REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 1 OF 2018

ERNEST KITHI MBULA.....APPELLANT

VERSUS

ESTHER NZELI MUTUA.....RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at

Machakos in Civil Case No. 785 of 2006 delivered on 12th June, 2015

by Hon. L. Simiyu –SRM)

JUDGMENT

1. In the trial court, the Respondent sued the Appellant together with The District Land Adjudication and Settlement Officer, Makueni District and the Honorable Attorney General vide a Plaint amended on 12th July, 2007. In the Amended Plaint, the Respondent sought for an order of rectification of the Adjudication Register, a declaration that the creation of Plot No. 247 out of Plot 245 was done fraudulently and, a permanent injunction against the 1st Defendant *(Appellant)* and costs.

2. The Respondents case was that she was the registered owner of parcel of land known as Plot 245 Uvete Adjudication Section and that she was the wife of a son to Yuma Nduta *(deceased)* whereas the Appellant was the son to the younger brother to Yuma Nduta. According to the Respondent, sometimes in the year 1939, Yuma Nduta purchased Plot No. 245 and paid the full purchase price and that when he died, the land was registered in her name. The Respondent informed the trial court that she was surprised when she discovered that the Appellant had curved Plot No. 247 out of her Plot No. 245 without her knowledge and that as a result, she has been deprived of the use of her property

3. In his Defence, the Appellant averred that his father contributed to the purchase price that purchased the suit land; that Yuma Nduta held the property in trust for the Appellants father and that the suit land was registered in his name in 1975 when the demarcation took place. The Appellant averred that he had been in continuous occupation of the land and would be raising a Defence of adverse possession.

4. The Appellant further pleaded that plot numbers 245 and 247 were given at the same time in 1975 and that he could not be a trespasser on his own land. The Appellant objected to the jurisdiction of the court to handle the instant dispute because the same was vested under the Land Disputes Act 1990 and that the Plaint offends the provisions of the Land Adjudication Act Cap 284 of the Law of Kenya. The Appellant further pleaded that the Plaint was not capable of supporting an injunctive order. He prayed for the dismissal of the suit with costs.

5. At the hearing, the Respondent testified as PW1 and stated that the Appellant was a cousin to her late husband; that she resides on parcels No. 247 and 245; that the land was purchased by her father in law who later gave it to her husband and that the two parcels of land were surveyed as one plot. The Respondent testified that her parcel was Plot No. 245 and that she was not aware when Plot No. 247 was excised from her land. It was the evidence of PW1 that she reported the dispute to the clan. PW1 produced in evidence the deliberations of the clan.

6. Tom Musau Mbula, PW2, testified that Plot No. 245 was bought by his uncle Juma who paid Kshs 100/- and the balance was paid by his sons. PW2 testified that Plot No. 247 is illegal; that the entire land was supposed to read Plot No. 245 and that he was shocked to learn that the Appellant had a title to Plot No. 247. PW2 testified that the clan had declared that the Appellant had no land in that area and that the Plot No. 247 was created by the Appellant and the survey people to defraud PW1 Hannington Mwao Muteti.

7. PW3 testified that that it is PW1 who occupied the suit land; that the Appellant had no share in the suit land and that the entire plot ought to be 245 which was surveyed in the name of PW1. PW3 testified that the dispute was referred to the clan who arbitrated and found that the Appellant was grabbing land from his brothers. On cross-examination, PW3 testified that the Respondent moved onto the land in 1992 and that there is no possibility that the Appellant could own Plot No. 245. On reexamination, PW3, testified that the Appellant never had land at Uvete.

8. In his Defence, the Appellant testified as DW1. The Appellant informed the court that the land designated as 245 was his; that he was given the land during adjudication in 1975 and that the land was subdivided between his father and the Respondent's husband. DW1 testified that his father caused Plot No. 247 to be registered in his names and that his father favored him a lot and that is why he gave him the said land.

9. DW1 produced in evidence the letter by the Land Adjudication Officer and the proceedings before the Yatta District Officer. On cross examination, DW1 testified that he was not present when the subdivision of Plot No. 247 was being done but that he was later shown the boundary when he called on the survey office.

10. DW1 testified that he had no document to show how and when his father acquired the suit land or how his father gave him Plot No. 247. He admitted that PW1 was in possession of the two plots and stated that he had no counterclaim for vacant possession.

11. On re-examination, the Appellant testified that he was not served with a notice to attend arbitration at the clan level and that the clan is not a land adjudication officer. Although summoned by the court, the adjudication officer did not attend court to testify on the adjudication process in the area.

12. In his judgment, the learned trial magistrate found that the adjudication process in respect of the suit land was not complete because the same was awaiting the court process. The trial Magistrate found that it was undisputed that the clan arbitrated on the matter and found that the Appellant had no land in that adjudication area; that Plot No. 247 was erroneously created and that the District Officer had no jurisdiction to arbitrate over the matter. The court further found that the Plaintiff occupied, used and controlled the suit land that the suit land was not ancestral land.

