



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. A. NO. 11 OF 2017**

**(FORMERLY EMBU CIVIL APPEAL NO. 37 OF 2015)**

**MWANGI NDIRANGU.....1<sup>ST</sup> APPELLANT**

**MARION MBUCU MWANGI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CATHERINE WACEKE GICHUKI.....RESPONDENT**

(Being an appeal from the judgement and decree of Hon S.K. Mutai (SRM) dated 1<sup>ST</sup> September 2015 in Embu CM's CC case No.70 of 2012)

**JUDGEMENT**

1. This is an appeal against the judgement and decree of Hon S.K. Mutai (SRM) in Embu CMCC No. 70 of 2012 in which judgement was entered for the Respondent against the Appellants on 1<sup>st</sup> September 2015.
2. The brief facts of the case are that the Respondent herein filed the said suit against the Appellants seeking their eviction from Title No. GATURI/WERU/8172 (hereinafter known as the "suit property") together with *mesne* profits, costs and any other relief the court may deem fit to grant.
3. The basis of the said suit was that the Appellants had defaulted on an oral sale agreement whereby the Respondent was to transfer the suit property to the 1<sup>st</sup> Appellant in exchange for transfer of the latter's plot in Thika. The Respondent apparently obtained consent of the Land Control Board (hereinafter the "LCB") for transfer of the suit property to the 1<sup>st</sup> Appellant whereas the latter also obtained similar consent in respect of the Thika plot. However, it would appear that the 1<sup>st</sup> Appellant never proceeded with the transaction due to some misunderstanding between the parties.
4. The Appellants filed a defence to the said action and introduced another angle to the Respondent's action. They alleged that there were two transactions and not one. The first was an outright purchase of the suit property by the 1<sup>st</sup> Appellant for a consideration of Kshs 250,000/- which was paid in full by instalments. The second was an exchange of another one acre of the Respondent's land with the plot at Thika.
5. The Appellants claimed that the Respondent had in breach of the said agreements sold the 2 acres of land of which they were already in possession to a third party. They, therefore, counter-claimed for a transfer of the suit property to them.
6. The suit was partly heard before Hon. M.W. Macharia (CM) and partly before Hon. S.K. Mutai (SRM). It is the latter who delivered judgement in favour of the Respondent on 1<sup>st</sup> September 2015. The Appellants being aggrieved by the said judgement appealed against the entire judgement. They raised the following grounds of appeal in their memorandum of appeal dated 30<sup>th</sup> September 2015.
  - a. The trial magistrate erred in law and fact in finding that the Appellants had not purchased land parcel No. Gaturi/Weru/8172 measuring one (1) acre.
  - b. The trial Magistrate erred in law and facts in failing to find that the Appellant was to exchange a 2<sup>nd</sup> acre of land with his plot at Landless in Thika.
  - c. The trial magistrate erred in fact and law in failing to find that the Appellants were living on the suit land.

d. The trial magistrate erred in law and fact in ordering the eviction of the Appellants while there was overwhelming evidence that the Appellants had actually attended the Land Control Board and obtained consent for transfer of land parcel No. Gaturi/Weru 8172.

e. The trial magistrate erred in law and fact in failing to order for specific performance in respect of land parcel No. Gaturi/Weru/8172.

f. The trial magistrate erred in law and fact in failing to appreciate the land law in totality thereby arriving at a wrong judgement.

7. The Respondent herein filed a replying affidavit in response to the memorandum of appeal. She supported the judgement of the magistrate's court as sound in law and in accordance with the evidence adduced by the parties. She, therefore, saw no basis for disturbing the judgement and asked the court to dismiss the appeal with costs.

8. According to the record, the parties appear to have agreed to dispose of the appeal through written submissions. Consequently, the Appellants' Advocates filed their written submissions on 13<sup>th</sup> September 2017 whereas the Respondent's Advocates filed theirs on 18<sup>th</sup> September 2017.

9. This court is aware of its duty as a first appellate court. It must conduct an independent assessment of the evidence tendered before the trial court and draw its own conclusions. The applicable principles were summarized in the case of *Selle Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126* as follows;

**“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

10. The court has perused the Appellants' written submissions and noted that their advocates submitted only on the first ground of appeal. It is not clear if there are other pages which could be missing since the submissions are not paginated. The court shall, however, consider all the 6 grounds of appeal since most are intertwined.

11. The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are really two sides of the same coin and I shall deal with them together. The learned trial magistrate was faulted for finding that the transaction on the suit property was not an outright sale but an exchange with the 1<sup>st</sup> appellant's plot in Thika. On this aspect the trial magistrate held as follows;

“From the material placed before me, I find that the 1<sup>st</sup> Defendant never bought land parcel number Gaturi/Weru/8172 since he tendered no agreement or proof of payment to confirm the same. Accordingly, the contention by the Plaintiff that she was to exchange her land parcel number Gaturi/Weru/8172 with Thika Municipality Block 24/2543 is plausible and credible even though the transactions never went through because of disagreement between both parties.”

12. The court finds no fault with the reasoning and finding of the trial court at all. The conclusion reached was not inconsistent with the evidence on record. It must always be borne in mind that the trial court saw and heard the witnesses. It observed their demeanour. The trial court's findings of fact should not be lightly be set aside except on the grounds set out in the case of *Selle Vs Associated Motor Boat Co. Ltd & Others* (supra). In my view, there is no merit in the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal and the same is hereby rejected.

13. The 3<sup>rd</sup> ground of appeal faults the learned magistrate for failing to find that the Appellants were living on the suit property. I do not quite appreciate the import of this ground. The trial court actually appreciated that the Appellants were in possession of the suit property and he granted an order for their eviction from the suit property. It was not the Appellant's case that they had acquired some other rights over the suit property by virtue of their occupation or longevity of their occupation. They had not pleaded any form of trust or overriding interest over the suit property. The court finds no merit in the 3<sup>rd</sup> ground of appeal and the same is hereby rejected.

14. The 4<sup>th</sup> ground faults the trial court for granting the Respondent's claim in spite of the consent of the LCB having been granted for transfer of the suit property. In my opinion, the mere fact that consent had been granted by the LCB could not, by itself, entitle the Appellants to the suit property regardless of intervening circumstances. Once the trial court found that there was no evidence of an outright sale and payment of the purchase price in respect of the suit property, he was entitled to allow the Respondent's suit. The court finds no merit in this ground of appeal and it is accordingly rejected.

15. The 5<sup>th</sup> ground faults the learned trial magistrate for failing to order specific performance in favour of the 1<sup>st</sup> Appellant. It goes without saying that if the court found that there was no outright purchase of the suit property, it could not order specific performance in favour of the Appellants. This ground of appeal is really tied up with the resolution of the 1<sup>st</sup> ground. Once the Appellants failed to demonstrate a sale and payment of the purchase price, they could not be entitled to an order for specific performance. The 5<sup>th</sup> ground of appeal is accordingly rejected.

16. The 6<sup>th</sup> ground faults the trial magistrate for failing to appreciate the applicable land law and as a result arriving at a wrong decision. Given that the Appellants have failed in all the preceding grounds of appeal, there is no basis for challenging the judgement on the omnibus ground of failing to appreciate land law in its totality. This ground is accordingly rejected.

17. The upshot of the foregoing is that the court finds no merit in the appeal and the same is hereby dismissed with costs to the Respondent.

18. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day of **APRIL, 2018**

In the presence of Ms Rose Njeru holding brief for Ms Beth Ndorongo for the Appellants and Mr Mugendi holding brief for Mr. Gachau for the Respondent.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**12.04.18**