REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 1 OF 2016

JAMES KAMAU MURANGO.....1ST APPELLANT

MURIUKI THUO.....2ND APPELLANT

VERSUS

MWANGI MURIUKI.....RESPONDENT

(An Appeal from the Judgment and Decree of the learned Hon. Y.M. Barasa – Resident Magistrate sitting at Kerugoya CMCC No. 105 of 2014 Delivered on 18th December 2015)

JUDGMENT

The Appellants who were the plaintiffs in the original suit before the Magistrate's Court had sought a declaration against the Respondent to vacate from the suit land parcel No. KABARE/NYANGATI/5870. The Appellants had also sought a permanent injunction restraining the Respondent by himself, his servants or anyone claiming under him from entering, cultivating, constructing or in any way interfering with their proprietary rights of the suit land.

The Respondent filed defence and counter-claim seeking cancellation of the 1st Appellant's name as proprietor of L.R KABARE/NYANGATI/5870 and subsequent registration of the Respondent or second Appellant. In addition, he sought a permanent injunction restraining the Appellants and/or their servants from entering, alienating or interfering with his right over L.R No. KABARE/NYANGATI/5870.

The finding of the trial Court was that the Respondent has been on the land and built permanent house where he stays with his family. The Court also discovered that bearing in mind that the land is ancestral, it would not be proper to evict the Respondent. I have also observed that the 1st Appellant had failed to prove his case on a balance of probability while the Respondent had proved his counter-claim on the required standard. The trial magistrate therefore entered judgment as follows:

> ***(1) The Appellants suit be dismissed.***
>
> ***(2) The 1t Appellant's name be cancelled as proprietor and subsequent registration of the Respondent.***
>
> ***(3) Permanent injunction restraining the Appellants and/or their servants from entering, cultivating, or interfering with the Respondent's right over L.R KABARE/NYANGATI/5870.***
>
> ***(4) The 2nd Appellant to refund the 1st Appellant a sum of Ksh. 1.8 million.***

Being aggrieved by the said decision, the Appellants filed the present appeal citing the following grounds:

> ***1. That the learned magistrate erred in law and fact by dismissing the 1st Appellant's suit against the Respondent contrary to the evidence adduced in Court and which evidence was sufficient to grant the orders prayed in the plaint.***
>
> ***2. The learned magistrate erred in law and fact by granting the Respondent prayers prayed in the counter-claim notwithstanding the fact that he made conclusive finding that the Respondent had failed to prove his counter-claim as per the law established hence granted an order not supported by evidence.***
>
> ***3. The learned magistrate erred in law and in fact by ordering that the 1st Respondent to title deed L.R KABARE/NYANGATI/5870 be cancelled and transferred to the Respondent contrary to the findings of fact that the 1st Appellant***

had acquired clean title from the 2nd Appellant and which title is indefeasible under the law hence granted orders not supported by sufficient evidence.

4. The learned magistrate erred in law and fact by holding that L.R KABARE/NYANGATI/5870 was ancestral land contrary to evidence on record hence made a finding not pleaded or fully canvassed before the Court against rules of Natural justice.

5. The learned magistrate erred in law and fact by ordering that the 2nd Appellant do refund to the 1st Appellant the amount of consideration to L.R. KABARE/NYANGATI/5870 amounting to Ksh. 1.8 million contrary to the findings that the sale agreement between the parties and whose transaction over the suit land were regular and procedural and in any event, no pleadings, prayers or evidence was adduced seeking orders for refund of consideration by the parties to the suit.

6. The learned magistrate erred in law and fact by basing his agreement on extraneous matters not pleaded or evidenced by the parties hence made a judgment not supported by evidence or law as established.

7. The learned magistrate erred in law and fact by not appreciating the law protecting rights of a registered proprietor under the registration Act No. 3 of 2012 hence erred in law by giving a judgment contrary to the law.

8. The learned magistrate erred in law and fact by not considering and appreciating fully the evidence by the Appellants and submissions filed herein hence delivered unconsidered judgment.

9. The learned magistrate erred in law and fact by granting orders not sufficiently proved by evidence on record.

10. The learned magistrate erred in law by granting orders cancelling title deed registered under the provisions of Registration of Land Act without the requisite legal jurisdiction to grant such an order.

