



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. APPEAL NO. 13 OF 2017

SIMON KIMANI.....1ST APPELLANT

GRACE GAITAU.....2ND APPELLANT

VERSUS

JOHN NDUNGU MUBEA.....1ST RESPONDENT

DISTRICT LAND REGISTRAR MURANG'A.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MILCAH WAMBUI KAHUNGLI.....4TH RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Thika in Civil Case No. 348 of 2007 delivered on 4th February, 2016 by Hon. S.N. Tewela –RM)

JUDGMENT

1. In the Memorandum of Appeal, the Appellants have averred that the learned Magistrate erred in law and fact by relying on extraneous matters to arrive at her decision; that the learned Magistrate erred in her evaluation of evidence and arrived at a wrong finding and that the learned Magistrate totally disregarded the Plaintiffs' testimony and their written submissions. The Appellants are seeking for an order setting aside the entire Judgment of the learned Magistrate.
2. The Appeal proceeded by way of written submissions. The Appellants' advocate submitted that indeed the Appellants are the *bona fide* purchasers of land parcel Makuyu/Kimorori/Block 1/1628; that the learned Magistrate in making her Judgment against the Plaintiffs completely disregarded fundamental documents produced by the Plaintiffs and corroborated by the PW2; that the Plaintiffs produced a letter issued by Ngimu Farm (*page 48 of the Record of Appeal*) from the Chairman clearly indicating that indeed, the Plaintiffs were the owners of the suit land and that the Plaintiffs produced a receipt of payment and an acknowledgment of receipt of the purchase price for the said plot.
3. Counsel submitted that the Plaintiff and PW2, an official of Ngimu Farm, testified to the effect that the suit property was originally Makuyu/Kimorori/Block 1/1630 which was subsequently sub-divided into smaller plots constituting the suit property which was bought by the Plaintiffs.
4. The Appellants' counsel submitted that the learned Magistrate in her Judgment completely failed to acknowledge the evidence produced by the witnesses of the Plaintiffs towards the fact that indeed the Plaintiff had bought the land for value; that the Magistrate refused to allow a letter from Ngimu Farm indicating that the Appellants were the legal proprietors of the suit land and that the said letter would have clarified the issues.
5. The Appellants' counsel submitted that the learned Magistrate failed to appreciate that the two parcels of land being 1682 and 1630 were the same, with 1630 being the block from which the Plaintiffs were given a portion that is 1682.
6. Counsel submitted that the learned Magistrate failed to assess the weight of the evidence of PW2 on a very flimsy technical issue that could have been resolved by requesting for necessary documentation. It was submitted that PW2 gave clear and concise evidence showing that in 1994, when he joined Ngimu Farm, Grace was already cultivating the suit land.
7. According to counsel, PW2 testified that a survey was done in the year 2000; that there could not have been any title to the land in another person's name prior to that date and that the dismissal of the testimony of PW2 on a technicality greatly damaged the claim of the Plaintiffs.

8. The Appellants' counsel submitted that it is unfair to remove the Appellants from their matrimonial home and source of livelihood yet they have clearly shown that their claim to the land is genuine. Counsel stated that the Honourable Magistrate failed to look at all facts as presented in a transparent manner and ought not to have made a decision that would subject the Appellants to unfair hardship by overlooking key facts.

9. The Appellants' advocate submitted that the learned Magistrate, in making her Judgment, overlooked gaping holes in the Defendant's evidence which ought to have formed a large part of the reasoning behind her Judgment; that the learned Magistrate seemed to have assessed the quantity of the documents rather than the quality and that the Respondents' documents numbers 1 to 10 have no probative value in this matter; that the documents numbered 13 to 15 are correspondences between advocates on record that came about just before institution of the suit and that the maker of document number 16 was not called to testify and as such, the authenticity of the same is highly in question.

10. The Appellants' advocate finally submitted that the learned Magistrate failed to appreciate that once a title has been impeached, it is paramount that the purported registered owner does clearly indicate to court the process that he undertook before obtaining a title to such land and that no receipts for rates and rents clearances, survey fees or receipts from Ngimu Farm were produced by the Respondents.

11. The Appellants' counsel relied on the cases of **R vs. Minister for Transport & Communications & 5 others, Ex parte Waa Ship Garbage Collector & 15 others (2006) 1 KLR (E&L) 563** and **Chemei Investments Limited vs. The Attorney General & Others, Nairobi Petition No. 94 of 2005** which I have considered.

12. The Respondents' advocate submitted that the 1st Respondent explained that after balloting was conducted, his ballot fell on a piece of land which was unproductive; that in a meeting of the company held on 23rd September, 1993, under Minute 46/93(4) (d), the 1st Respondent was allocated land known as Makuyu/Kimorori/Block 1/1682, (*the suit property*) and that the 1st Respondent produced the Minutes under which he was issued with the suit property.

13. The Respondents' counsel finally submitted that the learned Magistrate rightly decided that the 1st Respondent herein is the registered owner of the suit land; that the Appellants herein did not prove to the trial court that the process that was followed by the 1st Respondent to obtain the Title Deed was done fraudulently and that it is trite law that the acts of fraud must be particularized with precision and sufficiency. Counsel relied on the case of **Kinyanjui Kamau v. George Kamau Njoroge (2015) eKLR** where it was held that:

“... to succeed in the claim for fraud, the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding...”

14. Counsel submitted that the Appellants failed to sufficiently plead and give the particulars of the alleged fraud. In addition, it was submitted that the Appellants failed to place sufficient material or evidence before the learned Magistrate that would make him draw an inference or conclusion that there was fraud.

15. According to the Respondents' counsel, the Appellants were not the *bona fide* purchasers for value without notice of Makuyu/Kimorori/Block 1/1682; that the Appellants did not produce any Sale Agreement, transfer documents or a Title Deed for the suit property to show that they were *bona fide* purchasers for value without notice of defect in title and that the Appellants did not produce any prove of being members of Ngimu Farm Limited.

16. This being a first Appeal, the court is obligated to evaluate the evidence that was tendered in the lower court and arrive at an independent finding.

17. In the amended Plaint that was filed in the lower court by the Appellants, the Appellants averred that they purchased a parcel of land known as Makuyu/Kimorori/Block 1/1682 (*the suit land*) from Ngimu Farm Limited by virtue of being members in the said company; that on 3rd April, 2002, they paid Kshs. 200,000 for the said land and that since the year 1992, they have been in possession of the suit property.

18. The Plaintiffs averred in their Plaint that on 18th December, 2006, the Defendant purported to lay claim on the suit property alleging that he is the registered proprietor of the same; that as at 31st January, 2007, the suit land was still registered in the name of Ngimu Farm Limited and that the purported registration of the suit property in the name of the Defendant was fraudulent.

19. In his Defence, the 1st Defendant/Respondent averred that in the year 2006, he discovered that the Plaintiffs/Appellants had illegally entered the suit land; that he is the registered proprietor of the suit land and that the Plaintiffs were not members of Ngimu Farm Limited as alleged.

20. The 1st Defendant also filed a Counter-claim in which he claimed for a declaration that the title for land known as Makuyu/Kimorori/Block 1/1682 (*the suit property*) was fraudulently issued and for a mandatory injunction ordering the Plaintiffs to vacate the suit land.

21. When the matter came up for hearing in the lower court, the 2nd Plaintiff, PW1, informed the trial court that the 1st Plaintiff is her husband; that she purchased the suit land in the year 2003 although they had lived on the land since the year 1992 and that she bought the land from Ngimu Farm Limited.

22. To show that she purchased the suit property, the 2nd Plaintiff produced in evidence an acknowledgment slip dated 3rd April, 2002. In the said acknowledgment slip, the Directors of Ngimu Farm Limited purportedly acknowledged receipt of Kshs. 200,000 from the 2nd Plaintiff, being full payment for a portion of land measuring approximately one and a quarter acre of the land known as Makuyu/Kimorori/Block

1/1630. The said acknowledgment slip further provided that *“Title shall be issued after obtaining consent of the Land Control Board.”*

23. In addition to the acknowledgment slip of 3rd April, 2002, PW1 produced a receipt dated 3rd April, 2002 for Kshs. 200,000 from Ngimu Farm Limited. According to PW1, she continued utilizing the land until 18th December, 2006 when she received a letter from the Defendants’ advocate telling her husband to cease cultivating the suit land.

24. In cross-examination, PW1 stated that she became a member of Ngimu Farm Limited upon payment of Kshs. 12,000 and that she bought a portion of the suit land before it was sub-divided. According to PW1, the entire land was parcel number 1630 and that after sub-division, she found herself occupying parcel number 1682, which is the portion of the land that she bought.

25. PW2 informed the court that he was a Director of Ngimu Farm Limited between the years 1994 to 2003; that the company owned parcel number 1630 and that the 2nd Plaintiff used to cultivate a portion of the said land. According to PW2, PW1 bought a portion of the land belonging to the company by paying Kshs. 200,000 and that the entire land generated 39 subplots.

26. PW2 stated that the 2nd Plaintiff was a member of the company and that the 1st Defendant was not known to him and that PW1 is the owner of parcel number 1682 which is a sub-division of parcel number 1630. According to PW2, a Title Deed for parcel number 1682 was to be issued to the 2nd Plaintiff after obtaining the consent of the Land Control Board.

27. On his part, the 1st Defendant, DW1, informed the court that he was a member of Ngimu Farm Limited since 1985; that he had 150 shares in the company and that like all the other members, he was entitled to one acre of land in the farm and that the company had 1,500 members. To support the averment that he was a member of Ngimu Farm Limited, the Defendant produced in evidence several letters and minutes that he received from the company.

28. DW1 informed the court that he balloted for a piece of land within the company’s land and that he was eventually allocated the suit land; that he was given a Title Deed for the land in 1994, and that when he went to develop the land, he found the Plaintiffs in occupation.

29. After hearing the matter, the learned Magistrate found in favour of the 1st Defendant. The learned Magistrate correctly found that the receipt for Kshs. 200,000 dated 3rd April, 2002 produced by the 2nd Plaintiff/Appellant was for a parcel of land known as Makuyu/Kimorori/Block 1/1630 and not for Makuyu/Kimorori Block 1/1682 which was registered in favour of the Defendant on 6th January, 1994.

30. Indeed, both PW1 and PW2 admitted that parcel number 1630 ceased to exist when the same was sub-divided, and that parcel number 1682 is one of the sub-divisions of parcel number 1630. According to PW2, the whole land known as Makuyu/Kimorori/Block 1/1630 measured 39 Ha and was sub-divided.

31. If that is so, then it would not have been possible for the 2nd Appellant to pay Kshs. 200,000 on 3rd April, 2002 for parcel number 1630 as shown in the receipt. The said land had ceased to exist many years back.

32. The learned Magistrate correctly observed that the Defendant had produced several letters and Minutes of the company, which was evidence showing that he was a member of the company. Indeed, one of the documents produced by the Defendant is the Minutes of Ngimu Farm Limited dated 4th October, 1993. Those Minutes shows how the Board of Directors discussed how the several parcels of land of the company should be sub-divided and allocated.

33. Minutes number 4 shows the resolution of the Board allocating the Defendant parcel number Makuyu/Kimorori/Block 1/1682 in exchange for unsuitable land that he had been allocated. It is on the basis of those Minutes that the Defendant was issued with a Title Deed on 6th January, 1994.

34. Considering that parcel number 1682 was a sub-division of parcel number 1630, and in view of the fact that the sub-division of parcel number 1630 was done prior to the issuance of a Title Deed to the Defendant in 1994, the Plaintiffs’ evidence that he bought the suit land in the year 1992 and paid for it in the year 2002 cannot pass muster.

35. That being the case, I am in agreement with the finding of the learned Magistrate that the Appellant neither proved that she bought the suit land from Ngimu Farm Limited nor that the registration of parcel of land number Makuyu/Kimorori/Block 1/1682 was done fraudulently.

36. In any event, by the time the Appellants purported to buy the land by paying Kshs. 200,000 in the year 2000, the suit land had already been registered in the name of the 1st Respondent. The Appellants only recourse, limitation of time allowing, is to seek for a refund of the Kshs. 200,000 from Ngimu Farm Limited.

37. For those reasons, I find the Appellants’ Appeal to be unmeritorious. The Appeal is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE