REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 21 OF 2015

MICHAEL MURAYA KIRARA…….....……APPELLANT

VERSUS

THE COUNTY COMMISSIONER MURANG'A COUNTY….....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL….....….2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 5TH DECEMBER, 2014 BY HON. B. OCHIENG – Ag. C.M AT MURANG'A CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 371 OF 2013)

JUDGMENT

Litigation, it has been re-stated several times, belongs to the parties in the dispute and not to the Court. The Court's role is confined to performing the duty of an impartial arbiter. It does not have an inquisitorial function in an adversarial system. That is why a Court should not descend into the arena of litigation.

That hallowed principle appears to have been thrown out of the window by the trial Court in the dispute subject of this appeal. The result, as will become clear in this judgment, was that the trial magistrate fell into serious error.

First, however, the facts of the dispute leading to this appeal.

MICHAEL MURAYA KIRARA the appellant herein was the plaintiff in **MURANGA CHIEF MAGISTRATE'S CIVIL CASE NO. 371 of 2013** in which he had sought judgment against the respondent as defendants in the following terms:-

a. ***A permanent injunction barring the 1st defendant either through her, her successors in office, agents, servants or anybody or authority howsoever through her from interfering howsoever with the plaintiff's quite enjoyment and occupation of land parcel No. MURANGA MUNICIPALITY/BLOCK 3/364.***
b. ***Costs of the suit and interest.***
c. ***Any other relief the Honourable Court may deem fit to grant.***

The basis of the appellant's suit in the subordinate Court was that whereas he was the holder of a certificate of lease in respect of land parcel No. MURANGA MUNICIPALITY/BLOCK 3/564 (the suit land) having bought it at a consideration of Ksh. 200,000 sometime in the year 2002 and has diligently remitted the statutory amounts appurtenant thereto, the 1st respondent has stopped him from developing it

even after the building plans were approved by the relevant authorities. It was the appellant's case in the lower Court that the 1st respondent has no authority to stop him from developing the suit land which was lawfully acquired. Further, that the 1st respondent's assertion that the certificate of lease was fake was mis-placed since there was only a typographical error which was rectified after the appellant paid the requisite fees.

By a joint statement of defence dated 18th February 2014, the respondent averred that the suit land belongs to the Government of Kenya and denied in toto the appellant's claim to ownership thereof adding that the suit was misconceived, misdirected and should be struck out with costs. After several interlocutory applications had been canvassed in the suit, the hearing was fixed for 12th May 2014 before B. Ochieng Ag. Chief Magistrate.

On 12th May 2014 when the suit came up for hearing, there was no appearance by representatives of the respondents or their counsel although the date had been taken by consent. The trial magistrate proceeded to hear the only witness who was the appellant and who produced the certificate of lease of the suit land (Exhibit 3) and other documentary evidence in support of his claim. And in a reserved judgment delivered on 5th December 2014 and which is the subject of this appeal, proceeded to dismiss the appellant's suit with costs.

That judgment provoked this appeal in which the following grounds have been raised:-

1. ***The learned magistrate erred in law and fact in dismissing the appellant's case without paying regard that his evidence was un-corroborated.***

2. ***The learned magistrate erred in law and fact in not appreciating the production of certificate of lease was prima facie evidence of ownership of the suit property.***

3. ***The learned magistrate erred in law and fact in holding that the appellant had a duty to call as a witness the person from whom he had purchased the suit property without paying regard to the fact that his title had not been revoked.***

4. ***The learned magistrate erred in law and fact in holding that the appellant had a duty to produce the agreement for sale when the same was not warranted in the circumstances of the case.***

The appellant therefore prays that the judgment of the lower Court be over-turned and this Court do enter judgment for the appellant as prayed in his suit plus costs.

When the appeal came up before me for directions on 2nd November 2015, there was no appearance by the Hon. Attorney General for the respondent. This Court directed that the Hon. Attorney General be served with the appellant's submissions which was done and on 25th January 2016 Ms Masika counsel for the Respondents asked for two weeks to file submissions. However, by 16th March 2016 when the appeal came up for mention there were no submissions filed by the respondents and neither did their counsel appear. This Court therefore fixed the judgment date for 6th May 2016. I have therefore not had the benefit of submissions by the respondents in drafting this judgment.

I have considered the grounds of appeal, the record in the subordinate Court and the submissions by Mr. Mwaniki counsel for the appellant.

As this is the first appeal, this Court will be guided by the principles enunciated in the case of ***SELLE VS ASSOCIATED MOTOR BOAT CO. (1968) E.A 123*** that I must reconsider the evidence, evaluate it and draw my own conclusion though bearing in mind that this Court neither saw nor heard the witnesses. However, this Court is not bound necessarily to follow the findings of the trial Court if it is shown that either it failed on some point to take account of particular circumstances or in its appreciation of the evidence generally.

I shall consider grounds 1 and 2 of the appeal together which question the trial magistrate's decision in dismissing the appellant's case yet his evidence was un-controverted and further, in not appreciating that the production of the certificate of lease was prime facie evidence of the ownership of the suit land.

As indicated above, the appellant was the only witness who testified in the trial Court. His evidence was that he purchased the suit land from one **GEORGE MURIITHI** on 5th February 2011 at a consideration of Ksh. 200,000 which he paid in full and obtained the certificate of lease and thereafter commenced development of the same after his application was approved. He was however stopped from further development by the County Commissioner apparently after a report appeared in the Star newspaper that the suit land had been grabbed from the Government. That evidence was un-controverted as the respondents did not attend the hearing. The appellant having tendered in evidence the certificate of lease of the suit land and the respondents not having adduced any evidence to challenge its authenticity or to demonstrate that the suit land was Government land, the trial magistrate clearly erred both in law and fact in dismissing the appellant's case.

The production of the certificate of lease by the appellant was, in terms of ***Section 26(1) of the Land Registration Act***, conclusive evidence that the appellant is the proprietor of the suit land. That section 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, un-procedurally or through a corrupt scheme".***

Sections 27 and 28 of the repealed Registered Land Act under which the suit land is registered similarly provided that the registration of a person as the proprietor of land vests in him the absolute ownership of that land subject only to any other interests known in law.

The appellant having produced the certificate of lease in respect of the suit land registered in his names, that was prima facie evidence that he is the registered proprietor thereof. And under ***Section 83 of the Evidence Act,*** the trial magistrate was entitled to presume that, the certificate of lease with respect to

the suit land was genuine and duly signed by the Land Registrar. If the respondents were minded to have that certificate of lease impugned for having been obtained illegally or that it was infact part of Government land, the onus was on them to lead evidence and rebut the appellant's claim that he held a legal title to the suit land. This is because, by producing the certificate of lease, the appellant had discharged any burden cast on him. It transpired that the certificate of lease had a typographical error which had been rectified by the authorities concerned. The trial magistrate in his judgment addressed that issue as follows:-

"The explanation offered by the plaintiff was that the anomaly was as a result of a topographical (sic) error. That could well be the truth but begs the question is there any system put in place at the land office to counter-check details on such important documents on Title before they are issued to registered proprietors? Could it be that the error was made by back street dealers in forged documents when they refused (sic) the year after being fed with details to be printed on the forged document? These are questions only an officer at the lands office could provide answers to and not the plaintiff who is an interested party. It is not possible in the absence of the two certificates of lease tendered in evidence by the plaintiff. Given the sensitivity of land matters, it was imperative that the plaintiff call a witness from the lands office to verify authenticity of the two documents and put the matter to rest. In the event that the document turnout to be forgeries, this Court may find itself in an awkward and unenviable position of being a party to an illegal and unlawful acquisition of Government land"

In the course of his evidence in the trial Court, the appellant informed the Court that following a newspaper report that his title document was defective, he made an application to the Land Commissioner and a new title document was issued. The trial magistrate considered this evidence and confirmed that indeed the appellant was issued with a new certificate of lease reflecting the dates on which it was infact registered. Having produced the certificate of lease in respect to the suit land, the appellant was not obliged to call officers from the lands office to verify its authenticity. The issue of whether or not the certificate of lease was a forgery was one which, as correctly stated by the magistrate, could only be answered by "***an officer at the lands office"*** who ***"could provide answers to and not the plaintiff who is an interested party***". The respondents having not adduced any evidence to that question, it was not open to the trial magistrate to resolve it in favour of the respondents. By so doing, the trial magistrate descended into the arena of the dispute and this blurred his vision with regard to the controversy between the parties. That was an error on his part. The trial magistrate may have thought that the appellant's case was hopelessly weak. Indeed the suit land may very well have been Government land. However, it was not the role of the trial magistrate, as an impartial umpire, to fill the gaps left by the respondents by failing to lead evidence to rebut the appellant's case. In my own evaluation of the appellant's un-controverted oral evidence taken together with the certificate of lease with respect to the suit land, it was an error both in law and in fact for the trial magistrate to dismiss the appellant's case as he did.

In grounds 3 and 4 of the memorandum of appeal, the trial magistrate is faulted for holding that the appellant had a duty to call as a witness the person from whom he purchased the suit land without paying regard to the fact that his title was not revoked and further, that the trial magistrate erred in law and in fact in holding that the appellant had a duty to produce the agreement for sale when the same was not warranted in the circumstances of the case.

The answer to the above is that a fact can be proved by one witness and it is not the law that a party must call all the witnesses that he may have lined up to testify if whatever he is required to establish can be proved by his own testimony. Indeed, in appropriate cases, a fact may be proved without calling the plaintiff. All depends on the particular circumstances of each case. A fact may be proved by the testimony of one witness unless such evidence is in the category that requires to be corroborated by law. The plaintiff's evidence did not fall into that category and by his production of the certificate of lease which is prima facie evidence that he is the absolute and indefeasible owner of the suit land, he had done enough, in my view, to prove his case particularly since that evidence was not controverted.

And with regard to the production of the agreement for sale by the appellant, the trial magistrate wondered whether the appellant acquired a good title to the suit land in the absence of the agreement between him and one **Mureithi** who sold it to him. But it was never the respondent's case that **Mureithi** had no good title to pass to the appellant. That issue was therefore not placed before the trial magistrate for consideration as the respondents did not lead any evidence to impugn the appellant's title. Again, the trial magistrate, with respect, wrongly descended into the arena of litigation which he is not supposed to. In any event, what better evidence was the appellant required to produce to prove his case than the certificate of lease in respect of the suit land in his own names?

I have said enough to demonstrate that the appeal is well merited and must succeed.

Ultimately, therefore, this appeal is allowed with the result that the lower Court's judgment dated 5th December 2014 is set aside and substituted with an order that judgment be entered for the appellant as prayed in the plaint filed in the subordinate Court. The appellant shall also have costs of the suit in the lower Court and also of this appeal. It is so ordered.

B.N. OLAO

JUDGE

12TH MAY, 2016

Judgment dated, delivered and signed in open Court this 12th day of May, 2016

Mr. Murigu for Mr. Mwaniki for Appellant present

Attorney General for Respondents absent

Right of appeal explained.

B.N. OLAO

JUDGE

12TH MAY, 2016