REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELCA NO.239 OF 2013

ACUMEN PROPERTIES (K) LTD.....APPELLANT

VERSUS

THE CHAIRPERSON (SUED ON

BEHALF OF MWERERE WOMEN GROUP).....RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of Hon. S.O. Temu SRM in Kajiado PMCC No. 93 of 2011(hereinafter referred to as "the lower court"). The appellant had instituted a suit in the lower court against the respondent seeking among others, a permanent injunction and general damages for trespass. The appellant had claimed that the respondent had trespassed on its parcel of land known as Plot No. 507/Business-Ole Kasasi Trading Centre (hereinafter "Plot No. 507"). In its plaint dated 14th June 2011 which was filed in the lower court, the appellant alleged that it purchased Plot No. 507 on 10th June 2009, from one, Elizabeth Wainaina Njeri who was the legal administrator of the estate of Zachariah Wainaina Njoroge (hereinafter "the deceased" where the context so admits)at a consideration of Kshs.550,000/=. The appellant averred that it paid the entire purchase price for the said property and took possession thereof. The appellant averred that on 2ndJune 2011 while it was undertaking construction on the said parcel of land the defendant trespassed on the property and caused extensive damage.

The respondent filed a defence and counterclaim on 3rd August 2011.The respondent denied that it had trespassed on Plot No. 507 owned by the appellant and caused damage thereon. The respondent averred that it owned Plot No. 470/Residential-Ole Kasasi Trading Center (hereinafter "Plot No. 470") which was allocated to it by Olkejuado County Council on 28th June 1994. The respondent stated that it had occupied and used Plot No. 470 from the time the same was allocated to it until the year 2009 when the appellant without any lawful justification trespassed on the said parcel of land and placed building stones thereon on allegation that the same had been sold to it. In its counter-claim against the appellant, the respondent sought, a permanent injunction restraining the appellant from trespassing on Plot No. 470, an order for the appellant to remove the structures and properties it had placed on the said parcel of land and general damages for trespass.

The lower court heard the appellant's claim and the respondent's counter-claim and entered judgment for the respondent against the appellant on 16th October 2012.It is against the said judgment that this appeal was preferred by the appellant. The appellant challenged the judgment of the lower court on the following grounds which are set out in the Memorandum of Appeal dated 1st November 2012;

*1. THAT the Learned Magistrate erred in law and fact in holding that both parties were referring to the same piece of land while they had distinctly laid out their claims as against different plots, namely **PLOT NO. 507/BUSINESS-OLE KASASI** by the Plaintiff and **PLOT No. 470** Residential Ole Kasasi by the Defendant.*

2. THAT the Learned Magistrate erred in law and fact by subjecting the Plaintiff's case to standards of proof beyond the ordinary standards of proof on a balance of probabilities.

3. THAT the Learned Magistrate erred in law and fact by holding that the Plaintiff had no proprietary right over plot No. 507/Business-Ole Kasasi trading centre situate at Ongata Rongai, the subject matter herein yet the allotting authority, County council of Olkejuado had by itself confirmed that the Plaintiff was the bonafide owner of the subject plot and in occupation of the same.

4. THAT the Learned Magistrate erred in law and fact by holding that the Plaintiff herein did not obtain ownership over plot No. 507/Business-Ole Kasasi from the previous owner yet that issue never fell for determination as the Plaintiff's acquisition and ownership was not disputed by the Defendant or at all.

5. THAT the Learned Magistrate erred in law and fact by considering extraneous issues that were not for determination before him.

6. THAT the Learned Magistrate erred in law and fact by dismissing the Plaintiff's evidence and documents from Olkejuado County Council and subjecting the same to higher standards of proof than required by law.

7. THAT the Learned Magistrate erred in law and fact by holding that there was no evidence that the ownership row had been determined by the council and proceeded to dismiss the communication from the council when indeed the Defendants had been summoned and failed to appear on several occasions.

8. THAT the Learned Magistrate erred in law and fact by holding that the pendency of the dispute in essence meant that the Defendants were rightful owners of the Plaintiff's plot.

*9. THAT the Learned Magistrate erred in law and fact by declaring that **PLOT NO. 507/BUSINESS-OLEKASASI** and plot No. 470 Residential OleKasasi are one and the same and they belong to the Defendant against the weight of evidence which clearly confirmed that the two plots are different and that the defendants were to be shown by the allotting authority, the physical location of their plot which was different from the site possessed and owned by the Plaintiff.*

10. THAT the Learned Magistrate erred in fact and law by invoking superfluous and unavailable principles of law in favour of the defendant when such principles did not apply as the plots in question herein are different.

11. THAT the Learned Magistrate erred in fact and law by ignoring the unambiguous evidence by the Defendant that indeed they were allocated the said plot by Hon. George Saitoti (deceased) when the said minister had no powers to allocate land thus rendering the defendant's evidence contradictory and unreliable.

12. THAT the Learned Magistrate erred in fact and law by ignoring to determine the issues in contention and instead framed his own issues and made arbitrary findings which were not sought by either party and unhinged on any law.

13. THAT the Learned Magistrate erred in fact and law by holding that both parties were paying rates on the same plot and same site yet the documents speak for themselves that the parties documents related to different plots in description and location.

14. THAT the Learned Magistrate erred in fact and law by failing to rule on the fact that the Defendant had stated that they did not know when they were allocated the said land by the Minister nor could they tell when they took occupation of the same, a fact that clearly showed the glaring contradictions in the Defendant's case.

15. THAT the Learned Magistrate erred in fact and law by ratifying the Defendants' documents while rejecting and declaring the Plaintiff's documents inadmissible thus demonstrating open bias and prejudice against the Plaintiff as the Plaintiff's documents had been admitted in evidence during the hearing in the presence of the Defendant without objection.

16. THAT the Learned Magistrate erred in law and fact in failing to appreciate the fundamental doctrines of equity, admission of documentary evidence and standards of proof in civil cases.

17. THAT the Learned Magistrate erred in law by not taking into consideration the evidence of the Plaintiff and thereby deriving erroneous findings on both law and fact.

18. THAT the Learned Magistrate erred in law by openly exhibiting partiality in favour of the defendant and enthusiastically attacking the the Plaintiff's case throughout his entire judgment and which attack was not supported by the defendant as no submissions were filed to that effect.

19. THAT the Learned Magistrate erred in law and fact by failing to analyze the submissions of the Plaintiff and addressing the issues raised together with the evidence tendered hereby misleading himself on the findings derived therein.

20. THAT the Learned Magistrate's judgment and decree is contrary to the weight of evidence tenderedand applicable legal principles.

21. THAT the Learned Magistrate's exercise of discretion was so injudicious and wrong such as to occasion grave injustices to the appellant, bring law into disrepute and invite anarchy and law of the jungle into commercial transaction and disputes.

22. THAT the Learned Magistrate erred in law and fact in failing to hold that a Self Help Group in the nature of the Defendant lacks legal capacity to acquire, own and or possess proprietary rights such as in land.

The appeal was argued orally before me on 19th January 2017 when Mr. Milimo appeared for the appellant while Ms. Jane Wanjiku Kanini, the Chairlady of the respondent appeared in person on behalf of the respondent. Mr. Milimo argued all the twenty two grounds of appeal together. He submitted as follows. Plot No. 507 was initially owned by Zacharia W. Njoroge (deceased) who died on 22nd December 2008. The deceased's wife Elizabeth Wainaina took out grant of letters of administration and sold Plot No. 507 to the appellant on 10th June 2009 at a consideration of Kshs 550,000/-. Plot No. 507 was transferred to the appellant on 6thSeptember 2010in vacant possession with the consent of OlKejuado County Council. The agreement for sale between the appellant and the deceased's wife, Elizabeth Wainaina was not challenged before the lower court. After purchasing the said property, the appellant started paying land rates to OlKejuado County Council. The appellant thereafter commenced construction on the said parcel of land on 2nd June 2011 when the respondent descended on the said plot and destroyed the structures the appellant had put up thereon.

Mr. Milimo submitted that, in its defence and counterclaim, the respondent did not plead that there was double allocation of one parcel of land by OlKejuado County Council to the appellant and the respondent or that Plot No. 507 and Plot No. 470 were one and the same. He submitted that the respondent had contended in the lower court that the two plots were distinct and separate. He submitted that since the parties were in agreement as to the status of their respective plots, what the lower court was supposed to establish was the location of the disputed parcel of land on the ground and its ownership based on the description which had been given to the same by the appellant and the respondent.

The appellant's advocate submitted that the appellant had produced before the lower court documents in support of its claim over the suit property which included a map from OlKejuado County Council showing the physical location of Plot No. 507, a letter dated 25th June 2008 from OlKejuado County Council confirming its ownership of Plot No. 507 as well as a letter dated 27th October 2010 from OlKejuado County Council warning the respondent not to encroach on Plot No. 507. He submitted that in support of its claim, the respondent had produced an allotment letter for Plot No. 470 and alleged rent payment receipts. He submitted that those who were allocated plots by the County Council paid rates and not land rent which was normally paid to the Ministry of Lands. He submitted that the respondent did not produce any documentary evidence to prove that the disputed parcel of land was Plot No. 470 and that it belonged to the respondent.

Mr. Milimo contended that the lower court's finding that both parties were paying rent to OlKejuado County Council was erroneous since the appellant was paying land rates and not rent. He submitted that the lower court also erred in its finding that the payments were in respect of the same parcel of land on the ground but with different land reference numbers because the parties had made it clear that their respective plots were different. He submitted that the only evidence presented to the lower court which touched on the location of the disputed parcel of land was in respect of Plot No. 507. He submitted that the court's finding was contrary to the evidence given by Olkejuado County Council which had allocated Plot No. 507 and Plot No. 470 to the parties which was to the effect that the two plots were different. Mr. Milimo referred the court to a survey report dated 12th November 2014 by the County Government of Kajiado which was presented to the court after the filing of this appeal and submitted that the surveyor who prepared the report had identified the disputed parcel of land as Plot No. 507 which belonged to the appellant. He submitted that it was also clear from the map which was attached to the said report that Plot No. 507 which was being claimed by the respondent was nonexistent.

The appellant's advocate submitted further that the trial court had misinterpreted the letter from OlKejuado County Council which was to the effect that there was a dispute over the plot which was being claimed by the appellant and the respondent. He submitted that the lower court erred in attacking the sale agreement between the appellant and Elizabeth Wainaina since the same was not in issue before the court. He submitted further that the lower court did not admit the documentary evidence that was presented to it by the appellant which was not controverted. Mr. Milimo submitted that in applying the first in time registration principle, the court relied on documents it had casted doubts on. He submitted that the court had relied on a letter of allotment issued to the respondent which had been produced without the maker thereof being called to give evidence. He submitted that since both parties had produced documents from Olkejuado County Council which was the authority responsible for land allocation, the court's decision was without basis. He contended that the lower court converted itself to land allocating authority.

In her submissions in response to the appellant's submissions, Jane Wanjiku Kanini, the respondent's chairlady submitted that the members of the respondent began cultivating the disputed parcel of land during the colonial period and that the property was subsequently given to them by the late George Saitoti. She submitted that the appellant later attempted to grab the property. She submitted that the respondent had been paying rent for the suit property for several years and that their letter of allotment of the suit property and receipts for the rent they had paid for the property had been produced. She submitted that Zacharia Njoroge and Elizabeth Wainaina from whom the appellant allegedly purchased the property were unknown to them.

I have perused the proceedings of the lower court and the judgment of that court which is the subject of this appeal. I have also considered the appellant's grounds of appeal and the submissions which were made before me by the parties. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of Verani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269on the duty of the first appellate court.

An appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court

acted on wrong principles in reaching its conclusion. See,Peter vs. Sunday Post Ltd. [1958] E.A 424 and Makube vs. Nyamuro[1983] KLR 403.

As I have mentioned earlier, the appellant challenged the decision of the lower court on twenty two grounds which I have set out above. In my view, the appellant's grounds of appeal can be summarized into two grounds namely:-

1. That the lower court erred in its finding that the appellant had not proved its case against the respondent.

2. That the lower court erred in its finding that the respondent had proved its counter-claim against the appellant.

After reviewing the evidence on record, I find no merit on the first ground of appeal. I am in agreement with the lower court's finding that Plot No. 507 and Plot No. 470 wasone and the same parcel of land on the ground. It follows therefore that the dispute between the appellant and the respondent was over one parcel of land with two different land reference numbers. The onus was upon the appellant to prove that the parcel of land in dispute which it referred to as Plot No. 507 and which the respondent referred to as Plot No. 470was owned by it and that the respondent was a trespasser thereon. I have considered the evidence which the appellant placed before the lower court in proof of its ownership of the disputed parcel of land. The appellant had contended that it purchased the disputed parcel of land (hereinafter referred to as "the suit property") from one, Elizabeth Wainaina Njeri who was the administrator of the estate of Zacharia Wainaina Njoroge (deceased). The appellant had contended that the suit property was owned by Zacharia Wainaina Njoroge (deceased) before the same was sold and transferred to it by her widow and legal administrator, Elizabeth Wainaina Njeri. As was rightly observed by the lower court, the appellant placed no evidence before the court showing how the deceased acquired the suit property. Apart from correspondence from Olkejuado County Council and the appellant's advocates, no evidence was placed before the court to show when and how the deceased acquired the suit property. There was no evidence that the suit property was allocated to the deceased. The court was left to wonder on what basis the appellant had acquired the suit property from Elizabeth Wainaina Njeri. Olkejuado County Council which the appellant referred to in its submissions as the allocation authority whose word on the issue of ownership of the suit property the lower court should have taken as final placed no evidence before the court on how the suit property came to be owned by the deceased. No letter of allotment was placed before the court. There was also no evidence that the deceased had been paying land rates or rent to Olkejuado County Council for the suit property before the property was sold to the appellant. There was completely no evidence before the court showing that the deceased had acquired the suit property from Olkejuado County Council.

In the case of George Mbiti Kiebia & Another vs. Isaya Theuri M'lintari & Another (2014) eKLR the Court of Appeal stated that;

> *"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M'Kiebia."*

In the same case the court stated further as follows;

> *"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title which is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted in the register."*

The root of the appellant's interest in the suit property is unknown. As I have mentioned above, there is no evidence of how Zacharia Wainaina (deceased) acquired the suit property. From the evidence on record, the appellant was aware that there was a dispute over the ownership of the suit property between the respondent and the deceased. In the circumstances, the appellant had a duty which it failed to discharge of showing the court that the deceased had a good title to the suit property which the deceased's administrator passed to it. For the foregoing reasons, I am unable to fault the lower court in its finding that the evidence that was placed before it by the appellant fell short of proving the appellant's case to the required standard.

On the second ground of appeal, I am once again in agreement with the finding by the lower court that the respondent had proved its counter claim against the appellant. As I have stated above, Plot No. 507 and Plot No. 470 was one and the same parcel of land on the ground (the suit property).The appellant and the respondent both claimed to have acquired the suit property at different times. I cannot fault the lower court for determining the dispute over the ownership of the suit property on the basis of who acquired the same first. The respondent placed adequate evidence before the lower court showing that the suit property which the appellant and Olkejuado County Council referred to as Plot No. 507 was allocated to it by Olkejuado County Council on 28th June 1994 as Plot No. 470 and that it had occupied the same prior to the purported sale of the same by the deceased's legal administrator to the appellant in 2009. The respondent placed evidence before the court showing that it paid for the allotment of the suit property on 18th September 1995 and continued paying annual rent for the same between 1995 and 2010. The letter dated 25th June 2008 which was produced by the appellant in the lower court as exhibit P. 7 supported the respondent's contention that it was in occupation of the suit property before the same was sold to the appellant. There was sufficient evidence before the court showing that the respondent acquired the suit property prior to the purported sale of the same to the appellant. In the case of Gitwany Investment Limited vs.Tajmal Limited & 2 others, NRB HCCC 1114 of 2002 (2006) eKLR, the court stated as follows:-

> *"My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported):- is the "grant [that] takes priority. The land is alienated already." This decision was again upheld in Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail."*

Contrary to the contention by the appellant that Plot No. 507 and Plot No. 470 were separate and distinct parcels of land, no evidence was placed before the lower court to that effect. The correspondence from Olkejuado County Council that was produced in evidence in the lower court did not indicate the physical location of Plot No. 470. Even the report that was submitted to this court by the Surveyor from the County Government of Kajiado after the filing of this appeal did not point out the physical location of Plot No. 470. I am of the view that if at all, Plot No. 470 existed separately from Plot No. 507, nothing would have been easier for the appellant and Olkejuado County Council than to point out the location of the said parcel of land. I am satisfied that the respondent proved its ownership of Plot No. 470 and the fact that the appellant had trespassed on the same. The respondent was in the circumstances entitled to the reliefs which were granted in its favour by the lower court.

In the final analysis and for the foregoing reasons, I find no merit in the appeal before me. The same is accordingly dismissed with costs to the respondent.

Delivered and Signed at Nairobi this 21st day of July 2017

S. OKONG'O

JUDGE

Judgement read in open court in presence of:

Mr. Mureithi holding brief for Milimo for the Appellant

Jane Wanjiku in person for the Respondent

Catherine Court Assistant