



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC APPEAL NO. 38 OF 2017**

**MICHAEL NJUGUNA KIMEMIA.....APPELLANT**

**VERSUS**

**VITALIS KUNGU AYIEYE.....1<sup>ST</sup> RESPONDENT**

**PAMELA AKINYI KUNGU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This appeal is against the judgment that was made by Hon. P. Gichohi (Mrs) S.P.M on 13<sup>th</sup> April, 2006 in Milimani Chief Magistrate's Court Civil Case No. 12815 of 2004, Vitalis Kungu Ayieye and Pamela Akinyi Kungu v Michael Njuguna Kimemia (hereinafter referred to as "the lower court"). The respondents herein had sued the appellant in the lower court seeking a permanent injunction to restrain the appellant from entering, trespassing onto, carrying out any construction works of any kind or dealing with all that parcel of land known as Plot No. 507 Phase 13 on L.R No. 8469/4, Nairobi (hereinafter referred to as "the suit property") and Kshs.10,000/= in damages. In their plaint dated 2<sup>nd</sup> March, 1999 in the lower court, the respondents had averred that at all material times, they were the owners of the suit property which they acquired from Karura Farmers Company Ltd. (hereinafter referred to as "the third party") at a consideration of Kshs.55,000/=. The respondents averred that the suit property was sold to them after the same had been forfeited by the appellant when he failed to pay additional share capital to the third party that was required for him to maintain his membership in the third party. The respondents averred that on 24<sup>th</sup> February, 1999 and 2<sup>nd</sup> March, 1999 they visited the suit property and found the appellant putting up a foundation with a view to constructing a building on the suit property. The respondents averred that the appellant refused to halt the construction works even after he was asked to do so by the third party and the Officer in Charge of Njiru Police Station.

The appellant filed a statement of defence on 29<sup>th</sup> March, 1999 in which he averred that he was not privy to the circumstances under which the respondents alleged to have acquired the suit property. The appellant averred that he was still a member of the third party having become a member in 1981. The appellant averred that he was not aware that his share in the third party had been forfeited and transferred to the respondents. The appellant averred that if at all his share in the third party had been forfeited and transferred to the respondents, the whole process of forfeiture and transfer of the said share was unlawful and as such the purported transfer of the said share was null and void. The appellant averred that the respondents had no cause of action against him and that their suit was defective, bad in law, incompetent and amounted to an abuse of the process of the court.

At the trial, the 1<sup>st</sup> respondent gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> respondent who was his wife and called one witness. The appellant also gave evidence and called one witness. The 1<sup>st</sup> respondent told the court how they acquired the suit property from the third party at a consideration of Kshs.55,000/= after which they were issued with a share certificate. He produced in evidence a copy of the agreement for sale and a copy of the share certificate that was issued to them by the third party as exhibits. He stated that in March, 1999 he visited the suit property and found the appellant carrying out construction thereon and that despite the intervention of the police and the third party the appellant did not stop the construction leaving them with no alternative but to file a suit against the appellant. The 1<sup>st</sup> respondent told the court that in the year 2000 he was issued with an allotment letter by the Ministry of Lands in respect of the suit property which after survey and registration was given land reference Nairobi Block 141/767. The respondent's witness was one, Tom Ouko Apamo (PW 2). PW 2 was a director of the third party. He told the court that the suit property was a portion of a hitherto larger parcel of land that the third party purchased from a company known as Mulanye Enterprises (Mulanye") for Kshs.4.7 million in 1980. He stated that by the end of February, 1986, the third party had only paid Kshs.3 million to Mulanye. He told the court that Mulanye threatened to repossess the entire parcel of land unless it was paid the balance of the purchase price. PW 2 stated that as a result of this development, the members of the third party resolved that each member pays a sum of Kshs.2,454/= per plot as additional share capital. He stated that this resolution was communicated to all members of the third party through the radio, newspapers and personal letters. He stated that the third party notified the members that those who failed to pay the said sum of Kshs.2,454/= would have their plots forfeited and sold to prospective buyers. He stated that the appellant who was a member of the third party and who was the owner of the suit property was notified of the said resolution through a letter and the other modes of communication that I have mentioned above. He stated that those who failed to pay the additional share capital aforesaid and had their plots sold were to get a refund of the money that they had paid for their plots. He stated that since the appellant did not pay the additional share capital his plot was forfeited and sold to the respondents who were subsequently issued with a share certificate. He stated that the respondents were the lawful owners of the suit property. He produced as exhibits copies of the resolutions made by the third party and notices that were issued by the third party to its members in relation to the additional share capital

and the consequences of default in the payment thereof.

In his defence, the appellant told the court that in 1999 he went to the suit property that he had purchased earlier from the third party and started constructing a house thereon. He stated that the 1<sup>st</sup> respondent who was a stranger to him came to the site and asked him to stop the construction. He stated that he was issued with an allotment letter and a ballot paper for the suit property by the third party. He stated that he spent over Kshs.9,000/= to purchase the suit property and that he was still a member of the third party. He stated that he was not issued with a certificate of title for the suit property even after he engaged an advocate to demand the same from the third party. He stated further that he was never issued with a share certificate in respect of a share that he held in the third party. He told the court that he never heard of the notices that the third party had sent out to its members about the additional share capital and that he never discussed with the third party about the refund of the monies that he had paid for the suit property.

The appellant stated that if he had been notified of the demand for additional share capital, he would have paid the same. He stated that the third party was facing several suits in the High Court regarding the sale of plots that were forfeited following the said notices. He mentioned HCCC No. 643 of 90 which he stated was won by a member whose plot was sold by the third party after the purported forfeiture. The appellant produced as exhibits among others, photographs of the building he had put up on the suit property, a certified copy of the ballot paper, certified copies of the receipts for the payments that he had made for the suit property, a demand letter that his lawyer had written to the third party for a certificate of ownership of the suit property and a certified copy of the judgment that was delivered in Nairobi HCCC No. 643 of 1990, Catherine Wangui Mwangi v Karura Farmers Company Ltd. & Another. The appellant's witness, Teresia Wanjiku (DW 2) corroborated his evidence.

In a judgment that was delivered on 13<sup>th</sup> April, 2006, the lower court found that the respondents had proved their case against the appellant and entered judgment for the respondents against the appellant for a permanent injunction restraining the appellant from trespassing on or carrying out any construction works on the suit property. In the judgment, the learned Magistrate found that the appellant was a shareholder of the third party by virtue of which he was required to pay Kshs.10,000/= and additional share capital in the sum of Kshs.2,454/= in default of which he was to forfeit the suit property and be refunded the said sum of Kshs.10,000/=. The learned Magistrate noted that the appellant only paid Kshs.6,000/= to the third party. On whether the appellant was served with a notice to pay the additional share capital, the learned Magistrate held that the mode through which the said notice was sent to the members of the third party was the same mode that was used to notify them of the availability of land that was sold to them. The court held that the notices were indeed sent out and even DW 2 received the same. The learned Magistrate held that the respondents were bona fide purchasers of the suit for value and that they had been issued with a share certificate. The learned Magistrate distinguished the decision in HCCC No. 643 of 1990 that was cited by the appellant. The learned Magistrate noted that in that case, the plaintiff had been issued with a share certificate by the third party which was not the case in the case that was before her.

It is against the said judgment that the appellant has brought the present appeal. The appellant has challenged the decision of the lower court on seven (7) grounds set out below:

1. THAT the Honourable Magistrate erred in law and fact in disregarding the evidence produced before the court which shows that the defendant/appellant was initially allotted the suit property by the third Party i.e. Karura Farmers Co-operative Society Limited in 1983 and has been in occupation since then.
2. THAT the Honourable Magistrate erred in law and in fact in concluding that the respondents/plaintiffs had proved ownership of the suit property on a balance of probability despite evidence that the suit property was allocated irregularly to the respondents in 1992 and without the knowledge of the appellant.
3. THAT the Honourable Magistrate erred in law in failing to abide by the doctrine of *stare decisis*, by disregarding the authority that was produced by the defendant where facts were similar i.e. HCCC No. 643 of 1990 Catherine Wangui Mwangi v Karura Farmers Co. Ltd & Another.
4. THAT the Honourable Magistrate erred in law and in fact in failing to address the documents produced by the defendant/appellant in support of his suit, showing that he was the true owner of the property and had therefore invested heavily on the suit property, such developments which still remain on the suit land.
5. THAT the Honourable Magistrate erred in law and in fact in misdirecting herself by implication that there was a valid notice to the defendant/appellant of forfeiture of his property, yet there had been no communication to him.
6. THAT the Honourable Magistrate erred in law and in fact in ruling that the plaintiffs had proved their claim and thus entering judgment in their favour.
7. THAT the learned Magistrate erred in law in disregarding the appellant's evidence and his advocate's submissions and thus arriving at a wrong decision.

The appeal was argued by way of written submissions. The appellant filed his submissions on 14<sup>th</sup> August, 2015 while the respondents filed their submissions on 2<sup>nd</sup> October, 2015. I have considered the proceedings of the lower court, the judgment of the court, the memorandum of appeal and the submissions by the advocates for the parties. This is my view on the matter. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, the case of Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

It is also well established that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not

based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v Sunday Post Ltd. [1958] E.A 424 and Makube v Nyamuro[1983] KLR 403. What was in dispute in the lower court and which the court was called upon to determine was whether the appellant had forfeited the suit property to the third party and whether the third party had lawfully sold the property to the respondents. On the evidence on record, I am in agreement with the findings of the lower court that the third party had indeed called upon its members to pay additional share capital to save their parcels of land that were threatened with repossession by the original owner. Evidence was placed before the court showing that the third party's call for additional share capital was communicated through newspaper advertisements, radio and personal letters. The appellant had denied receiving the third party's notices regarding the additional share capital.

I have perused the third party's Memorandum of Association. Articles 34, 35, 36, 37 and 38 allowed the directors of the third party to forfeit the shares of a member who fails to pay for the shares on being given notice to do so. The mode of serving the notice upon the members is not provided for in the Memorandum of Association. The appellant did not cite any provisions of the Memorandum of Association of the third party which required that he be served personally with the notices issued by the third party. In the circumstances, I find no reason to fault the finding by the lower court that the appellant was properly served by the third party with the notice calling for the payment of additional share capital through the various modes of communication that were adopted by the third party. It was not disputed that the appellant did not pay the additional share capital. The third party was in the circumstances entitled to forfeit the appellant's share in the third party which entitled him to the suit property.

I am therefore in agreement with the lower court that the suit property was lawfully forfeited by the third party and sold to the respondents. I find no merit in ground 1 of appeal. There was no dispute at all before the lower court that the suit property was allocated first to the appellant by the third party. There was however no evidence before the lower court that the appellant had occupied the suit property prior to 1999. I also find no merit in grounds 2 and 3 of appeal. As I have held above, the suit property was lawfully repossessed by the third party from the appellant through forfeiture and sold to the respondents. The respondents in the circumstances acquired the suit property free from the appellant's previous proprietary interest in the same which was extinguished through forfeiture. The lower court did not therefore err in its finding that the respondents had proved that they owned the suit property.

With regard to ground 3 of the appeal, I am in agreement with the lower court that the decision in Nairobi HCCC No. 643 of 1990 was distinguishable. In that case, the third party's member who was the plaintiff had paid for her share in full and had been issued with a share certificate and when a call was made for additional share capital, she also made the payment. Furthermore, in that case, the court had made a finding that the third party had colluded with the purchaser to dispossess the plaintiff of her plot. The circumstances in the case before me are different. The appellant herein did not prove that he had paid fully for the share that was allotted to him by the third party. Again, it was not disputed that he did not pay the additional share capital that was called for by the third party. The appellant did not also establish that there was collusion between the third party and the respondents herein. In the circumstances, the lower court was entitled to distinguish the said case.

For the reasons that I have given earlier, I find no merit in grounds 4, 5, 6, and 7 of appeal. The upshot of the foregoing is that the appeal fails wholly and the same is dismissed. I have noted from the submissions by the respondents that they sold the suit property while this appeal was pending. For that act, I will deny them the costs of the appeal. Each party shall bear its own costs of the appeal. It is so ordered.

**Delivered and Dated at Nairobi this 25<sup>th</sup> day of October 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

No appearance for the Appellant

No appearance for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

Catherine - Court Assistant