REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 23 OF 2017

AGGREY KHAJIRA INDECHE :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

JONAH ANDANJE MUCHILIMANI :::::::::::::::::::::::: RESPONDENT

JUDGEMENT

This appeal is from the judgment of the Chief Magistrate's Court Kakamega delivered on the 4th May, 2010 by the Principal Magistrate, J.M. Githaiga. The appellant being aggrieved by the said decision puts forth the following grounds of appeal.

1. THAT the learned trial magistrate evaluation of the evidence before him was wanting.

2. THAT the learned trial magistrate grossly erred on relying partially on the evidence contained in the District Land Registrars Report.

3. THAT the learned magistrate grossly erred in not finding on a balance of probabilities that there was no evidence of purchase of land by the respondent.

4. THAT the learned trial magistrate failed by not holding that the appellant was an innocent purchaser for value without notice.

5. There was no basis for the holding that the appellant title deed was fictitious.

6. The learned trial magistrate completely disregarded the Land Registrar's evidence.

7. The learned trial magistrate grossly erred in not arriving at a conclusion that the failure by the respondent to call the original owner of the parcel was fatal to the respondent's case.

8. The learned trial magistrate exhibited actual bias against the appellant.

9. The learned trial magistrate erred by not holding that in any event he had no jurisdiction to entertain the suit.

10. The learned magistrate orders have occasioned grave injustice.

It is proposed that the judgment be set aside and an order be made dismissing the respondent's suit with costs.

The appellant submitted that, the learned trial magistrate failed to analyze the evidence before him and/or to appreciate the substance of the report of the Land Registrar that was produced by the respondent as plaintiff's Exhibit No. 4 and the submissions of counsel. The basis of the respondent's case in the lower court was alleged fraud. The trial magistrate failed to critically analyze the evidence and to appreciate that the allegations of fraud through collusion or otherwise were never proved. The testimony of the Land Registrar (DW2) was critical and remained unchallenged. The magistrate did not evaluate and consider it in his determination. He instead misdirected himself into believing that South Kabras/Bushu/2652 did not exist and/or that it was a fiction. He did not closely interrogate Exhibit P/4 that was put in by the respondent, but took a lopsided view of what was reported therein. Each of the two parcels viz South Kabras/Bushu/1805 and South Kabras/Bushu/2652 had a separate and distinct title and lineage. In his observations contained at the end of Exhibit P/4 the land Registrar clearly set out the lineage of each parcel. The land registrar must have extracted that information from the records in his custody in the Land Registry. The existence of two parallel registers must have implied the existence of two parallel parcels of land. Given the above scenario, they wonder how only South Kabras/Bushu/2652 became a fiction and overlapped South Kabras/Bushu/1805 when there was no evidence that the rest of the parcels within that lineage, up to the head title i.e. No. South Kabras/Bushu/1803, were also fictitious. The learned trial magistrate clearly made a bad decision.

The learned trial magistrate failed to appreciate the evidence placed before him and to apply the law thereto. The respondent claimed to have purchased plot No. South Kabras/Bushu/1805 from one Tebla Chimase for Ksh. 32,000/= in January, 1995. He had no concrete evidence to back up that claim. All he had was title deed for South Kabras/Bushu/1805. If the respondent purchased the land from Mrs. Tebla Chemase then section 3 (3) of the law of Contract Act required such transaction to be evidenced by a memorandum in writing. None was exhibited by the respondent. In her statement to the Land Registrar (Plaintiff's Exhibit 4) Teblas Chemase vehemently denied having sold the plot or any land at all to the respondent and/or having received any money from him. That was enough according to the appellant to seal the fate of the respondent's claim. Non production of written evidence of purchase and evidence from the Land Control Board and of the process of mutation/subdivision fatally affected the respondent's case. A title deed is only the final product of a process. If the due process was not complied with, the authenticity of the final product is in doubt. The above statement fortified the appellant's stand that he was a purchaser for value without notice of the respondent's claims.

They submitted that, law that governed registered land in 1995 and when the suit went to trial in the magistrate's court was the Registered Land Act (Repealed by the Land Registration Act No. 3 of 2012). Section 32 (2) of the repealed Act provided as follows:-

> *"A title deed or a certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register."*

This section was in 2012 reproduced as section 26 (1) of the Land Registration Act 2012. The respondent did not adduce any evidence to allay the implication that he could be the one having a fictitious title acquired illegally, un-procedurally or through a corrupt scheme. It is a pity that the learned trial magistrate failed to appreciate that the seller's statement gave life to the appellant's title and spelt doom to the respondent's claim. The appellant did not wish to pursue this ground 7 and abandons it.

At the time of trial, the trial magistrate derived his jurisdiction from section 159 of the now repealed Registered Land Act which stated:-

> *"Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High court and, where the value of the subject matters in dispute does not exceed twenty-five thousand pounds, by the Resident Magistrate's court, or, where the dispute comes within the provisions of section 3 (1) of the Land disputes Tribunals Act, in accordance with that Act."*

In their view, that jurisdiction did not extend to rectification of a land register and cancellation of

registered title. Jurisdiction to rectify a land register and cancel registered title was reserved to the High to be exercised under section 143 of that Act. That section 143 of the repealed Act has been reproduced as section 80 of the Land Registration Act No. 3 of 2012. Even if it turned out that a magistrate had jurisdiction, after all, to rectify a land register and cancel registered title, it is their submission that the learned trial magistrate failed to appreciate and/or that he misconceived the law as it then was and failed to apply it to the facts before him. There were conditions to be fulfilled before orders could be issued under section 143 of the repealed Act (or section 80 of the substituted Act No. 3 of 2012). The court had to be satisfied that:

a. The registration in issue (other than a first registration) was obtained, made or omitted by fraud or mistake.

b. The proprietor who is in possession and acquired the land for valuable consideration, had knowledge of the omission, fraud or mistake sought to be rectified.

c. The said proprietor in possession caused the omission, fraud or mistake, and

d. The said proprietor in possession substantially contributed to the omission, fraud or mistake by his act, neglect or default.

The registration of S. Kabras/Bushu/2652 was obviously not a first registration, but was it obtained by fraud or mistake? The learned trial magistrate failed to critically consider this issue. Respondent in paragraph 5 of his plaint pleaded fraud and set out particulars he relied on. The basis of his contention was that the appellant "*acting in collusion with the 2nd defendant's officials at Kakamega District Land Registry had a fake title deed created known as No. S. Kabras/Bushu/2652 which title does not have corresponding plot in existence on the ground but purported it to relate and/or be the same as plot No. S. Kabras/Bushu/1805.....*"

The respondent did not fortify his claim with evidence of how title No. S. Kabras/Bushu/2652 was allegedly created by the appellant or by the appellant in collusion with the Land Registrar. DW2, himself a Land Registrar, testified to the effect that his office did not create land titles. It was the District surveyor who surveyed the land, carried out subdivision and drew mutations, assigned new parcel or title numbers to the sub-divisions created and then filed them with the Land Registrar whose function was merely to register the created title numbers, issues certificates or title deeds and to maintain the register. The evidence DW2 was never challenged.

In addition to the sale agreement (Exhibit D/1) produced by the appellant, DW2 produced the documents received from the surveyor. They were an application for consent of the Land Control Board (Exhibit D/2); letter of consent (Exhibit D/3); the transfer (Exhibit D/4) and the Mutation form (Exhibit D/6) which showed how the surveyor subdivided Land Parcel No. South Kabras/Bushu/2180 to produce two new parcels viz. south Kabras/Bushu/2651 and south Kabras/Bushu/2652. The genuineness of those documents was not challenged. No fraud or wrong doing was alleged on the part of the surveyor. No evidence was adduced to show that those documents were created by the Land Registrar or by the Land Registrar in collusion with the appellant or that they did not in fact come from the surveyor and/or were fake.

None of those documents mentioned or made reference to south Kabras/Bushu/1805. In fact parcel No. South Kabras/Bushu/2652 and south Kabras/Bushu/1805 do not share the same register. Each is registered separately and no evidence was adduced to show that the registration of South Kabras/Bushu/1805 was cancelled and replaced with South Kabras/Bushu/2652. The two parcels still exist separately and do not share the same register.

The appellant submits that what seemed to come out of paragraph 6 of the respondent's plaint in the lower court was that although his title South Kabras/Bushu/2652 had been created earlier on 21st June 1995, a new title No. South Kabras/Bushu/2652 created nine years later on 11th February 2004 was supplanted on his No. South Kabras/Bushu/1805. It was then assumed that the same plot was clothed

with two different numbers. There is a difference between being registered earlier and being a first registration. Although plot No. south Kabras/Bushu/1805 was registered earlier it was never a first registration. It was a latter subdivision just like South Kabras/Bushu/2652 and was also amenable to being probed to eliminate any doubts that it had been obtained, made or omitted by fraud or mistake.

It was not, however, denied that the appellant was in possession and had acquired the plot for valuable consideration. No evidence was adduced to show that he had knowledge of any omission, fraud or mistake sought to be rectified. There was absolutely nothing to show that the appellant was present in 1995 when the respondent allegedly acquired his plot or that he thereafter became aware that the respondent owned any such plot or that the plot he was buying was the same as the one purchased 9 years earlier by the respondent.

The learned trial Magistrate simply relied on the opinion of the Land Registrar in his Report (Plaintiff's Exhibit 4) that "land parcel No. South Kabras/Bushu/2652 overlaps the plaintiffs plot" (No. South Kabras/Bushu/1805) and dismissed title No. South Kabras/Bushu/2652 as a fiction. Unfortunately the writer of that report did not attend court to testify and explain the term "overlap" in relation to the two plots in dispute and how in real time that was even possible.

The learned trial magistrate failed to appreciate that there was something of a contradiction in the report of the Land Registrar (Plaintiff's Exhibit 4). How could there be an overlap when the same Land Registrar made observations in which he clearly set out the lineage of each parcel. South Kabras/Bushu/1805 was registered on 31/1/1995 having been a product of subdivision of South Kabras/Bushu/1639 which in turn had been a product of subdivision of south Kabras/Bushu/1038. On the other hand South Kabras/Bushu/2652 that was registered on 1/11/2004 was the product of sub-division of South Kabras/Bushu/1983 and finally South Kabras/Bushu/1983 was also a product of subdivision of South Kabras/Bushu/1803.

The Land Registrar must have extracted that information from the records in his custody in the Land Registry. Given the above scenario, they wondered how only south Kabras/Bushu/2652 became a fiction and overlapped south Kabras/Bushu/1805 when there was no evidence that the rest of the parcels within that lineage, up to the head title i.e. No. South Kabras/Bushu/1803, were also fictitious. There respondent allegedly bought his plot in 1995. Apparently he did not set foot there for nine years until 2004 when he strayed into the area and found the appellant at work. It was unfortunate that the learned trial magistrate failed to appreciate that there was absolutely no evidence of any omission, fraud or mistake caused by the appellant and/or of any act, neglect or default on the part of the appellant that could have substantially contributed thereto in order to satisfy the requirements of section 143 of the then Registered Land Act. The High Court in Nyeri dealt with a similar situation in **Job Muriithi Waweru v. Patrick Mbatia (2008) eKLR**, and had this to say when it partially allowed the appeal and vacated the order cancelling title.

> *"Even if the title deed to the suit premises was not a first registration, section 143 (2) of the Registered Land Act provides complete armour for the respondent against adverse claims over the suit premises. The title so issued cannot be rectified for so long as the registered proprietor was not party to the omission, fraud or mistake in consequence of which the rectification is sought. The evidence on record clearly shows that the respondent did not cause the omission, fraud or mistake or substantially contributed to it by his act, neglect or default. In deed the respondent was an innocent purchaser for value. The learned magistrate thus could not have made an order cancelling his title aforesaid."*

They submitted that a similar fate should befall the orders appealed against herein and they pray that the appeal be allowed, the judgment of the lower court be set aside and substituted with dismissal of the respondent's suit with costs.

The respondent submitted that, it is on record that the respondent is the absolute registered proprietor of L.R. NO. S/KABRAS/BUSHU/1805 which he acquired on the 21st June 1995. He proved this by production of a title deed and green card as exhibits. When he testified in the subordinate court, he said

that on 1st February 2005, he found the appellant working on his (respondent's) land which is a plot within Malava town. When he asked him about it, he replied that the plot was his and was L.R. NO. S/KABRAS/BUSHU/1805 owned by the respondent. They made report which was produced as an exhibit. They concluded that L.R. NO. S/KABRAS/BUSHU/2652 was created later that LR. NO. S/KABRAS/BUSHU/1805 and overlaps it on the ground. In actual fact, the surveyor's report indicates that L.R. NO. S/KABRAS/BUSHU 1805 and LR NO. S/KABRAS/BUSHU/2652 occupy the same position on the ground.

Whenever courts are faced with such scenario they submit, it is only the land registrar and surveyor who can make a report once they visit the ground. Such reports are relied on by the courts as a true version of actual situations on the ground. There was, therefore, nothing wrong for the trial magistrate to rely on the land registrar and surveyor's report. The appellant cannot be heard arguing that the trial court erred in relying on the report. In any case he never objected to its production during the trial and never appealed it when it was made. In any case, the respondent produced documents to prove ownership of his land which documents were confirmed to be genuine by DW2 the Land Registrar.

The appellant testified and said he bought his land from one Tembula Chemate. He never called her as a witness to corroborate his evidence. In an attempt to prove that he acquired his land legally and lawfully, the appellant produced several documents as exhibits. Among them was a transfer of land form which was produced as exhibit DMFI 4. It was not signed by the transferor. Without a signature of a transferor, such a document is incapable of transferring title to land.

Ground 4 of the grounds of appeal cannot stand. They say so because the appellant could not be taken to be an innocent purchaser for value without notice. This is because he failed to bring, as a witness, the person who allegedly sold him the land. He didn't adduce any evidence to show that he did any due diligence by carrying out an official search before buying the land. This could have enabled him know whether or not L.R. NO. S/KABRAS/BUSHU/2652 existed and if so, where on the ground. The trial court therefore rightly found that the title he holds is a fiction and he should seek redress from the person who sold him nonexistent land.

On ground 6 of the appeal, they submit that the trial court never disregarded the evidence of the land registrar. The registrar's evidence on record in actual fact supports the respondent's averment that the appellant and the land registrar colluded and had a fraudulent title No. S/KABRAS/BUSHU/2652 created without corresponding space on the ground. They say so because the land registrar was sued as a party. He came to court and testified as a witness for the appellant. He never brought any document to court to dispute that L.R. NO. S/KABRAS/BUSHU/1805 does exist on the actual space on the ground.

On ground 8 of the appeal, they submit that the learned trial magistrate, in his judgment, never held that failure by the appellant to call the land's original owner was fatal. They urge the court to disregard that ground of appeal. The learned trial magistrate arrived at a proper decision. It was well reasoned, balanced and sound. That the appeal should be dismissed with costs.

The court has carefully considered the appellant's and the respondent's submissions in this appeal. On ground 9 of the appeal; the appellant alleges that the learned trial magistrate lacked jurisdiction to hear and determine the case. The suit before the lower court was filed on 15th September, 2005. This was done when the Registered Land Act Cap 300 Laws of Kenya (now repealed) was the applicable law. Section 159 of the Act vested jurisdiction to hear disputes relating to land in the High Court and the subordinate court presided over by a Senior Resident Magistrate. This was the then express provision of the law that was applicable before the act was repealed. It is therefore, not true that the subordinate court which was presided over by a Principal Magistrate who is senior to a Senior Resident Magistrate lacked jurisdiction to hear and determine the case. Section 159 (1) stated that;

> *"Except as provided by section 120 of this Act, civil suits and proceedings relating to title to, or possession of, land or to title to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being interest which is registered or registrable under this Act, or being an interest which is expressed by this Act not to require registration shall, not withstanding*

the provisions of the courts Act, be tried by the High Court or when the value of the subject matter in dispute does not exceed then thousand shillings, by the High Court or a subordinate court held by a Senior Resident Magistrate or a Resident Magistrate.

Provided that where the land in question is within the special areas the limit of jurisdiction of a subordinate court held by a Resident Magistrate shall not apply".

From the above section of the law applicable by then, the subordinate court had jurisdiction to hear the case.

On grounds 1, 2, 3, 4, 5,6 and 8 the court observed as follows: the appellant submitted that, the learned trial magistrate failed to analyze the evidence before him and/or to appreciate the substance of the report of the Land Registrar that was produced by the respondent as plaintiff's Exhibit No. 4 and the submissions of counsel. The basis of the respondent's case in the lower court was alleged fraud. I find that the trial magistrate did proper evaluation of the evidence presented before him and arrived at a proper and well considered judgment. It is on record that the respondent is the absolute registered proprietor of L.R. NO. S/KABRAS/BUSHU/1805 which he acquired on 21/6/1995. He proved this by production of a title deed and green card as exhibits. When he testified in the subordinate court, he said that on 1st February 2005, he found the appellant working on his (respondent's) land which is a plot within Malava town. When he asked him about it, he replied that the plot was his and was L.R. NO. S/KABRAS/BUSHU/1805 owned by the respondent. They made report which was produced as an exhibit. They concluded that L.R. NO. S/KABRAS/BUSHU/2652 was created later that LR. NO. S/KABRAS/BUSHU/1805 and overlaps it on the ground. In actual fact, the surveyor's report indicates that L.R. NO. S/KABRAS/BUSHU 1805 and LR NO. S/KABRAS/BUSHU/2652 occupy the same position on the ground (PEx4). DW2, the land registrar confirmed the same, in cross examination he admitted that the respondent's title was registered first. The trial magistrate in considering his evidence stated that;

"The 2nd defendant prayed the plaintiff's costs denying there was collusion/creation of fake title deed/fraud and averring without prejudice that if there was no plot corresponding to the title L.P.No.S.Kabras/Bushu/2652 the title was produced on a bona fide mistake that such land existed and the court could not cancel the title deed No.S. Kabras/Bushu/2652".

The trial court rightly found that the title held by the appellant is a fiction because no one parcel of land can have two titles. The one held by the appellant was fraudulently acquired and much later after the respondent had lawfully acquired his. The trial magistrate in his judgement also stated that;

"The court has considered the evidence adduced, the submissions by advocates for the parties, the relevant provisions of law and all the circumstances of the case. According to the copy of register for the land parcel South Kabras/Bushu/1805 the plaintiff became the registered proprietor of that land parcel on 21.6.1995 when a title deed (P exhibit 1) was issued. The copy of register also indicates the land was subject to gazettement vide gazette notice No.8238 of 7.12.2001. What that means is that the plaintiff was the absolute proprietor of that land parcel from 21.6.1995 and nobody else could dispose of/transfer the land in issue without the authority of the plaintiff. The report of the District Land Registrar confirmed land parcel South Kabras/Bushu/2652 overlaps the plaintiff's land parcel which had been registered earlier. That is impossible. The court finds the suit land is South Kabras/Bushu/1805 and belongs to the plaintiff absolutely. The title South Kabras/Bushu/2652 is a fiction. The 1st defendant should sue the person who sold to him the non-existent land and the person who issued him with a title deed for the no-existent land. An eviction order should and is hereby issued against the 1st defendant who has no right to be on the plaintiff's land parcel. Costs and interest are awarded to the plaintiff".

In **Mwanasokoni v Kenya bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown

demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE