



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL NO. 9 OF 2016

JACOB MBATIA WAMAYI.....APPELLANT

VERSUS

JOHN KAMANGU MBATIA.....RESPONDENT

JUDGMENT

John Kamangu Mbatia (hereinafter referred to as the respondent) sued **Jacob Mbatia Wamayi (hereinafter referred to as the appellant)** in the Chief Magistrate's Court in Eldoret in Civil Suit No. 182 of 2006 averring that on the 23.12.1997, he jointly purchased a parcel of land known as Plot No. 156, Langas Farm together with his late brother who is the defendant's father, from one Ibrahim Macharia and that the two of them jointly owned the said plot. That the respondent averred in the lower court that the appellant had fraudulently registered himself as the sole owner of the said parcel, Plot No. 156, Langas Farm without the respondent's consent and removed his name from the register and had started developing the same. The fraud was particularized as the act of the appellant **registering** himself as the sole owner of the land knowing very well that the land was jointly owned. Moreover, the act of secretly registering himself as the sole owner of the land without the respondent's knowledge and/or approval. Lastly, secretly causing the respondents name to be removed from register without his knowledge and/or consent.

That in the premises, the respondents claim against the appellant was for a declaration that he is a joint owner and/or co-owner of that parcel of land Plot No. 156 Langas Farm and that the appellants action of removing the respondent's name from the register and registering himself as the sole owner was illegal. That the respondent further claimed against the appellant for an order of restitution of his name in the register of Plot No. 156 Langas Farm.

The respondent prayed for judgment against the appellant that a declaration be made that he is a joint owner or co-owner of that parcel of land known as Plot NO. 156 Langas Farm and that the appellants action of removing the respondents name from the register and registering himself as the sole owner is illegal. The respondent further prayed for restitution of his name in the register of the parcel of land Plot No. 156 Langas Farm. He further prayed for costs of the suit and interest.

In the written statement of defence, the appellant stated that the subject land was bought by his late father and his brothers in the name and style of Mbatia Brothers & Company for the benefit of their late mother one Leah Nyawira who was subsequently registered as the owner. The appellant's late father and the respondents signed the sale agreement merely as representatives. The appellant's late father did refund the respondent and his other brothers, the amount they claimed to have contributed towards the purchase of the suit land and hence their interest in the suit land if any became extinct and that since his deceased grandmother was the legal owner of the suit land, she donated the same to the appellant on the 20th September, 1989. That the appellant had peaceful occupation of the suit land since 1977 and thus, the

provisions of adverse possession. That the respondent has at no time been registered as the owner of the suit land hence the reliefs sought in the plaint were not available to him. That the appellant contended that the lower court had no jurisdiction to entertain the suit and that the respondents suit did not disclose any reasonable cause of action and therefore the appellant was to raise a preliminary objection to have it struck out with costs at the most opportune moment.

When the matter came for hearing before the trial court, the respondent testified that the appellant who is his nephew transferred Plot Number 156 Langas to himself which he owned jointly with his father. They had built the plot in three months' time. He applied for the title deed and found that the appellant had changed the particulars. He went to the Eldoret Municipality to check on the rates and found that the appellant used fraudulent means to have the plot registered in his name. He urged that the records with the Municipality to be altered to read two names and that the court to declare that the appellant acted fraudulently.

The appellant on his part testified that the respondent is his paternal uncle. His father had five brothers. His father bought plot No. 156, Langas farm. The farm was sold by Ibrahim Macharia to Mbatia Brothers which was his father's company. The Mbatia brothers paid rates until 1989 and later Leah Nyawira started paying rates upto 1994. He was given the land as a gift on 20.9.1999. He has been staying in the and with his children whilst John Kamau has never stayed in plot No. 156.

The learned Magistrate in his judgment found that it is clear when looking at the agreement that the appellant was not privy to that agreement. Moreover, that the appellant was very young when the agreement was signed hence he cannot be heard to say that the agreement was only signed by one person. The court further found that the land did not belong to Leah Nyawira and that even at the time the appellant alleges that the land was donated to him, the appellant's father was still alone. The court also found that the land even if donated, was donated to a son to Leah Nyawira and not a grandson and therefore, the appellant being a grandson to Leah Nyawira could not have been the beneficiary.

