



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC APPEAL NO. 7 OF 2013

(Being an Appeal from the Judgment of the Honourable Chief Magistrate-Lucy Gitari delivered on 30th January 2013 in Malindi CMCC NO. 292 of 2003

FESTUS NGUMA.....APPELLANT

=VERSUS=

WALTER MBUGUA.....RESPONDENT

J U D G M E N T

Introduction:

1. This is an appeal against the Judgment of the chief Magistrate in Malindi CMCC No. 292 of 2003. In the Judgment, the magistrate allowed the Plaintiff's claim as prayed in the re-amended Plaintiff.
2. The Appellant has raised ten (10) grounds in support of his Appeal.
3. According to the Appellant, the Magistrate erred by failing to find that the Re-amended Plaintiff did not satisfy the substantive procedural requirements of law; that the learned Magistrate failed to analyse the evidence; that the learned Magistrate erred in holding that the Respondent had acquired title to property and that the Honourable Magistrate failed to hold that the Appellant was a purchaser for value and without notice.
4. The parties agreed to dispose of the the Appeal by way of written submissions.

The Appellant's Submissions:

5. The Appellant's advocate submitted that although the court allowed the Respondent's claim for an injunction, the said prayer was granted without an attempt from the Respondent to prove his case on a balance of probabilities.
6. All that the Respondent attempted to demonstrate, it was submitted, was the fact that he was a member of Maisha Mapya Self Help Group who had acquired parcel of land number 1734 measuring 262.88 acres in which all the members including the Respondent acquired shares.
7. Counsel submitted that the secretary of the Group testified that the Respondent did not pay in full for the three parcels of land he had intended to acquire from the Group for a sum of Kshs.50,000 per plot.
8. According to counsel, the only amount that was shown to have been contributed by the Respondent was Kshs.50,000 which was for one plot being plot number 214 and that Maisha Mapya, a Self Help Group, rightfully allocated the other two parcels of land to paid up members.
9. The Appellant's counsel submitted that the Respondent did not prove ownership of plot number

- 215 which belongs to the Appellant; that the payments that were made for the plot were by his wife and that the Appellant bought the said land as an innocent purchaser for value.
10. Counsel submitted that if there is any justifiable cause by the Respondent, then it is between himself and Maisha Mapya Self Help Group for damages but not as against the Appellant.
 11. The Appellant's counsel further submitted that the injunction in the lower court was in respect of plot number 215 which plot is non-existent.
 12. According to counsel, L.R. No. 1734 was sub-divided and given new identification numbers including plot number 215. It was submitted that after the survey was done, the said plot became to be known as parcel number 10719/359.
 13. Counsel submitted that the Appellant conducted due diligence before purchasing the suit property whereafter he entered into an agreement with one Kazungu Rua Nyanzua and thereafter an indenture was issued in his favour.
 14. Counsel submitted that the Respondent admitted that there was no indication of the plot numbers on the receipts; that were issued to him by the Group that it is the Respondent who wrote the plot numbers on the receipts and that the Respondent acknowledged having bought plots that were not allocated to him.

The Respondent's submissions:

15. The Respondent submitted that the Appellant confirmed in his evidence in the lower court that plot number 213 existed; that he was a bona fide member of the society group; that the officials of the society could not just decide on what to do with the property of a member without minutes and that the Indenture that was produced by the Appellant in the lower court was irrelevant.
16. According to the Respondent, the Appellant never produced the Indenture in the lower court and that the same was prepared in the year 2008 after the filing of the suit.
17. The Respondent submitted that at the time of allocation, the suit properties did not have documents of ownership except allocation letters which were given to the members who had purchased the plots.
18. The Respondent submitted that the letters dated 2nd March 2003 by the Chairman of the Society clearly showed that he purchased three plots; that he paid for all the three plots; that the Appellant lost the case in the lower court because he could not explain why he was not allocated the plot from the beginning with rest of the members of the Group and that he could not account for the excess amounts reflected in the accounts.
19. The Respondent finally submitted that the Appellant is not an innocent purchaser for value without notice because he was informed that the plot belonged to him; that the Appellant saw the permanent bathroom and toilet that was on the suit property and that he only stopped construction after the injunctive order was given.
20. The Respondent's submissions were rather long which I have tried to summarise above.

Analysis and findings:

21. This being a first appeal, I am required to look at the evidence that was adduced in the lower court and arrive at my own findings.
22. The Respondent in this matter was the Plaintiff in the lower court.
23. According to the Plaintiff's/Respondent's Re-amended Complaint filed in the lower court, the Respondent sought for loss of use of plot number 215 and 213 and for an order of injunction and specific performance.
24. In support of the prayers in his Complaint, the Plaintiff/Respondent averred that he was entitled to plot number, 213 and 215 Maisha Mapya having bought them from Maisha Mapya, Self Help Group, way back in 1993. Maisha Mapya Self Help Group was the 6th Defendant.
25. The Plaintiff further averred that the 1st Defendant (the Appellant) trespassed on plot number 215, Maisha Mapya sometimes in the year 2003 while the 2nd Defendant encroached on plot number 213 Maisha Mapya.
26. After hearing the parties, the learned Magistrate held that the Plaintiff/Respondent had proved his case on a balance of probabilities and issued an order of injunction.
27. This appeal is only in respect of plot number 215 which the Respondent claims the Appellant

