



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 4 OF 2018

HANNAH NJERI KAMAU..... APPELLANT

VERSUS

DANIEL MUYA MBUGUA.....1ST RESPONDENT

SAMUEL KAMAU MBUGUA.....2ND RESPONDENT

(Being an Appeal from the Judgment by the Honourable L.Mutai (Mrs), Senior Resident Magistrate in Githunguri Civil Suit Number 3 of 2000 delivered on 25th April 2007)

JUDGMENT

Background

1. This appeal was filed as Nairobi High Court Civil Appeal Number 454 of 2007. It was subsequently transferred to the Environment and Land Court in 2018 and assigned the current case number. The appeal arises from a judgment delivered on 24/4/2007 by Honourable L K Mutai (SRM) in Githunguri SRMC Civil Suit Number 3 of 2000 in favour of the 1st respondent. The appellant was an interested party in the said suit and was allowed to ventilate her defence and counterclaim. The appellant and the 2nd defendant are husband and wife. The trial court found that the 1st respondent was entitled to ½ of an acre out of Land Parcel Number Githunguri/Gathangari/1812 which the 2nd respondent had sold to him. The trial court also found that the appellant had failed to prove her counter-claim in which she sought a declaration that the sale of the said ½ acre portion was illegal. The trial court dismissed the appellant's counterclaim.

2. Aggrieved by the said judgment, the appellant brought this appeal and sought the following orders:

- a) The appeal be allowed*
- b) The decision of the Learned Magistrate be set aside*
- c) The 1st respondent's suit be dismissed*
- d) The Appellant be granted the reliefs sought in the counterclaim.*

Grounds of Appeal

3. The appellant raised the following 15 grounds of appeal:

- 1) The learned magistrate erred in law and fact in finding that the 1st respondent had proved his claim on a balance of probability.*
- 2) The learned magistrate erred in law and fact in failing to hold that the appellant had proved her case against the 1st and 2nd respondents on a balance of probability grant in her prayers sought in the counter claim.(sic)*
- 3) The learned magistrate erred in law in failing to attach reasons as to why the appellant's counter claim would not succeed.*
- 4) The learned magistrate made a wrong assessment of the evidence and failed to arrive at the conclusion that the sale transaction between the 1st and 2nd respondents was fraudulent and hence void ab initio and of no legal or contractual effect.*
- 5) The learned magistrate failed in her apprehension of the facts of the case in failing to establish the fact that the 2nd*

respondent was holding the suit premises in trust for the appellant and other members of her family and were hence entitled to valid any objections relating to the disposal or alienation of the suit premises to wit Title Number GITHUNGURI/GITHUNGURI/1812. (sic)

6) The learned magistrate misdirected herself in holding that the appellant did not have any legal basis to caution the suit premises or question the sale transaction between the 1st and 2nd respondent.

7) The learned magistrate erred in law in failing to conclusively adjudicate and decide on all the matter put forth by the parties in their pleadings, evidence and submissions.

8) The learned magistrate erred in law and in fact in basing her ruling on extraneous factors.

9) The learned magistrate erred in proceeding along the wrong principles of land law.

10) The learned magistrate erred in both law and fact in drawing conclusions which were not supported by the evidence and thus arriving at an incorrect judgment.

11) The learned magistrate misdirected herself in the assessment of evidence and thus arriving at an erroneous and unjust conclusion and judgment.

12) The learned magistrate erred in law in failing to give a proper and wholistic evaluation of the entire evidence tendered and in failing to appreciate the correct evidence given.

13) The learned magistrate erred in law in failing to specify which party has to bear the costs of the 1st respondent.

14) The decision in its entirety is against the evidence adduced by the parties before the trial court.

15) The entire decision is contrary to law and misapprehension of the law.

Submissions

4. Parties presented written submissions. The appellant filed three sets of submissions dated 23/11/2016, 8/1/2018 and 22/1/2019. She submitted that there were irregularities and illegalities committed by the respondents. She further submitted that both respondents did not inform her that there was a sale transaction going on between them. She argued that she had placed a caution on the suit property and the caution was later lifted by the 2nd respondent before she successfully lodged a second caution. She submitted that the land control board fraudulently sanctioned transfer of the suit property to the 1st respondent without involving her and the 2nd respondent on the day they were to seek consent as both of them were not in the meeting.

5. The 1st respondent filed his submissions on 23/11/2018. It was the 1st respondent's case that he entered into a sale agreement to buy ½ acre of land from the 2nd respondent for KShs 275, 000/=. He submitted that the 2nd respondent applied for land control board consent, signed the land consent forms and mutation forms in order to transfer land to the 1st respondent. He argued that the suit land was transferred into the joint names of the 1st respondent (0.5 acres) and the 2nd respondent (1.50 acres). He further submitted that the appellant lodged a caution after the transfer of 0.5 acres to the 1st respondent had already happened and therefore the consent could not be revoked. He added that spousal consent was not a requirement in law at the material time.

