



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 7 OF 2017

PETER NDEKEI MUHIA.....APPELLANT

VERSUS

CHARLES NJOROGE KIMANI.....1ST RESPONDENT

NANCY WANGARI WAWERU.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Thika delivered by Hon. B. J Bartoo (RM) on 17th July 2015)

JUDGMENT

The Respondents herein **Charles Njoroge Kimani** and **Nancy Wangari Waweru** filed **Civil Suit No.1013 of 2010** at the **Chief Magistrates Court Thika**. The claim was against the Appellant herein and they sought for;

- a) An order for permanent injunction restraining the Defendant, his agents, servants and/or employees or anybody else claiming under him from entering, interfering, with quiet possession, occupation and/o user of the Plaintiffs 's land parcel No.Ruiru/Ruiru East Block 2/4332.***
- b) Costs of the suit.***
- c) Any other or further relief that is fit to grant***
- d) Exemplary Damages for trespass***
- e) An Order for possession and ownership over Ruiru/Ruiru East Block 2/4332.***
- f) Interest on (b) an (d)***

In the said claim, the Respondents had averred that the 2nd Respondent was the bonafide registered owner for value and consideration of the suit land also known as land parcel **Ballot No. 1436**, having lawfully purchased the suit property from one **Magdalena Wakahiu** through a share acquisition scheme of **Nyakinyua Investments** in which she held shares. It was their contention that pursuant to the sale and transfer of the suit property to the 1st Respondent, he took lawful possession of the suit property and shortly thereafter made the suit property to be transferred in the name of the 2nd Respondent through a share acquisition scheme in which the 2nd Respondent owned shares in **Nyakinyua Investments Limited**. They therefore contended that the said transfer of shares made the 2nd Respondent the absolute and registered proprietor of the suit property. The Respondents therefore averred that the 2nd Respondent holds a valid title over the suit land.

They averred that around the month of **August 2010**, the Appellant invaded the suit property and without any colour of right, he committed acts of waste by physically commencing constructions and digging quarry stones therein thereby depriving them of the use and enjoyment of the suit property. They particularized fraud on the part of the Defendant(Appellant herein) as; Colluding with 3rd parties to obtain purported documents of ownership in respect of land parcel **Ruiru/Ruiru East Block 2/4332**, obtaining purported documents of ownership over **Ruiru/Ruiru East Block 2/4332**, through forgery or misrepresentation and colluding with 3rd parties to try and defeat the Plaintiffs'(Respondents') claim over **Ruiru/Ruiru East Block 2/4332**. They therefore contended that the alleged and/or purported documents of ownership in respect of the suit property in the name of the Defendant(Appellant herein) if any is null and void and the same was fraudulently obtained as 2nd Respondent holds a *bonafide* title. The Respondents urged the trial Court to enter Judgment in their favour.

The Appellant herein had filed his Amended Defence on **17th December 2012**, and denied all the allegations made in the Plaintiff. The

Defendant had averred that he is the registered owner of the suit property and denied depriving the Respondents of the use of land and further denied that he is a trespasser. He further averred that his documents are the proper documents of title in respect to the suit premises but the Respondents documents are the ones that are not legal.

The 1st Respondent who was the 1st Plaintiff before the trial Court gave evidence and testified that he bought the suit land from **Francis Theuri in 2008**, the land having been registered in the name of **Magdalena Wakahiu**, who had the original share certificate. He produced Exhibits **1, 2, 3,4,5,6,7 and 8**. He further testified that he found someone interfering with the land, and reported the matter to the Chief who advised them to get Clearance Certificate from the owner of the land to which they did. He further averred that it was then that the said land was registered in his wife's name as it could not be registered in his name as **Nyakinyua Investments** is a woman's group.

In cross examination, he testified that the land was originally **No.1436**, as per the ballot number but was later registered as **No.4332** at the Lands Registry after the verification by the land buying Company. He further testified that from the sale agreement, the Appellant had bought the suit land from **Mary Wanjiku**, four years before while his agreement is for **2008**. He further testified that when the Defendant(Appellant) started interfering with the suit land, they went for verification and it was confirmed that Magdalena was the owner of the suit land. It was his testimony that the letter that the Defendant(Appellant) held was from **Gatundu Investment Company Limited**, whereas the land was sold by **Nyakinyua Investment Co. Ltd.**

PW2 testified that her husband bought the land from **Nyakinyua Investment** and registered it in her name and confirmed that the share certificate is in her name and she was present at the Company .On cross examination, she confirmed that everything was done by her husband except her signing of the transfer of the suit land.

On the part of the Defendant(Appellant), two witnesses were called, **DW1** the Appellant herein testified that he bought the suit land from **Rahab Njeri Gatimu** and **Mary Wanjiku Kamau**, and the purchase price was **Kshs.90,000/=** wherein he paid **Kshs.80,000/=** and he produced the copy of the agreement as exhibit 1. He established that the land belonged to the women and that he had the ballot showing the parcel being **No.1436** and then he went to **Nyakinywa Investments** and he was given the letter of ownership wherein he paid **Kshs.5,000/=**. He further testified that he lives in the suit land and denied the allegations of trespass.

On cross examination, he testified that the agreement does not have the description of the land parcel as the vendors did not have a title deed. He denied that he bought a non-existent parcel of land and stated that both companies that are listed in his letter are owners but that he did not know why they wrote the letter using the two names. He however acknowledged that he did not have a title deed though he heard in Court that there was a title deed. In re -examination, he testified that the title deed by the Plaintiff is dated **11th May 2011**, while he bought the land in **2004**, and that his agreement stated that the ballot is **No.1436**, being the land that has been quoted by the Plaintiffs. Further that his letter dated **30th October 2012**, has a signature and bears the Company Seal.

DW2 Rahab Njeri Gatimu, testified that she sold the suit land to the Appellant together with her sister though she could not remember the parcel number. She testified that she was given the suit land by Kenyatta's daughter, though she could not remember it was through which Company. She acknowledged that she is the one who had given the land to the said **Ndekei** (Appellant). In cross emanation she testified that they had been given the land during Mzee Kenyatta's time and that she had been given the land by one **Nduta** and she paid **Kshs.3,000/=** having been given the same by one Rebeca.

After the *viva voce* evidence, the Plaintiffs(Respondents) filed their written submissions and on **17th July 2015**, the trial Court entered Judgment in favour of the Plaintiffs (Respondents herein) plus costs and interest.

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** filed on **6th August 2015**. The Appellant sought for the setting aside of the Judgment delivered on **17th July 2015** by **Hon. B. J. Bartoo, Resident Magistrate Thika**.

The grounds upon which the Appellant sought for the Appeal to be allowed are;

- 1. The learned Magistrate erred in not considering the fact that this was a case where one title was contested by several people and that the Appellants documents were issued earlier than those of the Respondents and that the Appellant has a better claim than the Respondents.*
- 2. The learned magistrate erred in holding that since the Appellant had no description of the land in the agreement of sale, he did not own the land while in fact it was clear which land the Appellant was talking about.*
- 3. The learned magistrate showed an open bias in this case when he failed to consider in her Judgment the submissions made by the counsel for the appellant but only considered the ones filed by counsel for the Respondents. The counsel for the appellant filed the submissions on 5th March 2015 and served the same on the counsel for the Respondents on 9th March 2015. The learned magistrate had a duty under the law and procedure to take in consideration of both submissions before she wrote the Judgment. A copy of the Appellants said submissions were annexed to the Memorandum of Appeal.*
- 4. The learned magistrate erred in relying on the fact that the Respondents held the title deed to the disputed land while in fact the title deed was only a prima facie evidence of ownership.*
- 5. The learned magistrate erred in not considering the fact that it is the appellant who uses and occupies the suit land since he bought it in 2004 and that the Respondents have never used or occupied the land even after they got the illegal title in 2011.*
- 6. The appellant will contend at the hearing hereof that the case was a mistrial and that there is clearly a miscarriage of Justice*

and a retrial should be ordered.-

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of Waithira Mwangi & Co. Advocates**, filed his written submissions on the **7th of March 2019**, and urged the Court to allow the appeal. It was submitted that the Appellant was the first to establish an interest in the land and therefore the first in time rule should have been applied in this situation. It was further submitted that title is not always prima facie evidence of ownership especially when acquired through fraudulent means as captured in **Section 26 of the Land Registration Act**, and as the Respondents bought land that had already been sold to another person, their interests cannot precede those of the 1st purchaser.

