expedient to grant.**

The Appeal is based on the grounds that

1. **The Learned trial Magistrate erred in law and in fact by not appreciating that the Plaintiff had practically proved his case on a balance of probability.**
2. **The Learned trial Magistrate erred in law and in fact in dismissing the Plaintiff's suit, when it was proved that the 1st, 2nd and 3rd Defendants land parcel No. Ruiru/Ruiru East Block 2/1975 was in ballot Number 1358 A while the Appellant's Land Parcel Number Ruiru/Ruiru East Block 2/1974 which he had purchased from Francis Wakahiu Theuri was in ballot No. 1358 B**
3. **The Learned trial Magistrate erred in law and in fact in not considering that the Plaintiff had even cleared with the 4th Defendant for L.R Ruiru/Ruiru East Block 2/1974 and had paid the transfer charges.**
4. **The Learned trial Magistrate erred in Law and in fact in failing to consider and or even adequately adopt and appreciate the written submissions of the Appellant.**
5. **The decision of the trial court was against the weight of the evidence.**

The Appeal was canvassed by way of written submissions. Counsel for the Appellant **Ndung'u Mwaura & Company Advocates** filed his written submissions on **22ND May 2020** and submitted that the Appellant in his list of documents produced a copy of the sale agreement dated **12th April 2006**, a copy of the ballot card No. **1358B**, and he had purchased the suit property and got valid documents pertaining to ownership, facts which were disregarded by the trial Court. It was the Appellant's submission that the Appellate Court can correct the error of the trial Court of failing to consider that the Appellant had proved his case on the required standard.

Despite service, the Respondents did not file any response to the Appeal and therefore the Appeal is uncontested.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the grounds of Appeal and submissions by the Appellant herein. The Court has considered the Appeal herein, the record of Appeal in totality.

The, the court is called upon to make a determination of this Appeal filed by the Appellant as provided by **Section 78 of the Civil Procedure Act**, wherein the court is called upon to analyze the whole evidence, evaluate, assess, weigh, investigate and scrutinize it and give it its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses. Therefore, it must give allowance for that and the

findings of the trial court must be given due deference, unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of **Selle –vs- Associated Mobi Boat Co (1968) EA 123:-**

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

The court has now carefully considered the grounds of Appeal, written submissions and the proceedings and Judgement of the trial Court. The court too has considered the applicable law and finds that the issues for determination are;

1. **Whether Appellant proved his ownership of the suit property**
2. **Whether the Appeal is merited**

1. Whether Appellant proved his ownership of the suit property

In her determination the learned trial Magistrate held that;

“The Plaintiff has failed to prove that Francis Theuri who was selling on behalf of Ann had acquired the land from Hellen Wanjiru. There is no proof that Hellen sold the land to the Plaintiff. I find that he has not produced the same. In the end, I find that the plaintiff has not proved his case against the Defendants. His suit is dismissed with cost.”

From the reading of the Judgment of the trial Court, it is the Court considered view that the Appellant's suit was dismissed based on the fact that he had not proved that he was the owner of the suit property. Further that the trial Court faulted the Appellant for failing to call the said **Francis Wakahiu** to collaborate his evidence. It is not in doubt that when a person's title to a suit property is called to question, then that person must be able to show the root of his title. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

In the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

It is not in doubt that **Hellen Wanjiru** was allegedly the initial allotee of the land as the same has been acknowledged by the Appellant. The Appellant testified that the said **Hellen Wanjiru** subdivided her parcel of land which was two acres and sold **1358B** to **Maryann Wairimu**, who sold the said land to the Appellant through her brother **Francis Wakahiu**. The Court has carefully looked and gone through the sale agreement and notes that the said sale agreement talked of a sale of the suit property that was contained in **Share Certificate No. 3895** and the **original Ballot No. 1358**. The Appellant produced in evidence ballot No. **1358B** that bears the No. **1974**. Further though the Respondents did not produce any evidence, the Appellant in his evidence produced the Replying Affidavit of the 1st Respondent which the Court has also carefully read and considered. The Court notes that the Respondents claim that they bought the suit property from **Hellen Wanjiru** and that the said parcel of land emanated from ballot **1358A**. The Court has seen the survey and payment receipt from

Nyakinyua Investment Company limited that indicate that ballot **1358A** relates to parcel **1974**. Therefore, the Court concurs with the trial Court that in this instant, the Appellant needed to show the root of his title

Having perused the sale agreement dated **12th April 2006**, produced in evidence by the Appellant, the Court notes that the sale was with regard to ballot **1358** and the ballot produced in evidence by the Appellant further shows that the ballot was **1358B**.

How the sale of **1358** turned to be the sale of **1358B**, in the Court's considered view needed to be explained. From the documentation produced in evidence by the Appellant being the Replying Affidavit of the Respondents, it is clear that they bought the suit property from the said **Hellen** that emanated from ballot **1358 A** that led to the suit property.

Though in the Court' considered view the issue of whether or not the Appellant bought **1358 B** from the said **Mary Ann** was never an issue, the issue has been whether or not what he bought resulted into the suit property and where did he get the said ballot from as he had acknowledged that **Hellen** was the original allottee. The Appellant therefore needed to prove the root of the ballot was which in the Court's considered view, he has failed to do so. The Appellant has thus failed to **prove his ownership of the suit property**.

2. Whether the Appeal is merited

The Appellant in its Memorandum of Appeal had faulted the trial Court for failing to consider his written submissions and the weight of his evidence and therefore coming to wrong conclusion and dismissing his suit. However, this Court sitting as an Appellate Court has carefully evaluated the evidence and assessed the same and has come to its own conclusion that the Appellant failed to prove ownership of the suit

property and therefore did not prove his claim and this Court agrees with the trial Court that he was not entitled to the orders as sought in his claim. Consequently, the Court finds that the Appeal is **not** merited.

Having now carefully considered the available evidence, having evaluated it and coming to its own independent decision, this court finds and holds that the trial Magistrate did not **err** and misapprehend the fact and evidence on record.

Consequently, the Court arrives at a verdict that the Appeal is **not** merited and the same is dismissed entirely. The upshot of the foregoing is that the Judgment of the Subordinate Court dated **10th December 2018** is **Upheld** and affirmed and the Appeal is dismissed with no orders as to costs.

It is so ordered.

Dated, signed and Delivered at Thika this 3rd day of December, 2020.

L. GACHERU

JUDGE

3/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wanaina Holding brief for Ndungu Mwaura for the Appellant

Mr. Kamau Holding brief for Mr. Githii for the Respondent

L. GACHERU

JUDGE

3/12/2020