



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI LAW COURTS
ELC. APPEAL CASE NO. 366 OF 2015
(FORMERLY HCCA NO. 501 OF 2013)

RAPHAEL KIMANI MWANGI.....APPELLANT

VERSUS

CHAIRMAN, TREASURER & SECRETARY

KWARE-MUKURU KWA NJENGA

JUA KALI ASSOCIATION.....1ST RESPONDENT

PASTOR JOHN KIOKO KILUNGU.....2ND RESPONDENT

NELIUS MUTHONI KARIUKI.....3RD RESPONDENT

(Appeal arising out of the judgment and decree of the Hon. Ag. Senior Principal Magistrate Mrs. L.A Arika delivered and dated 6th September 2013 in Nairobi CMCC No. 3451 of 2009)

JUDGMENT

This appeal originated from the dispute before the trial Court which related to a parcel of land known as plot no. 51 Kware Mukuru-Kwa-Njenga Jua Kali Association (hereinafter referred to as “the suit property”). Through a plaint dated 4th June 2009 in Nairobi CMCC No 3451 of 2009, the appellant as the plaintiff sued the defendants seeking a declaration that the acquisition of the suit property by the 2nd defendant and subsequently by the 3rd defendant without his authority was unlawful. The appellant also sought a permanent injunction restraining the defendants from entering, encroaching, trespassing, undertaking construction works or in any way accessing the suit property.

Through their statement of defence dated 21st August 2009, the 1st defendant stated that the suit property was sold to the 3rd defendant by the 2nd defendant at a purchase price of Kshs 930,000/-. The 3rd defendant in her statement of defence dated 11th June 2009 admitted the 1st defendant’s assertion and stated that through an agreement dated 2nd July 2008, she purchased the suit property from the 2nd defendant. Upon payment of the full purchase price, the 3rd defendant took possession of the suit property and was issued with an ownership certificate. She stated that she started constructing a building on the suit property without interruption until a court order dated 15th June 2009 was issued. The 1st and 3rd defendants called for the dismissal of the appellant’s case.

When the suit came up for hearing, each party called 4 witnesses who gave oral testimony. On 6th September 2013, the trial court delivered judgment dismissing the suit and restraining the appellant from interfering and/or trespassing on the suit property. Aggrieved by the trial court's decision, the appellant filed this appeal raising the following grounds in his Memorandum of Appeal dated 24th September 2013 which was amended on 30th September 2013:-

- 1) That the learned magistrate erred in law and in fact by failing to uphold the submission that the appellant had established a prima facie case with probability of success.
- 2) That the learned magistrate erred in law and in fact by failing to uphold the submission that the 1st defendant purported association register was doctored and was not authentic as alleged.
- 3) That the learned magistrate erred in law and in fact by failing to uphold the inconsistencies of the 1st defendant's association register.
- 4) That the learned magistrate erred in law and in fact by failing to uphold that the signatures of the share certificate of the suit property was attested by the 1st defendant.
- 5) That the learned magistrate erred in law and in fact by failing to uphold that the plaintiff was the legitimate owner of the share certificate for the suit property.
- 6) That the learned magistrate erred in law and in fact by failing to uphold that the alleged transfer by the 1st and 2nd defendant to the 3rd defendant was illegal and fraudulently done to deprive him his legitimate share certificate of the suit property.
- 7) That the learned magistrate erred in law and in fact by failing to hold that the 1st defendant had double allocated the share certificate of the suit property.
- 8) That the learned magistrate erred in law and in fact by failing to hold that the 3rd defendant was a trespasser in the suit property.
- 9) That the learned magistrate misdirected herself in exercise of her discretion and considered irreverent points of law and facts.

The Appellant is seeking the following orders:-

- a) That this appeal be allowed.
- b) That the decision and judgment dated 6th September 2013 by the learned Ag. Senior Principal Magistrate against the appellant be set aside.
- c) That the costs of this appeal be awarded to the appellant.

Parties filed and exchanged submissions on this appeal which were highlighted in court on 30th March 2016. The appellant in submissions dated 14th January 2015 contended that the trial court did not interrogate why the 2nd respondent (DW3) had failed to file his defence to challenge this suit. He submitted that DW3 was the link man between the 1st and 3rd respondents. Counsel for the appellant argued that the trial court erred for not interrogating the consent dated 7th November 2011 to have plaintiff's exhibits no. 1, 2 and 3 as well as defendants exhibits 2, 3 and 3(a) examined by a document examiner and further, for failing to capture the consent and objections thereto in the judgement.

The appellant further submitted that the trial court erred to find that DExh. 1 "the association register" was inconsistent with the defendants' testimony. That although DW2 testified that he had custody of the register and recorded on it, the trial court took judicial notice that the handwritings were different and had

not been done by one person as alleged by DW2. Further, that although DW2 testified that the association had more than 300 members, evidence of members not captured in the association register was not tendered.

