



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC APPEAL NO. 15 OF 2013

MURIUNGI MITHIARU.....APPELLANT

VERSUS

JOSEPH KABERIA ARIMBA (SUING AS A LEGAL

REPRESENTATIVE OF THE ESTATE OF ISAAC

M' ARIMBA ALIAS ISAAC BARIMBA.....RESPONDENT

(An appeal from the judgment of the Learned Senior Principal Magistrate Hon. B. Ochieng dated 24/01/2013 in CMCC No. 462/006 (MERU))

JUDGEMENT

BACKGROUND

The Appellant was the plaintiff in CMCC No. 462 while the Respondent was the Defendant in that suit. In a plaint dated 6th November, 2006, the Plaintiff/Appellant alleged that between 07/05/1988 and 27/07/1988 the Defendant/Respondent secretly fraudulently and unlawfully caused 1.00 Acre of the deceased's land parcel No. Njia-Cia Mwendwa/921 transferred to himself and consequently registered in his name as land parcel No. Njia-Cia- Mwendwa/2405 by the Land Adjudication Office. The Plaintiff/Appellant further averred that from 07/05/1988 to the filing of that suit, the Defendant/Respondent has never taken actual possession of the land parcel described as Njia-Cia-Mwendwa/2405 and has never caused the same excised from the deceased's land parcel No. Njia-Cia-Mwendwa/921 and demarcated on the ground.

The Plaintiff/Appellant also averred that the transfer of the one Acre of the land Reference no. Njia-Cia- Mwendwa/921 to the Defendant/Respondent and the subsequent registration in his name was fraudulent and unlawful.

He set out particulars of the alleged fraud by the Defendant/Respondent. The Plaintiff/Appellant then sought an order for a declaration that the excision, transfer and registration of the deceased's one acre from parcel No. Njia- Cia- Mwendwa/921 into the Defendant's/Respondents name was fraudulent and illegal. The Appellant/Plaintiff also sought an order directing the Meru-North District Land Registrar to rectify the register by cancelling the Defendant's registration and registering the same in favour of the deceased person or the Plaintiff. The Plaintiff also sought an order of permanent injunction restraining the Defendant, his agents, servants, employees, assign, and/or legal representatives from interfering with the Plaintiff's use, possession, occupation, management, development, and utilization of the suit land parcel Nos. Njia-Cia –Mwendwa 921 and 2405 respectively.

The Defendant/Respondent through the firm of Mwangi E.G & Co. Advocates filed a statement of defence denying the Plaintiff's claim and all particulars of fraud. In particular, the Defendant/respondent at paragraph 4 of the statement of defence averred that in 1984 or thereabouts, he bought one acre from the Plaintiff's father (deceased) who transferred the same to him in 1988 and got registered in the year 2005. The Defendant further averred that the deceased showed him the extent of his one acre and beacons were placed by the Surveyor and that he took possession of the same.

After hearing the parties and their witnesses and upon analyzing the evidence, the trial magistrate entered judgement for the Plaintiff against the Defendant as prayed in the plaint. Being aggrieved by that decision, the Defendant appealed on 12/02/2013 citing the following nine grounds:

- 1. The Learned Senior Principal Magistrate erred in law and fact by stating at the outset that the Appellant had not filed a defence while a defence was filed and paid for on 17/11/2006 and his holding influenced his final findings in the judgment.**
- 2. The Learned trial magistrate erred in law in allowing the Respondents claims based on evidence that actually supported**

the Appellant's case.

3. **The Learned trial magistrate erred in law and facts by misapprehending the Law of Contract as far as sale of land is concerned and especially unregistered land in an adjudication section despite clear evidence by the Respondent's witness.**
4. **The Learned trial magistrate erred in law and fact by not appreciating the law on first registration of the title.**
5. **The Learned trial magistrate erred in law by bringing extraneous matters which did not form any evidence in the trial which matters influenced his findings and final judgement.**
6. **The learned trial magistrate erred in law in not considering the evidence of the Appellant and that of his witness therefore arriving at the wrong conclusion.**
7. **The learned magistrate erred in law and fact in that while acknowledging a written document existed between the parties hereto nevertheless dismissed it as of no legal effect, by mere speculation.**
8. **The learned trial magistrate showed total misapprehension of fact when he relied on minor discrepancies on the identity card to arrive at a wrong finding.**
9. **The learned magistrate's judgement is against the weight of evidence.**

APPELLANT'S SUBMISSIONS

The Appellant in support of ground No. 2 of the Appeal submitted that the evidence from page 55 to 60 actually supported the Appellant's case. He stated that PW1 who is the Respondent/Plaintiff stated that in 1988 when the land was transferred to the Appellant, he was in class 7. He also stated that his late father never told him everything. The Appellant submitted that PW1 stated that his father's land is a first registration showing the acreage as 4.1 acres. It has a title deed issued as NJIA-CIA-MWENDWA/921. It was issued during the lifetime of its owner who is the Respondent's late father, one Isaac Barimba. The deceased who passed on in 2006 never complained that his land was less or that the Appellant had taken his land.

The Appellant also submitted that the Respondent does not know how he got the suit land as can be seen in page 57- line 6. He submitted that the Respondent says that the Appellant committed fraud in acquiring land parcel No. NJIA-CIA MWENDWA/2405 but does not put in any evidence or at all. He states that his only evidence is that his father's ID card No. is shown on the transfer document in three different numbers but admits that the old generation card had the slush and some numbers. He says that the Plaintiff admits that his deceased father got his second generation ID card in 1998.

On the fourth ground, the Appellant submitted that a title on 1st registration is indefeasible unless fraud, irregularity, misrepresentation can be proved. It is submitted by PW3 that the deceased applied to transfer 1 acre to the Appellant.

After verification and approval by the Lands Committee, the one acre was excised and transferred to the Appellant. PW3 also stated that the laid down procedure was followed. It is further submitted that after he got his title deed, he never complained before he passed on in 2006. PW 5 who is the wife of the deceased and mother to the Respondent confirmed that if one wants to sell land in an adjudication section, they write to the Demarcation Officer and request the Chairman of land Committee to confirm the sale. The Appellant submitted that that was confirmed by the Appellant's witness No. 2 one, Joseph M'Berwaine Muthure who was the Chairman of the Land Committee for NJIA -CIA -MWENDWA between 1984-2003. The witness confirmed the two parties appeared before him and that the deceased/seller had already received the money.

On ground No. 5, the Appellant referred to page 105-106 where he submitted that the court went off the course and stated that Exhibit No. 5 was drafted by the Appellant and that it was never read back to the deceased who was illiterate. The Appellant also submitted that the court remarked that there were no witnesses to Exhibit 5 and that the deceased was tricked into signing a document he did not understand.

On ground No.6, the Appellant submitted that the court did not mention or consider the evidence of the Appellant and that of the former Chairman of the Lands Committee.

On ground No. 7, the Appellant submitted that it was a total misapprehension by the court to dismiss Exhibit No. 5 as of no consequence and instead demand a written agreement for a sale of land to be valid. He submitted that the court acknowledged that both parties thump printed on Exhibit no. 5. It was also signed by the Land Adjudication Officer and the Chairman of the Lands Committee. He submitted that these two witnesses saw the parties sign the written document brought by the deceased by way of thump printing.

The Appellant finally submitted that the trial court put a lot of weight on the National Identity Card of the deceased/transferor. He put a lot of weight on minor discrepancies which ultimately made him make an erroneous judgment.

SUBMISSIONS BY RESPONDENT

The Respondent submitted that there was no agreement for sale between the Appellant and his deceased father. The Respondent also submitted that there was no prove that consideration was paid by the Appellant for the purchase of the suit property. The Respondent also stated that there were discrepancies in the identification card numbers of the deceased. The Respondent cited the following cases in opposition to this appeal:

1. Stephen Muange mutual – Vs- Miriuki kirubi & Another CA No. 81 of 2008.

2. Katende –Vs- Haridas & Company Ltd CA 54/-03 (Court of Appeal of Uganda)

EVALUATION AND DECISION

I have carefully re-evaluated the evidence adduced by both the Plaintiff/Respondent and the Appellant/Defendant and their witnesses before the trial magistrate. I have also looked at the documents relied by the parties both in support and in defence of their case and the applicable law.

The first ground of Appeal is challenging the judgment of the trial magistrate by stating that the Appellant/Defendant filed a Memorandum of Appearance on 15/11/2006 but unaccompanied by statement of defence. A cursory look at page 96 of the record of Appeal confirms the trial magistrate statement in his judgment. Whether that statement influenced his decision can be observed at the tail-end of this appeal.

GROUND 2 & 3 OF THE APPEAL

On ground 2 and 3 of the Appeal, my re-evaluation of the evidence adduced by the Plaintiff and his witnesses will be material. PW1 was the Plaintiff/Respondent who is the administrator of the estate of his late father Isaac M'Arimba who he said passed on in March 2005 at the age of 74 years. He produced a limited grant in Succession Cause No.136/2006 dated 30/10/2006. He also produced a certificate of official search of the suit property No. NJIA –CIA-MWENDWA/921 owned by the deceased measuring 4 acres.

The Plaintiff stated that between 7/5/88 and 27/7/88 the said parcel of land was under adjudication process and that the title deed had not been issued in favour of his late father. The land was measuring approximately 5 acres. After the title deed was issued he discovered that about one (1) acre had been excised and registered in the name of the Defendant. The plaintiff referred to a letter dated 7/5/88 which is an application by his late father who was the proprietor requesting for a transfer of one (1) acre to the Defendant/Appellant. The Plaintiff/Respondent stated that the names of his late father were mis-spelled. The said letter was signed by the Land Committee Chairman on 27/7/88. The Defendant/Applicant who is the transferor also signed the letter. He said that two sets of the deceased's National Identity Card was used. One was given as [Particulars Withheld], and [Particulars Withheld] in the name of Isaac Mbarimba. He stated that the sets of numbers are not genuine. He said that the deceased's ID number was [Particulars Withheld]. The request was implemented by the Adjudication Officer and a new Parcel No. NJIA-CIA-MWENDWA/2405 measuring 0.45 excised and registered in the name of the Defendant/Appellant. He stated that from the request, the deceased was describing the transferee as his brother. He produced the letter as P. Exhibit No. 5. The Plaintiff/Respondent stated that no transfer was done by his late father to the Defendant/Appellant. He stated that the deceased did not inform them about the transfer. He stated that the transaction was fraudulent and no sale agreement was produced showing the Defendant paid the consideration for the land. The Plaintiff also stated that the Defendant is currently cultivating the portion excised which is parcel no. NJIA-CIA-MWENDWA/2405.

On cross-examination the Plaintiff stated that his late father's land No. NJIA-CIA-MWENDWA/921 has a title deed and the Defendant has a separate title deed for parcel no. NJIA-CIA-MWENDWA/2405. He stated that the former is a first registration but was not sure whether the later is a first registration. The Plaintiff also stated that his father's ID card is on the transfer document and his names too. His father's latest ID card was issued on 1998. He stated that the old generation ID card had a slash at the end.

PW3 was one George Benard Owour working with the Ministry of Lands at Maua as a Land Adjudication Officer. He stated that their office received an application for transfer of land dated 07/5/88 from one Isaac M'Barimba who was requesting to be allowed to transfer a portion of his land to a third party. They subsequently acted on the letter and a new title was issued in the name of the transferee/Defendant. He said that two different identity card numbers were given. The transferor, Isaac M'Barimba thump printed on the transfer document. He identified the document marked P. Exhibit 5.

On cross-examination, the witness confirmed that the document marked P. Exhibit No. 5 (transfer) was genuine. The Appellant got an acre on the basis of that letter. He also confirmed that transactions can be done at adjudication stage on the basis of a request letter such as the one produced as P. Exhibit No.5. He confirmed that that was the procedure. He also confirmed that the Chairman of the Committee approved the transaction. The witness also stated that the documents are brought to headquarters in Nairobi for verification.

Having re-evaluated the evidence given by the Plaintiff/Respondent and his witness George Benard Owour (PW3) it becomes apparent that the deceased Isaac M'Arimba alias Isaac Barimba is the one who wrote a letter dated 7/5/1988 which he requested to transfer one acre from his parcel of land to the Defendant/Appellant. The said letter also contains the National Identity card of the said vendor Isaac M'Arimba alias Isaac Barimba No. 2375046/65. The evidence by the plaintiff and George Benard Owour clearly shows that the deceased Isaac M'Arimba alias Isaac Barimba willingly wrote a letter requesting to sell one acre of his land to the Appellant. In his judgement, the trial magistrate observed as follows;

“The said transfer document was thump printed by both deceased and defendant but does not bear any signature or thump print of any of their witnesses. Though it is countersigned by Land Committee Chairman and Land Adjudication Officer, they did that in their official capacity to confirm that they had no objection to and had allowed the transfer respectively. They never countersigned the documents as parties witnesses to the sale agreement as envisaged under Section 3 (3) Cap. 23 (supra). They only came into the picture in their official capacity in due execution of their duties to facilitate transfer of portion on land....”

In his analysis of the transfer document, the trial magistrate correctly observed that the transfer document was thump printed by both deceased and Defendant and also countersigned by the Land Committee Chairman and the Land Adjudication Officer. The approval by the Land Committee Chairman and the Land Adjudication Officer is sufficient proof that they knew the parties and that the transaction was genuine. The same witness could not countersign the same document twice in different capacities as there is no provision in the document

produced. Suffice to say that an Adjudication Officer has a wide discretion to admit evidence which would not be admissible in a court of law. Section 12 of the Land Adjudication Act Cap. 284 provides as follows;

“12 (1) In the hearing of any objection or petition made in writing, the Adjudication Officer shall make or cause to be made a record of the proceedings, and shall so far as is practicable, follow the procedure directed to be observed in the hearing of Civil Suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim contained in any official record, and may call evidence of his own accord....”

The Adjudication Officer was not therefore bound to apply the provisions of the law of Contract Cap. 23 Laws of Kenya in establishing claims and interest in an Adjudication Section. I therefore find that the trial magistrate misdirected himself both in law and in fact by misapprehending the evidence adduced by the witnesses particularly the Plaintiff and PW3. Ground No. 2 and 3 of the Appeal therefore succeeds.

GROUND 4 AND 5

It is not in dispute that the Appellant is the first registration in respect of the suit property Registration No. NJIA-CIA-MWENDWA/2405. Section 26 of the Land Registration Act provides as follows;

“26 (1) 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 subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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....”

The plaintiff/Respondent himself produced in evidence a letter which his late father wrote to the Land Adjudication Officer requesting to transfer one acre of his land to the Defendant/Appellant. The Land Adjudication Officer (PW3) in his testimony confirmed the authenticity of that letter and also stated that that was the procedure when a party wishes to sell a parcel of land in an adjudication area. The sale transaction was even approved by the Chairman of the Land Committee one, Joseph M’Berwaine Muthure (DW2) who confirmed that the two parties appeared before him and that the seller (deceased) even confirmed to him that he had been paid the purchase price.

My re-evaluation of the evidence does not prove any fraud or misrepresentation for which the Defendant/Appellant was a party. At page 106 of the record of Appeal, the trial magistrate in his analysis of the evidence stated as follows:-

“Finally, it is the evidence of Land Adjudication Officer that transfer document was, as far as they are concerned, genuine, and it was on the basis of the same that they issued title deed to the Defendant for the new land parcel number 2405 excised from deceased’s parcel number 921. However, his evidence was devoid of any details whatsoever on when the demarcation officer and surveyor visited the land to survey and subdivide the land on the ground nor did he produce any duly completed mutation forms, new sketch map showing the new parcel on the ground or beacon certificate to confirm beacons were fixed marking the new boundaries.....

This is clear testimony that the land has never been surveyed on the ground, and it is therefore a mystery how title deed for a new portion of land (parcel number 2405) was issued without following due process. Considering the foregoing, I do find and hold that the purported sale of a portion of land by the deceased to the Defendant was fraudulent as it was based on a forged transfer document. Further, it is clear that title deed for the aforesaid new parcel of land was issued without following due process and was therefore irregular and unlawfully.”

From analysis of the evidence adduced, the trial magistrate concluded that the purported land from the deceased to the Defendant was fraudulent as it was based on a forged transfer document. There was no evidence showing that the transfer document which was presented by the deceased to the Land Adjudication Officer (PW3) was forged. In fact the witness himself confirmed that the very same document was genuine and that both the deceased and the Defendant appeared before him. The anomalies noted in the National Identity Card of the deceased was explained by counsel for the Defendant but the trial magistrate rejected in his judgement page 103 of the record of Appeal stating as follows:-

“The explanation offered by Defendant counsel for the discrepancies is that the only difference in the ID number is /65 added after the Identity number and that it is common knowledge that the first generation ID cards used to have the ID card number stroke(/) something. The explanation is not satisfactory simply because the Defendant tendered a copy of deceased’s new generation ID card and testified that it was the one the deceased handed over at the time the transfer document was being drafted. The issue of any confusion arising as a result of using the old generation card ID numbers therefore does not arise. Obviously the deceased never availed a copy of his ID card to the drafter of the purported transfer document and that is why he came up with three incorrect ID card numbers purporting to be the deceased. The only possible reason for this state of affairs is that the purported transfer document was forged and was intended to facilitate acquisition of a portion of deceased’s land by means of fraud.”

From my reading and analysis of the judgement, it appears the learned trial magistrate ignored the evidence adduced and possible explanation given by the defence counsel and instead used extraneous matters to conclude that fraud was committed when no such evidence was proved. The trial magistrate seemed to have relied more on perceived evidence in his mind rather than those presented in court by the

parties or their witnesses together with submissions by their counsels. I also note that the trial magistrate erred in law in the interpretation regarding first registration. The learned magistrate in his judgement (page 107) noted that the Defendant was undisputed first registered owner whose title shall not be subject to challenge except on grounds of fraud or misrepresentation to which the person is proved to be a party. No iota of evidence of either fraud or misrepresentation was produced by the witnesses to which the Defendant is proved to be a party.

GROUND NO. 6, 7, 8 AND 9

In combination grounds No. 6,7,8 and 9 of the Appeal, I note that the trial magistrate misapprehended the evidence adduced by the Defendant and his witnesses therefore arriving at a wrong decision. The Defendant, the Adjudication Officer (PW3) and the Land Committee Chairman (DW2) were the only witnesses present during the sale transaction in the year 1988. Their evidence in my evaluation is candid and truthful. They confirmed that the transfer document presented by the deceased for the transfer of one (1) acre of his land parcel No. 921 to the Defendant/Appellant was genuine and that was the standard procedure used in the transfer of land situate in Land Adjudication areas. The trial magistrate failed and/or ignored to consider that evidence without any legal basis. I find and hold that the findings and decision of the learned magistrate was influenced by extraneous matters without any evidentiary value.

In the upshot, the said decision must be interfered by this court which I hereby do on the following forms:

- 1. The trial magistrate's judgement issued on 24/01/2013 be and is hereby set aside.**
- 2. That the said judgment is replaced with an order dismissing the said suit with costs to the Defendant.**
- 3. That the costs of this Appeal shall also be borne by the Respondent.**

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C/A: Janet

Maamu H/B for E.G Mwangi for Appellant

Muthamia H/B for Kiogora Arithi for respondent