



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 7 OF 2016

BENSON MURIUKI KIBATA.....APPELLANT

VERSUS

GITARI FRANCIS GIKIRI.....1ST RESPONDENT

GIKIRI NJOROGE.....2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KERUGOYA (HON. Y.M. BARASA) IN CIVIL CASE NO. 6 OF 2007 DELIVERED ON 26TH JUNE 2015)

JUDGMENT

The genesis of this appeal is a plaint filed in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 6 of 2007** by the Appellant (as Plaintiff) in which he sought judgment against the two Respondents (as Defendants) in the following terms:

(a) A permanent injunction restraining the defendant from entering, working, trespassing, or interfering with the plaintiff's quiet possession and use of the plaintiff's land parcel No. BARAGWE/THUMAITA/2813.

(b) Costs of the suit.

(c) Interest on (b) above at Court rates.

(d) Any other relief this Court may deem fit and just to grant.

The basis of the Appellant's case in the trial Court was that he is the registered proprietor of land parcel No. BARAGWE/THUMAITA/2813 (the suit land) but the Respondents who are a father and son had on or about December 2005 and without any colour of right, unlawfully invaded the said land and picked his coffee against his wishes thus occasioning him loss.

The Respondents had filed a defence admitting that the Appellant was the registered proprietor of the suit land but adding that by a decree issued in the subordinate Court dated 5th February 2007 all the purchase price received by the 1st Respondent amounting to Ksh. 197,800 be refunded to the Appellant who would then re-transfer the suit land to the 2nd Respondent and by the time that decree was being issued, the Respondents had made a refund of Ksh. 151,000 via Bankers Cheque No. 00900 drawn on Equity Bank Ltd Kerugoya Branch. That the Respondents had complied with the said decree but the Appellant had disregarded the same. The Respondents also pleaded that the suit was res-judicata.

The trial commenced before **HON. S.N. NDEGWA (PRINCIPAL MAGISTRATE)** on 5th December 2012 who heard the case to completion on 22nd May 2013 but for reasons which are not clear, perhaps following her transfer to Nyeri Court, the judgment was written and delivered by **HON. Y.M. BARASA** (Resident Magistrate). In that judgment which was delivered on 26th June 2015, Hon. Y.M. Barasa found that the Appellant had failed to prove his case as required and dismissed it with costs thus provoking this appeal.

The appeal which was filed on 27th July 2015 by the Appellant in person raises the following grounds:

- 1. That the learned magistrate erred in law and fact in dismissing the Appellant's plaint dated 16th January 2007 whereas no substantive submission argument had been tendered thereon.***
- 2. That the learned magistrate erred in law and fact by not appreciating the fact that the issue before him on the part of the appellant was for permanent injunction restraining the Respondents herein from entering, working, trespassing or interfering with the Appellant's quiet possession and use of the land BARAGWE/THUMAITA/2813.***
- 3. That the learned magistrate erred in law and fact by not considering the fact that the issue of refund of the purchase price to the Appellant by the 1st Respondent had been dealt with by Kerugoya Senior Resident Magistrate in LDT No. 2 of 2007 where the Respondents were found to be not honest with their claim that they had refunded the purchase price of the suit land to the Appellant vide the said Kerugoya Senior Resident Magistrate's ruling dated 21st December 2007.***
- 4. That the learned magistrate erred in law and fact by not properly perusing the order three (3) in the LDT No. 2 of 2007 which clearly demonstrate that: "That if the second objector herein Francis Gitari (the 1st Respondent herein fails to refund the said money) that is Ksh. 197,000) within three (3) weeks, Benson Muriuki Kibata shall retain the land namely BARAGWE/THUMAITA/2813)".***
- 5. That the learned magistrate erred in law and fact by overthrowing the ruling dated 21st February 2007 of his Senior colleague in LDT No. 2 of 2007 which decision is only for an appeal Judge which was not the case before him.***
- 6. That the learned magistrate erred in law and fact appreciating the fact that there is a binding decree of Kerugoya Senior Resident Magistrate's Court in LDT No. 2 of 2007 which has never to-date been challenged in an appeal Court and/or Judicial Review preferred against the same.***
- 7. That the learned magistrate erred in law and fact by not holding that the Honourable magistrate in LDT No. 2 of 2007 when there arose a controversy that the 1st Respondent herein has refunded Ksh. 151,000 to the Appellant which denied the Court summoned the Manager Equity Bank who said, and I quote "A bankers Cheque was drawn by Kamuga Mburu advocate on 14th February 2006 and then confirmed that the said amount re-credited to Kamuga Mburu advocate again. Further the Manager said that one Benson (Appellant) never received the money".***
- 8. That the learned magistrate erred in law and in fact by not holding that the magistrate in LDT No. 2 of 2007 which he said he had perused clearly demonstrate that and I quote: "From the above revelation, it follows that the panel of elders verdict of 19th October 2006 and also adopted as judgment on 5th February 2007 has not been made within three week. For those reasons the Respondent retains the land as per the judgment and that the Respondent cannot be ordered the land he bought from the Applicant back to the Applicant hence the Court cannot order Executive officer to effect such transfer".***
- 9. That the learned magistrate erred in law and fact by not holding the finding of his colleague Senior Resident Magistrate J.N. Onyiego who found in his ruling dated 21st December 2007 that, and I quote: "In any event, I do observe the Tribunal had no jurisdiction to convict or***

declare on sale agreement over land (contract) null and void and then proceed to order refund of purchase price as the transaction was complete unless elements of fraud proved in a Court of law and not Tribunal”.

10. That the learned magistrate erred in law and fact by not observing that the 2nd and 1st Respondents preferred reference before the Gichugu Land Disputes Tribunal Case No. 53 of 2006 which later became Kerugoya Senior Resident Magistrate’s Court LDT Case No. 2 of 2007 after the contract between the 1st Respondent and the Appellant was complete and the suit land had already been registered in the names of Benson Muriuki Kibata the Appellant herein and the said Appellant had even occupied the suit land and planted crops therein which he was tendering until the 1st and 2nd Respondents took the Appellant to Kianyaga Police Station where he was charged with the offence of fraudulent transfer of land. The charge was later dropped.

11. That the learned magistrate erred in law and fact by not holding that the Appellant is rightfully registered proprietor of the suit land and should be given an opportunity to benefit from such proprietorship.

12. That the learned magistrate erred in law and fact by observing that the Appellant herein had been refunded the purchase price in the tune of Ksh. 151,000 when the evidence before him was on the contrary.

13. That the learned magistrate erred in law and fact by delivering a biased, vague and unreasonable judgment in law against the argument put across by the Appellant.

Reasons wherefore the Appellant prayed that this Court sets aside the lower Court’s judgment and decree made on 26th June 2015 and admit the prayer sought in Kerugoya Senior Resident Magistrate’s Court Civil Suit No. 6 of 2007 and costs both in the lower Court and this Court be provided for.

When the parties appeared before me on 3rd April 2017, it became clear that none of them really understood what was required of them in arguing the appeal and with their consent, it was agreed that I determine the appeal on the basis of the record herein.

This is a first appeal and my duty as was well settled in the case of **SELLE VS ASSOCIATED MOTOR BOAT COMPANY LIMITED 1986 E.A 123** is to re-consider and evaluate the evidence and draw my own conclusions while bearing in mind that I have neither seen nor heard the witnesses.

In my view, this appeal can easily be determined by answering grounds 2, 9 and 11 of the Memorandum of Appeal which basically are that the trial magistrate erred both in law and in fact by not appreciating the fact that as the registered proprietor of the suit land, the Appellant was entitled to the order of permanent injunction sought in the plaint.

It is clear from the record herein that the Appellant is the registered proprietor of the suit land and holds a title deed issued on 22nd December 2005 having purchased it from the 1st Respondent. However, there appears to have been some disagreement between them which ended up in the Gichugu Land Disputes Tribunal Case No. 2 of 2007 and an award was made that the Appellant refunds the purchase price to the 1st Respondent amounting to Ksh. 197,800 within three weeks after which the Appellant would re-transfer the suit land to the 2nd Respondent. In default, the Appellant would retain the suit land. That award was adopted on 5th February 2007 as an order of the Senior Resident Magistrate’s Court at Kerugoya. Thereafter, a dispute appears to have arisen again as to whether or not the Appellant had been refunded the purchase price which was allegedly paid by way of a banker’s Cheque. That issue was canvassed before Hon. J.N. Onyiego Senior Resident Magistrate (now Justice Onyiego) on 12th April 2007 following an application dated 7th May 2007 in which the Respondents were seeking orders that the Court’s Executive officer signs all the necessary transfer forms in respect to the suit land in place of the Appellant. The Appellant’s response to that application was that he had not been refunded the purchase price as decreed in the award dated 5th February 2007. Since the Respondents were claiming to have

refunded the Appellant the sum of Ksh. 151,000 by Banker's Cheque, Hon. Onyiego Senior Resident Magistrate (as he then was) decided to summon the Manager of Equity Bank on which the Cheque was drawn. The Manager **MR. SIMON KAMAU KANYINGI** appeared in Court on 20th December 2007 and confirmed that although a Banker's Cheque was drawn on 21st December 2005 in favour of the Appellant, it was later cancelled and credited to account No. 0100190095039 in the names of **JEREMIA KAMUGA MBURU** and that the money was never paid to the Appellant. **JEREMIA KAMUGA MBURU** appears in the record as the advocate who had drawn the sale agreement between the Appellant and the 1st Respondent. Having heard the application by the 2nd Respondent dated 7th May 2007 in which he was seeking orders that the executive officer of the Court signs all the relevant documents on behalf of the Appellant to facilitate the transfer of the suit land to the 2nd Respondent who was the applicant, and also having had the benefit of the evidence from the Manager Equity Bank who had stated on oath that the Banker's Cheque for Ksh. 151,000 was never paid to the Appellant, Hon. Onyiego made a finding that the Appellant having not been refunded the purchase price, he would retain the land. The application was therefore dismissed. No appeal appears to have been filed from that ruling which was delivered on 21st December 2007.

