



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC APPEAL NO. 11 OF 2017**

**BENSON TSINDOLO SHIPITI.....APPELLANT**

**VERSUS**

**JOHN LUSENO NGARA.....RESPONDENT**

**JUDGEMENT**

This appeal to the Environment and Land Court of Kenya against the whole of the decision of the lower court in RMCC No. 64 of 2004 on the following grounds:-

1. That the learned honourable magistrate failed to consider the evidence adduced by the appellant and his witnesses to the effect that the appellant was the bonafide purchaser and lawful owner of the land in dispute being Tiriki/Serem/285.
2. That the learned honourable magistrate failed to allow the appellant to proceed with the matter by way of formal proof as the respondent had never filed his appearance nor defence to the plaintiff's claim as set out in the plaint.
3. That the learned honourable magistrate erred in law and fact by allowing the respondent to give evidence in the suit when he had not filed any pleadings to that effect.
4. That the learned honourable magistrate erred in law and fact in allowing the suit to proceed interparties when there was interlocutory judgment on record in favour of the appellant.
5. That the learned honourable magistrate in dismissing the appellants' case without giving adequate reasons for so doing.
6. That the learned honourable magistrate misdirected himself in finding that the respondent was the lawful owner of the suit premises by virtue of registration and occupation only.
7. That the learned honourable magistrate erred in law and fact in failing to attach any weight whatsoever to the evidence of the appellant and his witness.

The appellant seeks for orders that:-

- (a) That the judgment of the Senior Principal Magistrate dated 10<sup>th</sup> June, 2005 be set aside and the same be substituted with the prayers sought in the appellant's plaint filed in RMCC NO. 64/2004.
- (b) That this appeal be allowed and the costs of the Senior Principal Magistrate's suit be awarded to the appellant.
- (c) That the appellant be awarded the costs of this appeal.

On Grounds No. 1, 6 and 7 the appellant submitted that, the trial Magistrate failed to consider the Appellant's evidence at pages 13 to 14 of the Record of Appeal. The issue of purchase of land by the Plaintiff was corroborated by the evidence of his two witnesses PW2 and PW3 at pages 14 to 15 of the Record. The Trial Magistrate did not interrogate how the Respondent had acquired the Land from the Appellant's Uncle as the transfer to the Respondent was effected by the Registrar of the Court and not the Vendor or purported seller. The Respondent did not call any witness to adduce evidence to support his alleged purchase of the land as she merely relied on documents whose authors were not summoned to give evidence before the trial magistrate. The mere fact that the Respondent had registered himself as the lawful owner of the subject matter was not adequate to be upheld in the face of the Appellant's witnesses' evidence as aforesaid.

The trial magistrate was duty bound to interrogate how the Respondent had acquired the land in issue before registering himself as the owner of the subject land as the Appellant sufficiently demonstrated through evidence that he had purchased the subject land from his uncle for value of Kshs. 17,000/=.

On Grounds 2, 3 and 4, the appellant submitted that the Trial Magistrate at pages 12 to 13 of the Record of Appeal opened up the case to the Respondent who had not filed any defence to the Appellant's claim and hence no reference to the same pleadings in the record. There is no defence on record by the Respondent and his evidence was irregularly admitted without a primary defence document on record. Infact the Trial Magistrate ought to have allowed the Appellant to proceed by way of formal proof as earlier indicated in the Court proceedings of August, 2004 now that the Respondent did not file any defence to the Appellant's claim with the interlocutory Judgment on record in favour of the Appellant (See page 12 of the Record of appeal), the Trial Magistrate misdirected himself in allowing the Respondent to defend the suit and produce documents that got the Appellant by surprise as he had never been notified of their existence thereby jeopardizing/prejudicing his claim.

On Ground No. 5 the appellant submitted that, the Trial Magistrate dismissed the Appellant's case without giving adequate reasons for so doing. The Record of Appeal at page 20 shows that the Trial Magistrate stated thus;- 'From the foregoing it is pretty obvious that the Plaintiff's suit lacks merit The same is dismissed with costs to the defendant'. The Trial Magistrate, did not consider the evidence of the Appellant and his witnesses which indeed confirmed that the Appellant had purchased his Uncle's land being the subject land. It was not enough for the Magistrate to state that the Appellant's land case lacked merit without stating to what extent and in what respect.

All in all the Trial Magistrate did not consider the seriousness of his decision that led to the eviction of the Appellant from the suit premises and the extensive damage to his properties. The Trial Magistrate visited upon the Appellant great injustice and we urge your Lordship to allow the Appeal and set aside the trial Magistrate's orders with costs to the Appellant. The Appellant relies on the following Case-law in arguing this appeal. ATHI HIGHWAY DEVELOPERS LTD VS. WEST END BUTCHERY LTD & OTHERS CASE:- C.A. NO. 246 OF 2013 and ESTHER NDEGI NJIRU & ANOTHER VS. LEONARD GATEI CASE ELC CIVL NO. 128 OF 2011

The respondent submitted that, this is an appeal by the Appellant/Plaintiff against the Judgment of Senior Principal Magistrate Hon. M.N. Gicheru sitting as the Presiding Magistrate in RMCC NO. 64 of 2004, which case was wholly dismissed with costs. The trial magistrate gave several solid and concrete reasons for dismissing the Appellants case as enumerated in the above paragraph. The Appellant is misleading this Honourable court by indicating that the trial magistrate never gave reasons for dismissing the case. He gave over 3 reasons justifying why the Appellant's case lacked merit. The Record at Page 20 is just a conclusion of what has been analyzed at Page 19.

The respondent further submitted that, it was not misdirection on the part of the Learned Trial Magistrate to find that the respondent is the lawful owner of the suit property. This is actually the case as the Respondent during trial produced a sale of land agreement, transfer documents and a copy of title deed as proof of legal and lawful ownership of the said parcel of land. The Appellant did not allege any fraud or false misrepresentation by the Respondent in the lawful ownership of the title deed.

This court has considered the appeal and the submissions herein. On the 20<sup>th</sup> day of November 2006 the Appellant being aggrieved by the Judgment of the Senior Principal Hon. M.N. Gicheru sitting as the presiding Magistrate in RMCC No. 64 of 2004 filed the instant appeal dismissing the Appellant's claim with costs. The Respondent was duly served with the Record of Appeal and has gone on record as opposing the appeal as filed although no formal document has been filed in Court in that regard. The Appeal as filed is grounded on the Appellant's right of ownership over a piece of land being L.R No. Tiriki/Serem/285 situated in Tiriki West of Hamisi Division of Vihiga District (as it then was now Vihiga County) over which he stakes a claim of a purchaser for value from a relative. The case in the Magistrate's court was fully heard and the trial magistrate dismissed the appellant's claim on ownership of the subject property leading to the instant appeal.

On count 1,4,5,6 and 7 the Appellant submits that he is the buyer of the suit land. However, the evidence at Pages 13 and 14 of the Record of Appeal indicate the Appellant, as was then the Plaintiff, indicating to the court that he had no title deed to the said parcel of land. The court then directed that he brings documents showing that he is the owner of the land. He later brought transfer documents that were neither executed nor effected to completion. The Appellant in my opinion failed to demonstrate to the trial court that he was the legal owner of the suit land. At pages 14 to 15 of the Record of Appeal, the Appellant's witness, PW1, indicated to the court that the Appellant was merely given land by Jisikwa Tsindolo. PW2 then stated that the Appellant, as was then the Plaintiff, bought land from the Jisikwa Tsindolo. These testimonies were contradicting. While PW1 stated that the Appellant was given land by Jisikwa Tsindolo, PW2 categorically stated that he was not there during the alleged sale of land. The Appellant, it appears during the lower court trial, did not produce any documents showing that he bought land from the said Jisikwa Tsindolo. No agreement whatsoever, no acknowledgement was produced. I find that the Trial Magistrate did interrogate how the Respondent had acquired the land.

The Respondent produced a copy of the sale agreement as Exhibit No. 1, showing that he had actually bought the land from Jisikwa Tsindolo. This document was never disputed and was adopted by the court in evidence. It is also clear to note that the executive officer was empowered to sign the transfer forms because the said vendor had failed to transfer. The Respondent also produced the original title deed showing that he was the registered owner. The same was also not disputed.

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*"Subject to this Act, 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."*

Section 26 (1) of the Land Registration Act states as follows:

*"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject*

*to challenge except –*

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the respondent. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”*

I find that the appellant did not prove his case on a balance of probabilities before the Trial Magistrates Court.

On ground 2 and 3 the appellant submits that the trial magistrate opened up the case to the respondent who had not filed any defence to the appellants claim. I find that the fact that a defence is not filed by a litigant acting in person should not bar him/her from adducing evidence in court. This is a procedural technicality given the fact that the party was not represented by an advocate.

Close perusals of the proceedings indicate that both parties were faithfully attending court all through the trial. Parties should be allowed to give oral evidence. This is the objective in Article 159 of the Constitution of Kenya 2010.

In *Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870*, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**