It was therefore submitted that the Appellants interest to the land is valid and the title held by the 2nd Respondent is not genuine and therefore the Court was urged to allow the appeal and set aside the decision of the lower Court.

The Respondents on the other hand through the **Law Firm of Mwihia & Mutai Co. Advocates**, filed their submissions on the **20th of March 2019**, and submitted that the Appeal is defective as it is in violation of **Order 42 rule 1(2) of the Civil Procedure Rules** and the Appellant has not appealed against the Decree. It was further submitted that the Amended Defence Violates **Order 8 Rule 7(1)** as it is silent on the date of amendment. It was further submitted that the Respondents proved their case on the balance of probabilities as the appellant did not prove possession either by photographic impression or otherwise. The Court was therefore urged to dismiss the appeal with costs to the Respondents.

This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows:-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78 of the Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd...Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”.

This Court will first determine the issue on whether this appeal is properly before this Court as the Respondents have submitted that the Appellant has appealed against the decision of the Court being the Judgment but did not appeal as against the Decree of the Court and therefore the same ought to be dismissed.

The Appellant has attached the Decree of the Court to the Record of Appeal. Even so the decree emanates from the Judgment of the trial Court and it is the Court's opinion that a **Decree** is just but a manifestation of the pronouncement of the Judgment. It is the Court's further holding that cases that tend to lean against allowing dismissal were decided before the enactment of **Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya, 2010**, which enactments require Courts to administer justice **“without undue regard to procedural technicalities,”**. See the case of **Monicah Nyawira Wahome ...Vs... Veronica Wambui [2016] eKLR** where the Court held that;

Therefore, on the first issue of whether the application as presented without an extract order or decree is fatally defective, the case of Stephen Boro Gititha Vs Family Finance Building Society & 3 Others Civil Appeal Nairobi 263/2009 is relevant. In that case, the Court held that:-

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflicts with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The Court must warn the litigants and counsel that the Courts are now on the driving seat of justice and the Courts have a new call to use the overriding objective to remove all the cobwebs hitherto experimented in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the Courts is to use the new broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory application and instead to adjudicate on the principle issues in a full hearing if

possible.

In this case, the plaintiff's counsel did annex copy of the judgment which is sought to be reviewed. The extraction of a decree or order sought to be reviewed no doubt stems from the judgment and is a purely procedural omission which should not be used to impede access to justice. Furthermore, Section 99 of the Civil Procedure Act gives latitude to this Court to amend judgments, decree or orders. It states

Clerical or arithmetical mistakes in judgments, decree or orders or errors rising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

Therefore, failure to extract decree in this case is not fatal to an application for review. I am not persuaded by the cases cited by the Defendant, which cases were decided before the enactment of Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya, 2010, which enactments require the Courts to administer justice "without undue regard to procedural technicalities," and especially, where in the omission like the one in the instant case is not demonstrated to occasion any prejudice or injustice to the defendant, and which prejudice cannot be adequately compensated by an award of costs."

With the above mind, the Court finds that the Appeal before this Court is properly before it and therefore will overlook the procedural technicalities.

Further, it is evident that in the lower Court and before this Court, the Appellant's case has been that this is a case of two competing titles and since he is the one who bought the suit land first from one **Rahab Njeri**, then the trial Court ought to have considered the same and found that his title was the first in time and proprietorship of the suit land ought to have been granted to him. However, the Court finds that this suit is not one about competing titles as it is not in doubt that there are no two titles. Though the 2nd Respondents hold the title to the suit land having bought the same from one **Magdalena Wakahiu**, the Appellant does not hold any title to the suit property and therefore there are no two competing titles.

The Court further finds that what need to be addressed is whether the title that is held by the 2nd Respondents is valid and genuine. That though the Appellant claims that he was the first to acquire interest over the suit property, what then must be established is whether there was due process to which either of the parties had gotten the documents to the suit property and whether by the time the 2nd Respondent was getting title or the ballot to the property, the suit same was available for allocation.

In her Judgment the learned Magistrate had held that the sale agreement between the Appellant and DW2 did not bear the description of the suit property and therefore the same was not valid. However, it is this Court's finding that the suit before the Court was not one that was to establish whether or not there was a valid sale agreement as the Respondents were not part of the contract between the Appellant and DW2 and therefore they did not have *locus standi* to challenge the same.

Further this Court concurs with the Appellant that at that particular time, the suit land did not have a title deed and therefore it could not have been described in any other way. That at the time the suit land's description was one to be described by the ballot number and the Certificate number to which it clearly did. It was therefore not right to claim that the Appellant did not know which parcel of land he was talking about. In his testimony PW1 confirmed that the land that he purchased was one bearing ballot **No.1436**, which was later changed to **No.4332**. The Appellant referred to the same parcel of land and therefore it is evident that the parties herein referred to the same parcel of land.

This Court therefore has to investigate the root of the documentations that have been produced by both parties. The Appellant alleged that he bought the suit land from **Rahab Njeri** and **Mary Wanjiku** and produced the sale agreement and the ballot **No.1436** for the suit land. DW2 who was the vendor in the said agreement testified that she sold the suit land to the Appellant having been given the same by one **Rebecca Njeri**, who was the daughter of Kenyatta. It was her evidence that this land was given to her during Mzee Kenyatta's regime. However, she did not produce any documentations to prove these allegations. It is trite that **'whoever alleges must prove'**. It was incumbent upon the Appellant to prove that whoever sold to him the suit land had a proper title or documents to which she was then able to pass it to him.

On the other hand the Respondents alleged that they bought the suit property from one **Magdalena Wakahiu**. The Respondents produced a ballot for the parcel **No.1436** and **Share Certificate**. It is clear that from the share certificate from **the Nyakinyua Investments** that the said **Magdalena Wakahiu** was issued with the said share certificate dated **10th December 1997**, and the receipt for the ballot issued on the same day. The Respondents have further produced a letter from **Nyakinyua Investment** that confirmed the suit land belonged to the said **Magdalena Wakahiu**. From the above documentations, the root as to the proprietorship by the vendor who sold the suit premises to the Respondents has satisfactorily been explained to this Court. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others[2016] eKLR**, where the Court held that;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

However though the Appellant has produced a letter confirming that he is the owner of the suit property, the said letter is from **Nyakinyua Investment Company Ltd** and **Gatundu Nyakinyua Company Ltd** and is not clear how the said Companies who sold the suit land to him acquired the suit property.

The Appellant further alleged that the Respondents acquired the title to the suit property through fraud. It is trite that fraud must be specifically pleaded and proved. As the definition of frauds include misrepresentation of facts, the Court finds that the Respondents did not misrepresent any facts as they have satisfactorily shown through documentations how they acquired the title to the suit property. It is the Court's finding that the said title was acquired procedurally.

Section 24 of the Land Registration Act provides that:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. **Section 26(1) of the Land Registration Act** which was imported from **Section 28 of the Registered Land Act** (Repealed) provides;

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is therefore very clear from the above that the law protects title to land but there are two instances wherein such title can be challenged. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Court of Appeal in the case of **Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR**, held as follows:

“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 prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”

Also see the case of **Dr. Joseph Arap Ngok ...V...Justice Moijo ole Keiwua & 5 others, Civil Appeal No.Nai.60 of 1997** where the Court held that;

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

Having found that the Respondents properly acquired the title to the suit property, and the Appellant having failed to explain how the vendor who sold to him the suit property acquired the interest in the said property, then this Court finds that the certificate of title held by the Respondents is proper and the trial court did not err in finding for the Respondents.

Even though the Appellant might have innocently purchased the suit property from **Rahab Njeri** and **Mary Wanjiku**, it is apparent the documentations for allocation of the suit land to the said **Rahab** and **Mary** are suspect. It is also evident that **Magdalena Wakahiu** acquired the suit land in **1997** and she later sold it to the Respondents. **Magdalena** acquired the suit land long before any interest was passed over to the Appellant in the year **2004**.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant's Appeal is not merited and consequently the said Appeal is disallowed entirely and the Judgment and Decree of the trial court is upheld. On the issue of costs, the Court finds the same is granted at the discretion of the court. Given the circumstances of the case, the Court directs that each party to bear its own costs on this Appeal

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of October, 2019.

L. GACHERU

JUDGE

18/10/2019

In the presence of

Appellant present in person (My advocate is absent)

Mboha for Respondents

Lucy - Court Assistant

Court – Judgement read in open court.

L. GACHERU

JUDGE

18/10/2019