13. The issue before the trial court was how portion no. 247 was created. It was the opinion of the trial court that the evidence of PW2 and PW3 on how the land was acquired was free from bias and that the evidence of the Appellant was unsupported and unbelievable. The court further recognized that the Respondent had been in occupation of the suit land. The court allowed the suit and granted the prayers sought in the Plaint.

14. Being dissatisfied with the decision of the court, the Appellant has raised eleven grounds of appeal, namely; -

a) The learned trial Magistrate erred in law and exceeded her jurisdiction in granting orders which are only available in the High Court in Judicial Review proceedings.

b) The learned trial Magistrate erred in law and in fact in holding that Plot Number 247 was fraudulently created out of Plot No. 245 whereas the Defendant produced a letter dated 10th June, 2004 wherein the Land Adjudication and Settlement Department, Makueni clearly stated that Plot No. 247 was never excised from Plot No. 245 but was originally demarcated as such.

c) The learned trial Magistrate erred in law and in fact in disregarding the fact that Plot No. 245 and 2347 were demarcated and numbered at the same time in the year 1975 when the same was then registered in the Defendant's name.

d) The learned trial Magistrate erred in law and in fact in concluding and holding that the Defendant was a trespasser on land which is registered in his name.

e) The learned trial Magistrate erred in law and in fact in finding that no Judgment was arrived at the District Officer, that there was opinion of un-named land officer, that three is no documents attached to show sources of information for the said officer and that the District Officer was not properly constituted whereas proceedings and Judgment reached by District Officer Kilome on 22/3004 which form part of Defendant's list of documents provides all the above information.

f) The learned trial Magistrate erred in law and in fact in faulting the mode of which the Land Adjudication Officer furnished the court with the contents of the adjudication register.

g) The learned trial Magistrate erred in law and in fact in completely disregarding the documents and evidence adduced by the Defendant and thus arrived at the wrong decision.

h) The learned trial Magistrate erred in law and in fact placing the burden of proof upon the Defendant to disprove the alleged fraud whereas the Plaintiff did not sufficiently or at all prove the particulars of fraud pleaded against the Defendant.

i) The learned trial Magistrate erred in law and in fact in finding in favour of the Plaintiff without satisfying herself that the Plaintiff had discharged her evidential burden to the required standards. She further erred in relying on the Defendant's biological brother's evidence to arrive at her decision to reject the Defendant's evidence.

j) The learned Magistrate erred in law and in fact in finding that there was sufficient evidence that the entire parcel belonged to the family of the Plaintiff which is in occupation and use whereas he disregarded the fact that the Defendant adduced evidence to the effect that he had been in continuous occupation of Plot No. 247 for over thirty (30) years.

k) The decision of the said Magistrate was against the evidence before her.

15. In his submissions, counsel for the Appellant, F.N. Mulwa Advocate, argued that none of the parties to the agreement to the suit land were parties to the suit and that the Respondent did not tender evidence to show that she held the land under a trust.

16. Counsel submitted that the Respondent did not tender the surveyor's report for the court to conclude that 6 acres of Plot No. 246 had been excised to create Plot No. 247 and that the trial magistrate disregarded evidence showing that Plot Nos. 247 and 245 were created at the same time in 1975.

17. The Appellant's counsel submitted that the finding by the court that no Judgment was arrived at by the District Officer was erroneous because the judgement formed part of the Appellant's list of documents; that the court shifted the burden of proof of fraud in the creation of Plot No. 247 from Plot No. 245 to the Appellant and that such a finding was in disregard of Section 3(4) of the Evidence Act on the part of the trial court.

18. Finally, counsel submitted that the evidence on record showed that Plot No. 247 was allocated to the Appellant on first registration; that no evidence was led to disprove the same in the terms of Section 24 of the Land Registration Act and that this court should allow the appeal.

19. In reply, counsel for the respondent, Kivuva Omuga and Co Advocates, argued that the learned trial Magistrate was correct to find in the Respondent's favour and that the Respondent's evidence was supported by her documentary and oral testimony and that of her two independent witnesses.

20. Counsel submitted that the creation of portion No. 247 should have been supported in this case by some form of evidence from the adjudication officer; that the same was not done, and that the court imputed bad faith on the part of the Appellant in the failure of the Land Adjudication Officer to attend court. Counsel submitted that Section 24 of the Land Registration Act and Section 3(4) of the Evidence Act could not come to the aid of the Appellant because the Respondent was in continuous occupation of the land.

21. The Respondent's advocate submitted that the sale of the suit land was done in 1939 before the Law of Contract Act came into force and that the suit in the trial court was not based on contract but the illegal creation of title from Plot No. 245. On the issue of burden of proof, counsel submitted that there was consistent evidence showing that Plot No. 247 was created out of 245; that there was no evidence to show that the Appellant was given Plot No. 247; that there was failure to call the adjudication officer to prove that Plot No. 247 was adjudicated in his favour and that Section 24 of the Land Registration Act only applies to titles registered under the Act. Counsel urged the court to dismiss the Appeal and award the Respondent the costs.

22. This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in ***Samuel Kamere v Lands Registrar, Kajiado Civil Appeal 28 of 2008*** thus;

> *It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions*.

23. This court therefore is enjoined to weigh the evidence that was tendered in the lower court and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law, while remembering to make due allowance for the fact that it has neither seen nor heard the witnesses.

24. Indeed, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

25. The multiple grounds raised by the Appellant are all essentially concerned with the manner in which the trial magistrate evaluated the evidence before him, and for that reason, will be considered concurrently. In order to decide in favour of the Appellant, the trial court had to be satisfied that the Appellant had furnished it with evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by the Respondent, might hold that the more probable conclusion is that for which the Appellant contended, since the standard of proof is on the balance of probabilities/preponderance of evidence *(see Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345).* The burden of proof was on the Appellant to prove on the balance of probabilities that he had a better claim to the land than the one made by the Respondent.

26. The Appellant's claim was premised on the fact that he had obtained the land in dispute as a gift *inter vivos* from his late father, the late Ezekiel Mbula. A gift is a voluntary transfer of personal or real property without consideration. It involves the owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the done" *(see Black's Law Dictionary, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187).*

27. Oral words, coupled with delivery, and gift by deed are the only modes available at common law for an *inter vivos* grant of a gift. The Appellant's evidence was not clear whether the gift by his late father was oral or written. Therefore, this court takes the view that the gift was never evidenced in writing. The purported transaction between the Appellant and his father was entirely oral coupled with delivery.

28. Dealing with this aspect of the Appellant's claim, the trial magistrate in his Judgment did not address the same. However, he opted to believe Pw1 and her witnesses because they *"were clear and free from bias on how the land in question was acquired"*.

29. According to Section 143 of *The Evidence Act*, subject to the provisions of any other law in force, no particular number of witnesses in any case is required for the proof of any fact. Evidence is not to be counted but only weighed and it is not the quantity of evidence, but the quality that matters. Consequently, the testimony of one witness alone, if believed, is sufficient to establish any fact that requires proof. It is only if some aspect of that testimony is found unreliable or lacking that the court will look for corroboration.

30. The issue of whether or not the Appellant obtained the suit land as a gift from his father depended on his credibility as a witness. Questions of credibility relate to whether the witnesses should be believed and how much weight should be given to their testimony. Decisions on the credibility of a witness may depend on the demeanour of that witness, the internal consistence of the testimony, its overall consistence with the rest of the evidence of proved facts, motive for the testimony, its accuracy, existence or otherwise of exaggerations, speculations and so on, with the court at all time in that process drawing on its own common sense, good judgment and experience of life in deciding whether the testimony is reasonable or unreasonable, probable or improbable.

31. In the instant case, the trial court did not come to its conclusion based on the credibility of the appellant as a witness before it, but rather, on the lack of corroborative evidence. This court therefore is in as good a position as the trial court in the determination of the veracity of the Appellant and the logical consistency of his evidence.

32. A gift *inter vivios* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift.

33. In her testimony, the Respondent explained that she was in occupation of the land. The Appellant, on the other hand, admitted that there is no evidence to show that he took possession of the land when the same was gifted to him by his late father. The Respondent testified that she lived on and farmed on the land.

34. Both the appellant and the respondent produced documentary evidence in support of their claims. This evidence being unassailable as inherently incredible or possibly untrue and both witnesses not having been cross-examined on it, the trial court ought to have inferred that the documentary evidence of the Appellant could not have been relied upon because it imputed bad faith on the Adjudication officer who made the entries but did not attend court.

35. On the part of the Respondent, the court accepted the letter issued to the Respondent granting her authority or consent to sue in respect of the suit land. Whereas one document related to an interest in land, the other related to the right to sue in respect of the same land. The evidence that the trial court relied upon and culminated in the finding that the Respondent had taken exclusive occupation and established user of the land thus had a better right to the land, as opposed to the Appellant who claimed that he obtained the land following the gift *inter vivos*, was not documentary, but the oral evidence of the witnesses that was corroborated. In this regard, the court came to a correct finding of fact and cannot be faulted for rejecting the documentary evidence of the Appellant because the same could not shake the basic version of the Respondent's case.

36. In any event, the members of the clan where the Appellant's hail from were unanimous that the Appellant or his late father never owned the suit land. That being so, the Appellant cannot claim that being his father's favourite son, his father gifted him with Plot No. 247.

37. There being no Title Deed that was presented before the court, the Appellant could not rely on Section 24 of the Land Registration Act. The court was entitled to protect the Respondent's interests on the unregistered land and her possessory rights. Comparing and balancing probabilities as to their two versions. This court is of the view that a reasonable man might hold that the more probable conclusion is that for which the Respondent contends. The Respondent discharged the onus cast upon her and proved her claim against the Appellant. The trial court therefore came to the correct conclusion when it entered judgment in favour of the Respondent.

38. For those reasons, the Appellant's Appeal is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE