



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 971 OF 2014

(FORMERLY CIVIL APPEAL NO. 311 OF 2009)

GRACE MUTHONI GICHUNGWA.....1ST APPELLANT

SALOME WANJIKU MBIRWA.....2ND APPELLANT

VERSUS

SAMUEL KIBUI MBIRWA.....RESPONDENT

JUDGEMENT

1. This is an appeal against the decision of the Provincial Land Appeal Tribunal at Nyeri made on 29/4/2009. The Memorandum of Appeal was amended on 30/4/2012 to join the parties who purchased the suit land to the proceedings as Respondents.
2. The Appellant seeks to set aside the decision of the Land Appeals Tribunal with respect to the land known as Dagoretti/Thogoto/T.315 on the grounds that the Tribunal failed to observe the rules of natural justice by not affording the Appellant a hearing. The Appellant further argues that the Tribunal erred in law by giving an award that was contradictory to the decision of the Kiambu West Tribunal which it purported to uphold.
3. The decision of the Kiambu West Tribunal was to the effect that Plot No. Dagoretti/Thogoto/315 was to be shared equally between the claimant (who was Grace Muthoni Gichungwa) and Grace Wanjiku Mwangi who had occupied the plot for over 12 years. The Tribunal made a further finding that the court was to order the lifting of the cautions put by the Respondent's wife and mother to allow for the subdivision of the land.
4. The Provincial Land Appeal Tribunal made a finding that Dagoretti/Thogoto/T.315 was registered under the names of Samuel Kibui Mbirwa. The appeals Tribunal stated in its decision that it had listened to both parties, and perused the documents; and that the parties had agreed that the appeal Tribunal should go with the ruling of the Kiambu panel with respect to plot No. Dagoretti/Thogoto/76.
5. The Tribunal went further to state in its award that Dagoretti/Thogoto/T.315 was to remain registered under the names of Samuel Mbirwa. It also directed that the Kiambu District Registrar was to remove any restrictions or cautions in the parcels and the court was to sign all the necessary land consent documents.
6. The court is inclined to agree with the Appellant that the Provincial Land Appeal Tribunal deviated from the ruling of the Kiambu panel when it directed that this parcel of land was to remain as registered under the names of Samuel Mbirwa. The Kiambu panel had ordered that Dagoretti/Thogoto/T.315 was to be shared equally by Grace Muthoni Gichungwa and Grace Wanjiku Mwangi who had occupied the plot for over 12 years.
7. The Appellant claims that she was not afforded an opportunity to be heard by the appeals Tribunal. The proceedings of the hearing before the Tribunal were not attached to the record of appeal. The court can only go by the Tribunal's statement where it mentions in its decision that it had listened to both parties.
8. Being aggrieved by the award of the Provincial Tribunal given on 29/4/2009, the Appellant filed the memorandum of appeal on 19/6/2009. She filed the application dated 28/9/2011 seeking to stay execution of the Tribunal's decision pending determination of the appeal. She also sought to restrain dealings with the suit land. The court notes that Ang'awa J. granted temporary orders awaiting *inter partes* hearing on 3/10/2011. It is not clear whether that application was ever argued.
9. Parties filed written submissions. The 1st Respondent's submission is that he was not a party in the proceedings before the District Lands Tribunal despite being the registered owner of the suit land. He argues that the Tribunal ought not to have made a decision without giving him an opportunity to defend his right as the registered owner.

10. Being dissatisfied with the decision of District Lands Tribunal, he filed the appeal at the Provincial Lands Tribunal. He maintains that the dispute was heard in his presence and that of the Appellant. He agrees with the decision made by Provincial Lands Tribunal that he should remain as the registered owner of the suit land. He argues that the Provincial Land Tribunal did not uphold the decision of the Kiambu Lands Tribunal in its entirety.

11. He further argues that the Appellant only moved the court on 28/9/2011 after he had sold the suit land to the 2nd and 3rd Respondents through a sale agreement which was concluded on 22/8/2011 and a title deed issued to the 2nd and 3rd Respondents. He averred that it was only when the 2nd and 3rd Respondents took possession and started developing the suit property that the Appellant moved this court.

12. In their submissions, the 2nd and 3rd Respondents argue that they entered into a sale agreement with the 1st Respondent on 19/7/2011 for the purchase of the suit land at the agreed consideration of Kshs. 2,650,000/= which they duly paid. They applied for and were granted consent by the Land Control Board to transfer the land to their names. They claim they did due diligence and confirmed from the search they conducted that the 1st Respondent was the registered owner of the suit property.

13. The court agrees with their assertion that the Appellant did not take any action to preserve the suit property by either obtaining a court order or registering a caution against the suit property pending the determination of this appeal.

14. The 2nd and 3rd Respondents claim that they are protected being bona fide innocent purchasers for value who had no notice of any defects in the 1st Respondent's title. They rely on the case of **Zebak Limited v. Nadem Enterprises Limited (2016) eKLR** in which the court adopted the test laid out in the Ugandan case of **Katende v. Haridas & Company Limited (2008) 2 EA 174** defining a bona fide purchaser as one who honestly intends to purchase property offered for sale and does not intend to acquire it wrongly. Such a purchaser must prove that he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased it for valuable consideration; the vendor had a good title; he purchased it without notice of any fraud and was not a party to any fraud.

15. On its part, the Appellant urges that the Tribunal erred in law by failing to observe the rule of natural justice and not giving her an opportunity to be heard. The Appellant argues that her right is enshrined in Article 50 of the Constitution. The Appellant argues that the Tribunal ought to have allowed her to participate in the proceedings before it. The Appellant also argues that the appeal should be allowed since the Provincial Tribunal gave an award that was contradictory to the ruling of the Kiambu Tribunal which it stated it had upheld.

16. The 1st Respondent contends that despite being the registered owner of the suit land, he was not heard by the Kiambu panel before it arrived at the decision that Plot No. Dagoretti/Thogoto/315 was to be shared equally between the claimant (who was Grace Muthoni Gichungwa) and Grace Wanjiku Mwangi who had occupied the plot for over 12 years. The Appellant did not address this issue in her submissions. The court is of the view that had the Kiambu panel heard the 1st Respondent, it would have arrived at a different decision.

17. The court has considered the rival arguments. The issue for determination is whether the court should grant the orders sought in the appeal. The suit land has already been transferred to the 2nd and 3rd Respondents. The 2nd and 3rd Respondents assertion that they are bona fide innocent purchasers for value who had no notice of any defects in the 1st Respondent's title was not challenged by the Appellant. On filing the appeal, the Appellant did not obtain orders to restrain dealings with the suit property. If she had and these were noted on the land register, the 2nd and 3rd Respondents would have had notice of this appeal.

18. In light of this, the court finds that setting aside the decision of the Land Appeals Tribunal with respect to the land known as Dagoretti/Thogoto/T.315 will not serve any useful purpose since the land has changed hands and is now registered in the names of the 2nd and 3rd Respondents.

19. The court dismisses the appeal. Each party will bear its own costs.

Dated and delivered at Nairobi on this 13th March 2018.

K. BOR

JUDGE

Delivered in open court in the presence of: -

Mr. Gachuhi holding brief Mr. Mutiso for the Appellant

Samuel Kibui- 1st Respondent

Mr. Kamau holding brief for Mr. Ngugi for the 2nd and 3rd Respondents

Mr. V. Owuor- Court Assistant