Nyokabi v Kendagor & another (Civil Appeal 7 of 2019) [2024] KECA 1320 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1320 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 7 OF 2019

FA OCHIENG, JM MATIVO & WK KORIR, JJA

SEPTEMBER 27, 2024

BETWEEN

EUNICE NYOKABI .... APPELLANT

AND

JAMES CHEPYATOR KENDAGOR .... 1ST RESPONDENT

SIMON ROTICH .... 2ND RESPONDENT

(Being an appeal arising from the Judgment in Environment and Land Court of Kenya at Nakuru (Ohungo, J.) dated 30th October, 2018 in Nakuru ELC No. 208 of 2012 formerly HCC. No. 307 of 2009)

JUDGMENT

1. By a plaint filed on 23rd October 2009 before the Environment and Land Court, (ELC), the appellant averred that she bought land parcel number Baringo/Perkerra – 101/791 (the suit property) from the 1st respondent between the years 2000 and 2007. It was her case that she procured the consent of the Land Control Board on 9th October 2007, and even though she was in possession of the suit property, due to tribal clashes which erupted following the 2007 general elections, she lost her copy of the sale agreement and before she could transfer the suit property into her name, she learned that the property had been transferred to the 2nd respondent. She averred that the respondents colluded and fraudulently transferred the property to the 2nd respondent on 20th June 2007. Accordingly, she sought judgment against the respondents jointly and severally for:

    a. Cancellation of the title Baringo Perkerra 101/791 in the name of the 2nd defendant.

    b. An order that the said title be transferred to the plaintiff and defendants do sign all conveyancing documents and in default Deputy Registrar to sign the same.

    c. Costs of the suit.

2. In their joint statement of defence filed on 10th November 2013, the respondents refuted the appellant's claim and urged the court to dismiss the case with costs.

3. The 1st respondent did not participate in the proceedings before the ELC because he was deceased.

4. The appellant and the 2nd respondent testified in support of their respective cases. After considering the pleadings, the parties' evidence and submissions, the learned Judge framed two issues for determination,

   (a) whether there was a sale agreement between the appellant and the 1st respondent, and

   (b), whether the appellant was entitled to the relief sought. Vide judgment delivered on 30th October 2018, the trial Court dismissed the appellant's suit with costs to the 2nd respondent.

5. Aggrieved by the said judgment, the appellant lodged this appeal. In her memorandum of appeal dated 18th February 2019, the appellant cites 8 grounds of appeal essentially faulting the learned judge for:

   (a) finding in favour of the 2nd respondent when in fact he never produced a sale agreement to show that he purchased the property from the 1st respondent (deceased);

   (b) applying a double standard by requiring a sale agreement from the appellant and allowing the proprietorship of the 2nd respondent in the absence of a sale agreement, even after admission that it was never in existence;

   (c) finding that the 2nd respondent's title is legal despite absence of supporting documents;

   (d) failing to find that the 2nd respondent's title was fraudulently acquired in light of the 2nd respondent's admission that there was no sale agreement between him and the vendor (1st respondent);

   (e) failing to consider the 2nd respondent's deceit in obtaining a consent from the Land Control Board in the absence of a sale agreement between the 1st and himself;

   (f) finding that the appellant's Land Control Board Consent was not a valid prerequisite to the existence of a valid sale agreement;

   (g) upholding the 2nd respondent's title despite lack of evidence that he acquired it from the 1st respondent; and

   (h) the decision that was against the weight of the evidence tendered.

6. The appellant prayed that the appeal be allowed with costs and the trial court's judgment be quashed and the appellant be awarded costs of this appeal and the trial court.

7. At the hearing of the appeal on 19th June 2024, the appellant highlighted his submissions dated 22nd November 2019. The 2nd respondent did not participate in this appeal despite being served.

8. Regarding grounds 1, 2, 3 & 4 of the memorandum of appeal, the appellant maintained that she was in actual occupation of the property and there was prima facie evidence in terms of receipts showing payments made to the 1st respondent for the purchase of the property and the 1st respondent affixed his official stamp on all the receipts confirming existence of a written agreement between them. In addition, the appellant argued that there were letters from local authorities confirming the appellant's proprietorship and her evidence that the sale agreement was lost during the tribal clashes remained uncontroverted. Therefore, the missing sale agreement did not negate the 1st respondent's intention when he allowed her to take possession. In support of her submissions, she cited this Court's decision

in Anne Jepkemboi Ngeny vs. Joseph Tireito & Another [2021] eKLR that even in absence of a sale agreement, evidence of occupation would suffice.

9. The appellant also submitted that the evidential burden shifted to the 2nd respondent who despite engaging in a land transaction with the 1st respondent lacked a supporting sale agreement. Consequently, it was the appellant's contention that the 2nd respondent failed to demonstrate all the elements for the existence of a contract, specifically, a sale agreement in support of his case. Accordingly, the learned judge erred in sanctifying the 2nd respondent's title in the absence of the requisite documents to prove how he acquired it.

10. Regarding grounds 5 and 6, the appellant submitted that lack of supporting documents is a clear manifestation of the fraudulent nature of the purported transaction. Furthermore, in the absence of a written agreement between the respondents, there is nothing to countercheck whether the purchase price was fully paid to enable the 2nd respondent to benefit from the doctrines of constructive trust and proprietary estoppel.

11. In conclusion, the appellant contended that she had already constructed a permanent residence on the land and was in occupation even during the trial and that she lost the suit property illegally through displacement and this court as a court of the last resort should do justice and not allow her to lose her property to the 2nd respondent who fraudulently acquired ownership documents.

12. We have considered the record, the parties' respective submissions and the authorities cited. Our mandate in a first appeal under Rule 31(1) (a) of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, we remain guided by the principles articulated in Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 that we will not interfere with the trial court's findings unless we are satisfied that the trial court misdirected itself in some matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial judge was clearly wrong in the exercise of his discretion and occasioned injustice by such wrong exercise.

13. In our considered view, this case will turn on one broad issue, which is whether the appellant proved her case to the required standard.

14. Section 3 (3) of the *Law of Contract Act* provides:

    (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

    a. the contract upon which the suit is founded—

        i. is in writing;

        ii. is signed by all the parties thereto; and

    b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

    Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

15. In Peter Mbiri Michuki vs. Samuel Mugo Michuki [2014] eKLR, this Court held:

> "Section 3 (3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by

the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3 (3) of the said Act to contracts made before the commencement of the subsection. Section 3 (3) of the *Law of Contract Act*, came into effect on 1st June, 2003. .... Prior to the amendment of Section 3 (3) of the *Law of Contract Act* in 2003, the subsection read as follows: -

> 3 No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> i. Has in part performance of the contract taken possession of the property or any part thereof; or
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> ii. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

16. From the record, it is uncontroverted that the 1st respondent originally owned the suit property, and that he died before the hearing of this suit. No attempt was made to substitute him. Be that as it may, during hearing, while being cross-examined, the appellant confirmed that she did not have any problem with the 1st respondent and that she had decided to pursue her claim against the 2nd respondent since he was the one who had the title deed to the suit property.

17. It is also noteworthy that the appellant stated that she initially bought plot No. 555 but it had problems and therefore she agreed with the 1st respondent for the appellant to buy another plot and they entered into an agreement to which she paid the 1st respondent Kshs.80,000/=. They subsequently went to the Land Control Board with the 1st respondent and they obtained a consent on 9th October 2007.

18. As stated above, the appellant having abandoned her suit against the 1st respondent and opted to pursue the 2nd respondent, without the support of the alleged agreement for sale between herself and the 1st respondent, it is only the appellant and the 1st respondent (deceased) who know exactly what transpired between them. Cases are decided on evidence or lack of it. This Court can only deal with the evidence as presented. Having abandoned her claim against the 1st respondent and opted to pursue a claim against the 2nd respondent who was not privy to her alleged agreement with the 1st respondent, we agree with the learned trial judge that the trial court was deprived of an opportunity to ascertain whether there existed a contract between herself and the 1st respondent. In the absence of an agreement between the appellant and the 1st respondent in accordance with the mandatory provisions of section 3 (3) of the *Law of Contract Act*, we find that the appellant failed to surmount the hurdle that would activate the shifting of the evidentiary burden to the 2nd respondent.

19. In Miller vs. Minister of Pensions [1947] 2 All ER 372, Denning J. stated that:

> " Thus, proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing,

the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.

20. Accordingly, we find that, the appellant did not, on a balance of probabilities, discharge the burden of proving that she actually had a valid sale agreement with the 1st respondent. Therefore, the burden of proof could not shift to the 2nd respondent for him to explain how he acquired the suit property. This Court is guided by Sections 107,108 and 109 of the *Evidence Act* which provides:

> “ 107. Burden of proof
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> 1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

21. We can fittingly recall the words of Lord Brandon in Rheir Shpping Co. SA. vs. Edmunds [1955] IWLR 948 at 955 that:

> “ No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”

22. The High Court Hellen Wangari Wangechi vs. C. Muthoni Gathua [2015] eKLR, cited Lord Brandon in the above case and proceeded to state:

> “Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the litmus test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone PTE Ltd vs. Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: as follows:
>
> “The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

23. In the circumstances, we agree with the trial court that in the absence of proof of a contract, the mere fact that the appellant is in occupation of the suit property is not of any consequence considering that the 2nd respondent is the registered proprietor and his title can only be impeached in accordance section 26 of the *Land Registration Act* which stipulates:

> “ 26. Certificate of title to be held as conclusive evidence of proprietorship

i. 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—

ii. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

iii. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme…"

24. Without satisfactory proof of fraud, illegality, misrepresentation or corruption in the manner in which the 2nd respondent acquired his title, his title remains indefeasible. The appellant's goose was cooked the moment she abandoned her claim against the 1st respondent who was the registered owner of the suit property whom she accused of fraudulently colluding with the 2nd respondent to transfer the suit property to him. We find that the 2nd respondent's title provided conclusive evidence of his ownership of Baringo/Perkerra – 101/791, and that his title remains absolute and indefeasible.

25. For the above reasons, we hold that the ELC correctly ruled in favour of the 2nd respondent. Accordingly, this appeal is devoid of merit and we hereby dismiss it. Since the 2nd respondent never participated in the appeal, we make no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

………………………

JUDGE OF APPEAL

W. KORIR

………………………

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR