REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C.A. CASE NO. 18 OF 2015

(FORMERLY HCCA NO. 4 OF 2013)

ROWLAND EDWIN NYAGA MURITHI.....APPELLANT

VERSUS

NYAGA MURUA MBARIO.....RESPONDENT

(Being an appeal from the Judgement and decree of Hon. M. Wachira (CM) dated 15.10.2013 in Embu CMCC No. 27 of 2010.)

JUDGEMENT

1. This is an appeal against the judgement and decree of the Hon. Margaret Wachira (CM) dated 15.01.2013 in *Embu CMCC No. 27 of 2010*. By the said judgement, the trial court dismissed the Appellant's suit against the Respondent and directed that each party should bear his own costs.

2. The brief facts of the said suit were as follows. By a plaint dated 16.02.2010 and amended on 07.03.2011, the Appellant sued the Respondent who is his father claiming an order for transfer of *Plot No. 19A Ugweri* (hereinafter the *suit property*) into his name. In the alternative, the Appellant sought monetary compensation at the current market value thereof. The Appellant also sought a refund of Ksh.14,500/- incurred on account of valuation fees.

3. The Appellant's case was that the Respondent had sometime in 2003 sold the suit property to him at a consideration of Kshs.200,000/- but that the Respondent had failed to transfer the same to him despite having obtained a confirmed grant with respect to the suit property.

4. By his statement of defence dated 1.03.2010, the Respondent denied having owned the suit property in 2003 and pleaded that at the material time the suit property was registered in the name of *Triza Riimi* who was deceased. The Respondent further pleaded that he acquired the suit property in 2009 pursuant to *Runyenjes PM Succession Cause No. 20 of 1995* of which the Appellant was aware but did not raise any objection to confirmation of grant.

5. The Appellant filed a reply to defence dated 8.03.2010 by which he denied being aware that he was listed as a beneficiary of the estate of the late *Triza Riimi* in *Succession Cause No. 20 of 1995*.

6. The record shows that upon a full hearing of the suit the trial court delivered a judgement dated 15.01.2013 dismissing the Appellant's suit. The court held that the Appellant had failed to prove the existence of a sale agreement and payment of the purchase price. The trial court also held that the Appellant had failed to plead with particularity the claim for compensation since it was in the nature of special damages. Finally, the trial court held that the prayer for specific performance was not tenable since the Respondent had no legal capacity to dispose of the suit property in 2003 since he had no legal interest in it.

7. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 11th February 2013 raising the following grounds of appeal:

> *a) The learned Chief Magistrate erred in law and fact when she failed to consider that the Plaintiff was seeking compensation for plot No. 19A Ugweri together with the developments thereon at current market rates.*
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> *b) The learned Chief Magistrate erred in law and fact when she failed to consider that the Plaintiff had produced a valuation report (Plaintiff's exhibit No. 16) giving the value of the plot and developments thereon at current market rates.*
>
> *c) The learned Chief Magistrate erred in law and fact when she failed to order that the Plaintiff be compensated as per the valuation report.*

8. The Respondent filed an unusual response to the memorandum of appeal styled *"Reply to the memorandum of appeal"* dated 12.02.2013. The Respondent supported the judgement and decree of the trial court. It was contended that the Appellant's valuer had failed to attend court to explain how the value of the suit property and developments thereon was arrived at.

9. When the appeal was listed for directions on 20.12.2018 it was directed that the appeal shall be disposed of through written submissions. The parties were given 45 days each to file and serve their respective submissions and the appeal fixed for further mention on 21.3.2019 to confirm compliance and fix a date for judgement. When the matter was mentioned on 21.03.19, only the Appellant's advocate attended court and she informed the court that she intended to rely entirely on the record of appeal without filing submissions.

10. The court is aware of its duty as a first appellate court. It has a duty to reconsider, analyze and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in such an appeal were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows;

> **"…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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."**

11. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows;

> **"…It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"**

12. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows;

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

13. The court has considered and appraised the entire evidence on record in this appeal. There is no doubt from the pleadings, evidence and other material on record that the Appellant's main prayers before the trial court were for specific performance of the agreement for sale of the suit property and an *alternative* prayer for compensation at the prevailing market value of the suit property.

14. The three grounds of appeal raised by the Appellant in reality constitute only one ground of appeal. The real complaint is that the trial court failed to appreciate that the Appellant was seeking monetary compensation for loss of the suit property and that the trial court had failed to appreciate that the Appellant had proved that claim.

15. It is clear from the material on record that the Appellant was not merely seeking monetary compensation with respect to the suit property. The main prayer was for specific performance of the alleged agreement for sale whereas monetary compensation was pleaded as an *alternative* prayer. A perusal of the judgement of the trial court indicates that both prayers were considered and rejected by the court. It could not be said that the trial court failed to appreciate the nature of the Appellant's claim and the reliefs sought in the suit. The material on record indicates that the Appellant's claim was fully considered and rejected on merit.

16. The only issue for consideration is whether or not the trial court erred in law or fact in dismissing the Appellant's suit. The trial court found and held as a fact that the Appellant had failed to demonstrate the existence of a sale agreement with respect to the suit property. No sale agreement was produced before the trial court. The court is of the view that since the Respondent had denied the existence of the alleged sale agreement, it was the duty of the Appellant to demonstrate the existence of such an agreement. The court finds that on the basis of the evidence on record it was not unreasonable for the trial court to reach the conclusion that it did.

17. The record also shows that the trial court found that, in any event, the Respondent had no legal capacity to dispose of the suit property since he had no proprietary interest in it in 2003 when the sale agreement was allegedly made. The evidence on record shows that the

Respondent acquired the suit property in 2009 upon confirmation of grant in *Runyenjes PM's Succession Cause No. 20 of 1995.* This court is not satisfied that a reasonable tribunal properly directing itself to the facts and the law could not have reached such a decision.

18. The court is of the opinion that the Appellant's alternative prayer for compensation was not tenable for at least two reasons. First, the Appellant having failed to demonstrate the existence of a sale agreement and a breach thereof, there could be no basis for awarding him monetary compensation for the value of the suit property. Second, the court is of the opinion that the claim for compensation was not pleaded with particularity as required by law.

19. The court is of the opinion that the Appellant's claim was in the nature of special damages. All the particulars including the amount sought ought to have been pleaded with specificity. The Appellant's amended plaint merely made a claim for compensation at the "current market rates". The value of suit property was not specified in the amended plaint. The only figure which was specified was the valuation fee of Kshs.14,500.00

20. In the case of **Ouma V Nairobi City Council [1976-80] KLR 375** Chesoni J (as he then was) said of special damages as follows at page 386:

> **"Thus for a plaintiff to succeed on a claim for special damages, he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, Ratcliffe V Evans (1892) 2 QB 524 where Bowen LJ said at pages 532 & 532:**
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> **The character of the act themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

21. On the basis of the pleadings on record it is evident to the court the Appellant had failed to plead particulars of the monetary compensation sought with specificity as required by law. The court finds no fault with the holding of the trial court on the issue of monetary compensation.

22. The upshot of the foregoing is that the court finds no merit in the grounds of appeal raised by the Appellant. Consequently, the Appellant's appeal is hereby dismissed in its entirety. Each party shall bear his own costs.

23. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED in open court at EMBU this 19TH DAY** of **SEPTEMBER, 2019**

In the absence of both the Appellant and the Respondent.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

19.09.19