



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 56 OF 2012

JOSEPH MURITHI M'MUGAINE.....APPELLANT

VERSUS

MWARANIA NKANATA.....RESPONDENT

JUDGMENT

(Being Appeal from the Ruling of Hon. NDUBI S.R.M Delivered on 6th June 2012 in C.M.C.C No. 16 of 2010 (Nkubu)

INTRODUCTION

This appeal arises from the judgment of the Senior Resident Magistrate Hon. Ndubi delivered on 6th June 2012. Being dissatisfied with the findings of the trial magistrate, the Appellant lodged an appeal citing the following grounds:

- 1. The learned magistrate erred in law and fact by allowing the lower Court suit against the weight of the evidence given.*
- 2. The learned magistrate erred in law and fact in not finding that the respondent case could not have succeeded without enforcing the District Land Registrar concerned as 2nd defendant.*
- 3. The learned magistrate erred in law and fact in not finding that no fraud was proved.*
- 4. The learned magistrate erred in law and fact in disregarding the defendant's agreement.*
- 5. The learned magistrate erred in law and fact in giving a compromised ruling.*

The Appellant in the appeal was the defendant while the Respondent was the plaintiff in the lower Court case. The plaintiff/Respondent in a plaint dated 18th February 2010 was seeking an order for the rectification of the register of L.R No. ABOGETA/U-KIUNGONE/2881 to read the correct amount of the defendant share as 0.36 Ha instead of 0.67 Ha as currently indicated or alternatively the defendant's names be deleted from the plaintiff's title and the plaintiff be set at liberty to refund the purchase price. The plaintiff/Respondent was also seeking costs of the suit.

In his rejoinder by way of defence, the defendant/Appellant denied the plaintiff/Respondent's claim and all particulars of fraud stating that he acquired his land legally and squarely.

PLAINTIFF'S CASE

The plaintiff/Respondent in the lower Court gave sworn testimony and stated that on 23rd January 2007, he sold a portion of his land measuring 0.89 points which was to be excised from land parcel No. ABOGETA/UPPER KIUNGONE/2881. He marked the sale agreement as P-MFI I. He identified the Green Card which was produced as P Exhibit No. 2. He said that they have never gone to the Land Control Board to get consent to effect the sub-division. He said that he did not sign any transfer form in favour of the purchaser. The Respondent stated that the Appellant went to his land and divided the land to himself chasing those who were in the land. He sold the portion of land at Ksh. 300,000/= and was paid Ksh. 200,000/= leaving a balance of Ksh. 100,000/=.

DEFENDANT'S CASE

The defendant/Appellant recalled that on 23rd January 2007, he bought a portion of land from the plaintiff/Respondent. They went to the firm of Kiautha & Co. Advocates where a sale agreement was drawn and witnessed by one Thurania. He paid money to plaintiff. The plaintiff

later on the same day asked him to add more money so that he could give him more land. They wrote a second agreement. The first agreement was for a consideration of Ksh. 300,000/= while the second agreement was for Ksh. 500,000/=. The first agreement was for a parcel of land measuring 0.89 Ha while the second agreement was for 1.39 Ha. Both agreements were for the same day. They went to the Land Board and obtained a consent to transfer on 8th December 2009. They agreed to register the land as joint owners and sub-divide later.

DW2 was Thurania Atheru. He is an advocate practicing in the firm of Kiautha Arithi & Co. Advocates. He recalled that on 23rd January 2007, he received both the plaintiff/Respondent and the defendant/Appellant in their offices who wanted to enter into a sale agreement of land. The two were accompanied by three witnesses. He drew the sale agreement where the plaintiff/Respondent was selling the defendant/Appellant 0.89 Ha from land L.R No. ABOGETA/UPPER KIUNGONE/2881 at a consideration of Ksh. 300,000/=. The purchaser paid Ksh. 600,000/= upon execution and a further sum of Ksh. 100,000/= upon obtaining consent from the Land Control Board and the balance of Ksh. 140,000/= upon actual transfer. The parties and their witnesses signed. The first witness was son of the purchaser, the 2nd witness was chairman of parties clan while the 3rd witness was wife of the seller. The sale agreement was produced as Plaintiff Exhibit No. 1.

APPELLANT'S SUBMISSIONS

The Appellant through the firm of Kaimenyi Kithinji & Co. Advocates submitted that the trial Court ought to disregard the testimony of Mr. Thurania Atheru (PW3) since he ought to be clear as to whether he is the author of the second agreement or not. The learned counsel submitted that by concluding that the said witness did not draft the second agreement, the Court was attempting to rewrite agreements for the parties. The Appellant also submitted that the Respondent failed to enjoin the Land Registrar as a party to this suit. He stated that for the offence of fraud to be complete, two parties must be involved. He stated that the Appellant alone could not have caused the land to be registered into his name. He said that the standard of proof in claims of fraud is beyond reasonable doubt and that the Respondent did not prove his claim in the Magistrate's Court. The Appellant cited the following cases in support of this appeal:

1. Gatobu M'Ibuutu Karatho Vs Christopher Muriithi Kubai (2014) e K.L.R.

2. Vijay Marjana Vs Nansingh Maholisingh Darbar & Another (2000) e K.L.R.

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Ayub K. Anampiu & Co. Advocates submitted that from the evidence of the parties and their witnesses, the following inference can be drawn:

- 1. That the 2nd agreement for the sale of 1.39 acres which is being contested did not indicate the existence of an earlier agreement of the same day.*
- 2. The 2nd contested agreement for sale of 1.39 acres did not indicate that it was amending or rectifying the first agreement for sale of 0.89 acres.*
- 3. Witnesses who signed the 1st agreement did not sign and witness the 2nd agreement when clearly the agreements are alleged to have been drawn on the same day.*
- 4. The advocate Mr. Thurania Atheru did not recall drawing the 2nd agreement and was only aware of the agreement of sale for 0.89 acres.*

The learned counsel sought to have this appeal dismissed with costs.

DECISION

I have re-evaluated the evidence adduced by the plaintiff/Respondent and his witness and that of the Appellant/defendant before the trial Court. I have also considered the two sale agreements produced by both parties. The plaintiff/Respondent stated in his sworn testimony that he sold a portion of his land parcel No. ABOGETA/UPPER KIUNGONE/2881 measuring 0.89 to the defendant/Appellant for a sum of Ksh. 300,000/=. He stated that he never signed any transfer forms and did not also appear before the Land Control Board for consent to transfer. He also admitted that he has so far been paid Ksh. 200,000/= leaving a balance of Ksh. 100,000/=. The plaintiff's witness was Mr. Thurania Atheru advocate who stated that both the plaintiff and the defendant appeared before him on 23rd January 2007 together with three witnesses with instructions to draw a sale agreement. The witness further stated that from the instructions given by the parties, the Vendor Mwarania Nkanata wanted to sell a portion of his land L.R No. ABOGETA/UPPER KIUNGONE/2881 measuring 0.89 at a consideration of Ksh. 300,000/=. According to the witness, the purchaser was to pay the Vendor as follows:

- (i) Ksh. 60,000/= upon execution of the agreement*
- (ii) Ksh. 100,000/= upon obtaining consent from the Land Control Board and*
- (iii) Ksh. 140,000/= upon actual transfer.*

The parties signed the agreement and their witnesses in his presence. However, he denied having witnessed the parties and/or their witnesses execute a second agreement the same day.

I have looked at the evidence adduced by both the Respondent and the Appellant together with the witness before the trial Court. I have also looked at the sale agreements produced by the Respondent and the Appellant and the submissions by the parties through their advocates. This being a first appeal, the power of the Court is to re-evaluate the evidence in its entirety and to make its own conclusion. That was the decision in the case of **SUMARIA & ANOTHER VS ALLIED INDUSTRIES LTD (2007) 2 K.L.R** at **Page 1** where it was held:

“Being a first appeal, the Court was obliged to reconsider the evidence, re-evaluate it and make its own conclusion. A Court of Appeal would not normally interfere with a finding of fact by the trial Court unless:

(a) It was based on no evidence.

(b) It was based on a misapprehension of the evidence or

(c) The Judge was shown demonstrably to have acted on wrong principles in reaching the finding he did”

The agreement produced by the plaintiff’s witness Mr. Thurania Atheru advocate as Plaintiff’s Exhibit No. I contain some mode of payment of the purchase price of a portion of land measuring 0.89 acres. The second purported sale agreement should have mentioned whether the two agreements are separate or the same and the mode of the payment by instalment. If the two agreements are separate, then the Respondent owes the Appellant more than 1.39 acres. That makes me believe that the purported agreement produced by the Appellant as D Exhibit No. 1 should have mentioned the first agreement. The said Mr. Thurania Atheru even denied having drawn the purported agreement for the sale of 1.39 acres at a consideration of Ksh. 500,000/=. If the Respondent/Vendor denied that he signed the purported sale agreement and the Seller/Appellant wishes to rely on the same as prove in a Court of law, it behooves upon the person seeking to rely on the same to subject the same to a Document Examiner to confirm that the same was signed by the person who disowned it. The Respondent denied having sold a portion of his land measuring 1.39 acre as shown on the Appellant’s exhibit produced before the trial Court as Defence Exhibit No. I. Mr. Thurania Atheru who is purported to have drawn and witnessed the agreement has also come out denying any knowledge of the same. Mr. Thurania Atheru is an officer of this court and I tend to believe in this testimony. In the absence of any report by a Document Examiner to say who signed the same, the purported second agreement in my respective view remains a mere document without any evidentiary value. My re-evaluation therefore makes me to agree with the analysis and evaluation by the trial magistrate that the valid and binding agreement is that which was produced by the plaintiff for 0.89 acre to be excised from the Respondent’s parcel of land L.R No. ABOGETA/UPPER KIUNGONE/2881. I find and hold that the learned magistrate properly directed her mind to the facts and the applicable law in arriving at the decision she made and have no reason to disturb her finding.

In the upshot, this appeal lack merit and the same is hereby dismissed with costs to the Respondent.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 14TH DAY OF NOVEMBER, 2018.

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In the presence of:

C/A: Janet

No appearance of the appellant/advocate

No appearance of the respondent/advocate