Counsel submitted that the trial magistrate never captured the issue of double allocation and missing serial number which arose during cross examination. That the trial court failed to address and/or interrogate the discrepancies in the signatures in PExh. 2 and the alleged sale agreement which DW2 contended were almost similar. Further, that the ledger entry in respect to plot no. 50 had been interfered with to read plot no. 51 evidencing foul play on the suit property. Counsel averred that the advocate who drew the alleged agreement, M/s Moerwa, was not called by the defendants to testify on the terms of the agreement.

The appellant relied on the case of **Peter vs. Sunday Post(1958)EA 48** for the submission that the role of an appellate court is to review the evidence and determine whether the conclusions reached thereon are in accordance with the evidence and the law. It was submitted that the appellant had established a prima facie case. Lastly, the appellant submitted that the issue regarding the glaring irregularities which could have affected the evidence tendered had not been taken into account. The appellant relied on the cases of **Gitwany Investment Ltd vs. Tajmal Ltd & others (2006)eKLR, Embakasi Properties Ltd vs. Safe Cargo Ltd & 2 others(2007)eKLR, Ng'ati Farmers Cooperative Society Ltd vs. Councillor John Ledidi & 15 others(2009)eKLR, Nyangeri Obiye Thomas vs. Yunike Sakagwa(2014)eKLR and Zacharia Onsongo Momanyi vs. Evans Omurwa(2014)eKLR.**

The respondents filed submissions dated 26th February 2016 in which they argued that for the appellant to have established a prima facie case, he was required to prove that PW4 was allocated and paid for plot no. 51 or that he legally acquired the plot from someone else. It was submitted that while PW4 had in her evidence alleged to have been the original owner of the suit property, her name was not in the register of the association and she had no ownership certificate issued by the association. Further, it was submitted that whereas PW4 claimed to have sold the plot to PW1 at Kshs 150,000/-, she admitted that no agreement was executed in that respect and that the dates of the transaction differed with PW4 stating that it was on 27th October 2001 while PW1 contended that he bought the property in September 2001.

The respondents averred that the 2nd defendant joined the association in the year 2000 whereupon he was allocated plot no. 51 and was issued with a share certificate on 14th May 2001 after paying the full purchase price of Kshs 30,000/-. They further submitted that the 2nd respondent had peaceful and uninterrupted possession for 8 years until he sold the suit property to the 3rd defendant at Kshs 930,000/-. They also stated that upon execution of the sale agreement, the 2nd defendant's name was deleted from the register and replaced with the name of the 3rd defendant who was accordingly issued with an ownership certificate. It is the respondents' submission that whereas the plaintiff did not produce a single document to support her claim to the suit property, the defendants' documents were availed in court and therefore the trial court did not err in holding that the plaintiff had not established a prima facie case.

The respondents submitted that whereas PW4, the original owner, testified that she sold the suit property without any formality, a disposition of an interest in land must be in writing and signed by both parties as was held in **Doris Morgan vs. F. Slubenitsky CA No. 30 of 1977**. Counsel argued that even if PW4 was the owner, which was denied, she could not have passed a good title to PW1 who purported to have sold the suit property to the plaintiff.

In further submission, the respondents contended that the plaintiff's claim that the 1st defendant's register was doctored was not supported by evidence. Counsel averred that DW2 gave evidence that he was the custodian of the register and that any issues which arose were solved in the office. The respondents submitted that there was no dispute between DW3 and PW4 concerning the suit property for the 8 years DW3 owned the plot. Counsel argued that the association's register showed that the suit property was owned by DW2 while plot no. 50 was owned by DW4 and that there were no inconsistencies regarding the ownership of the said plots.

In respect to ground 4 of the appeal, the respondents contended that the plaintiff who participated in the lower court trial had a right and opportunity to apply for examination of the signatures by a handwriting expert. Counsel averred that DW2 had indicated that the alleged signature was not his and the plaintiff lost the opportunity to have the signature examined by an expert.

While submitting that the magistrate had arrived at the right verdict in dismissing the plaintiff's claim, the respondents contended that the plaintiff did not present sufficient evidence to overwhelm their evidence. Counsel contended that the plaintiff's evidence was riddled with contradictions in that the plaintiff could not remember the name of the hotel where he paid Kshs 200,000/- to Ayub Githendu (PW1) who is purported to have sold the property to him. Further, that although PW1 stated that he paid transfer fees of Kshs 14,000/- for the plots, PW4 alleged to have paid Kshs 10,000/- as transfer fees. Counsel submitted that the purported sale of the plot to the appellant was characterized with inconsistencies, improbabilities and outright lies and that the trial court found that the suit property rightly belonged to the 3rd defendant.

In further submission, the respondents contended that the 1st defendant testified that there was only one plot no. 51 which was allocated to the 2nd defendant and later sold to the 3rd defendant. They further contended that the officials only issued one ownership certificate to DW2 which was cancelled when he sold the plot. Further, that the purported certificate produced by the plaintiff was not issued by them. The defendants submitted that PW4 who was the purported original owner did not produce any document in proof of her ownership of the suit property and that there was no concrete evidence pertaining to the alleged double allocation of the suit property.

The respondents referred to the definition of trespass as stated in the Trespass Act, CAP 294 Laws of Kenya and submitted that no criminal charges had been preferred against DW4. They added that the 3rd defendant legally purchased the suit property from the 2nd defendant for value without any notice of encumbrance. The respondents submitted that the suit property was transferred to the 3rd defendant who was issued with an ownership certificate and was therefore entitled to legally occupy the suit property as of right. The respondents submitted that the trial court rightly found that the 3rd defendant could not have been a trespasser on her legally acquired land and reliance was placed on the case of **Kiptanui Ngisirei vs. R (1994)eKLR** for the proposition that an occupier of land who has obtained title is not a trespasser.

In respect to the last ground of appeal, the respondents submitted that the appellant had not specifically stated what points of law and fact the appellant found irregular. Counsel submitted that the trial magistrate could not be faulted for judicially exercising her discretion and that the appellant had not pointed out how the trial magistrate misdirected herself. The respondents made reference to the case of **Martin A. Waindi vs. Phamaceutical Co. Ltd & another CA No. 79 of 1988** and submitted that the allegations made by the appellant in his pleadings and witness statement were inconsistent and contradictory and could not help to prove the appellant's case.

I have considered the grounds of appeal raised by the Appellant in this appeal as well as the submissions of counsel. It is indeed true that as was stated in the case of **Peter vs. Sunday Post (1958) EA 48**, the role of an appellate court is to review the evidence and determine whether the conclusions reached thereon are in accordance with the evidence and the law.

In his first and fifth ground of appeal, the Appellant asserted that the register of members produced by the 1st Defendant was doctored and that the 1st Defendant double allocated the suit plot. In the case of **Stephen Wasike Wakhu & another vs. Security Express Ltd (2006) eKLR** it was stated that he who alleges must prove. To address this issue, I will focus on the evidence of DW1, the 1st defendant's Treasurer. It was his evidence that the project was started in the year 2000 when he was elected the Treasurer. He said that if a member wanted to sell a plot in the project, all 3 officials being the Chairperson, the Secretary and he as the Treasurer had to be present and would record the transaction between the buyer and the seller. It was his evidence that the 1st Defendant would then record the transaction in their register of members and an ownership certificate in the name of the buyer would be issued. After this, the buyer could commence development of the plot. He confirmed that the Register of

Members was kept by their Secretary, Paul Musembi. Upon cross-examination, he stated that the 2nd and 3rd defendants involved the 1st defendant in their transaction and that the 3rd defendant inspected the Register to confirm that the 2nd defendant's name was in the Register. He confirmed that upon payment of the transfer fees of Kshs. 10,000/-, the 3rd defendant's name was entered in the register as the owner of the suit plot while the 2nd defendant's name was cancelled. He did not have any record of the transactions involving the Appellant in acquisition of the suit plot. This evidence was corroborated by the Secretary of the 1st defendant, Paul Musembi Mbithi. He stated that he only came to be aware of the Appellant's claim on the suit plot after the 3rd defendant commenced construction on the same, having purchased it from the 2nd defendant in his presence. He testified that as the Secretary of the 1st defendant, he is the only one who made all entries in the Register of Members and that to his knowledge, there has only been one case of a double allocation of a plot which involved a Councillor. He denied that there could have been any case of doctoring of the association register or that this case involved a double allocation of the suit plot. Being the bona fide officials of the 1st defendant, the testimonies of DW1 and DW2 remain unassailable. The appellant has not been able to prove to this court that the Register of Members produced in court by the 1st Defendant was in any way doctored. He was also not able to convince this court that there was a case of double allocation of the suit plot by the 1st Defendant. On those accounts therefore, I find that the Appellant has not proved those grounds of appeal.

On his second ground of appeal, the appellant stated that the Trial Court erred by failing to recognize that he was the holder of a share certificate in respect to the suit plot which was duly attested by the 1st Defendant's official. I have established that the appellant informed the Trial Court that he misplaced his share certificate for the suit plot in the process of moving houses. He did not produce to the Trial Court any share certificate in his name. What he produced as PExhibit No. 1 was an original share certificate in the name of PW1 in respect of Plot No. 50 which was not the subject matter of the suit. He further produced PExh. No. 2 which was a photocopy of an Ownership Certificate in the name of PW1 in respect of the suit plot. He did not produce any Ownership Certificate in his name, issued by the 1st Defendant, to prove that he indeed was the owner of the suit plot. On this account, his second and third grounds of appeal fail.

The Appellant further raised the ground of appeal that the transfer of the suit plot from the 2nd Defendant to the 3rd Defendant was illegal and fraudulent and that the 3rd Defendant is a trespasser on the suit plot. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In this particular suit, the Appellant failed to prove that the transfer of the suit plot by the 2nd Defendant to the 3rd Defendant was fraudulent in any way. This particular transfer was confirmed to have been effected with the authority of the 1st Defendant as stated earlier. The Paper trail in support of that transfer was produced before the Trial Court. The 3rd Defendant cannot be said to be a trespasser on the suit plot as she was able to prove that she indeed is the current owner of the same.

The upshot of the above findings is that this Court fully agrees with the findings of the Trial Court in the Judgment delivered on 6th September 2013. The Appeal is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE