



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELCA NO. 10 OF 2018

PATRICK MACHARIA GICHOMO.....APPELLANT

VS

JOYCE WANJIRU WAMBUGU.....RESPONDENT

JUDGMENT

1. This appeal has progressed in the proceedings before the Kangema Land Dispute Tribunal through the PMCC Kangema into this Court.

2. On 31/7/08 the Kangema Land Dispute Tribunal (LDT) made the following award;

“After hearing evidence from both parties, the tribunal members recommended that the Magistrate orders the Defendant in this case Patrick Macharia Gichoho to file the succession case of his late father Gichoho Mukuha. The Magistrate also to order the Defendant to transfer 1.0 acres from the parcel in dispute LOC12/SUB.LOC5/533 to the Plaintiff Joyce Wanjiru Wambugu after succession”

The award was on 7/8/08 filed the Kangema PMCC pursuant to the provisions of the then Land Dispute Tribunal Act and registered as case No 18/2008.

3. On the 17/1/2012 the Respondent filed suit against the Appellant in Kangema PMCC No 9 of 2012 and sought the following orders;

“a. the transfer of one acre out of parcel of land LOC12/SUB-LOC5/533 to the Plaintiff by the Defendant or a refund of Kshs 150,000/- together with interest from the date of filing of this suit until payment in full.

b. costs of the suit.”

4. The Appellant then the Respondent, as was entitled to do, on 15/2/2012 filed a statement of defence. In the defence the Appellant denied the Respondent's claim in the lower Court and asserted that the said suit, was inter alia, resjudicata. The Appellant concluded his defence by asking the Court to dismiss the Plaintiffs' suit.

5. After hearing the case, the Kangema Principal Magistrate on 17/4/2013 dismissed the Respondents case on transfer of one acre in respect of the suit land and entered judgment for the Respondent to be refunded Kshs 150,000/- together with costs and interest thereon.

6. Being aggrieved with the decision of the learned Principal Magistrate aforesaid the Appellant filed this appeal on 7/5/13 and set out the following grounds;

“ a) That the learned magistrate erred in law in stating that the Respondent was seeking rights under succession Act hence limitation does not apply and thus erred in not finding that the contract had surpassed 6 years and had therefore expired.

b) The learned magistrate erred in law in acknowledging the existence of the Land Disputes Tribunal award which was filed in Kangema Court on 7/8/2008 as LDT Case No 18 of 2008 and stating that because the said award was formally made into a judgement therefore that the award should be thus confined to the LDT case thus arriving at a decision that could not stand legal scrutiny and which therefore ignored or turned on its head the doctrine of res judicata.

c) The learned Hon Magistrate after finding that the misdescription of the land as Loc.12/Sub-loc.5/533 instead of Loc.12/Sub-Loc5/553 was fatal and thus dismissed the claim for specific performance, the Court nonetheless erred in law in allowing the claim for Ksh. 150,000/= thus failing to realize that both the claim for land and for the money were res judicata and it was impossible to

actually grant either of the 2 prayers.

d) The learned Hon. Magistrate erred in fact and in law in dismissing the documents proving that the Appellant had already refunded Kshs. 150,000/= to the Respondents mother in-law because of issues of identity card numbers and the fact that the documents were not produced in the LDT case. The Court therefore dismissed the said documents without proof that they were forgeries.

e) The learned Hon. Magistrate exhibited a biased interpretation of evidence by stating that one Stephen Maina in leasing the land for a total of Kshs. 50,000/= was merely topping up on the price of Kshs. 150,000/= so as to complete the transaction.

f) The learned Hon. Magistrate erred in law and fact in finding that the Respondent was entitled to the money because she held a grant to the estate of the purchaser of the land without taking into consideration the fact that the Appellant was never party to the Succession cause and was never notified or served with the grant prior to the refund of the purchase price to the mother to the deceased purchaser”

In conclusion he requested the Court to allow the appeal with costs and set aside the judgment of the lower Court with consequential orders of dismissal of the suit relating to the judgment appealed.

7. The parties in concurrence with the Court canvassed the appeal by way of written submissions. The Appellant and the Respondent filed their submissions on 24/9/18 and 1/10/18 respectively which I have read and duly considered. Later the Appellant abandoned the 1st and 6th grounds of appeal. Both parties concentrated on the 2-5th grounds of appeal.

8. This being the first appeal, over and again the Courts have reiterated that the appellate Court is bound to reconsider the evidence, re-evaluate it and make its own conclusions and secondly, the appellate Court would not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on misapprehension of the evidence or the trial Court acts on wrong principle in reaching its findings.

9. In **Sumaria & Another vs. Allied Industrial Limited[2007] 2 KLR**, the learned judges observed that the first Appellate Court is obliged to consider the evidence, re-evaluate it and make its own conclusions, but in doing so, it must be remembered that it has neither seen nor heard the witnesses and that a Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did and further, the Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally.(See also, **Selle & Another vs Associated Motor Board Co Ltd & Others [1968]EA 123**.

10. Having read the complete record of the subordinate Court, the Memorandum of appeal and the submissions of the parties, the issues set out below fall for consideration;

- a. Whether the Learned Magistrate fell in error by not accepting that the suit before her was Resjudicata.
- b. Whether the purchase price was paid to the Respondent’s mother in law, and if so,
- c. Whether payment of the purchase price to Respondent’s mother in law was a valid settlement of the purchase price of the suit land.
- d. Costs of the appeal.

11. The Court will proceed to consider issue No a) in its entirety. Such action is effective and efficient so much so that if the finding is in the affirmative then the appeal will have been concluded fully.

12. As stated above the award of the Land Dispute Tribunal and the refund of the purchase price was subject to discussion and finding by the Land Disputes Tribunal. The Tribunal awarded the prayer of transfer of 1 acre from the suit land. It did not make any finding of refunds of the purchase price. It is trite law that a claim for refund of the purchase price was declined. It would not have made any logical sense or lawful finding to, at the same time, that the land dispute tribunal to order a transfer and a refund of the purchase price. The justice of the case was fully met by the transfer of one acre from the suit land.

13. In the suit before the lower Court the Respondent sought to have one acre transferred from the suit land or a refund of the purchase price. The prayer for transfer (which had been permitted by the LDT) was dismissed and an order for a refund (which impliedly was declined by the LDT) of the purchase price was permitted.

14. Section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

It is clearly manifest that for the Court to arrive at a determination in this case as to whether or not the suit is resjudicata, the Court has to

revisit the previous suits so as to establish the facts as to whether or not there existed sameness in the parties, issues, subject matter and whether the issues were heard and determined by a competent Court inter alia.

15. Section 3 of the Land Disputes Tribunal Act (now repealed) provides as follows;

“1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4”.

It therefore follows that the Land Dispute Tribunal did not have any jurisdiction to determine the issues of title to land and or matters relating to refunds of the money. It therefore was not a competent Court for purposes of section 7 cited above. The suit in the lower Court therefore is not resjudicata.

16. In respect to the issue No 2; Whether the Appellant paid the purchase price to the Respondent's mother in law? The Appellant and his witness DW2 gave evidence that a sum of Kshs 154,000/- was allegedly paid to the Respondent's mother in law and brother in law. The Appellant states indeed having been paid the said sum by the Respondent's husband. The Appellant did not offer any explanation as to why it was necessary for him to refund the purchase price which he acknowledged to be 154,000/-. This action if indeed it was taken was done after the Respondent's husband had died and the evidence is being produced in the lower Court after the Respondent's mother in law had died. Such evidence was not produced before the LDT at the time when the Respondent's mother in law was alive and neither was she called as a witness to deny or acknowledge receipt of the purchase price.

17. The Learned Magistrate in the lower Court saw and observed the demeanour of the Appellant and his witness in relation to his alleged payment in relation to the alleged Kshs. 154,000 to the Respondent's mother in law. The Magistrate found discrepancies in the documents produced to support the alleged payments and concluded that the Appellants and his witness was not believable to the extent that such payment was indeed made.

18. I have perused and considered the evidence as recorded by the lower Court and have also seen the documents relied by the Appellant and his witness in the lower Court on the alleged payment to the Respondents' mother in law. I do not find anything in my evaluation to fault the findings of the trial Court. The Appellant's ground of appeal in relation thereto is rejected.

19. As to whether payment of the purchase price to Respondent's mother in law was a valid settlement of the purchase price of the suit land, the Court has found in the preceding issue that the Appellant did not pay any money to the Respondent's mother in law. The Respondent husband Kenneth Johnson Iguku died on the 3/9/2005. The Respondent was issued with the letters of administration to the estate of her husband on the 24/7/2006. In this circumstance the Respondent being the administrator of the estate of her husband, the said Kenneth Johnson Iguku would be the correct recipient of a payment or a refund of the purchase price. The Respondent's mother in law is not the correct recipient of the purchase price which falls within the estate of her son namely Kenneth Johnson Iguku who is the husband to the Respondent.

20. This case has protracted and transited from the chief's office, DO office, the LDT, the lower Court resting with this Court. Going by the evidence on record it is clear that the Appellant has been evasive obstructive and entirely dismissive of the Respondents' case so much so that any meaningful resolution of the dispute could not be realized.

21. In the evidence of the Appellant and his witness the matter complained in relation to the payment of the purchase price took place in the year 2005. In his evidence the Appellant admits that there was an agreement in 2005 with the Respondent's late husband for purchase of 1 acre of land. The evidence of the Appellant in this respect is more believable than that of the Respondent who states that the agreement was entered into in 2007. I say because the Respondent's husband died on 3/9/2005 and she obtained a grant of administration on 24/7/2006. There is no specific date given on the agreement or payment of the purchase price. Nevertheless, the probable date can only be on or before 3/9/2005 when the Respondent's husband passed on. In all fairness the Court would fix the date of such payment and or agreement to be 3/9/2005.

22. The Court makes appropriate orders as below;

- a. The appeal be and is hereby dismissed.
- b. The award of the LDT be and is hereby declared a nullity.
- c. The Appellant shall pay to the Respondent the sum of Kshs 150,000/- from 3/9/2005 with interest at the rate of 20% p.a until payment in full.
- d. The Appellant shall pay the Respondents cost of this Appeal and the Lower Court case on the defended scale.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF JANUARY 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant – Absent

Respondent – Present in person. Advocate is absent.

Irene and Njeri, Court Assist