REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 10 OF 2016

MOSES ODHIAMBO MURUKA.....1ST APPELLANT

GILLET MANDEKA TUNGANA.....2ND APPELLANT

VERSUS

STEPHEN WAMBEMBE KWATENGE.....1ST RESPONDENT

JUDITH NASIMIYU MULONZA.....2ND RESPONDENT

JUDGMENT

1. This is a first appeal by Moses Odhiambo Muruka and Gillet Mandeka Tungana hereinafter referred to as the 1st and 2nd appellant respectively against Stephen Wambembe Kwatenge and Judith Nasimiyu Mulonza hereinafter referred to as the 1st and 2nd respondents respectively. This being the first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in ***Selle & Another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123 the court held as follows:***

> ***a. "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally.***

This same position had been taken by the Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited [1958] EA 424* where Sir Kenneth O'Connor stated as follows: -

> ***b. It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.***

2. The basic facts in this matter are that the 2nd appellant purchased from the 1st appellant a plot measuring 1/8 of an acre on the 18.1.2003 for Kshs. 450,000. Later, on 20.1.2003, the 1st respondent purchased from the 1st appellant the remaining portion of 1/8 of an acre for Kshs. 300,000. The 1st respondent paid a sum of Kshs. 170,000 and took immediate possession of the property which had structures erected therein. The 1st respondent paid a total of Kshs.250,000 leaving a balance of Kshs. 50,000 which has not been paid to-date.

3. According to the sale agreement between the 1st appellant and the 1st respondent, Kshs. 170,000 was paid upon signing of the agreement. The balance of Kshs. 130,000 was to be paid on 25.1.2003 in the tune of Kshs.100,000 and Kshs. 30,000 to be paid before 30.4.2003. The 1st respondent was to take possession of the suit property upon signing of the agreement. In essence, the 1st appellant's parcel of land measured ¼ of an acre. He sold 1/8 of an acre to the 2nd appellant and the remaining 1/8 to the 1st respondent. The 1st appellant went ahead to sell the 1st respondent's plot to the 2nd respondent's husband, Lazarus Kirk Shilaro. He did not transfer the 1/8 plot to the 1st respondent as agreed. The 1st appellant went ahead and registered the 1st respondent's portion and the other portion in the names of the 2nd appellant. The land was registered as Eldoret/Municipality/King'ong'o 21/3483 comprising both portion of land measuring ¼ of an acre.

4. The 1st appellant's evidence in the magistrate's court was that he sold the property to both the 2nd appellant and the 1st respondent but at the time of sale, the property was in the name of one Moses Cherop and that when the title to the entire 2 portions was secured, it was registered in the names of the 2nd appellant though she was only entitled to a portion of 1/8 of an acre. The 2nd appellant's evidence is that she purchased 1/8 of an acre from the 1st respondent. The 2nd respondent bought the land from the 1st appellant but later realized that it had been bought by the 2nd appellant.

5. The court considered the evidence on record and found that it is not in dispute that the 1st respondent bought 1/8 of an acre from the 1st appellant and paid a total of Kshs. 250,000 leaving a balance of Kshs. 50,000 which the 1st appellant declined to take when the money was offered. There was no default clause on the sale agreement. The 1st respondent had paid 2/4 of the purchase price. The learned Magistrate further found that the sale agreement was not rescinded and that it was still enforceable. Moreover, that the 1st appellant had no property to pay to the 2nd respondent. The court further found that the 2nd appellant used fraud to obtain a title for the whole ¼ of an acre and yet she bought 1/8 of an acre.

6. The honourable Magistrate went further to order the 1st respondent to pay the balance of Kshs. 50,000 to the 1st appellant and that the 1st appellant to sign all the transfer documents in favour of the plaintiff and in the event the 1st appellant declines to sign the same, the Executive Officer to sign on his behalf. The appellants were restrained by permanent injunction from dealing in any way with the plaintiff's 1/8-acre plot. The 1st appellant was ordered to refund the 2nd respondent Kshs. 300,000 within 45 days.

7. The appellants appealed and the first ground raised by the appellants is jurisdiction. The appellants submit that the suit property was registered under the registration Act Cap 300 laws of Kenya (repealed). Section 159 of the Act limited the jurisdiction of the court to Ksh. 500, 000 in claims involving tittle to, and possession of property.

8. The appellants submit that the value of the land at the time it was sold was Kshs. 750,000 and that the 1st respondent has confirmed to spending Kshs.3,000,000 to repair the same and therefore, the claim was based on a property whose value was far above the jurisdiction of the court.

9. On the issue of jurisdiction, this court finds that the finding of the Lower Court that the value of the subject matter was below Kshs. 500,000 was not challenged by way of appeal and that there was no valuation report before the lower court to prove that the value of the property was beyond the jurisdiction of the court. Moreover, that the preliminary objection on jurisdiction cannot be revisited in this appeal as it was a subject of a ruling which was not appealed against. The purchase price for the 1/8 of an acre was Kshs. 300,000. The claim by the 2nd respondent of Kshs. 450,000 is separate from the claim by the 1st respondent and therefore, even if the court was to find that the issue of jurisdiction was alive, the ground would fail again on the facts available as the claims were below Kshs. 500,000.

10. The second ground is that the learned Magistrate erred in finding that the 2nd appellant used fraud to obtain title. I have perused the evidence on record and do find that the 1st respondent did not prove fraud to the required standard as the allegations of fraud were mere statement without any scintilla of evidence. The burden of proof was on the 1st respondent that the title was fraudulently obtained and the standards were slightly high than balance of probability. No documents of transfer or any document was produced by the 1st respondent to demonstrate how fraud was applied.

11. However, I do find that the learned Magistrate correctly found that the contract of sale did not have a default clause as I have perused the same and have found none, and that the contract was not rescinded by the 1st respondent as the evidence on record shows that It is the 1st appellant who appeared reluctant to receive the balance of Kshs. 50,000. I do further find that the learned Magistrate correctly issued an order of permanent injunction against the appellants from dealing in any way with the 1st respondent's 1/8-acre plot. Ultimately, the appeal fails and the same is dismissed with costs.

Dated and delivered at Eldoret this 11th day of May, 2018.

A. OMBWAYO

JUDGE