- (who was the 1st Defendant) has encroached on.
28. According to the evidence of the Plaintiff (Respondent) in the lower court, he bought two plots from Maisha Mapya in 1993 which were later on grabbed by two individuals. It was his evidence that he was registered as a member of Maisha Mapya in March 1993 after paying an installment of Kshs.5,000 of the expected Kshs.50,000 for the first plot.
 29. On 26th November 1993, PW1 informed the Court that he registered for two plots and paid Kshs.3,000 for the 1st Plot and Kshs.10,000 for the second plot to Maisha Mapya.
 30. It was his evidence that at the time of the purchase, the Group did not indicate the plot numbers he was purchasing on the receipt.
 31. Of these two plots, it was the evidence of PW1 that he decided to register one in the name of his wife, Jane Mbugua and the other one in the name of his sister, Zippora Munyinyi Mutunga.
 32. According to PW1, when Maisha Mapya Group started allocating its members plots, he was allocated plot numbers 213, 214 and 215 which later on changed to plot numbers 10719/359, 10719/361 and 10719/383 respectively.
 33. It was the evidence of PW1 that he found the 2nd Defendant, Kilelu Rua developing plot 213 which he had been allocated and told him as much.
 34. In June 2013, PW1 found a stranger (the 1st Defendant) bringing down his fence on plot number 215.
 35. The evidence of PW1 was that he paid Kshs.40,000 out of Kshs.50,000 for plot number 213. It was his evidence that he paid Kshs.60,000 for all the three plots and declined to pay the balance because the society went ahead to sell his plots.
 36. It was the evidence of PW1 that neither Kazungu Rua, the person who sold the suit property to the Appellant nor the Appellant were members of Maisha Mapya Self Help Group and that there was no record indicating that the said Kazungu Rua had paid for a plot in Maisha Mapya Self Help Group.
 37. On the issue of whether the Appellant (1st Defendant) was an innocent purchaser for value without notice, PW1 informed the court that the 1st Defendant saw the permanent room and toilet that he had constructed on the suit property. PW1 stated at the trial that although the court had ordered the 1st Defendant to stop constructing on the suit property, he still went ahead to do so.
 38. In cross examination, PW1 informed the trial court that after the formal subdivision, plot numbers 214, 215 and 213 ceased to exist, that is, they were given new members.
 39. It was his evidence that although he was supposed to pay Kshs.150,000 for the three plots, he only paid Kshs.50,000 for the two disputed plots. It was his evidence that in addition to the said Kshs.50,000 he paid Kshs.10,000 for plot no. 214 which he had developed.
 40. PW1 also admitted that Maisha Mapya Group had informed him that he should pay the balance within 21 days.
 41. According to PW1, although receipt no. 0123 indicated plot no. 215, he altered it to read 214 and that receipt number 772 had indicated plot no. 214 but he altered it to read 215.
 42. Jane Mbugua, PW2, informed the court that she was the wife of PW1. It was her evidence that she bought plot number 215 at Maisha Mapya and had a toilet and bathroom built on it.
 43. According to PW2, although it is her husband who paid for plot number 215, she was the owner while her husband and sister in law owned plot numbers 214 and 213 respectively.
 44. It was her evidence that it was the Plaintiff who paid for plot number 215 although she did not know the amount of money that was paid.
 45. On the other hand, the 1st Defendant (Appellant), DW1, informed the court that he is the owner of portion number 10719/359 Malindi; that the plot was initially owned by one Kazungu Rua and that after confirming that he was the owner, he purchased the land. As at the time of the purchase, DW1 stated that the suit property was known as Plot No. 1734/215 which was a subdivision of portion no. 1734 owned by Maisha Mapya Self Help Group.
 46. It was the evidence of DW1 that he confirmed that Kazungu Rua had paid Kshs.40,000 to Maisha Mapya Self Help Group before he completed the purchase of the land from Mr. Rua.
 47. The 1st Defendant admitted that when he purchased the plot from Mr. Kazungu, there was a permanent toilet and a bathroom on the plot. DW1 further admitted that he did not see any receipt evidencing that Mr. Kazungu had paid for it.
 48. An official of Maisha Mapya Self Help Group, DW3, informed the trial court that land parcel

- number 1734 was initially owned by four people; that the four people offered the land to the Group in 1990 and that the Group offered for sale the land that was not occupied by squatters to outsiders so as to raise the purchase price.
49. It was his evidence that the Plaintiff/Respondent was one of the outsiders who purchased land from the Group.
 50. According to DW3, the Plaintiff wanted to purchase three plots, one in his name and the other two plots in the name of his wife and sister. He paid Kshs.10,000 for the 1st plot which was to be registered in his name, Kshs.10,000 for the 2nd plot and Kshs.35,000 for the third plot.
 51. It was the evidence of DW3 that the Plaintiff refused to finalise the payments for the three plots.
 52. The witness produced in evidence the notice which was served on the Plaintiff demanding the payments of the purchase price.
 53. It was the evidence of DW3 that after considering the amount of money the Plaintiff had paid, they realised that he was only entitled to one plot. It was his evidence that the Group decided to repossess plot numbers 213 and 215 from the Plaintiff.
 54. According to DW3, plot no. 215 was allocated to Kazungu Rua who sold it to the 1st Defendant.
 55. It was the evidence of DW3 that every plot was being sold for Kshs.50,000 while the squatters were paying Kshs.25,000 for each plot.
 56. The evidence of DW3 was that the Group gave to Kazungu Nyanzua plot no. 215 in the year 2003 although he did not produce a receipt that the said plot was paid for.
 57. From the evidence that was adduced, it was not in dispute that indeed the Respondent intended to buy plot numbers 213, 214 and 215 from the Group. It is also not in dispute that for all people who were not squatters on plot number 1734, they were purchasing the plots for Kshs.50,000 per plot.
 58. The evidence by the Plaintiff/Respondent shows that he did not pay the full sum of Kshs.150,000 to Maisha Mapya Self Help Group for three plots that he intended to acquire. Indeed, the Plaintiff confirmed that he had paid Kshs.60,000 for the three plots and was waiting for officials of the Group to sort out their books of accounts before he could pay up the balance.
 59. Both the Plaintiff and DW3 are agreeable that the contract that they entered into for the sale of the three plots was oral and the consideration was Kshs.150,000/-.
 60. The Plaintiff/Respondent is also agreeable that it is only Maisha Mapya Self Help Group that was mandated to allocate the land to the squatters, with or without consideration and could also sell the land to outsiders for Kshs.50,000/- per plot.
 61. If the Plaintiff's case was that he is entitled to a permanent injunction in respect to plot numbers 213, 214 and 215 which he had purchased from the Group vide an oral agreement, the burden of proving that he was not in breach of the oral agreement was on him.
 62. It is trite law that whoever desires the court to give judgment as to any legal right dependent on the existence of facts which he asserts must prove that those facts exist (see section 107 of the Evidence Act).
 63. There is no evidence before this court to show that Maisha Mapya Self Help Group agreed to transfer to the Plaintiff the three plots even if he did not pay the sum of Kshs.150,000.
 64. Having failed to pay the full sum of Kshs.150,000 even after being requested vide a written notice by the Group official, the Plaintiff/Respondent cannot turn around and accuse the Group for having re-allocated plot number 215 to Kazungu Rua Nyanzua, or any other person.
 65. Whether plot number 215 was re-allocated to Mr. Nyanzua who eventually sold it to the Appellant for consideration or not is not relevant because the Maisha Mapya Self Help Group was the vendor. It is only a member of the Group, in a different action, who can complain if indeed plot number 215 was re-allocated by the Group to Mr. Nyanzua without consideration.
 66. I do not therefore agree with the learned Magistrate's holding that the Plaintiff had proved that the three plots had been allocated to him and that DW3 did not prove by way of Minutes that the Group sat and decided to take away the Plaintiff's plots.
 67. It was not for the Defendant to prove that the plots in question had been lawfully withdrawn from the Plaintiff before being re-allocated. It was for the Plaintiff to prove that he had fully paid for the plots and consequently the same could not be taken from him.
 68. Although the learned Magistrate stated that DW3 had not produced any evidence to prove that the plot was sold to the Plaintiff and to show that the Plaintiff had not paid for the plots, it was for the Plaintiff to show that he had paid for the three plots.

69. It is not for the Defendant in a civil suit to prove its case when the Plaintiff has not discharged his burden. The Defendant could only be called upon to show that the Plaintiff had not paid up for the three plots after the Plaintiff has proved that he had paid the sum of Kshs.150,000, and not the other way round
70. In any event, the Plaintiff did admit in the evidence that he did not pay the requisite Kshs.150,000/- for the three plots even after being told to pay up. In fact, the evidence by DW3 corroborates the Plaintiff's evidence in all aspects and he cannot be said to have cooked up the evidence.
71. Although the learned Magistrate held that Kazungu Rua could not pass a good title to the 1st Defendant because he did not pay for the plot, I find and hold that it is only Maisha Mapya Self Help Group that can complain that the said Kazungu Rua did not have a good title to pass.
72. I say so because the Plaintiff did not have any good title in the first place considering that he never paid the full purchase price as agreed. Consequently, the said plot could be re-allocated by the Group on terms agreed upon between the group and the new owner. Having repossessed it from the Plaintiff, it was for the Plaintiff to show that the said repossession was unlawful, which he failed to do.
73. In the circumstances, I find and hold that the Respondent did not prove his case in the lower court on a balance of probabilities to be entitled to an order of injunction.
74. Consequently, I allow the Appellant's Appeal, I set aside the Judgment of the lower court in CMCCC No. 292 of 2003 and substitute it with an order dismissing the Plaintiff's suit with costs.
75. The Respondent shall also pay to the Appellant the costs of this Appeal.

Dated and delivered in Malindi this 20th day of February, 2015.

O. A. Angote

Judge