



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 92 OF 2010

DR. LEONARD KIMEU MWANTHI APPELLANT

VERSUS

RUKARIA M'TWERANDU M'IRIUNGI.....RESPONDENT

{Being an Appeal from the judgment of the SRM J. Ndubi in Meru Civil Case No.119 of 2003 dated 29.7.2010}

JUDGMENT

1. The appellant herein was the plaintiff in Meru CM's civil case No. 119 of 2003 while respondent was the defendant.
2. In the lower court case, appellant had pleaded that in 1970's he bought 1 ½ acres of land out of parcel land No. Ntima/Igoki/118 from defendant's father Stanley M'twerandu M'Iriungu. The parcel of land later became No. Ntima/Igoki/3185 in 1979. He further pleaded that him and M'Twerandu subsequently became the registered owners of the land where by the specific shares of each person were reflected in the instrument of registration.
3. M'Twerandu died. Appellant then tried to pursue the issue of separation of the title in vain. None of the kinsmen of M'Twerandu were willing to petition for letters of administration. Eventually a succession cause was filed, the same being cause No. 197 of 1997 at Meru High court whereby defendant became the administrator of the estate of deceased. Appellant had taken up possession of the land but was being harassed by defendant. Appellant had then applied to be enjoined in the succession cause but the court ordered him to file a separate substantive suit. That is why appellant resulted to filing a case before the lower court where he sought for the following orders:
 - (a) A permanent injunction restraining defendant from ever entering or interfering with the plaintiff's 1 ½ share of land Ntima/Igoki/3183.
 - (b) Special damages of Kshs.6,400/=, general damages and exemplary punitive/aggravated damages as pleaded in paragraphs 10, 11 and 8 respectively.
 - (c) Order for partition of Ntima/Igoki/3183 as per shares in land register and separation of the parties and in default the executive officer of this Honourable court do sign all transfer forms necessary to transfer the 1 ½ acres purchased by the plaintiff.
 - (d) Interest and costs of and incidental to the suit.
 - (e) Interest on (b) above.
 - (f) Any other or such better relief which the honourable court may deem fit to grant to meet the ends of justice.
4. In his defence filed on 23.9.2005, Respondent had denied that claim of the appellant. Respondent had also pleaded fraud averring that the purported registration of 1 ½ acres on land Ntima/Igoki/3183 was by stealth and extra-legal means. Respondent's prayer in the defence was for dismissal of the suit with costs to plaintiff.
5. After a rather lengthy period in the court corridors (7 or so years) judgment was delivered on 29.7.2010. Appellant lost the case hence this appeal.
6. In the memorandum of appeal dated 25.8.2010, appellant avers that 'the learned senior magistrate erred in law and in fact by misdirecting himself on the facts of this case thereby arriving at a wrong conclusion.
7. On 7.2.2018 the advocates for the parties herein (Mr. C.P Mbaabu for appellant and Mr. Mutunga for respondent) agreed to have the appeal heard by way of written submissions. Each side was given 30 days to file their submissions and matter was then scheduled for

26.4.2018.

8. On 26.4.2018, the respondents had not filed their submissions nor was their advocate in court. The appellant's side had however filed their submissions.

9. This court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, ***“the court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that. This court has to reconsider and evaluate the evidence that was tendered before the trial court, access it and make its own conclusions in the matter”***.

10. The evidence of the appellant before the lower court was that he had bought part of the suit land Ntima/Igoki/118 from defendant's father in July 1977. The entire land was 3.6 acres. The vendor wanted to sell to appellant a further ½ acre but the latter refused and the vendor proceeded to sell this portion to one Gerald Angaine who insisted on getting a title deed.

11. The vendor M'Twerandu had then caused the subdivision of land Ntima/Igoki/118 whereby one of the resultant parcels was Ntima/Igoki/3183 which is 3.1 acres. M'twerandu had given the appellant the title deed of this parcel of land indicating that it was registered in the name of appellant and M'twerandu whereby appellants share was reflected as 15/31.

12. Plaintiff's witness no. 4 was a retired Judge of the high court, David Rimita. He testified that the agreement between plaintiff and defendant's father was executed in his presence, and that there was an initial agreement showing that plaintiff was buying one acre but the two parties did an amended agreement where plaintiff was to get 1 ½ acres of land. The agreements were produced before the lower court as exhibits. Plaintiff had also produced a land certificate of Ntima/Igoki/3183 issued to him and Twerandu Muriungi. He had also availed documents showing that he endeavored to have the land partitioned.

13. According to plaintiff, M'Twerandu passed on in 1989 before the partitioning of the land. Thereafter, efforts to have the title severed hit a snag when the succession cause No. 136 of 2003 was filed. Appellant tried to participate in this succession cause in vain. A grant was issued and he was not included in the same. He availed a copy of the grant as an exhibit too. It shows that the suit land was included as part of the estate of deceased.

14. Plaintiff also testified that when he bought the land, he took possession of the portion he was entitled to. He went ahead to occupy this portion of land for a period of 23 years. He had even put up a house on that land.

15. Plaintiff witness number 2, one Stanley Mugambi had testified that he used to do casual jobs for the plaintiff, that he used to see plaintiff on the suit land and that the latter had even put up a semi-permanent house.

16. As for plaintiff witness number 3, he testified that he used to buy nappier grass from plaintiff's suit land during the years 1992 – 2000.

17. Defendant had on the other hand testified that the land parcel No. Ntima/Igoki/3183 was family land. Defendant, had wondered why there was no transfer of the land from 1977 when the agreement was made until when his father died in 1989. He denied that plaintiff had ever bought land from his father. He also stated that plaintiff's registration on the suit land could only be fraudulent. Defendant did not call any witness and he did not avail any exhibits.

Determination

18. One of the prayers of the appellant before the lower court was for the partitioning of the land Ntima/Igoki/3183. The land certificate produced as P exhibit I and the green card produced as P exhibit II clearly indicate that appellant was registered as one of the two proprietors of land parcel No. Ntima/Igoki/3183, and the registration there of was under The Registered Land Act (cap 300 laws of Kenya).

19. Section 27 of the aforementioned act provides that ***“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”***. This is an echo to the provisions of the current applicable law which is section 24 of Land Registration Act.

20. The effects of registration are strong. A title document cannot be trashed unless there is firm and clear evidence to that effect.

21. Respondent had pleaded fraud, trashing the registration of the appellant as co-owner of the suit land. Fraud has to be proved by evidence. Nowhere in his testimony did the respondent adduce evidence to indicate that the title document was acquired through fraud. What the respondent had told the court regarding the issue of fraud is that ***“I doubt the genuineness and source of the title produced by the plaintiff”***. By the very use of the very words ***“I doubt the genuineness”***, it is clear that defendant was merely speculating. However, a title document emanates from the Lands office. A certificate of search would clearly show as to who is the registered owner of the land in question. The present Respondent while being cross examined during the lower court proceedings had admitted to having done a search at the Lands office and he was told that ***“the land is registered in the name of the plaintiff and my father”***.

22. What appears to have cast doubts in the mind of the trial court is the period it took for the partitioning of the land to be done. The judgment thereof reads as follows; ***“It is clear the defendant father died some twelve (12) years after signing the sale agreement. For all that time the defendant's late father and the plaintiff did not make any attempt to have the 1 ½ acre which defendant's father had allegedly sold to the plaintiff excised off or transferred to the plaintiff during the defendant's late father's life time. I have gone through exhibit No. 1 produced by the plaintiff i.e. the certificate of registration of title in respect of land parcel No. Ntima/Igoki/3183 which shows that the plaintiff is the registered owner of some 15/31 share/portion of land out of Ntima/Igoki/3183. That registration was***

obtained way back in March 1979. The plaintiff had 10 (10) years to have his portion partitioned (excised off) before the death of the defendants late father in 1989. He did not do so. It is law that a purchaser of land ought to obtain consent to partition subdivide within 6 months from the date of purchase from the land board. It has not been shown or demonstrated by the plaintiff that such consent was obtained or at all within such stipulated period. It follows that the moment the consent provided for under sections 6 and 7 of the land control act cap 302 was not obtained within the stipulated period of 6 months from the date of sale of the 1 ½ acres to the plaintiff by the defendants late father, the entire transactions of sale between the defendants late father and the plaintiff became a nullity. The court cannot enforce a nullity.”

23. What is apparent from the findings of the trial magistrate is that the court failed to recognize the effects of registration as provided by the then applicable law. The registration of the appellant and defendants father as owners of the suit land conferred upon the two status of **proprietors in common**. The trial magistrate did mix issues. Nowhere in the statutes is it stipulated that severance of such a title has any timelines. The issue of the land control board does not arise also as no evidence was led by the respondent to that effect.

24. The trial court hence misdirected himself in holding that plaintiff had not given evidence to show that land control board consent had been obtained. What the magistrate did was to shift the burden of proof upon the appellant for the appellant to demonstrate that his title was a good one. It is the respondent who ought to have availed evidence to the effect that the suit land was under a land control area and hence subject to the provisions of the land control Act and that such provisions were not followed.

25. Counsel for appellant has taken it upon himself to show that Meru municipality land control area came into effect from 9.5.1999. I can only state that he is adducing evidence but this is because the trial magistrate too had shifted the burden of proof upon the plaintiff in his judgment.

26. The provisions of section 3 (4) of the evidence Act cap 80 laws of Kenya provide that **“A fact is not proved when it is neither proved nor disproved”**.

27. The respondent never proved that appellant’s registration in respect of the suit land was fraudulent and it was therefore not necessary to delve into whether the land sale was illegal or not.

28. The characteristics of proprietorship in common were provided under section 103 of the Registered Land Act (cap 300-repealed) which stipulated that ***“Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate”***.

29. It follows that when M’Twerandu died it is only his share which formed part of his estate and not the whole land. Severance of such co-ownership is provided for under section 94 (1) of the Land Registration Act where it is stated that ***“An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by— any one or more of the tenants in common without the consent of all the tenants in common; or any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree....”***

30. This court has not been able to discern the fractions indicated as 15/31 for the appellant and 16/31 share for M’Twerandu in the land certificate. However, plaintiff was consistent in his claim of 1 ½ acres of land in Ntima/Igoki/3183. I hence allow this claim.

31. I however disallow the claim for special damages as no evidence was led to that effect by appellant before the trial court.

Conclusion

32. The final orders of the court are as follows:

- (i) The Judgment delivered on 29.7.2010 in Meru CM’s court civil case no. 119 of 2003, the decree thereof and all consequential orders are hereby set aside.
- (ii) An order is hereby issued for the partition of Ntima/Igoki/3183 whereby appellant is to be registered as owner of 1 ½ share of that land. The remainder of the land is to be registered in the names of the persons appearing in the confirmed grant.
- (iii) The executive officer of this court is hereby authorized to sign all documents which are necessary to effectuate the judgment of this court.
- (iv) A permanent injunction is hereby issued restraining defendant from interfering with appellants portion of the land Ntima/Igoki/3183 which is 1 ½ acres.
- (v) As to costs appellant awarded the costs of the suit in the lower court and in the ELC court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 23RD DAY OF MAY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

C. Mbaabu for appellant present

Mutunga for respondent present

Appellant present

Respondent present

HON. LUCY. N. MBUGUA

ELC JUDGE