Ereng v Swisscom Logistics Ltd (Civil Appeal E245 of 2020)
[2024] KECA 975 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 975 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E245 OF 2020

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

JULY 26, 2024

BETWEEN

PAUL NAKACHII ERENG ..... APPELLANT

AND

SWISSCOM LOGISTICS LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the Environment & Land Court at Nairobi (Eboso, J.) dated 12th November 2019inELCC No. 924 of 2014)

JUDGMENT

1. By a judgment dated 12th November 2019, the Environment and Land Court at Nairobi (Eboso, J.) declared that the respondent, Swisscom Logistics Ltd, was the lawful proprietor of Land Reference Nos. 13815/2 and 13815/3 (the suit property) situate in Karen, Nairobi. The appellant, Paul Nakachii Ereng, had also laid claim to the suit property in a counterclaim that he instituted in response to the respondent's suit against him. The learned judge also issued a mandatory injunction compelling the appellant to vacate the suit property,and a prohibitory injunction restraining him from trespassing onto the suit property. However, the learned judge directed each party to bear their own costs.

2. In its suit filed on 14t th July 2014, the respondent pleaded that, at all material times, it was the duly registered proprietor of the suit property and in possession thereof. On or about 9th May 2014, the appellant, without any colour of right, trespassed into the suit property, demolished the respondent's structures thereon, and wrongfully took possession. The respondent prayed for a declaration that it was the proprietor of the suit property, prohibitory and mandatory injunctions against the appellant, damages for trespass, costs and interest.

3. In a defence filed on 8th August 2014, the appellant denied the respondent's claim and averred that he was the proprietor of the suit property, having purchased it in 1996 from a Col. Gabriel Atambo (Col. Atambo). He further pleaded that he put his caretaker on the suit property but that, in May 2014, the

respondent wrongfully evicted the caretaker, took possession and illegally and fraudulently subdivided the suit property into three parcels, namely 13815/1, 13815/2 and 13815/3.

4. It was the appellant's case that the respondent's registration as proprietor of the suit property was acquired illegally and fraudulently, the particulars of which he pleaded. By way of counterclaim, the appellant prayed for a declaration that he was the lawful proprietor of the suit property, cancellation of the respondent's title, mandatory and prohibitory injunctions, general damages for trespass, costs and interest.

5. The respondent filed a reply to defence and defence to counterclaim where it denied that the appellant was the lawful proprietor of the suit property or that it was a trespasser thereon. The respondent further pleaded that Col. Atambo who purportedly sold the suit property to the appellant was never the registered owner.

6. Eboso, J. heard the suit with both the appellant and the respondent calling two witnesses each. By the impugned judgment, the learned judge held that the suit property was allocated in 1997 to Paul Mecha Kipchumba (Mr. Kipchumba) who complied with the conditions of allocation and transferred the suit property to the respondent, which was duly registered as proprietor. As regards the appellant's claim, the learned judge held that there was neither evidence that the suit property was ever allotted to Col. Atambo from whom the appellant allegedly purchased the same, nor a sale agreement between him and the appellant.

7. Further, that the transfer that the appellant relied upon was undated, unstamped, had never been presented for registration, and above all, it related to a different parcel of land in Kijabe, Nyandarua County. The learned judge also held that after registration of the respondent's title, the number of the appellant's title to the Kijabe property was casually altered by ink from IR 52888 to IR 52887 without following the procedure prescribed under the Registration of Titled Actor theLand Registration Act. PARAGRAPH 8.

8. For the above reason, the learned judge found in favour of the respondent and granted the reliefs we have already mentioned.

9. The appellant was aggrieved and preferred the present appeal based on 15 grounds, some of which are repetitive and duplicative. In all, the appellant contends that the learned judge erred by holding that his title was invalid; that his land was in Kijabe; that Col. Atambo had not sold the suit property to him; and that the respondent was the lawful owner of the suit property. The appellant further faulted the learned judge for dismissing his counterclaim; for ignoring evidence that the Attorney General and the Chief Land Registrar had previously supported his claim to the suit property; and by failing to hold that the suit property, having been allotted to Col. Atambo, was not available for allotment to the respondent.

10. By a consent letter dated 20th September 2022, the parties agreed to have the appeal heard through written submissions with no oral highlights.