6. The 2nd respondent filed his submissions on 16/1/2018. He submitted that the appellant placed a caution on the suit property after she discovered that he had sold it to the 1st respondent. He added they both appeared before the land control board but they were not allowed to participate because he had not sought spousal consent before selling the suit property. He further submitted that the 1st respondent got registered as proprietor of 0.5 acres of the suit property without following due process and that the consent by the land control board was illegal because the appellant and the 2nd respondent were not present before the members of the board.

Determination

7. I have considered the entire record of appeal, the grounds set out in the memorandum of appeal and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key questions in this appeal. Considered collectively in the context of the pleadings before the trial court, the 15 grounds of appeal raise two key issues: (i) whether the trial court erred in holding that the sale of the suit property to the 1st respondent by the 2nd respondent was within the law; (ii) whether the trial court erred in holding that the appellant had failed to prove his allegation of joint fraud on part of the respondents.

8. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions, although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of **Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269** on the duty of the first appellate court.

9. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, **Peter v. Sunday Post Ltd. [1958] E.A 424** and **Makube v. Nyamuro [1983] KLR 403.**

10. The first issue for determination in this appeal is whether the impugned sale was within the law. The tenor and import of the appellant's

case before the trial court was, firstly, that the sale of the suit property to the 1st respondent by the 2nd respondent was illegal because the suit property which was registered in the name of the 2nd respondent was held by him in trust for the 2nd respondent and the appellant.

11. The impugned sale and subsequent registration of the 1st respondent as owner of ½ of the suit property took place before the current land laws were enacted. At that time, spousal consent was not a mandatory requirement in transactions involving disposal of interest in land. The current legal regime where spousal consent is necessary was not in force. Secondly, there was common ground that the 2nd respondent was the registered proprietor of the suit property. It was therefore incumbent upon the appellant to prove that the suit property was trust property. In my view, she did not discharge that evidential obligation. To the contrary, she testified in cross-examination that the 2nd respondent inherited the suit property from his father. She did not lead any evidence to demonstrate that she contributed to the acquisition of the suit property. The appellant further confirmed that apart from the suit property which was registered in the name of the 2nd respondent as sole proprietor, they were the registered joint owners of a different parcel of land, Githunguri/Gathangari/1813. In my view, the totality of the evidence on record did not point at the existence of a trust in relation to the 2nd respondent's registration as proprietor of the suit property. In the absence of proof of trust, the trial court was justified in arriving at the conclusion that the sale of a portion of the suit property to the 1st respondent by the 2nd respondent was within the law. This is so because the 2nd respondent was the sole registered proprietor of the suit property. In the absence of evidence proving trustship, the trial court had no basis for inferring a trust.

12. The second key issue in this appeal is whether the trial court erred in holding that the appellant had failed to prove her case which was predicated on alleged joint fraud by the respondents. As stated in the preceding paragraphs, the suit property was registered in the name of the 2nd respondent as the sole proprietor. The 2nd respondent categorically confirmed in his testimony before the trial court that he sold ½ of the suit property to the 1st respondent. He further confirmed that he voluntarily executed all the conveyance documents including: (i) sale agreements; (ii) land control board application forms; (iii) partition forms; and (iv) mutation forms. He further stated that he authorized the land control board to issue the requisite consent and supervised the demarcation of the 1st respondent's ½ portion whose possession he personally handed to the 1st respondent. He added that at the time of selling the ½ acre portion, the land was not cautioned. He further testified that at the time of obtaining consent, the land was not cautioned. The 1st respondent's evidence that the 2nd respondent's decision to sell the ½ acre portion was prompted by the need for cash to enable him redeem a different title jointly owned by the appellant and the 2nd respondent was not controverted. Documents presented in evidence do not suggest that the title was cautioned at the time the sale contract was entered into.

13. Analyzing the totality of the evidence which was before the trial court, I find no basis for faulting the trial court for coming to the conclusion that the 1st respondent had proved his case and the appellant had not proved her counterclaim. The current change of position by the 2nd respondent is in my view a dishonest conspiracy by the couple which hopes to use the appellate court process to overturn a sale concluded two decades ago. The 2nd respondent's present submissions are a complete departure from the position he took during trial.

14. The only aspect of the trial court's judgment which I would fault is its failure to specify who was to bear the 1st respondent's costs of the suit and counterclaim. This omission, in my view, can be remedied by this court without disturbing the substantive aspects of the judgment of the trial court. In this regard, it is noted that the 1st respondent's suit against the 2nd respondent succeeded. It is also noted that the appellant's counterclaim against the respondents failed. I would therefore award the 1st respondent costs of the suit in the trial court, to be borne by the 2nd respondent. Similarly, I would award the 1st respondent costs of the counterclaim to be borne by the appellant who brought the counterclaim. Because the 2nd respondent did not raise a defence to the counterclaim in the trial court, there will be no award of costs to him in the trial court.

15. The net result is that this appeal is dismissed for lack of merit, save for the aspect of costs in the trial court, which are awarded as set out in the preceding paragraph. The appellant will bear the 1st respondent's costs of this appeal. Because the 2nd respondent supported the unsuccessful appeal, there will be no award of costs to him.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Hannah Njeri Kamau the Appellant present in person

Samuel Kamau Mbugu 2nd Respondent present in person

June Nafula - Court Clerk