



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 35 OF 2015

ELIPHAS MBAE ARITHIAPPELLANT

VERSUS

ANGELA GATUMI MUCHEKE.....RESPONDENT

(Appeal from the Judgment/Decree of Nkubu Senior Resident Magistrate Hon. D.A Ocharo dated 1st July, 2015)

J U D G M E N T

1. The appellant herein was the Defendant in the lower Court case while the Respondent was the Plaintiff. The background of this case is that the Appellant had apparently bought 1 acre from the larger Parcel No. Nkuene/ Mitunguu/ 861 from one Lawrence Kinoti Zakayo sometimes in the years 2003-2005. Appellant took over possession of the land, the one acre portion. Then Zakayo died. His wife, the present Respondent filed a Succession Cause in respect of the estate of deceased. She got the grant of letters of administration and the title to land was thereafter registered in her name.
2. Respondent then moved to Court in the SPM's Case No 74 of 03 at Nkubu seeking for an Order of Eviction of the Appellant and his family from the Parcel No. L.R Nkuene/Mitunguu/861.
3. The claim was allowed vide the Judgment of 01.7.15. The Appellant was aggrieved by this Judgment hence this Appeal.
4. Seven grounds have been listed in the Memorandum of Appeal. I will proceed to deal with ground 1, 3 and 4 together, then ground 2 and 5 and finally ground 6 and 7.
5. When the matter came up before me on 28.09.17, it was agreed that the appeal would be canvassed by way of Written Submissions. The Submissions have duly been filed and exchanged.
6. This Court is conscious of its role as a first appellate Court as it was stated in **SELLE VS ASSORTED MOTOR BOAT LTD (1965) E.A 123**. This Court has to reconsider and evaluate the evidence that was tendered before the trial Court, assess the same and make its own conclusion.
7. During the trial before the Lower Court , Plaintiff had testified that she is wife of Lawrence Zakayo Kinoti and that she had acquired title to the suit land through transmission in Succession Cause No. 277 /08 (Meru). She avers that she had registered a caution on the land even when her husband was alive.
8. Plaintiff's daughter and mother were her witnesses. The Plaintiff and her daughter (PW 2) had stated that Defendant resides on the Suitland where he has constructed 2 wooden houses and has planted crops. PW 3, mother of Plaintiff did not know the Kind of developments that are on the land.

9. In support of her case, Plaintiff had produced the following documents;

- A title deed issued in her name on 26.04.13 for Land Parcel Nkuene/Mitunguu/861 measuring 1.013 ha.
- Certificate of confirmation of grant issued to Plaintiff.
- A letter requesting for the land to be cautioned.
- Grant of letters of administration (temporary grant).

10. On the side of defence, it had been pleaded that defendant bought 1 acre from Kinoti Zakayo in year 2005 whereby Defendant took possession of the Land.

11. Defendant hence claimed that Plaintiff held the portion of one acre of land in Trust for Defendant (and his family). Defendant had therefore counter claimed for a declaration that Plaintiff is registered as a trustee of Defendant in respect of the acre of L.R. No. Nkuene/Mitunguu/861. Defendant had also sought for an order for transfer of one acre from L.R Nkuene/Mitunguu/861 to the Defendant.

12. In his testimony, defendant had told the Court that the entire price for the land was sh. 70,000 but he paid sh. 50,000. He was to pay the balance of Sh. 20,000 after transfer was effected. The transfer was not done because Kinoti Zakayo died shortly thereafter.

13. Members of the family of Zakayo Kinooti had testified in support of the Defendant. They included Zakayo's Mother (DW 2), the brother (DW 3) and a sister (DW 4). Their evidence is that indeed Zakayo had sold the portion of the land in question to Defendant. They also stated that it is defendant who occupies the Suitland.

14. In support of his case, Defendant had produced the following documents.

- Agreement of 30.03.05
- Receipt of a Surveyor (Kamunge technical office)

15. **DETERMINATION**

The trial Magistrate had framed the issues for determination as follows:-

- Whether there was a Sale Agreement between the Deceased (Zakayo Kinoti) and Defendant.
- Whether plaintiff holds a portion of one acre out of L.R. No. NKUENE/MITUNGUU/861 as a trustee for Defendant.
- Whether Plaintiff is entitled to seek for eviction of Defendant.

16. I find that the trial court had properly framed the issues. It is now the mandate of this Court to make a determination as to whether the issues framed were properly analyzed. In doing so, I have taken into account all the arguments raised herein as well as the submissions.

Grounds 1, 3, and 4.

17. All that the appellant, has stated regarding the alleged Sale of land was that **“there was a clear case of sale of land”**.

18. On the part of Respondent, it is submitted that appellant's claim that he had bought the suit land from Kinoti was false.

19. The document in support of the Sale Agreement is an acknowledge receipt. The terms of the alleged Sale agreement are not discernible from this document. However, it is quite apparent that Defendant had settled on the suit land by virtue of the alleged Sale Agreement.

20. From the evidence tendered before the lower court, it is clear that there was a seller –buyer relationship between the appellant and deceased. Out of that relationship, Defendant was put in possession of the land. The transaction was however not accomplished.

Ground 2 and 5

21. Did the Magistrate analyses the evidence properly, and did he take into account that Appellant had taken possession of the Suitland?

22. The Trial Court’s finding on issue of occupation was captured as follows;

“it is however not clear whether he is in occupation as a Lessee or as a Purchaser. I am unable to find that his occupation created on overriding interest over Plaintiffs title...”

23. The evidence adduced by all parties including the Respondent’s side is that Appellant is the one in occupation of the Suitland. He has built houses there. He farms there. That is where the appellant calls home.

24. The evidence of the Respondent in the lower Court reads as follows:

“The Defendant has bananas and horticultural crops there. He has two wooden houses there. He has no animals there. All these developments he started in 2005. The houses he built in year 2008.The Defendant occupies one acre whose boundaries are clear...”

25. In Civil Appeal No. 6 of 2015 Mwangi Maina & 87 Others vs. Mwangi Kagiri at Nyeri, a decision cited by Appellant. It was held as follows:-

“we find that the Respondent having put the Appellants in possession of the suit property created an overriding interest in favour of the Appellantsit is our considered view that the Respondent created an implied or constructive Trust in favour of those who had paid the purchase price....”

26. The Court went on to state that:-

“we do find that the possession and occupation by the Appellant of the suit property is an overriding interest attached to the said property....”

25. Section 28 (b) off the land Registration Act, provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a)

(b) trusts including customary trusts;

27. **“Rights of a person in possession or occupation of land are equitable rights which are binding on the land, and the land is subject to those rights”, see Peter Mbiri Michuki v. Samuel Mugo Michuki court of appeal case no. 22 of 2013, Nyeri.**

28. This evidence is a clear confirmation that Appellant had acquired possessory rights in the land. He

was there on account of having been put there by Zakayo Kinoti who was the lawful owner of the land in the year 2005.

29. It is apparent that Appellant's interest in the land falls under Section 28 of the Land Registration Act. I therefore find that the trial magistrate failed to make a proper analysis with regard to the appellants occupation of the suit land.

Ground 6 and 7.

30. It is noted that in the Judgment delivered by the Trial Magistrate, no reference was made to the cited case law and the Submissions. I find that the decision in Civil Appeal No. 6 of 2011 had been availed in the Lower Court. It appears that this decision was not at all considered.

31. I am inclined to find the decision of the trial Magistrate was unfair and unjust to the appellant.

32. CONCLUSION:-

I proceed to make the final orders as follows:-

- 1) **The appeal succeeds.**
- 2) **The decision given on 01:07:15 in SPMS Nkubu case No. 74 of 2013 is hereby set aside.**
- 3) **It is hereby declared that Respondent is registered as a trustee of the Appellant in respect of one acre of Land L.R. No. NKUENE/ MITUNGUU/ 861 (in respect of the portion occupied by appellant.**
- 4) **An order is hereby issued for the transfer of one acre from L.R. No. Nkuene/Mitunguu/ 861 to the Appellant (in respect of the portion occupied by Appellant).**
- 5) **Each party to bear their own costs in the appeal and in the Lower Court.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 24th JANUARY, 2018 IN THE PRESENCE OF:-

Court Assistants: Janet/Galgalo

Rimita for Appellant present

Kimathi K. for Respondent present

HON. L. N. MBUGUA

ELC JUDGE