



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 47 OF 2015

ANN WACEKE MAKORI.....APPELLANT

VERSUS

THOMAS KEBWARO GWAKO.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

JUDGMENT

This appeal is challenging the judgment and decree of Hon. C. W. Meoli, CM (as she then was) made 15th May, 2007 in Milimani CMCC No. 979 of 2004 (hereinafter referred to as “the lower court case”). In that case, the appellant had sued the respondents seeking a declaration that she was the bonafide and lawful owner of Plot No. D2-390 situated at Kayole Site and Service Scheme, Nairobi (hereinafter referred to as “the suit property”).

The appellant’s case in the lower court was that, she acquired the suit property pursuant to an agreement for sale dated 2nd July, 1997 between her and the original allottees of the suit property. The appellant averred that upon entering into the said agreement for sale, she took possession of the suit property and paid the requisite charges to the 2nd respondent. The appellant averred that on 3rd February, 2004, she visited the suit property and was surprised to find the 1st defendant carrying out construction thereon. The appellant contended that the allocation of the suit property by 2nd respondent to the 1st respondent was illegal and in total disregard of her proprietary rights in the property.

The 1st respondent filed a statement of defence dated 5th May, 2004 denying the appellant’s claim. The 1st respondent averred that the suit property was lawfully allocated to him by the 2nd Respondent through a letter of allocation dated 19th August, 2003. The 1st respondent denied knowledge of the appellant’s adverse interest in the suit property and averred that he was an innocent purchaser for value without notice of any other claims over the suit property.

The 2nd respondent in its defence dated 29th July, 2004 denied the appellant’s claim and averred that it allocated the suit property to Hamilton Mwandawiro Samboja who failed to comply with the terms and conditions that were contained in the letter of offer dated 20th March 1987. The 2nd respondent averred that it issued a notice through the Daily Nation Newspaper of 17th February, 2000 demanding payment of the loan arrears in respect of the suit property from Hamilton Mwandawiro Samboja who failed to comply with the said notice as a consequence of which, it repossessed the suit property.

The lower court heard the case and delivered judgment on 15th May, 2007 dismissing the appellant’s suit. In the judgment, the court also made a finding that the 1st respondent had not established his claim to the suit property. It is this judgment that triggered the instant appeal by the appellant and cross appeal by the 1st respondent.

The appeal:

In her memorandum of appeal dated 6th June, 2007, the appellant challenged the lower court’s judgment on the following eight grounds:

1. The learned trial magistrate erred in law and in fact in finding that the appellant had not proved her claim to the suit Plot No. D2-390 situated at Kayole and therefore dismissed her suit.
2. The learned trial magistrate erred in law and in fact in finding that the sale between the appellant and the original allottees of the suit plot dated 2nd July, 1996 was of no legal effect and therefore it did not confer any right on the appellant over the said plot.
3. The learned trial magistrate erred in law and in fact in finding that the 2nd respondent was justified and legally repossessed the suit

plot for alleged non-payment of dues payable to the 2nd respondent and subsequently re-allocating it to one Anne W. Kagonde, yet there is abundant evidence to the contrary.

4. The learned trial magistrate erred in law and in fact in finding that any notice or any proper notice was sent to the appellant or the said original allottees by the 2nd respondent of its intention to repossess the said plot for the alleged non-payments of dues on the plot.

5. The learned trial magistrate erred in law in fact in finding that the 2nd respondent followed the law and all laid down procedures in re-allocating the said plot to the said Anne W. Kagonde, when there is no evidence at all that she applied for its allocation to herself and/or even paid for it.

6. The learned trial magistrate erred in law in fact in failing to conclusively determine the issues in controversy by not determining who between the appellant and the 1st respondent was the bonafide and rightful owner of Plot No. D2-390 situated at Kayole.

7. The learned trial magistrate erred in law and in fact in blaming and unfairly punishing the appellant for what she rightly referred to as illegality, collusion, indolence and inefficiency on the part of the 2nd respondent in dealing with the administrative issues of the site and service scheme where the suit plot is located.

8. The learned trial magistrate erred in law and in fact in not fully grasping the issues before her and as a consequence arrived at the wrong decision of dismissing the appellant's case.

The appellant sought the following reliefs:

1. That the appeal be allowed and the entire judgment delivered on 15th May, 2007 by the lower court be set aside.
2. That the costs of the appeal and the suit in the lower court be awarded to the appellant.

The cross appeal:

On 26th May, 2015, the 1st respondent filed a Notice of Cross Appeal and grounds challenging the lower court's decision. The 1st respondent contended that the lower court erred in law and in fact in making findings on issues that were not the subject of the case before it. The 1st respondent faulted the lower court for making adverse findings on matters that were not pleaded. The 1st respondent also challenged the lower court's decision on costs contending that he ought to have been awarded the costs upon the dismissal of the appellant's suit. The 1st respondent sought the following reliefs:

1. That the declarations by the trial magistrate that the transfer of the suit property to the 1st respondent was riddled with illegalities and that the property still belonged to one, Anne W. Kagonde be quashed as having been made without any basis in fact, law and pleadings.
2. That the appellant be ordered to pay the 1st respondent's costs in the lower court and before this court.

The submissions by the parties:

The appeal was argued by way of written submissions. The appellant in her submissions dated 31st January, 2017 framed the following issues for determination by the court, namely, whether the appellant proved her claim over the suit property?, whether the agreement for sale dated 2nd July, 1996 between the original allottees and the appellant was valid?, whether the suit property was lawfully repossessed by the 2nd respondent?, whether the suit property was lawfully allocated to Anne W. Kagonde?, whether the original allottees were served with proper notices before the alleged repossession?, whether the appellant is the bona fide owner of the suit property?, whether the doctrine of estoppel applied against the 2nd respondent?, and whether the appellant was entitled to the orders she had sought in the lower court?.

In her submissions, the appellant argued that she had proved in the lower court that the suit property was originally allocated by the 2nd respondent to Hamilton Mwandawiro Samboja and his wife who sold the same to her. The appellant submitted that her evidence on how she purchased the suit property and had the same transferred to her was corroborated by Hamilton Mwandawiro Samboja (PW1) and one, Joseph Ndichu Kahonge who gave evidence on behalf of the 2nd respondent. The appellant contended that the sale agreement between her and Hamilton Mwandawiro Samboja and his wife (hereinafter referred to as "the original allottees") was valid as it met the requirements of section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.

The appellant submitted that the 2nd respondent never produced any evidence in the lower court to prove that the suit property was repossessed from the original allottees and re-allocated to Anne W. Kagonde. The appellant submitted further that neither a notice to repossess nor a demand to pay rates was sent to the original allottees. The appellant referred to section 17 of the Rating Act, Chapter 267 Laws of Kenya and submitted that where there is default in the payment of rates, a demand must be issued before any recovery proceedings are initiated. The appellant submitted that non-compliance with the aforesaid provisions of the law rendered the purported repossession of the suit property irregular, null and void.

In support of this submission, the appellant cited the case of Henry Kuria Ndethi vs. Paul K. Mugambi & another [2015] eKLR where it was held that even where a demand has been issued and there is no compliance, the only remedy provided under section 17(2) of the Rating Act

is for the 2nd respondent to take out legal proceedings in the subordinate court for the recovery of the outstanding rates and not to repossess the property in respect of which rates have not been paid. The appellant argued that under clause 11(a) of the terms and conditions of the letter of offer that was produced in evidence as P. Exh. 5, the 2nd respondent lacked powers to repossess the suit property on account of unpaid rent. The appellant submitted that since the repossession of the suit property was illegal, the subsequent re-allocation of the same to Anne W. Kagondu by the 2nd respondent was equally illegal. The appellant submitted that the 2nd respondent never passed a good title to the said Anne W. Kagondu that she could pass to the 1st respondent. The appellant relied on the case of M. A. Koinange vs. Joyce Ganchuku & 2 others [2015]eKLR in support of her submission that a court cannot enforce an illegal contract.

The appellant argued that the original allottees were the lawful owners of the suit property and having purchased the suit property from them, she was the bonafide owner of the property. The appellant argued that the repossession and re-allocation of the suit property by the 2nd respondent to Anne W. Kagondu was illegal. The appellant argued that the 1st respondent had failed to establish that he was a bonafide purchaser of the suit property and as such his title to the said property was impeachable.

The appellant submitted further that the doctrine of estoppel was applicable against the 2nd respondent. The appellant contended that having paid the arrears of rates and land rent which was unconditionally received by the 2nd respondent, the 2nd respondent was estopped from repossessing the suit property having accepted her payment. The appellant submitted that the 2nd respondent was also estopped from citing non-payment of rates as the reason for the repossession of the suit property having waived its right by its own conduct. The appellant submitted further that the 1st respondent's allegations that he bought the suit property from Anne W. Kagondu were baseless and unsupported by evidence. The appellant argued further that the 1st respondent's claim was time barred under section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.

The 1st respondent filed his submissions on 25th May, 2017 where he argued that the appellant did not appear anywhere in the sequence of events leading to the acquisition of the suit property. The 1st respondent submitted that there being no registered title, the suit property remained the property of the 2nd respondent subject to its allotment rights. The 1st respondent submitted that it was not in dispute that the 2nd respondent lawfully repossessed the suit property from its original allottees and re-allocated the same to Anne W. Kagondu who sold the property to him. He submitted that following the sale of the suit property to him, he was issued with an allotment letter after which he proceeded to develop the suit property.

The 1st respondent argued that the 2nd respondent produced in evidence the minutes of the meeting of the full Council at which the repossession and re-allocation of the suit property was confirmed. The 1st respondent submitted that the appellant purported to buy the suit property from the original allottees whose allotment had been cancelled after due process. The 1st respondent submitted that neither the original allottees nor the appellant challenged the revocation of the original allottees's allotment and as such any enquiry into the validity of the 2nd respondent's action following the said revocation was an exercise in futility.

The 1st respondent submitted further that the allotment of the suit property to Anne W. Kagondu was never challenged and as such the original allottees had nothing to sell to the appellant. The 1st respondent submitted that until the cancellation of the original allottees' allotment was reversed, the appellant's claim as a purchaser of a revoked allotment cannot see the light of day. The 1st respondent contended that the repossession of the suit property was never challenged and was not in issue in the lower court.

With respect to his cross appeal, the 1st respondent submitted that the lower court was not invited to make findings on the validity of the subsequent re-allotment of the suit property following the repossession thereof from the original allottees. The 1st respondent submitted that such findings could only be made if he had made a counter-claim. The 1st respondent submitted that the findings that were made by the lower court were baseless. He submitted that it was the appellant who had sought reliefs in the lower court and once the court found that the prayers she had sought could not be granted, the suit was liable for dismissal. The 1st respondent argued further that costs should have followed the event and that since the appellant's suit was dismissed, he should have been awarded the costs.

The 2nd respondent in its submissions filed on 24th May, 2017 submitted that the appellant had failed to prove that she was the rightful owner of the suit property. The 2nd respondent referred to clause 3 of the terms and conditions of the letter of offer and submitted that there was no evidence adduced at the trial showing that the original allottees of the suit property had received consent from the 2nd respondent to transfer the suit property to the appellant. The 2nd respondent submitted that it was entitled to withdraw the offer it had made to the original allottees under clause 2 of the terms and conditions of the letter of offer which required the original allottees to develop the suit property within 18 months, a term that they never complied with.

The 2nd respondent submitted further that the sale agreement between the original allottees and the appellant had no legal effect. In support of this submission, the 2nd respondent cited the case of Mbau Saw Mills Ltd vs. Attorney General Nyeri ELC No. 59 of 2008 where the court held that non-compliance with the terms of the allotment letter within the time allowed led to the lapse of the offer and that any transfer thereafter was null and void.

On the appellant's contention that the repossession was illegal, the 2nd respondent submitted that on the appellant's admission, no payments were made to the 2nd respondent between July, 1996 and February, 2004. On the issue of notices, the 2nd respondent submitted that a demand letter dated 3rd January, 2000 was sent to the last known address of the original allottees. The 2nd respondent relying on the doctrine of privity of contract submitted that, since the alleged transfer of the suit property by the original allottees to the appellant was not authorized by the Town Clerk of the 2nd respondent, no contract existed between it and the appellant and for that reason, a demand notice was properly issued to the original allottees. The 2nd respondent submitted further that another demand notice was also published in the Daily Nation Newspaper of 17th February, 2000.

Ms. Apolot holding brief for Mr. Kiplagat for the 2nd Respondent

Catherine

Court Assistant