



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC APPEAL NO. 2 OF 2016

KADENGE KATANA MUDALO.....1ST APPELLANT

TERENZIAH GEIS.....2ND APPELLANT

VERSUS

PHANNY KWAMBOKA MOKAYA.....1ST RESPONDENT

PENINAH JEROTICH LIMO.....2ND RESPONDENT

JUDGMENT

1. This is an Appeal arising from the decision and judgment of the Honourable L.N. Wasige, SRM Kilifi delivered on 29th February, 2016 in Kilifi SRMCC No. 103 of 2014; Kadenge Katana Mudalo and Another -vs- Phanny Kwamboka Mokaya & Another.

2. The Appellants who were the Plaintiffs in the case in the subordinate court had sought orders of injunction and a declaration against the Respondents claiming to be the rightful owners of a parcel of land described as Plot No. 0445/833 Prison Kiwandani. The Respondents had denied the Plaintiff's contention and filed a counterclaim claiming the same parcel of land.

3. In her Judgment delivered on 29th February, 2016 as aforesaid, the Learned Magistrate was satisfied that the 2nd Respondent had proved her counterclaim to the required standard and proceeded to enter judgment in her favour.

4. Aggrieved by the said judgment and decree, the Appellants moved to this court and filed a Memorandum of Appeal dated 29th March, 2016 contesting the whole Judgment/Decree on the following grounds: -

1. That the Learned Magistrate erred in law and fact by making a finding that the appellants failed to prove their case on a balance of probability and dismissing their suit;

2. That the Learned Magistrate erred in law and fact by making a finding that Plots No. 0445/833 and 0423 is not one and the same in view of the overwhelming evidence indicating that the Appellants and the Respondent (were) claiming same parcel of land;

3. That the Learned Magistrate erred in law and fact by treating Prison Kiwandani Upgrading CBO as the paramount Title Holder of the disputed parcel of land which entity was not a government instrumentality;

4. That the Learned Magistrate erred in law and fact by making a finding that the respondent was the owner of the disputed parcel of land and failing to appreciate that the 2nd Appellant was a purchaser for value without notice; and

5. That the Learned Magistrate erred in law and fact by relying on extraneous evidence thereby arriving at a wrong, decision by dismissing the Appellants' suit in the lower court.

5. As was stated in *Oluoch Eric Gogo -vs- Universal Corporation Ltd (2015) eKLR*: -

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another –vs- Associated Motor Boat Co. Ltd. & Another (1968) EA 123*, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a

finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect....

From the above decisions which echo Section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally."

6. From the material placed before me, the Appellants filed the suit on the basis that the suit Plot No. 0445/833 Prisons Kiwandani in Kilifi County belonged to them. It was the 2nd Appellant's case that vide an agreement dated 6th February, 2009, she had bought the said parcel of land from the 1st Appellant herein and that she had proceeded and fenced the same before building a house thereon.
7. It was the Appellants' case that the 2nd Respondent had fraudulently caused the records of a Community Based Organisation known as Prisons Kiwandani Upgrading CBO to be changed to reflect herself as the owner of the suit Plot.
8. Upon service of the suit papers, the 2nd Respondent filed a Statement of Defence and Counterclaim in which she not only denied the accusations of fraud but also claimed the suit Plot as her own. According to the 2nd Respondent she had duly bought the suit Plot from the 1st Respondent and she was now the duly registered owner thereof.
9. In her counterclaim, the 2nd Respondent sought to have the Appellants suit to be dismissed and urged the court to declare herself to be the bona fide purchaser and proprietor thereof.
10. At the trial, the two Appellants gave oral evidence. The 2nd Appellant told the court that she bought the suit plot from the 1st Appellant for Kshs.400,000/-. In support of that position, the 2nd Appellant produced a copy of a handwritten Sale Agreement as well as another typed one dated 6th January, 2009. It was her case that after the purchase, she fenced the plot and later on in the year 2014 sent some money for the building of a small house on the plot.
11. It was then that the 2nd Appellant learnt that the 2nd Respondent was also laying a claim to the same parcel of land. She came to learn that the 2nd Respondent was claiming to have bought the property from her niece who is the 1st Respondent herein.
12. In August, 2014, the 2nd Appellant approached the Kiwandani Upgrading Committee but she was informed that the plot she was claiming had been registered to someone else. It was her case that she never sold the land nor did she give her niece (the 1st Respondent) authority to sell the same.
13. During her cross-examination, the 2nd appellant conceded that both the purchase price and the location of the Plot she had bought from the 1st Appellant were not indicated in the Sale Agreement. On being shown the Respondent's documents, she again conceded that the 1st Appellant was registered as the owner of Plot No. 0423.
14. On his part, the 1st Appellant told the court that she sold the Plot of land measuring 112 x 46 feet to the 2nd Appellant for Kshs.400,000/-. The Plot had no title deed. He confirmed knowing the 1st Respondent as his neighbour who had at one time purchased a piece of land from his mother.
15. Upon cross-examination, the 1st Appellant confirmed that the Kiwandani Upgrading Group surveyed the Plots in the area and gave them numbers.
16. The 1st Respondent never entered appearance and did not participate in the proceedings in the Subordinate Court. Testifying in the proceedings as PW1, the 2nd Respondent told the court she bought the suit Pot from the 1st Respondent vide an Agreement dated 17th January, 2014. A transfer was thereafter done and her name was inserted in the records of the Kiwandani Upgrading Committee while that of the 1st respondent was cancelled.
17. The 2nd respondent told the court that her Plot is No. 0445 while the Appellants' parcel was No. 0423. She produced a Settlement Enumeration Form from the Committee for Plot No. 0423. She also produced a letter dated 22nd May, 2014 from the CBO confirming that she was the owner of the suit Plot.2w
18. The 2nd Respondent called 2 witnesses in support of her case. DW2 – Nelson Safari Kilumo was the chair of the Prisons Kiwandani Upgrading Committee. He told the court that his committee assists area residents to acquire title deeds for their pots. DW2 further told the court that although the 2nd Appellant was a member of their committee, the 1st Appellant from whom she bought the property had erroneously paid for Plot No. 0445 in their office and that a file was wrongly opened in that regard.
19. DW3 – Rosemary Mboi Kitololo was the Secretary of the Committee. She told the court that from their records, the suit Plot belonged to the 1st Respondent before she sold it to the 2nd Respondent. Accordingly, their office had replaced the 1st Respondent's name with that of the 2nd Respondent in their records. She also confirmed receiving 1st Respondent's money for registration but said the registration was erroneous.
20. Those then were the facts before the trial court. According to the Appellants, the Learned Magistrate erred in making a finding that the Appellants failed to prove their case on a balance of probabilities and in the finding that Plot No. 0445/833 and Plot No. 0423 is not one and

the same.

21. As it were, the Sale Agreement produced by the Appellants neither specified the parcel number nor the location of the parcel that was sold. No witness was in fact called to corroborate the fact that the parcel of land sold by the 1st Appellant to the 2nd Appellant belonged to the 1st Appellant in the first instance. From the Agreement produced as Plaintiff Exhibit 2, the said Plot is said to border Karisa Maitha to the West and a Mr. David to the East. These individuals were never called to assist in the identification of the Plot of land.

22. As the Appellants conceded it was the Prison Kiwandani Upgrading CBO that was in charge of surveying these Plots and giving them numbers. From the CBO's records as shown in Defence Exhibit 5, Plot No. 0445/833 was originally registered in the name of Phanny Kwamboka Mokaya (the 1st Respondent) before her name was cancelled and replaced by that of the 2nd Respondent referred to therein as Peninah Jepkemboi Limo. This is in contrast to Defence Exhibit 1 in which the CBO's records show that Plot No. 0423/833 was originally registered in the name of Kadenge Katana Mudalo (the 1st Appellant).

23. Arising from the foregoing, I did not find any basis to fault the findings of the Learned Trial Magistrate when she surmises at page 8 of her Judgment as follows: -

“I take the position that a sale agreement alone in the absence of any other documentation would not and does not prove ownership of an unregistered parcel of land. In any event, there is no link between the Plaintiffs and the suit Plot. None of their agreements refer to the suit Plot as the Plot sold by PW2 to PW1. The least the Plaintiffs should have done is to avail the parties named in the agreement (P. Exhibit 2) as witnesses whose parcels of land border the unsurveyed land that PW2 allegedly sold to PW1. That way, the court would have an idea which parcel of land was sold to PW1. The only logical conclusion that the court comes to then is that the unsurveyed Plot allegedly sold to PW1 by PW2 is not the suit Plot.

It was also not stated when and if PW2 actually owned the suit Plot. If anything, Exhibit 1 which is a Settlement Enumeration Form from Prison Kiwandani Upgrading CBO shows that PW2 owns Plot No. 0423 and not Plot No. 0445 (suit plot). In essence, it means that the chain was broken in the absence of evidence to show if indeed PW2 owned the suit Plot to enable him sell to PW1.”

24. The Appellants have urged this court to allow their Appeal and substitute a Judgment in favour of the Appellants. In light of my findings that there was no basis to fault the Learned Magistrate's findings, their Appeal must fail.

25. The Appeal is accordingly dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE