



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO 299 OF 2013

STEPHEN MURITHI M'NGARUTHI.....APPELLANT

VS

GEORGE MUTHINJA.....RESPONDENT

JUDGMENT

1. This appeal arises of the Judgement of Chief Magistrate's Court at Maua in Civil Case No. 211/2012 delivered on 1/10/13. In the Judgement the Lower Court dismissed the Defendant's Counter claim and entered judgment for the Respondent as prayed in the plaint.
2. This is a first appeal. In it, this Court is permitted to evaluate the evidence and the pleadings of the lower Court including the conclusions and matters of evidence and the decision taken by the lower Court.
3. In the lower Court the Respondent by a plaint dated 19/12/2012 seeks an order for removal of a caution registered by the Appellant on LR No. Amwathi/Maua/6718, costs and interests of the case.
4. By a defence and counter claim dated 15/1/2013 the Appellant seeks an order for transfer of parcel No. Amwathi/Maua/6718 to himself and costs of the counter claim.
5. On 27/6/13 the parties through counsel appeared before the lower Court and stated that they will proceed with further prosecution of their case by way of written submission.
6. On 10/9/13 the Court ordered the Respondent and the Appellant to file their list of documents which they wished to rely on within 7 days. Pursuant to the order of the Court the Respondent on 17/9/13 filed his list of documents as follows:-
 - a) Original Search Certificate for Amwathi/Maua/6718.
 - b) Original Green Card for Amwathi/Maua/6718
 - c) Copy of Letter forward refund cheque
 - d) Copy of refund cheque drawn in favour of the Plaintiff's Advocates
 - e) Copy of notice of intention to remove caution.
7. As at the time the judgment was written the Appellant had not filed his list of documents. There is incidentally a list set out in a document dated 14.1.13 by the Appellant titled list of Defendant's exhibits being;
 - a) Agreement dated 12/3/1997.
 - b) Transfer letter dated 12/3/1997.
 - c) Another transfer letter dated 11/3/1997.
 - d) Objection to caution undated.

Although the documents are listed they were not formally filed in the case even after the order of the Court of 10/9/13.

8. Nevertheless, it appears in the record of this appeal that the Appellant for unexplained reasons and without notice to and leave of the Court has filed and, a notice of motion dated 10/10/13 & affidavit of the Appellant on even date onto which the following documents are annexed;

- a) Agreement of sale of suit land dated 12/3/97.
- b) Letter dated 12/3/97
- c) Certificate of official search 3/12/12 and caution dated 9/10/12.

9. The Court has read the pleadings, the submissions made by the parties, the proceedings recorded and the judgement delivered in the lower Court. The Court does not wish to take these documents into account because they were not formally filed in the lower Court. Indeed their purpose was extinguished once the Notice of Motion dated 10/10/13 was disposed.

10. The grounds of appeal set forth by the Appellant against the said judgments are 4 in the memo of appeal dated 10/10/13. These are ;

- a. The Learned Resident Magistrate erred in law and in fact in holding that the Appellant's counter claim had no merit.
- b. The Learned Resident Magistrate erred in Law and in fact in failing to give the Appellant an opportunity of a fair hearing and proceeded with the suit by way of written submissions.
- c. The Learned Resident Magistrate erred in law and in fact in relying on documents which were not part of the list of the Respondent's documents.
- d. The Resident Magistrates erred in law and in fact.
 - i. In failing to find that the Appellant's counsel in the trial suit had not apprised the Appellant on the production of the documents, as the said documents were to be submitted during the pendency of the judgement.
 - ii. In visiting counsel's mistake upon an innocent litigant.
 - iii. In condemning the Appellant unheard, converse to the cardinal principles of natural justice and constitution of Kenya; and
 - iv. In failing to appreciate that the Respondent had admitted the Appellant's claim in his statement filed in Court on 19/12/2012.

11. It is common ground that the Respondent sold the suit land to the Appellant, that the Appellant is the registered owner of the suit land and that the Appellant registered a caution against the suit land.

12. In view of Para 10 above the only issues remaining for determination are ;

- a) Whether the Respondent title to the suit land is vitiated by fraud.
- b) Whether the Appellant is entitled to transfer of the suit land from the Respondent.
- c) Costs.

The 3 issues above among others not so material were duly considered by the Lower Court.

The Court will now analyze the issues in turn.

Issue A

13. The Appellant in his Counter claim and submissions alleges that the Respondent title is not valid because it was obtained fraudulently. The title of the Respondent was issued pursuant to the provisions of the Registration Land Act Cap 300. The Respondent as the 1st registered owner is absolutely insulated from a challenge to his title except for lawful counsel. See section 23 of Registration of Land Act. Such lawful cause could be fraud. In order to prove fraud the Appellant was bound to bring in evidence above balance of probability and not beyond reasonable doubt. See case of **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others.....** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that;-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In

fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

14. In the material before the lower Court the Appellant did not tender by way of evidence documentary or otherwise evidence to show that the Appellant acted fraudulently in securing registration to the suit land to himself.

Issue B;

15. In order for the Appellant to succeed in such a claim there has to be documentary evidence to show that he indeed had an agreement of sale to the suit land; that he paid the agreed purchase price and that the Respondent consented or acted in a manner granting consent for transfer or registration of the suit land to the Defendant. As the lower Court correctly stated these documents were not filed even after the lower Court gave an order for them to be filed. The common ground of sale is not supported by documentary evidence as required by section 3(3) of the Law of Contract Act. These documents if they were to be filed they ought to have been filed in the lower Court.

16. In view of the finding in Para 14 it is not necessary in this appeal to consider other causes or reasons save of which were submitted on by the Respondent and considered by the lower Court as to why the Appellant is not entitled to specific performance of the sale in respect to sale of the land.

Issue C;

17. Costs shall follow the event.

18. Finally the Court makes the following orders;

a) The appeal be and is hereby dismissed.

b) The Applicant shall pay the Respondent the costs of this appeal.

DELIVERED, DATED AND SIGNED AT MERU THIS 28TH DAY OF JUNE 2018

J G KEMEI

JUDGE

In the presence of:

C/A Mutua

N/A for appellant

Ms. Aketch holding brief for Mr. Mbogo for Respondent