



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCA NO. 59 OF 2015

(FORMERLY HIGH COURT CIVIL APPEAL NO.251 OF 2009)

1. NJANE KIBIRU

2. PENINAH WANJIRU.....APPELLANTS

VERSUS

JOSEPH KIMANI GIKONYO.....RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of Hon. H. Nyakweba R.M made in Kiambu CMCC No. 384 of 1993 (hereinafter referred to as “the lower court”). The respondent had instituted a suit in the lower court against the appellants seeking, general damages, special damages, a declaration that the respondent is the owner of Plot No.B3/49(hereinafter referred to as “the suit property” and a perpetual injunction restraining the appellants from interfering with his quiet enjoyment of the suit property. In his plaint dated 26th April 1993, the respondent averred that he was the owner of the suit property by virtue of 100 shares that he purchased from a company known as Githunguri Constituency Ranching Company Limited. The respondent averred that the appellants had without any valid reason laid a claim over the suit property and had between 1992 and 1993 uprooted the fencing poles and destroyed the wires he had used to fence the property.

The appellants filed a defence and counter-claim dated 28th June 1993. The appellants denied that the respondent was the owner of the suit property. The appellants averred that the respondent’s act of fencing the suit property was unlawful. The appellants averred that the 2nd appellant was the owner of the suit property. The appellants averred that the suit property was allocated to the 2nd appellant through a process of balloting and survey that was conducted openly. By way of a counter-claim, the appellants sought a declaration that the 2nd appellant was the lawful owner of the suit property.

The lower court heard the respondent’s claim and the appellants’ counter-claim and delivered a judgment on 17th September 2008. The lower court found the respondent’s case proved and entered judgment for the respondent as he had prayed for in the plaint. The court found the appellants’ counter-claim not proved and dismissed the same with no order as to costs. In the judgment, the lower court found that the suit property was initially owned by Githunguri Constituency Ranching Company Limited from which both parties claimed to have purchased shares which entitled them to the suit property. The court held that in the face of rival claims to the suit property, the determining factor when considering the ownership of the property was the documentation from Githunguri Constituency Ranching Company Limited regarding the type of shares which were held by the parties in the said company and what the said shares entitled them to. The court found that the user of the suit property was residential. The court found that the share

certificate that was issued to the respondent entitled him to a residential plot while the 2nd appellant's share certificate did not entitle her to such a plot. The court held that although the appellant's witness, Rebecca Waringa Njoroge who was a former director of Githunguri Constituency Ranching Company Limited claimed that according to the register of Githunguri Constituency Ranching Company Limited, the 2nd appellant was entitled to a residential plot, the claim could not be verified because the witness did not produce a copy of the said register in evidence. The court also found the letter dated 12th February 1993(Dexh.8) which had been written by the surveyor of Githunguri Constituency Ranching Company Limited confirming that the 2nd appellant was the owner of the suit property unreliable because the letter was qualified and the same surveyor had written an earlier letter dated 31st December 1992(P.exh.11) confirming that the suit property belonged to the respondent. The lower court was satisfied on the material before it that the respondent's case had been proved on a balance of probabilities.

On the appellants' counter-claim, the court held that although no defence was filed in response thereto, the appellants had a duty to prove the same. Due to the appellants' failure to prove that the 2nd appellant was entitled to a residential plot, the lower court held that the appellants' counter-claim had no basis. In the judgment, the lower court noted that although both parties had referred to the suit property in their pleadings as B3/49, the said land reference had been changed by Githunguri Constituency Ranching Company Limited to H 105. The court was of the view that since Plot No. B3/49 no longer existed it would have been futile to issue orders in respect thereof. To bring finality to the dispute between the parties, the court invoked the provisions of section 100 of the Civil Procedure Act and amended both the plaint and the counter-claim by striking out the word B3/49 and replacing it with the correct plot number, H105. It is against this judgment of the lower court that this appeal was preferred by the appellants. The appellants challenged the judgment of the lower court on the following grounds which are set out in the Memorandum of Appeal dated 18th May 2009:

1. *THAT the Learned Magistrate erred in law in his finding that the respondent had proved his claim against the appellants on a balance of probabilities which was not the case.*
2. *THAT the Learned Magistrate erred in law and fact in disregarding the evidence that was tendered by the appellants in support of their case particularly the evidence of DW 2, Rebecca Waringa Njoroge resulting in him making a wrong judgment.*
3. *THAT the Learned Magistrate erred in law and fact in admitting in evidence the Sale Agreement dated 9th July 1992 while the same was not a valid agreement in law.*
4. *THAT there was no evidence to support the Learned Magistrate's finding that the respondent was entitled to Plot No. H 105.*
5. *THAT the Learned Magistrate erred in law and fact in dismissing the appellants' counter-claim which was not defended.*

The appeal was argued by way of written submissions. Both parties filed submissions and the same are on record. I have perused the proceedings of the lower court and the judgement of that court which is the subject of this appeal. I have also considered the appellants' grounds of appeal and the submissions by the parties' respective advocates. 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. The court must however 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 269 and Selle vs. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

It is now well settled that 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. The appellants' appeal is on both fact and law.

As I have mentioned earlier, the appellant challenged the decision of the lower court on five grounds. In their submissions, the appellants argued all the grounds of appeal together without following any particular order. I will consider the said grounds of appeal in the same manner. The first ground of appeal argued by the appellants was that the lower court erred in admitting in evidence and relying on the agreement dated 9th July 1992(P.exh. 1A & B) which was null and void for non-compliance with section 3(3) of the Law of Contract Act. I find no merit in this ground of appeal. First, as correctly submitted by the respondent, the agreement dated 9th July 1992 was for the sale of shares in Githunguri Constituency Ranching Company Limited. It was not an agreement for the sale of an interest in land within the meaning of section 3(3) of the Law of Contract Act. Secondly, the agreement in my view met the requirements of the said Act. The agreement was in writing, signed by both parties and witnessed. The next ground of appeal was that the lower court overlooked the evidence that was tendered by the appellants and their witnesses. I am of the view that the appellants are not fair to the lower court which in my assessment did extremely well in its analysis of the evidence that was tendered by both parties before making findings on the issues which arose and finally the conclusion. The evidence of DW2 was considered by the court and the court clearly stated the reason why it did not attach any weight to that evidence. This witness referred to some information in a register which was not produced before the court. Furthermore, the said register was not in the custody of the witness. I am unable to fault the decision of the lower court to reject the evidence of this witness. With regard to the letter dated 12th February 1993(D.exh.8) from G. Magondu who was the surveyor for Githunguri Constituency Ranching Company Limited, the same was countered by a letter dated 31st December 1992(P.exh.11) which the same surveyor had written confirming that the suit property belonged to the respondent. The surveyor was not called by either party to shed light on these contradictory letters. Faced with the conflicting evidence, I cannot fault the court for giving more weight to the letter dated 31st December 1992. The court explained why it did so. The letter dated 31st December 1992 was first in time and was unequivocal whereas the appellants' letter dated 12th February 1993(D.exh.8) which came later was conditional. The appellant's other ground of appeal concerned the decision of the court to amend the pleadings by striking out Plot No. B3/49 and replacing it with Plot No. H.105. I have found no merit in this ground of appeal. As much as I agree with the appellants' argument that parties are bound by their pleadings, the court was entitled in the circumstances to make an order for the amendment of pleadings. I am satisfied that the court exercised its power under section 100 of the Civil Procedure Act properly to correct errors in the pleadings of both parties. The appellants have not convinced this court that the said amendment led to a miscarriage of justice.

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

Delivered and Signed at Nairobi this 29th day of September 2017

S. OKONG'O

JUDGE

Judgement read in open court in presence of:

Mr. Chege for the Appellants

Mr. Ngugi for the Respondent

Kajuju Court Assistant