The Appellants are now seeking orders to set aside the judgment and decree of the trial magistrate.

APPELLANTS CASE

The 1st Appellant/Plaintiff testified before the trial Court that he bought the land from the 2nd Appellant after conducting a search. The 2nd Appellant went to the Land Control Board and after obtaining consent, an agreement was prepared and he paid the purchase price of Ksh. 1.8 million. Among the witnesses were the 2nd Appellant's wife and children. The transfer documents were executed and he was given title deed. However, he was unable to take possession of the land since the Respondent who was in occupation refused to vacate. He was to take occupation on 1st April 2014. He instructed his lawyer to write a demand letter but the Respondent refused. He then filed the case in Court.

The 2nd Appellant on his part stated that he never gave his land to the Respondent. However, on cross-examination, the 2nd Appellant confirmed that he had sub-divided his land into five (5) portions and shown each of his sons where to farm and built. The Respondent was also shown his portion where he built a brick house.

PW3 was James Muriithi Muriuki. He stated that in January 2013, they were given land by his father Muriuki Thuo who is the 2nd Appellant. He said that their father sub-divided the land into five portions. He said that his brother Mwangi Muriuki who is the Respondent was allocated a portion but said he did not have money for title deed. His father used his money and Mwangi Muriuki was to refund him but he failed and his father sold the land to the 1st Appellant. He stated that the 1st Appellant bought the land but he has not utilized it since the Respondent refused to vacate. He confirmed that the suit property is a clan land. He stated that the Respondent has a wife and children who live in the suit property.

RESPONDENT'S CASE

The Respondent testified that the land belonged to his father (2nd Appellant) who sub-divided it into five portions and showed each son his portion. He said that he was given the suit land and has built a brick house and farms on it with his wife and children. He had put a caution on the land but got a letter from the Land Registrar to remove the same. He does not know how the 1st Appellant acquired the land.

DW2 stated that their father sub-divided their land parcel No. KABARE/NYANGATI/975 into five (5) portions. He wanted to distribute them to his sons. He said that the Respondent was to be given No. 5870. After he was shown his portion, the Respondent built a brick house and farms on it. He said that his father refused to sign for him the transfer. He stated that the Respondent was given land parcel No. 1771 by his grandfather. He testified that he was not involved when their father sold the land to the 1st Appellant. He was not also informed when the caution was removed and when the consent from the Land Control Board was issued.

I have re-evaluated the evidence adduced by the parties and their witnesses before the lower Court. I have also looked at the pleadings filed by the Appellants and the Respondent. Whereas the Appellants/Plaintiffs were seeking an order of eviction and permanent injunction against the Respondent in the lower Court, the Respondent was seeking an order for cancellation of the 1st Appellant's name as proprietor of title number KABARE/NYANGATI/5870 and subsequent registration of the land in his favour.

The Respondent was also seeking an order of permanent injunction restraining the Appellants by themselves, their agents and/or servants from entering, alienating or interfering with the Respondent's right on land parcel No. KABARE/NYANGATI/5870. The Respondent's counter-claim is based on fraud.

In his findings, the trial magistrate dismissed the Appellants claim and entered judgment in favour of the Respondent on his counter-claim as prayed. From his analysis, the trial magistrate observed at paragraph 9 of his judgment as follows:

> ***"I therefore have no doubt in my mind that the plaintiff acquired the land. Procedurally, he is also the registered owner. The only question would be, can the defendant then successfully challenge the plaintiff's title in view of the fact that his father had allocated him the land, and he has been living on it and even made substantial developments……"***

I find that the learned magistrate was correct in his analysis of the evidence that the Appellant may have acquired the suit land procedurally. However, the evidence adduced clearly shows that the suit land is a clan land. The Appellant did not adduce evidence to the contrary. The Respondent and his witnesses stated that the 2nd Appellant who is also his father sub-divided his land parcel No. KABARE/NYANGATI/975 into five portions to be shared between him and his sons. His father was to get parcel No. 5757, 5858 was for Jamlick, 5859 was for James, 5871 was for Patrick while 5870 was for the Respondent. Upon being shown his portion (5870), the Respondent built a brick house and started farming. He was also occupying the land with his family. I find that when the 2nd Respondent showed the Appellant a portion of the sub-divided land parcel No. 5870 and the Respondent built his house and started utilizing the land with his family, a trust arose from the possession and occupation of the land by the Respondent which has the protection of the law under Section 25 (2) of the Land Registration Act No. 3 of 2012. I therefore find that the Respondent's counter-claim succeeded not on the basis of fraud as pleaded and particularized in the statement of defence and counter-claim but on grounds that the Respondent and his witnesses proved the existence of a trust from the permanent brick house he had constructed on the suit property where the 2nd Appellant had shown him and which had been sub-divided and shared amongst all his four (4) sons. The trust could also be construed by the 2nd Appellant allowing the Respondent to farm and utilize the said parcel of land No. KABARE/NYANGATI/5870 with his family. These are undisputed facts which I find irresistible in arriving at the conclusion that the 2nd Appellant could not transfer the suit land to the 1st Appellant without the consent of the Respondent. I also note that when the 1st Appellant bought the suit property, he did not conduct due diligence by checking whether the property was vacant. It was in my view reckless of him to buy a property which another person was in occupation and later seek an order to remove him can avail. A purchaser must of necessity exercise prudence by first establishing whether the property he intends to buy is free from all encumbrances just the same way the law will protect his interests after registration under ***Section 25 (1) of the Land Registration Act.***

The other ground of appeal is in regard to the order by the trial magistrate directing the 2nd Appellant to refund the 1st Appellant the purchase price of Ksh. 1.8 million. In my view, the learned magistrate properly directed himself to the incidental order for refund after the transaction was tainted with illegality and directed that title be cancelled and the same be transferred to the Respondent herein. That order for the refund was appropriate in order to bring all the issues in controversy to finality. The trial magistrate could not have ordered the cancellation of the 1st Appellant's title without providing a remedy for compensation.

My overall re-evaluation of the evidence adduced both by the Appellants and the Respondent and their witnesses is that the trial magistrate properly analyzed and evaluated the same in arriving at the impugned judgment delivered on 18th December 2015. The trial magistrate was right in the finding that the Respondent had established the existence of a trust in the suit property. I am guided by ample decisions of the Superior Court. In the case of ***Karanja Wanjihia Vs Duncan Wanjihia & another (2004) e K.L.R,*** the Court stated as follows:

> ***"Trust is an issue both in fact and law. It is a serious issue, and needs to be demonstrated through proper evidence and verification of evidence".***

Again in the case of ***George Mbiti Kiebia & another Vs Isaya Theuri M'Lintari & another (2014) e K.L.R,*** the Court of Appeal stated:

> ***"The legal burden to prove the existence of the trust vests with the respondents……. It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of parcel No. 56 but also claim entitlement to parcel No. 70 pursuant to their being members of the family that owned the ancestral clan land. we state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the motion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to land parcel No. 70 and no evidence was led to rebut the respondents' testimony……"***

I fully associate with the reasoning by the Superior Court. The Respondent was the one alleging the existence of the trust and therefore the burden was on him to prove the evidence of the said trust. The evidence adduced was that the 2nd Appellant had sub-divided his land into 5 portions for each of his sons and had shown each of them their respective portions. The Respondent demonstrated that upon being shown his portion, he went ahead and took possession and occupation and even resided on the suit land with his wife and children. The Respondent even constructed a permanent brick house while doing farming in the land. Those averments were confirmed by PW3 who said that the land in question is a clan land.

For all the analysis and re-evaluation of the evidence, I find this appeal lack merit and the same must fail. Suffice to state that the authorities cited by counsel for the Appellant are distinguishable and therefore not applicable. In the upshot, this appeal is hereby dismissed with costs to the Respondent.

READ and SIGNED in open Court at Kerugoya this 25th day of January, 2019.

E.C. CHERONO

ELC JUDGE

25TH JANUARY, 2019

In the presence of:

Mr. Ngigi appearing for Respondent

Mr. Kahuthu appearing for the Appellant

Mbogo Court clerk