REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 13 OF 2016

[FORMERLY ELDORET HCCA NO. 97 OF 2011]

REUBEN SHIKAMBE SHISAMBO……..APPELLANT

VERSUS

ANTONINA SHILWATSO MATERU…...…RESPONDENT

JUDGMENT

This is an appeal from the judgment and decree of Hon. G. M. Mutiso, Resident Magistrate dated 26th April, 2011 in Kapsabet Magistrate's Court – Civil Suit No. 162 of 2008 between Reuben Shikambe Shisambo ***(hereinafter known as the appellant)*** and Antonina Shilwatso Materu (***hereinafter known as the respondent).***

The appellant went to the Lower Court on 9.10.2008 claiming that the respondent sold him a portion of land in the year 2003 measuring 0.20 acres at Kshs.80,00, which sum she was paid in full and handed over possession to the plaintiff who constructed premises from where he carries on battery charging and other business. That as of the year 2006, the defendant's only proprietary interest in Plot No. 135 was a portion measuring about 0.3 acres having sold out the rest to other purchasers besides the plaintiff. That by a further agreement in writing made on 6th December 2006, the respondent sold the remaining portion measuring 0.3 acres to the appellant at the sum of Kshs. 150,000 (One Hundred and Fifty Thousand Shillings) which amount she was paid in full by the appellant which she used to purchase alternative land at Musembe area-Turbo where she has put up her home. That the respondent undertook in writing to vacate the suit land by 1st October, 2008 but has since failed to honour the undertaking and still persists.

It was claimed that on or about the 12th day of July 2008, the respondent through the Chief Kapkangani Location petitioned the appellant to retain a portion measuring 0.2 acres of the sold land for which she would refund the sum of Kshs.101,000/= to the appellant a proposal which the appellant accepted and despite on request, having been given 2½ months to pay back, the respondent arrogantly refused neglected and/or declined to refund the sum and still keeps the land. That despite having sold the suit land, the defendant, her children have with use of threats obstructed and or prevented the plaintiff from enjoyment of his property and he has been prevented from farming thereon. The appellant has been frustrated and put to mental anguish and psychological anxiety as he had taken loan to purchase the land from the respondent and has sentimental attachment to the same having set his mind to the suit land as his permanent home. That the respondent has no proprietary interest in the land and her activities thereof remain unlawful.

The respondent filed defense on 16.10.2008 denying any such agreement and added that if any such agreement was done, then the respondents children ought to have been signatories and stated further that

the respondent would refund the plaintiff the purchased consideration of Kshs.100,000/= on condition that the plaintiff vacates 0.3-acre portion of the suit land. The respondent further denied having utilized the consideration as alleged to purchase a parcel an alternative parcel of land in Turbo and would invited strict proof thereof. The respondent reiterated that it was the appellant who refused and/or ignored to accept and/or collect the refund despite having been availed to him. The respondent vehemently denied any allegations of threats from her children and invited proof thereof.

When the matter came for hearing on 12.3.2009, the appellant opened his case by stating that he knew the respondent since 1985. She stated that the respondent sold him land measuring 0.2 acres for Kshs.80,000/= which he paid in cash. The land was Chepkumia/Chepkumia/Block 2/135. He produced an agreement and on the back of the agreement, there is another agreement for 0.3 acres made on 6.12.2006 for Kshs.150,000/=. However, the respondent told him to vacate the land in December, 2007. She did not vacate the land because of post-election violence on 16.4.2008. The appellant requested her to vacate but she asked for more and another agreement to vacate which they agreed that she vacates in October, 2008. PW2, Daudi Mugambi Winchira was sworn and stated that he knew both appellant and respondent and that they had a dispute over the land. He was called by the appellant to resolve the dispute. He met the appellant/respondent and one Maureen Kadogo whereby the respondent agreed to vacate the land in October, 2008.

DW1, the respondent herein stated that she had an agreement to sell the land to the plaintiff but the land was registered in her husband's name Laurence Materu. One point was costing Kshs.44,000/=. She sold 0.3 of an acre at Kshs.150,000/=. They have never taken out letters of administration. The whole parcel was 2.5 acres. She initially sold to the plaintiff 0.2 acres. The plaintiff now uses 0.2 points of an acre. She later sold him 0.3 points of an acre. Her children objected to the sale of the land. They sat down with the appellant and the chief. She was ordered to refund the appellant Kshs.100,000/= for 0.2 points of an acre. The appellant agreed to receive the Kshs.100,000/= and return 0.2 points of an acre. They took the Kshs.100,000/= to the acting chief for onward transmission to the appellant. The sale has never been sanctioned by the Land Control Board. She has never agreed to shift from the land, P. Exh.3. She does not know who wrote it. She did not sign P. Exh.3 and she was not there when P. Exh.3 was written which indicates that she was to vacate the land in October 2008. Her signature in P. Exh.2 is different from the one in P. Exh.3. P. Exh.4 is the chief's letter dated 7th of July, 2008 which ordered both the appellant and herself to stop cultivating on the suit property. PExh.4 is the chief's letter dated 7th of July 2008, which ordered both the appellant and respondent to stop cultivating on the suit property. P. Exh.5 shows the plaintiff agreed to receive Kshs.100,000/= and return to her 0.2 of an acre.

