



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT**

**AT MERU**

**CIVIL APPEAL NO. 37 OF 2011**

**DORIS KAMAMI.....APPELLANT**

**VERSUS**

**PETER KIMANI M'NDAKA.....1ST RESPONDENT**

**WILLIAM KALINGE M'MUKIRA.....2ND RESPONDENT**

**(Appeal from Judgment of Hon. J.N.Nyaga Senior Principal Magistrate**

**in PMCC No. 77 of 2005 (Maua) Delivered ON 17:03:2011)**

**JUDGMENT**

**Introduction**

This appeal arises from the decision of learned Senior Principle Magistrate Hon. J.N. Nyaga (as he then was in SPMCC No. 77 of 2005 (Maua). In that case, the first Respondent had filed a case against the appellant and two others seeking specific orders as against the appellant and the other two separately.

The appellant who was the first defendant in the subordinate courts case failed to enter appearance or file defence wherefore the 1<sup>st</sup> Respondent who was the Plaintiff made a request for interlocutory judgment in default of appearance and defence which request was allowed. The suit then proceeded to hearing as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and on 17/03/2011 the court rendered its judgment.

In favour of the plaintiff as prayed in the plaint and dismissed the counterclaim by 2<sup>nd</sup> defendantThe Learned Magistrate also decided that the 2<sup>nd</sup> defendant who is the appellant in this case do vacate the suit land within 14 days failing which eviction to issue. The learned magistrate further directed the Land Adjudication officer to register the land in favour of the plaintiff. It was further ordered that the costs of the suit be borne by the 2<sup>nd</sup> and third Defendants.

Being dissatisfied with the finding of the court the 1<sup>st</sup> and, 2<sup>nd</sup> respondents exercised their right of appeal to this court on the following grounds of appeal:-

- (1) The learned trial magistrate erred in law in dismissing the 1<sup>st</sup> defendants counterclaim despite making a finding that the suit land was registered in the name of the 1<sup>st</sup> defendant to hold it in trust for the appellant and her three children.

- (2) The learned trial magistrate erred in fact in failing to find that at the time of the sale of the suit land the 1<sup>st</sup> defendant had not discharged the trust.
- (3) The learned trial magistrate erred in law in failing to find that the land Adjudication officer had lawfully canceled the transfer of the suit land to the respondent by the 1<sup>st</sup> defendant.
- (4) The learned magistrate erred in law in finding that the sale of the suit land was legal even after he had rightly made a finding that it was unconscionable for the 1<sup>st</sup> defendant to sell the family land to the Respondent.
- (5) The judgment of the learned magistrate is not supported by his findings of fact and law thereon.
- (6) The learned magistrate erred in law in failing to find that the sale of the family land to the appellant by the 1<sup>st</sup> defendant secretly and without the consent of the appellant amounted to fraud.
- (7) The learned Magistrate erred in granting orders which were not prayed for in the plaint.
- (8) The learned magistrate's judgment was against the weight of the evidence before him.

In order to understand fully this appeal, it is important to appreciate the facts adduced by the witnesses before the trial court. First, the subject of the suit was land parcel number 5416 situated in Athiru Gaiti Adjudication Section. At the time of the alleged sale, the suit property just like many other parcels of land within that Section were still undergoing adjudication process and the land adjudication and settlement officer was yet to issue a notice of completion of the adjudication register for any aggrieved party to exercise their right of objection to such a record.

#### **Pleadings and Facts, giving rise to the plaintiff's 1<sup>st</sup> Respondents Action in the Lower Court.**

The plaintiff PETER KIMANI M'NDAKA who is the first Respondent in this appeal had filed Civil Case No. 77 of 2005 (Maua) in which he was seeking an order of specific performance against William Kalunge M'mukiri (1<sup>st</sup> defendant) directing him to re-transfer to the plaintiff LR. 5416 Upper Athiru Gaiti Adjudication Section. The plaintiff was seeking an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cease trespassing into the suit land to pluck the plaintiff Miraa or to threaten him with death. The plaintiff alone testified and closed his case. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants testified and called one witness in support of their counterclaim.

Both parties produced documents in support of their case. The testimony of the parties and their witness together with evidentially documents form fact of the record of appeal. The learned trial magistrate in this judgment noted the same. It is now well settled that Appeal concerns itself with the merits of a decision. When a matter goes on Appeal the major consideration that will govern the appellate court on whether to confirm or to disturb a decision is whether the decision in question is right or wrong on the basis of the facts and the applicable law.

It is also important to note that before disturbing a decision made by a trial court, the appellant court must exercise abundance of caution bearing in mind that the trial court enjoyed a bigger advantage having seen and heard the witnesses and stood in a better position to assess the significance of what was said and the demeanor of such witnesses. In HAHN VS. SJNGH {1985} KLR at page 716, the court held as follows: -

***“1. Before the appellate court could come to a different conclusion from that reached by the High Court Judge, it had to be satisfied that the advantage enjoyed by the judge of seeing and hearing the witnesses was not sufficient to explain or justify his conclusion.....”***

In this analysis and findings made on 17<sup>th</sup> March 2011 the trial magistrate stated as follows

***“Though the plaintiffs advocate made some submissions he did not quote any authority on the issue. The defendants advocate did not make any submissions. I am however guided by the case of Esther Nthira M’ikiugu and two others -Vs- M’ikiugu M’Mwirigania & Another – Meru High Court CC. No. 44 of 2005 where in a similar case where the wife had sued the husband for seeking the family shamba without her consent, Justice Ouko held that it was incumbent upon the 1<sup>st</sup> defendant the husband,***

***in my view of his Judiciary relationship with the plaintiff that he sought concurrence before committing to exchange the land..... the registration of the 2<sup>nd</sup> defendant (buyer) as the proprietor of the suit land when there was objection from the rest of the persons who had interest on the land amounted to fraud.”***

***“..... I do find that the sale of the land by the 1<sup>st</sup> defendant was a breach of trust to the 2<sup>nd</sup> defendant. What then is the remedy to the 2<sup>nd</sup> defendant?***

Though it was unconscionable for the 1<sup>st</sup> defendant to sell the 1<sup>st</sup> defendant to sell the family land. I do not think that the sale was illegal. The 1<sup>st</sup> defendant was the recorded owner of the land. I do not find any fraud on the part of the plaintiff. If the 2<sup>nd</sup> defendant wanted back the land she should have redeemed it from the plaintiff.

I hereby come to the conclusion that the plaintiff lawfully bought the land. The 2<sup>nd</sup> defendant can sue her husband for breach of trust....”

from the evidence adduced by the plaintiff he bought the land from William Kalunge M’Mukiri (1<sup>st</sup> defendant) on 4/2/2004 at a price of Ksh. 150,000/=. He however confirmed that both the appellant and David are currently in possession and using the suit land.

The plaintiff also testified that the land was registered in favour of the seller William Kalunge M’Mukiri and that after he purchased the land it was transferred to him before it was deleted and reverted to William Kalunge. The plaintiff did not give satisfactory explanation why a parcel of land which had been transferred into his name could subsequently be deleted and revert to the seller.

The plaintiff did not also produce evidence that necessitated the transfer of the land in his favour such as the transfer forms and consent from the relevant Land Board. Those are crucial ingredients necessary for the transfer of land from one party to another.

The trial magistrate in his wisdom cited a case from superior court decided by Hon. Justice Ouko (As then was) which required concurrence by a party having judiciary relationship with another party before taking steps that are likely to affect the interest in such a property. Without distinguishing that decision the learned magistrate went ahead and made a decision contrary to such a sound precedent by a superior court. It was incumbent upon the learned magistrate to give satisfactory explanation why he could not be bound by a decision of higher court on similar issues of law.

I also note from the judgment of the learned magistrate the following:-

***“i do find that the sale of the said land by the 1<sup>st</sup> defendant was a breach of trust to the 2<sup>nd</sup> defendant”***

If indeed the learned trial magistrate found that the 1<sup>st</sup> defendant was in breach of trust owed to the second defendant, then this duly was to declare anything validating such breach as illegal, null and void that includes the sale agreement.

The trial magistrate's evaluation and analysis of the evidence presented before him was plainly wrong.

I therefore find merit in the appeal and do hereby allow the same as prayed with costs.

**SIGNED AT GARISSA ELC COURT BY JUDGE E. C. CHERONO (MR)**

**DATED AND DELIVERED AT MERU ELC COURT THIS 7<sup>TH</sup> DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-**

H. Gitonga for Appellant present

Muriuki K. H/B for Ondieki for Respondent present

**HON. L. N. MBUGUA**

**ELC JUDGE**