The court found that the land belonged to the respondent and the appellant's father and that the respondent had proved on a balance of probabilities that his name was fraudulently removed from the register as a joint owner or co-owner of the land known as Plot No. 156, Langas farm. The court declared that the appellant's act of removing the respondents name from register and registering himself as sole owner was in itself illegal. The court ordered the restitution of the respondent's name in the register of the parcel of land Plot Number 156, Langas farm. Costs of the suit were to be paid by the appellant.

The appellant now appeals to this court on the grounds that the learned trial Magistrate erred in law and fact in finding that the respondent had proved his case on a balance of probability when there was no sufficient evidence to support the same. That the learned trial Magistrate erred in law and fact in finding that the name of the respondent was once in the register of owners of Langas farm without any documentary evidence to that effect. The learned trial Magistrate erred in law and fact in holding that the appellant removed the respondent's name from the register of owners of Langas farm yet no evidence was led in that regard. That the learned trial Magistrate erred in law and fact in holding that the respondent is a joint owner of the suit land contrary to the documentary evidence tendered in court. That the learned trial Magistrate erred in law and fact in failing to consider the appellant's concrete documentary evidence on record showing how he acquired the suit land. That the learned trial Magistrate erred in law and fact in ordering restitution of the respondent's name into the register of parcel of land Plot No. 156 Langas farm contrary to the evidence on record. That the learned trial Magistrate erred in law and fact in entertaining the suit yet she was not vested with jurisdiction to do so. That the learned trial Magistrate erred in law and fact in overly relying on the evidence of the respondent which was not proved.

Grounds 1, 2, 4, 5 and 8 were argued as one ground. On this ground, the appellant argues that apart from the agreement of the purchase of the land produced by the respondent as Dexbt.1, the respondent did not produce any other document to prove ownership of the suit land. Moreover, that the respondent did not produce any evidence in court to show that he has ever had any proprietary interest in the suit land since 1977 when the same was bought. Moreover, that the subordinate court lacked jurisdiction as the value of the subject matter exceeds Kshs. 500,000.

The respondent submits that the trial Magistrate cannot be faulted as her decision was based on evidence produced in court. The plot in question was in the name of Mbatia's brother but it is not demonstrated how it moved to Leah Nyawira. The respondent submits that there was ample evidence to show that the respondent purchased the land with his late brother. The trial Magistrate therefore came to the right decision that there was sufficient evidence before the trial court to warrant the respondent succeeding in his case.

On the issue of jurisdiction, it is argued that no valuation report has been produced to support the submission that the court lacks jurisdiction.

This being a first appeal, the court is reminded of its primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held inter alia that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

This principle also applies on the first appeal from the Magistrates' court to the Environment and land court.

I have considered the evidence on record and the submission of both counsel and do find that on the 23.12.1977, the Mbatia Brother Company of P. O. Box 317, Eldoret bought all that half of three quarters plot of piece of land situated at Langas farm as limited in Uasin Gishu District of the Rift Valley Province of Kenya as it then was with all improvements and developments therein more particularly stated in the agreement. The purchase price was Kshs.5,600 and full purchase price was received. The agreement was signed by the vendor and purchaser. The property was later registered at the Eldoret Municipal Council in the name of Mbatia brothers. It is not clear how the property was registered in the names of Leah Nyawira and later transferred to the appellant.

This court finds that the land in issue was not registered under the Registered Land Act cap 300 laws of Kenya(repealed) and now the Land Registration Act and therefore, the Act does not apply, none of the parties have title to the property, however, the agreement on record shows that the land ought to be registered in the name of the Mbatia brothers. The appellant is not one of the Mbatia brothers but a son of one the Mbatia brothers.

The learned Magistrate found that the respondent and the appellant's father purchased the property jointly as per the two signatures on the agreement. I do hold that the finding by the learned Magistrate was sound in law.

Moreover, the learned Magistrate found that Leah Nyawira did not have the authority to make a donation as it is not shown how she was registered as the holder of the suit land by the Eldoret Municipal Council. Moreover, that she donated the land to her son and not the grandson. The appellant is not the son of the late Leah Nyawira. I do agree with the respondent that based on the evidence on record, the learned Magistrate came to the right decision. Ultimately, the appeal is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE