



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CIVIL APPEAL NO. 103 OF 2014

CAPPITUS CHIRONGA JAZZ.....APPELLANT

VERSUS

ELIJAH MULWARESPONDENT

(Being an Appeal from the Judgment and decision of Kangundo Senior Principal Magistrate Court in Civil Case No. 139 of 2013 delivered on 13th June, 2014 by Hon. T.N. Sinkiyian, Resident Magistrate)

JUDGMENT

1. This Judgment is in respect to an appeal from the decision of the learned Magistrate that was delivered on 13th June, 2014.
2. The suit that was before the learned Magistrate was commenced by way of a Plaint dated 27th November, 2013.
3. In the Plaint, the Plaintiff/Appellant claimed that on 5th October, 2013, the Defendant trespassed upon his land measuring 4 acres, ploughed it and planted crops.
4. It was the Appellant's case that on 7th October, 2013, the Defendant was served with a notice by Muka Mukuu Farmers Co-operative Society Limited Management to vacate the Plaintiff's land but he refused. The Appellant sought for a permanent injunction to issue.
5. After hearing the Plaintiff, the Defendant and their respective witnesses, the learned Magistrate found that it is the Defendant's/Respondent's family that has been utilizing the suit land since the year 1972; that despite the Defendant's interests not being recorded by the Society, those interests are still protected as overriding interests on the land and that the Plaintiff had not proved that the Defendant had trespassed on the suit land. The learned Magistrate proceeded to dismiss the Appellant's suit with costs. The Defendant's Counter-claim was also dismissed.
6. The Plaintiff filed his Memorandum of Appeal challenging the decision of the learned Magistrate. In the said Memorandum of Appeal, the Appellant averred that he Magistrate erred by failing to find that he was an innocent purchaser for value; that the Magistrate erred by reducing the claim between the Appellant and the Respondent as a claim between two families and that the Magistrate erred by finding that the Respondent had been in actual possession of the land since 1972.
7. The Appellant's appeal is also based on the ground that the Magistrate erred by finding that there was a

trust in favour of the Respondent's family and that he was entitled to costs to the dismissed Counter-claim.

8. The Appeal proceeded by way of written submissions. The Appellant's counsel submitted that the correspondences over ownership of the suit land does not affect the title to the land, or the Appellant's right to the land as an innocent purchaser for value.

9. Counsel submitted that the trial court having found that the Respondent did not have the capacity to litigate or enforce rights accruing to his father's estate, he was bound to declare him a trespasser.

10. The Appellant's counsel submitted that the suit property did not exist in 1972; that the suit property was allocated in 1983 and that the evidence of PW3 confirmed that the Defendant's family never cultivated the suit property.

11. Having found that the Respondent had not proved the existence of a contract for disposition of land, the Appellant's counsel submitted that no interest could be enforced over the alleged joint purchase of the land; that in any event, the Respondent did not prove his late father's contribution to the purchase price and that the Respondent did not plead and particularize the elements of trust in his Defence and Counter-claim.

12. The Respondent submitted that the Appellant was not an innocent purchaser of plot No. 15- 107 share No. 1811; that the Appellant did not exercise the duty of care and diligent while purchasing the suit property and that the Plaintiff entered into an agreement of 7th September, 2012 before confirming from Muka Mukuu Farmers Co-operative Society the state of affairs of the suit land.

13. The Respondent submitted that the trial court could not have found him to be a trespasser because he has been in occupation of this suit land since 1972; that **Section 3** of the **Law of Contract Act** does not apply to him and that he proved his father's contribution to the purchase of the suit land.

14. The Respondent submitted that the court was alive to the fact that their existed a dispute between Komu Kitemu and Elija Katemu over ownership of plot no. 15-107 through a letter dated 29th September, 1992; that the Assistant Chief advised the Society not to allow Komu to transfer the suit property without the consent of Elija and that the Plaintiff did not produce evidence to controvert the Defendant's evidence.

15. The Appellant pleaded in his Complaint that he purchased four (4) acres of land in plot number 15-107 of share No. 1811 Muka Mukuu Farmers Co-operative Society Limited (*the Society*) from one John Matheka Komu on 7th September, 2014.

16. In his Defence, the Respondent averred that the suit property was bought jointly by Stephen Komu Kitemu (*deceased*) and the Plaintiff's late father, Elija Mulumbi Kitemu (*deceased*) in 1972. The Respondent sought in his Counter-claim for a declaration that him, together with his family, are the rightful owners of the suit property.

17. So, what was the evidence that was before the trial court?

18. The Appellant, PW1, informed the court that on 7th September, 2012, he bought the suit property jointly with his wife from one John Matheka Komu vide a sale agreement of 7th September, 2012.

19. According to PW1, by the time of the said purchase, the suit property was in the name of the Seller as per the Society's records and that he made all the requisite payments to the Society for the purpose of excising the four (4) acres from plot No. 15-107 of share No. 1772.

20. It was the evidence of PW1 that after the suit land was registered in their joint names, they took possession of the land in March, 2013, ploughed it and planted maize, beans and sunflower on it.

21. PW1 informed the trial court that in September, 2013, they hired servants to clear the suit property; that on 5th October, 2013, the Defendant, who was a total stranger to them, invaded the suit land and that is when they reported the matter to the Society and to Donyo Sabuk Police Station.
22. It was the evidence of PW1 that the Society confirmed to them that the suit property belonged to John Matheka whose share No. was 1811 and that they paid Kshs. 1,040,000 for the land.
23. In cross-examination, PW1 stated that before he purchased the land, he was not aware of any dispute over the land.
24. PW1 produced in evidence the agreement of 7th September, 2012 which shows that the property was being sold by John Matheka Komu, the holder of share certificate No. 1772 in the register of Muka Mukuu Farmers Co-operative Society.
25. The Sale agreement that was produced by PW1 further provided that the seller was selling the plot *“as the beneficial owner and heir to the estate of the deceased by virtue of the letters of administration and with the consent from all the beneficiaries of the estate of the late Komu Kitemu.”*
26. The signing of the Agreement was duly witnessed by Wanjala Benson Chameli advocate, Alex Nzomo and Preston Muisyo Komu.
27. The Plaintiff also produced the Share Transfer Forms showing that Stephen Komu Kitemu, being member No. 1772 in the Society and the owner of Plot No. 15-107 transferred his share to John Matheka Komu on 12th October, 2012. The said transfer was confirmed by the Chairman, the Secretary and the Treasurer of the Society.
28. The evidence that was produced by PW1 shows that on 16th October, 2012, the Society arbitrated over a dispute involving the suit property between the family of the Respondent and John Matheka Komu.
29. According to the letter, the Respondent informed the Society’s officials that his father, Elija Musumbi gave to the seller’s father Kshs. 900 while his grandfather contributed Kshs. 800 for the purchase of a share in the Society, which was to be shared among the sons of Elija Musumbi equally.
30. The Respondent further informed the Society’s officials that before his grandfather died, he directed that his properties, including plot No. 15-107, should be shared equally among his two sons.
31. After hearing the dispute, the Society’s officials concluded as follows:
- “The two parties should go back home and sit down and come out with a solution. But as per the records held in the office share No. 1811 plot No. 15-107 belongs to Stephen Komu Kitema since there is no evidence which shows the share is a jointer (Sic).”***
32. The evidence of PW1 was corroborated by the evidence of PW2, the Administration Manager of the Society.
33. PW2 confirmed that according to the records of the Society, the suit property belonged to Stephen Komu Kitemu who transferred it to his son John Komu. PW2 produced a letter dated 7th October, 2013 in which the Society gave the Defendant a notice to vacate the land after it was reported that he had started his own developments on the suit land.
34. John Matheka Komu, PW3, informed the court that the suit property initially belonged to his late father before the same was transferred to him.
35. PW3 denied that the suit property was owned by his late father and the Respondent’s father; that it was his father who was cultivating the land when the Respondent’s father was alive and that the

Respondent only invaded the land after he sold it to the Plaintiff.

36. It was the evidence of DW1, the Chairman of Kitemu's family, that in 1994, the clan had a meeting and decided that the land belonged to the two brothers; that the clan decided that plot No. 15-107 was to be divided between Komu Kitemu and Elijah because they bought the eight (8) acres jointly and that indeed his late father had complained about the division of the suit land thus necessitating a meeting to be called by the Chief.

37. In cross-examination, DW1 stated that his father and uncle purchased the suit land in the 80's; that he was not present when the two contributed the money to purchase the land and that the dispute between the two was never taken to court.

38. The Respondent's mother, DW2, informed the trial court that his late husband purchased the suit property jointly with John's father in 1972; that the two families cultivated this land jointly and that she stopped cultivating the land when her husband fell ill.

39. The Respondent, DW3, stated in evidence that the suit land was purchased jointly by his father and the seller's father; that the receipt for the purchase price was issued in the name of the seller's father and that the two families utilized the suit property jointly.

40. According to DW3, there has been a dispute over the land since 1992; that in 1994, the clan agreed that the two families should share the land equally and that the two families stopped cultivating the land jointly when the seller's mother started ailing.

41. It is not in dispute that the Plaintiff bought land known as plot No. 1811 (15-107) measuring four (4) acres situate in Kyeleni location Melungutu District, Machakos County.

42. It is also not in dispute that the seller is a cousin of the Respondent by virtue of the fact that their fathers, both deceased, were brothers.

43. The evidence that was produced before the trial court shows that the suit property, according to the records of Muka Mukuu Farmers Co-operative Society Limited, was registered in the name of John Matheka Komu, the son of Stephen Komu Kitemu.

44. With the above undisputed facts, the only issue that was before the learned Magistrate to determine was whether indeed the suit property was owned jointly by the seller's father and the Defendant's father or not.

45. While addressing the said issue, the learned Magistrate held as follows:-

“However, the documents the Defendants produced coupled with the fact that Elijah's family took possession of the plot in 1972 makes it probable that Mulwa's family have a basis for claiming Stephen acquired the plot on his behalf and in trust for Elijah Mulumbi Kitemu's family... Mulwa's family has been in open actual possession of the plot since 1972. It is doubtful if Matheka passed a good title of the plot to Chirong'a. Given that the court has found that Mulwa has on a balance of probabilities that there could be a trust in favour of his family against Stephen Komu's estate the court finds that Chirong'a is not entitled to a perpetual injunction as against Mulwa and family.”

46. The evidence on record does not show that it is the Respondent's family which has been in occupation of the four (4) acres exclusively as pointed out by the learned Magistrate.

47. The evidence of the Respondent's mother, DW2, was that since 1976, she had been cultivating the suit land alongside the seller's mother.

48. According to DW2, the two families used to share the proceeds from the said land until the wife of

Stephen passed on, and that she stopped cultivating the land when Stephen's wife became ill.

49. That was the same evidence that was given by the Respondent. According to the Respondent's statement, which was adopted by the Court, "*the two continued cultivating the farm until 2002 when Mrs. Mary Komu started ailing and later on passed on.*"

50. It is therefore not true that it is the Respondent's family that was utilizing the land since 1972. Considering that the Appellant proved that all along, the suit property was registered in favour of his father before the same was transferred to him, it was upon the Respondent to prove the fact that indeed his father contributed towards the purchase of the suit land.

51. The mere fact that the suit property has been having a dispute since 1992 when the dispute was allegedly taken to the area Chief and in 1994 when the family allegedly discussed the issue does not prove that the Respondents' father contributed towards the purchase of the suit property.

52. If it is true that the Respondent's father contributed towards the purchase of the suit property in 1972, it is not clear why the Respondent's family had to wait until 1992 to lodge a complain with the Chief and the clan.

53. The Respondent produced in evidence a letter dated 11th March, 1994 authored by the brothers of Stephen Komu Kitemu. In the said letter, the brothers informed the Chairman of the Society that the suit land should be divided amongst the two families.

54. That letter, in my view, does not in itself prove that the Respondent's father contributed towards the purchase of the suit property.

55. Indeed, none of people who signed the letter of 11th March, 1994 testified on the issue of whether they witnessed the contribution of the Respondent's father towards the purchase of the suit property.

56. Without producing evidence to show that indeed the Respondent's father contributed towards the purchase of the suit property, the learned Magistrate erred by holding that a constructive or resulting trust should be implied.

57. In *Halsbury's Laws of England, 5th Edition, Volume 71* at paragraph 280, the author states as follows:

"Subject to any express declaration of trust where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price..."

58. In this case, there was no evidence whatsoever to show the Respondent's father's contribution towards the purchase of the suit property. It cannot therefore be said that the Respondent, or his father, acquired an interest in the suit property proportionate to his contribution.

59. The learned Magistrate further erred by holding that Stephen Komu's rights as proprietor of the suit land were held subject to the overriding interests under **Section 28** of the **Land Registration Act** or **Section 30** of the **Registered Land Act (repealed)**.

60. I say so because the evidence that was before the learned Magistrate was that none of the parties was living on the suit property.

61. Save that there was evidence of cultivation of a portion of the suit land, the Appellant could not have known that it is the Respondent's family who were in occupation or possession of the suit land considering that they were not living on the suit property.

62. In the circumstances, I find and hold that the Appellant was an innocent purchaser for value without

notice of any defect and his claim should be allowed.

63. For those reasons, I allow the Appeal with costs and the Appellant's claim as prayed in the Plaint dated 27th November, 2013.

64. The Respondent's Counter-claim dated 10th January, 2014 is hereby dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF MARCH, 2017

OSCAR A. ANGOTE

JUDGE