



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 31 OF 2018

STEPHEN KARUU MAINA.....APPELLANT

=VERSUS=

MARION WAMBUI MUNGAL.....RESPONDENT

JUDGEMENT

1. This is an appeal from the judgment of Hon. S. Atambo Principal Magistrate at Milimani Law courts delivered on 19th April 2013 in CMCC Number 578 of 2010. The learned trial magistrate after hearing both parties found that the plaintiff (Appellant) had not proved his case and the suit was dismissed with costs.

2. The Appellant has filed three (3) grounds of Appeal and are:-

(1) That the honourable court erred in law and fact in dismissing the plaintiff/appellant's case as pleaded in the plaint thus ignoring the evidence adduced in court bot documentary and oral as is required in law.

(2) That the honourable magistrate erred in law and in fact by totally misconstruing and ignoring the pleadings, evidence and proceedings before her and thus failing to appreciate the plaintiff/appellant's case and the gist of the entire suit before him; in particular with how the suit property is held by the plaintiff equitably from the allocating company-Embakasi Ranching Company Limited.

(3) That the failure by the lower court to comprehensively analyses the pleadings, evidence and submissions has thus resulted into the lower court arriving at the wrong decision that is not premised in any known law; especially the various categories of land tenure/ownership/holding.

Reasons wherefore:-

(i) The dismissal of his suit vide judgment delivered on 19th April 2013 and the subsequent decree of Hon. Atambo, Principal Magistrate be and hereby set aside;

(ii) The judgment be entered for the plaintiff as pleaded for in the plaint dated 20th September 2010;

(iii) That the costs herein be to the plaintiff/appellant.

3. On the 11th February 2019, the court with consent from the parties directed that the appeal be disposed of by way of written submissions. Each party undertook to file written submissions within thirty (30) days.

The Appellant's submissions

4. The Appellant testified that he owned Plot No. MA 372 (**"the suit plot"**). That he acquired the plot in 1994 after paying Embakasi Ranching Company Ltd, Kshs.15,000/- through its advocates as per the agreement for sale (exhibit 1). He paid through a bankers cheque dated 28th March 1994 and was issued with a receipt dated 11th April 1994. He was then shown the plot, Titles were yet to be processed and issued by Embakasi Ranching Co. Ltd at the time of the trial. He produced an allocation map showing the physical situation of the plot.

5. The respondent on the other hand stated that she owns Plot L356 – B also allocated by Embakasi Ranching Co. Ltd. She did not file a counterclaim to show that the plot is the same as MA 372. The lower court erred in dismissing the appellants case. It failed to appreciate

evidence that the appellant was in possession. The respondent could not be allocated what was not available for allocation or sale.

6. The respondent did not produce an agreement for sale in writing contrary to the provisions Section 3(3) of the Law of Contract Act. He has put forward the case of **Gladys Wanjiru Ngach vs Teresia Chepsaat & 4 Others [2008] eKLR**. He prays that the appeal be allowed.

The Respondent's submissions

7. The evidence of the defendant was coherent. She became a shareholder in Embakasi Ranching Co. Ltd that owned the land and was allocated the material plot. The learned trial magistrate evaluated the evidence tendered by the parties and found the plaintiff's testimony to be grossly insufficient.

8. The appellant's submissions that the respondent had not exhibited any agreement for sale cannot stand as this was sufficiently addressed by the learned trial magistrate at page 102 of the Record of Appeal. The Respondent benefited as a shareholder from the assets of the company she held shares in. The appellant has not demonstrated any error that the learned trial magistrate committed to warrant interference with her decision. She prays that the appeal be dismissed with costs.

9. I have considered the grounds of appeal, the written submissions made on behalf of the parties and the authorities cited. The issues for determination is whether the appeal is merited.

10. I have gone through the proceedings of the lower court. The appellant, (plaintiff then testified on 15/5/2012. He stated in part;

".....I joined Embakasi Ranching Co. in 1993 and we bought plots as employees of S. N. Wambaru who was contracted to subdivide the two blocks 105 and 106. I paid Kshs.15,000/- through a bankers cheque sometimes in March 1994 through Njora Waweru & Co. Advocates. He prepared the agreement to this effect dated 28th March 1994 confirming the plot number. This is a copy of B/C dated 28th March 1994 to the Ranching Company. This is the receipt issued dated 11th April 1994 for Kshs.15,000/-. Plot was shown to me by one John Kariotha who was the Senior Surveyor and our supervisor. No title deed issued to date since survey was not fully paid. Titles within the scheme are yet to be issued. This is the allocation map for the said plot. Documents I have referred to are of ownership and am in possession of the plot. I have fenced the plot and dug a pit latrine and am cultivating the same".

He went further to say;

"In the year 2010, the defendant trespassed and cultivated and I got her contacts and we were unable to agree. I reported to Ruai Police Station. I gave her notice to file this case....."

When he was cross examined by the defendant's counsel he stated that:-

"I became a shareholder in the company when I bought the relevant parcel. I bought the parcels from another member. I have not produced any share certificate in court. Plot is located in Block 105 in Kamande area".

11. The Respondent (defendant then stated)

"Am not trespassing on the plaintiff's parcel. It belongs to me. There was an announcement in 1976 that the Ranching Company was selling its shares. I saw Mr. Muhuri and was directed to go and pay. I paid for one share at Kshs.1,100/- and waited for allocation. I paid for survey and engineering. Receipt were evidence of payment. I went for allocation and this was done in November 1982 – L356 which was the original plot and allocation letters were issued. We were to pay for the bonus later in 1994. I was given a share certificate and allocation letter NO. 1 on the list of documents. I paid Kshs.6000/- for bonus plot and waited for allocation date No. 2 on the list. Plots were allocated on 23rd June 1994 and we were to mark our immediate neighbor for ease. I was given allocation letter for original and bonus Nos 7 and 3 in the list. There were no roads so development took time. My immediate neighbor passed away. My bonus plot was L356-B. I put the beacons and a fence on one side after agreeing with my neighbor, Mr. Ng'ang'a. Plot was pointed out to me and my son planted a hedge.....".

12. It is against this evidence tendered that the learned trial magistrate formed the opinion that the defendant had proved she was a shareholder since 1978 by producing a share certificate. She was of the opinion that the plaintiff was unable to tender evidence to confirm that he became a shareholder upon purchase from another shareholder. She went further to state:-

"Nothing would have been easier for the plaintiff then to call a representative from the said company to testify on his behalf and explain how he became a shareholder in spite of the sale agreement relied upon heavily.....".

13. I agree with the learned trial magistrate that the appellant ought to have enjoined the Embakasi Ranching Co. Ltd as a party to the suit in order to prove his claim especially since there seem to be a case of double allocation which could only be addressed by the company. I find that a failure to enjoin the company as a party to the suit was fatal to the plaintiff's case.

14. In the case of **Mbogo & Another vs Shah EALR [1968]** the Court of Appeal held that:-

".....the court will not interfere with the exercise of the trial judges discretion unless it is satisfied that the judge in

exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice...”.

I am guided by the above authority. I find that the learned trial magistrate properly evaluated the evidence and arrived at a decision that the Appellant had not proved his case on a balance of probabilities. I find no basis to interfere in her decision. The upshot of the matter is that I find no merit in this appeal and the same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of December 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Appellant

Mr. S. N. Ng'ang'a for the Respondents

Kajuju - Court Assistant