Given the above ruling by Hon. Onyiego Senior Resident Magistrate (as he then was), it was not again open to Hon. Y.M. Barasa Resident Magistrate to make the following findings in his judgment subject of this appeal:

"In conclusion, I have tried to sought (sic) out the issued (sic) which to me was the contention between the parties. As for the issue of refund, my mind is clear that the plaintiff was paid back the entire purchase price as ordered on the issue of this suit being res-judicata, we have already seen that it is not.

The plaintiff having received the purchase price and failing to transfer the land to the 2nd defendant, he cannot therefore ask for a permanent injunction against the defendants.

It is unfortunate that the defendants did not file a counter-claim. I wish they did".

The trial magistrate then proceeded to dismiss the Appellant's suit with costs to the Respondents.

That was a clear misdirection on the part of the trial magistrate. The issue as to whether or not the Appellant had been refunded his purchase price had long been determined in favour of the Appellant by Hon. Onyiego Senior Resident Magistrate (as he then was) way back on 21st December 2007 some eight years earlier. That ruling could only be reversed on appeal by a Superior Court and it was not open to Hon. Y.M. Barasa Resident Magistrate to revisit that issue and, as it were, sit on appeal over a decision of another magistrate. That was an error in fact and in law and as captured in ground 9 of the Appellant's Memorandum of Appeal where it is stated that:

"That the learned magistrate erred in law and fact by not holding the finding of his colleague Senior Resident Magistrate J.N. Onyiego who found in his ruling dated 21st December 2007 that, and I quote "In any event I do observe the Tribunal had no jurisdiction to convict or declare on sale agreement over land (contract) null and void and then proceed to order refund of purchase price as the transaction was complete unless elements of fraud proved in a Court of law and not a Tribunal"

What the Appellant is questioning, and rightly so, is the decision of Hon. Y.M. Barasa to over-turn a finding that had been made by another magistrate on the issue of refund of the purchase price. That should be enough to dispose off this appeal.

But that is not all. The appellant having demonstrated by the production of the title deed to the suit land that he was the registered proprietor thereof, he was entitled to all the rights and privileges that go with that registration. **Section 26 (1) of the Land Registration Act** provides that:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon

a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

In their defence in the trial Court, the Respondents appear to have been contented in pleading that they had refunded the Ksh. 151,000 to the Appellant vide a Bankers Cheque. It was never their case that the Appellant’s title to the suit land was obtained through mis-representation, illegally, un-procedurally or by a corrupt scheme. Indeed, as Hon. Y.M. Barasa rightly observed, the Respondents had no counter-claim to the Appellant’s suit. Perhaps that is because they were acting in person. However, for as long as the Appellant’s title to the suit land had not been impeached by any evidence suggesting that it was obtained fraudulently, the trial Court was obliged to give it the protection donated by law and make a finding that the Appellant was entitled to the order of permanent injunction sought in his plaint. That is the gist of grounds 2 and 11 of the Memorandum of Appeal.

Finally, the Respondents appear to have hinged their case in the subordinate Court on the fact that the Gichugu Land Disputes Tribunal made orders with respect to the suit land which were subsequently adopted as a decree of the Kerugoya Senior Resident Magistrate’s Court LDT Case No. 2 of 2007. As the suit land is registered under the now **repealed Registered Land Act**, and as the dispute involved ownership thereof, such Tribunal had no jurisdiction to make the orders that it did and therefore, all its proceedings and the award that followed were all nullities and could not form the basis of any subsequent claim in the subordinate Court – see **MACFOY VS UNITED AFRICA CO. LTD 1961 3 ALL E.R 1169** and also **RE-CONTINENTAL CREDIT FINANCE LTD (2003) 2 E.A 399**.

Ultimately therefore, and upon considering the record herein, I find that this appeal is well merited and I allow it and make the following orders:

1. The judgment of the trial Court dated 26th June 2015 dismissing the Appellant’s suit is set aside and substituted with an order allowing his claim to the extent that a permanent injunction be issued restraining the Respondents from entering, working, trespassing, or interfering with the Appellant’s quiet possession and use of land parcel No. BARAGWE/THUMAITA/2813.

2. The Appellant shall have costs both in this Court and the Court below.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Judgment delivered, dated and signed in open Court this 16th day of June 2017

Appellant present

2nd Respondent present

1st Respondent absent

Right of appeal explained.

B.N. OLAO

JUDGE

16TH JUNE, 2017