11. In support of the appeal, Mr. Njoroge, learned counsel for the appellant, relying on written submissions dated 8th March 2021, submitted that the trial judge erred by holding that Col. Atambo was never the owner of the suit property, and yet the appellant had adduced evidence to prove Col. Atambo's ownership. Part of that evidence was a receipt for payment of Kshs 12,080 on account of survey fees for the suit property; a letter from the Commissioner of Lands dated 11th September 1989 demanding Kshs 55,520 from Col. Atambo, being the balance of allotment fees, conveyancing fees, registration fees and stamp duty; and a receipt for payment by Col. Atambo of the said sum of Kshs 55,520.

12. Counsel submitted further that, upon satisfying the said conditions, Col. Atambo was registered as proprietor of the suit property and issued with a certificate of title for LR No. 13815 on 17th June 1991. It was counsel's further submission that the appellant adduced evidence to show that on 18th January 1996 Col. Atambo applied to the Commissioner of Lands for consent to transfer the suit property to the appellant, which consent was granted vide a letter dated 24th April 1996, and that he paid the consent fees of Kshs 40,000 on 16th June 1996. In counsel's view, the fact that the Commissioner of Lands granted Col. Atambo consent to transfer the suit property was sufficient evidence that the same belonged to him.

13. Next, counsel submitted that the trial court erred by holding that the appellant's transfer related to Grant No. IR 52888 rather than Grant No IR 52887. He contended that on 26th June 2012, the Chief Land Registrar explained in writing that the appellant's title had, through an inadvertent error, been indicated as Grant No. 52888 instead of Grant No. 52887 and called for rectification of the same. Counsel added that the Attorney General had confirmed that the appellant's property was in Nairobi rather than in Nyandarua, and that the conclusion of the trial court on the location of the appellant's property was not based on the evidence on record.

14. Mr. Njoroge faulted the trial court for holding that the rectification was not done in accordance with the law, yet section 79 of the *Land Registration Act* allowed rectification of the title and that, at the material time no guidelines had been gazetted on rectification. Counsel further submitted that the court erred by relying on the provisions of the repealed Registration of Titles Act dealing with cancelation of titles whereas the appellant's title was being rectified rather than being cancelled.

15. Next, the appellant submitted that the respondent did not have a valid title to the suit property because its title was issued on 12th June 2012, some 11 years after the suit property was registered in Col. Atambo's name. He identified other facts which he considered to be anomalies in the registration of the suit property in the name of the respondent and submitted that the authenticity of the respondent's title could not be verified. In counsel's view, the evidence on record proved on a balance of probabilities that the suit property was Wreck Motors Enterprises v. Commissioner of Lands & Others, CA. No. 71 of 1997 and submitted that, in the event of double registration of land, the first registration in time prevails. Counsel added that, by the time the suit properly was purportedly allocated to Mr. Kipchumba and registered in the name of the respondent, it was not available for allocation.

16. For the foregoing reasons counsel urged us to allow the appeal with costs.

17. Mr. Rapando, learned counsel for the respondent, opposed the appeal on the basis of written submission dated 29th March 2021. It was counsel' submission that there was no basis for interfering with the findings and conclusions of the trial court.

18. Counsel submitted that the appellant's case was riddled with contradictions in that while the appellant purported to have purchased the suit property from Col. Atambo for Kshs 1.2 million, the instrument of transfer relied upon indicated the purchase price to have been Kshs. 2 million. Further, that the appellant did not produce any agreement for sale with Col. Atambo, who was not even called as a witness. It was also the respondent's submission that the appellant did not produce any letter of allotment of the suit property to Col. Atambo.

19. The respondent identified what it considered to be additional irregularities with regard to the appellant's registration as proprietor of the suit property. Among them was the fact that the transfer relied upon by the appellant was not dated, and that the same had neither been assessed for stamp duty nor registered. Counsel added that the appellant's alleged property, namely IR No. 52888 was in Kijabe Town, Nyandarua County rather than in Nairobi.

20. Mr. Rapando submitted that the evidence of the Chief Land Registrar confirmed that the suit property was validly allotted to Mr. Kipchumba and ultimately registered in the name of the respondent. That evidence also repudiated the existence of any record indicating allocation of the suit property to Col. Atambo. If anything, counsel submitted, from the evidence of the Chief Land Registrar, that the property allegedly registered in the name of the appellant was in Nyandarua rather than in Nairobi.

21. Relying on Dr. *Joseph Arap Ngok v. Justice Moijo ole Keiwua & 5 Others, CA No. 60 of 1997*; and Richard Kipkemei Limo v. Hassan Kipkemboi Ngeny & 4 Others[2019] eKLR, counsel submitted that the evidence on record shows that the suit property was validly allotted to Kipchumba who satisfied the conditions in the letter of allotment, culminating in the registration of the same in the respondent's name. He contended that the irregularities alleged by the appellant as regards the respondent's title were based on a misrepresentation of facts.

22. Next, Mr. Rapando submitted that, prior to the purported purchase of the suit property, the appellant did not conduct any search on Col. Atambo's alleged title, and that he ended up purchasing Grant No. IR 52888, which is in Nyandarua and not in Nairobi. It was contended that the alleged rectification of the register on 30th July 2013 involved a casual cancellation by hand, which was contrary to section 79 of the *Land Registration Act*, which was in force as of that date. It was contended that, even under the repealed Registration of Titles Act which envisaged cancellation and replacement of a title that had been erroneously registered, the purported rectification of the appellant's title did not pass muster under the prescribed procedure in that Act.

23. Richard Kipkemei Limo v. Hassan Kipkemboi Ngeny & 4 Others (supra); and Munyu Maina v. Hiram Gathiha Maina[2013] eKLR, the respondent submitted that the appellant failed to prove the validity of the root of his title or that Col. Atambo had procedurally and lawfully obtained the suit property before he purposed to sell and transfer the same to the appellant. For the foregoing reasons, counsel urged the Court to dismiss the appeal with costs.

24. We have carefully considered this appeal. Being a first appeal, we are obliged to reconsider and re-evaluate the evidence adduced by the parties and make our own independent conclusions, but always making provision for the fact that we do not have the advantage of the trial court which heard and saw the witnesses as they testified. (See Seascapes Ltd v. Development Finance Co. of Kenya Ltd. [2009] KLR 384).

25. Before the trial court, the appellant called two witnesses to prove his case, namely, himself and Joseph Gicovi Sammy (DW2). The appellant's evidence was that he lives in Texas, USA, and that he purchased the suit property in 1996 through a broker, Stephen Gichuhi, forKshs 1,200,000. However, he conceded that there was no agreement for sale; that the transfer he was relying on was not dated; that it indicated the purchase price as Kshs 2,000,000 rather than 1,200,000; that there was no assessment of stamp duty for the suit property; that the transfer was not stamped for purposes of payment of stamp duty; that the transfer did not bear a daybook number; and that the transfer was not even registered.

26. The appellant further admitted that, although there was a letter dated 14th September 1989 alluding to allotment of the suit property to Col. Atambo on 23rd September 1985, as of 1989 Col. Atambo had not paid the requisite money. He also agreed that, prior to purchasing the suit property, he had not conducted any official search to confirm that Col. Atambo was the registered proprietor of the suit property and further that he had not done any official search to confirm that the suit property was registered in his name.

27. For his part, DW2 testified that he was an estate agent, and that the appellant was his client. He was selling the suit property No. LR No. 13815 IR 52888 located in Karen Nairobi on behalf of Col.

Atambo, who availed to him the letter of allotment and other documents relating to the property. However, he admitted that the said letter of allotment was not produced in evidence, and that he did not know whether Col. Atambo met the conditions set out therein. He sold the property for Kshs 1,200,000, which the appellant paid to Col. Atambo. He also paid the stamp duty but could not recall the amount.

28. Col. Atambo, the man at the centre of the appellant's claim to a valid title to the suit property, did not testify.

29. The respondent also called two witnesses, namely, Julius Chacha Maroa (PW1) and Mr. Kipchumba (PW2). PW1, a senior lands registration officer, testified that, from the deed file for IR 52888, the parcel is located north of Kijabe town in Nyandarua District, and was not in any way related to the suit property in Nairobi. He testified that the suit property was allotted to Mr. Kipchumba on th April 1997 and that, on 12th November 2011, he requested the suit property to be registered in the name of the respondent where he was a director with his wife. According to his records, there was nothing to indicate that the suit property was ever registered in the name of Col. Atambo.

30. PW2 testified how he applied for allotment of the suit property, complied with the conditions of allotment, and ultimately successfully requested it to be registered in the name of the respondent. He did not know the appellant.

31. In our view, the central question in this appeal is whether, from the evidence on record, the Court can validly conclude that Col. Atambo was the registered owner of the suit property, and that he transferred and passed a good title to the appellant. As the trial court noted, the appellant never called Col. Atambo as a witness, and yet he is the one who is alleged to have been allotted the suit property before selling it to the appellant. There was no good reason given why Col. Atambo could not be called as the best suited person to shed light on this matter. The appellant's counsel merely stated before closing his case:

> " We have decided to abandon the third witness. We are satisfied that we have presented all the evidence we had. That marks the close of the defendant's (appellant's) case."

32. Upon analysing the evidence on record, like the trial court, we are satisfied that the appellant's case has fatal gaps that cast doubt about the validity of Col. Atambo's alleged title as well as that of the appellant. No letter of allotment of the suit property to Col. Atambo was produced, the appellant merely relying on a letter referring to such allotment. There was no evidence of compliance by Col. Atambo with the conditions of allotment. In fact, the correspondence on record suggest that if Col. Atambo was allotted the suit property, he did not meet the conditions within the set time. PW1 was categorical that, in their records, there was no evidence of allotment of the suit property to Col. Atambo. The only evidence of allotment was to Mr. Kipchumba.

33. In any event, a letter of allotment of and by itself does not create title to property. In Torino Enterprises Ltd v. Attorney General [2023] KESC 79 (KLR), the Supreme Court held as follows:

> " It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the

land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

34. In the absence of evidence of allotment of the suit property to Col Atambo and his acceptance and compliance with the stipulated terms and conditions of the allotment, there can be no basis for contending that Col Atambo obtained and passed a good title to the appellant.

35. The transaction between Col. Atambo and the appellant raises even more troubling questions. There was no agreement for sale between Col. Atambo and the appellant. The appellant did not conduct any official search to confirm that the suit property was indeed registered in the name of Atambo. There is irreconcilable inconsistency between the purchase price that the appellant claims to have paid and what is indicated in the transfer. Although PW2 claimed to have paid stamp duty, no evidence of such payment or the amount paid, was ever produced. More troubling is the admission by the appellant that the instrument of transfer on the basis of which the suit property was allegedly transferred and registered in the appellant's name was not registered. To make matters worse, that instrument of transfer related to Title No. 52888, which is in Nyandarua District, rather than to the suit property which is in Nairobi.

36. In Dina Management Ltd *v. County Government of Mombasa & 5 Others, Pet. No. E010 of 2021*, the Supreme Court agreed with the decision of this Court in Munyu Maina v. Hiram Gathiha Maina (supra) and reiterated that:

> "...where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."

37. Funzi Development Ltd & others v. County Council of Kwale [2014] eKLR as follows:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title." (Emphasis added).

38. A propriety whose registration is found to have been obtained irregularly or illegally does not enjoy the constitutional protection of the right to property. In Dina Management (supra) the Supreme Court stated the principle thus:

> "Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been (successfully) challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser."

39. The appellant has tried to explain the discrepancy between the number of the property indicated in the transfer (No. 52888) and the suit property (52887), as the result of an inadvertent error, which was rectified by the registrar to read 52887. In addressing that issue, the learned judge noted that the appellant's title was altered through cancellation by ink pen to read No. 52887 instead of No. 52888,

and that there was no evidence of compliance with section 79 of the Land Registration Act, which was already in force at the time of the alteration. The learned judge concluded thus:

> "The provisional title which the defendant holds is number IR 52888. The said number has been casually cancelled in ink and number IR 52887 has been casually inserted in ink without any regard to the requirements of both the *Land Registration Act* and the repealed Registration of Titles Act. With the above glaring illegalities, irregularities and gaps relating to the procurement of the title held by the defendant, I form the view that the defendant's title is not a valid title."

40. The evidence on record shows that the alteration of the title number was effected on 30th July 2013. . By that time, the *Land Registration Act*, No. 3 of 2012 was already in force, having commenced more than one year earlier on 2nd May 2012. Section 109 of the Act as read with the schedule repealed the Registration of Titles Act. While we agree with the appellant that the repealed Registration of Titles Act had no application in the case, the learned judge correctly held that the purported rectification was not done in accordance with section 79 of the *Land Registration Act*.

41. Section 79(2), which is the relevant provision in this case requires consent of all parties affected before rectification. As of the date of the purported rectification, the respondent was registered as proprietor of No. 52887 and rectifying No. 52888 to read 52887 was going to affect the respondent. There is absolutely no evidence on record to show that the respondent was ever notified of the purported rectification or its consent sought. We agree with the learned judge that the purported recitation was not done in accordance with the law.

42. For all the foregoing reasons, we are satisfied that the trial court did not err in holding that the appellant had failed to prove that he was lawfully and validly registered as proprietor of the suit property, namely No. 52887. Accordingly, we find no merit in this appeal and hereby dismiss the same with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.