On cross-examination, she states that the parcel No. 135 is not registered in her name. The land belongs to her deceased husband. She sold it to the appellant. Lawrence Materu is her late husband. She has also sold the land to Samwel Isije, Aggrey Ndede, Levy Miheso Amiani, Jacob Masiza Mbihane, Flora Lihanda Kabonye, Eunice Kageha in 2003. She sold to the plaintiff 0.2 points of an acre. In 2006, she sold the remaining 0.3 points of an acre. Erick Muhatia Materu, Catherine Materu, who are her children objected to the sale. The children told the chief that they have an interest in the land since their father is buried on it. On 27.9.2008, she was to return the money through the Assistant chief (P.Exh.5). She took the money to the Assistant chief on 26.9.2008 for onward transmission to the plaintiff. The Assistant chief still has the money to date. She is illiterate. She signed P.Exh.2 and P.Exh.3 was not signed by her. She does not know who signed it.

DW2, Abdala Ibrahim Haweli states he lives in Tindinyo and he is a court process server. He knows the plaintiff and the defendant have a dispute land parcel No. L.R. 1763/3 and Parcel No. Nandi/Chepkumia/Chepkumia/135. The chief called her and told her to go to the defendant's home. The children of the defendant refused to allow DW1 to sell the land where their father was buried. He was told that o.5 of an acre was sold but the children of the defendant (DW1) said that they would refund Kshs.84,000/= for 0.2 of an acre. PW1 said he wanted Kshs.100,000/=.

DW1's children agreed to return the money within 2½ months. On 26.9.2008, he was called by the chief. They met with the chief, Catherine Materu, DW1, Esther Laibojk, Abigael Mbone. The plaintiff did not turn up to receive the money. The plaintiff said that he would not accept the Kshs.100,000/=. He

preferred the matter to go to court. He was once called by the Officer Commanding Station Kaimosi Police Station. The plaintiff and the defendant had a dispute. The land is occupied by the appellant however the respondent has not vacated the land.

The Honourable Magistrate after considering the evidence on record and submissions from counsel, found that there is no evidence on record that the respondent is the proprietor of the parcel of land in dispute. The evidence on record was that the children of the respondent refused to sanction the transaction as it involved the estate of their deceased father. He cited section 45(1) of the law that forbids intermeddling with the deceased's property. He found that the appellant and respondent were indeed intermeddling in the property of a deceased person.

The court went further to order that the appellant be given only 0.1 acres out of the land he bought vide PExh.2 and Kshs.100,000/= being the consideration for the 0.2 acres where the defendant has established a home where the late Lawrence Materu was buried. The respondent was to keep the 0.2 acres. The respondent was to pay the Kshs.100,000/= within 30 days, failure of which, execution was to follow.

The appellant now appeals on grounds that the learned Magistrate erred in law in delivering judgment in the absence of the appellant and or his counsel of which no or no proper notice had been given to the prejudice of the appellant. Moreover, the appellant states that the learned Magistrate erred when it found that the agreement produced as P5 varied P-1, the initial agreement. Lastly, that the learned Magistrate erred in law in ordering a refund and distributing the property. Furthermore, that the learned Magistrate erred in law in relying on extraneous matters not before him and that in finding that the respondent was not the owner of the property when there was no such evidence. The appellant states that the learned Magistrate erred in holding that the property belonged to the Estate of a deceased person thus, Lawrence Materu and yet the same was not pleaded or proved. Moreover, that the children of the deceased were heirs of the deceased when there was no succession cause. The appellant further states that the court erred in finding the deceased as the proprietor of the parcel of land measuring approximately 0.94 acres at Yala River farm being Plot No. 135 comprised in a longer title known as Tindiyo 173(3).

I do find that It is not pleaded who owns the longer title No. Tindinyo 173(3). It is alleged that the respondent sold part of the land and therefore, her portion was reduced to 0.3 acres which she later sold to the appellant and bought an alternative land in Musembe area in Turbo and where she has put up a home and therefore, the respondent has no proprietary rights in the property. The registered proprietor of land Tindiyo 173(3) ought to have enjoined in the suit to enable the court determine the dispute fairly.

I agree with the appellant that the court considered extraneous issues that were not pleaded and proved to reach his judgment. Such as the respondent's children objecting to the sale because the property belonged to a deceased persons and the respondent's children being heirs of the estate. Neither the appellant nor the respondent pleaded that the property belonged to a deceased person and no evidence was produced to demonstrate that the respondent owned the property. The learned Magistrate erred in considering that the children of the respondent who are not even mentioned by name were the heirs of the estate of the deceased as the court cannot establish whether he was the owner of the property in dispute as there are no letters of administration and certificates of confirmation.

However, the learned Magistrate rightly found that none of the exhibited proceedings describe the respondent as the proprietor of the parcel of land in question. There is no indication that the respondent held herself as the proprietor of the land in question.

It was the appellant's duty to demonstrate that the transaction was done with the law and that the respondent was the registered proprietor of the suit land. No title deed or certificate of title was produced by the appellant. No consent of the Land Control Board was produced by the appellant. No certificate of official search was produced by the respondent to demonstrate that the land was available and registered in the name of the appellant. It was the duty of the appellant to prove his case on a balance of probabilities, which he did not.

The issue raised by the appellant that judgment was read in the absence of the appellant does not go to the

merit of the appeal and therefore the same is not a proper ground for an appeal. Having found that the appellant did not demonstrate that the land was registered in the names of the respondent and that the consent of the Land Control Board was obtained, this appeal must fail. Since the appellant has succeeded on the other grounds, I do order that each party to pay his own costs.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE