Ndegwa v Njoroge (Civil Appeal 60 of 2018)
[2023] KECA 135 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 60 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

FEBRUARY 10, 2023

BETWEEN

JACKSON KAMAU NDEGWA ..... APPELLANT

AND

ALICE WAMBUI NJOROGE ..... RESPONDENT

(Being an appeal from the Judgment and Orders of the High Court of Kenya at Nakuru (Mulwa, J.) dated 27th July 2017 IN Nakuru High Court Civil Suit No. 122 of 2008)

JUDGMENT

1. Jackson Kamau Ndegwa (the appellant herein), has filed this appeal against the judgment of Mulwa J, dated July 27, 2017.

2. The appeal arises from a suit that had been filed at the High Court in Nakuru on 29th February 2009, by the respondent against the appellant in which the respondent had sought *inter alia* a permanent injunction restraining the appellant either by himself, his servants or agents from interfering with her occupation, use and quiet enjoyment of all the parcel of land known as Nakuru Municipality Block 12/224 (hereinafter, 'the suit property').

3. The appellant denied the respondent's claim and further filed a counter claim against the respondent seeking *inter alia* an order to the Commissioner of Lands, Registrar of lands, Registrar of titles and/or the District Land Registrar Nakuru to effect the transfer of the suit property from the respondent to him.

4. The matter was heard by Mulwa, J who in a judgment delivered on July 27, 2017, entered judgment for the respondent and declared her the lawful owner and holder of the suit property absolutely and further dismissed the appellant's counter claim.

5. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal vide a Notice of Appeal dated July 27, 2017 and a Memorandum of Appeal dated February 28, 2018, setting out a whopping 18 grounds of appeal which are rather argumentative and repetitive and which we shall proceed to consider shortly and which are essentially in a nutshell, whether the learned Judge erred in using her office and seal of the court to authenticate and legalize what he considered deceitful and fraudulent alienation of the suit property thus rendering the entire judgment illegal and unconstitutional; secondly, whether the judge erred in law and facts by failing/refusing to hear the appellant and finally whether the learned judge erred by failing/refusing to recuse herself.

6. The brief facts in this appeal are that vide an agreement of sale dated and executed on December 18, 2007, the appellant agreed to sell and the respondent agreed to buy the appellant's parcel of land known as Nakuru/Municipality Block 12/224 (the suit land) being a subdivision of Nakuru Municipality Block 12/170 at an agreed consideration of Kshs 1,600,000/=. The respondent subsequently paid a sum of Kshs 300,000/= as stipulated in the sale agreement to the appellant so as to facilitate payment of outgoings towards land rent, rates and other incidentals to obtain the requisite clearance certificates.

7. The respondent further obtained from the appellant a duly executed transfer of the suit land and other documents in readiness to register the transfer but the appellant however failed to complete the transaction thus provoking the suit before the High Court which has now precipitated the appeal before us.

8. When the appeal came up before us for hearing on September 26, 2022, the appellant appeared in person whereas Ms Wangari learned counsel appeared for the respondent. The appellant in his brief oral highlight before the Court submitted that there was massive deceit and misrepresentation and that he had asked the judge to recuse herself but she refused and further, that the learned judge blocked the evidence that he was to adduce. Ms Wangari on the other hand solely relied on her written submissions without oral highlights. She submitted that the parties herein entered a sale agreement on December 18, 2003; that the respondent paid a deposit of Kshs 300,000.00 which was to offset outgoings such as rates and rent; that the appellant failed to pay the outstanding rates and rent as agreed, thus breaching the sale agreement.

9. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by Rule 29 of the *Court of Appeal Rules*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusions. See *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 and *Kenya Anti-Corruption Commission v Republic & 4 others* [2013] eKLR.

10. Before we embark on the merits or otherwise of the appeal, we wish to express our great reservations and displeasure with the record of appeal as filed as the same is incomplete and in flagrant breach of Rule 87 (1) of this *Courts Rules*. A cursory perusal of the record herein shows that the proceedings in the High Court start from November 25, 2014 as evidenced in page 64 A of the record whereas the instant suit was filed sometimes in the year 2009. It is therefore not clear what transpired from 2009 to November 25, 2014. Additionally, the proceedings start from November 25, 2014, when the appellant presented his defence case. We therefore did not have the benefit of going through the respondent's case as the same was not made available, for reasons only known to the appellant. Be that as it may, we shall proceed to consider the appellant's appeal on merit based on the record provided to us.

11. With regard to the first issue namely; whether the learned judge erred in using her office and seal of the court to authenticate and legalize a deceitful and fraudulent alienation of the suit property, we have carefully looked at the appellant's submissions and save for making these very serious and grave allegations against the learned judge, the appellant has not demonstrated how the judge allegedly used

her office and seal of the court "to authenticate and legalize the deceitful and fraudulent alienation of the suit property thus rendering the judgment unconstitutional." There was not even an iota of evidence to back the appellant's assertions of abuse of office on the part of the Judge.

12. As we had alluded to earlier we did not have the benefit of perusing the respondent's evidence before the trial Court as the record compiled by the appellant is incomplete. Be that as it may, and as we can discern from the judgment of the learned judge, PW3 Murungi Dishon Mwiti who was the advocate acting for the appellant in the transaction confirmed having witnessed the signing of the agreement and exchange of documents by the parties. It was his further evidence that the completion period of 90 days was not complied with by the appellant and that no payment of the balance of the purchase price was made, but by an order of the court, the balance was deposited in court.

13. On the other hand, we have carefully looked at the appellant's evidence before the High Court to the effect that most of the documents tendered by the respondent were fake and forgeries and that he had not appointed any lawyer. He however did not specifically point out the fake documents and neither did he level the alleged particulars of fraud to any specific party.

14. The learned judge at paragraph 30 of her judgment stated as follows:

> 30. It is true that the purchaser had not paid the full purchase price to the defendant by the time the transfer in her favour was effected. It is trite that in conveyancing the purchasers advocates ordinarily give their professional undertaking to pay the balance of the purchase price once completion is achieved. The plaintiff's advocates had given that professional undertaking and were holding the balance pending completion which the court ordered deposited in court. This was done.
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> 31. The transfer of the suit property to the plaintiff's name was effected on the July 8, 2008 as evidenced by a certificate of lease issued in her favour by order of the court issued on the July 29, 2008 (DK Maraga, as he then was). That registration vested to the plaintiff a legal interest that is indefeasible except where fraud, misrepresentation or illegality are proved. Section 25 of *Land Registration Act, 2012*, and Section 26 (1) of the 2012 *Land Act* gives a registered proprietor an indefeasible and absolute ownership of land, and such title can only be subject to challenge `on grounds of fraud and misrepresentation or if such registration was acquired illegally un-procedurally or through a corrupt scheme.
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> 35. I have not found any act by the plaintiff that may vitiate the title in her favour. By the counterclaim, the defendant sought to defeat the plaintiff's title, but he failed to lead any evidence that, on a balance of probability, may have persuaded the court to come to findings that the plaintiffs' title was irregularly, fraudulently or illegally obtained." (Emphasis added).

15. From the circumstances of this case and in absence of any evidence of fraud or misrepresentation as contended by the appellant, we are unable to agree with the appellant that the learned judge used her office and seal of the court to authenticate and legalize a deceitful and fraudulent alienation of the suit property thus rendering the judgment unconstitutional. This contention by the appellant is clearly without basis and farfetched. Consequently, nothing turns on this point.

16. The learned judge was further faulted for failing/refusing to hear the appellant. The appellant submitted that the learned judge locked out all the defence witnesses and allowed the respondent to prosecute her case in a record time of 7 years and barred him from producing in court very pertinent documents that were heavily relied upon by the respondent.

17. On the other hand, the respondent refuted the allegations that the appellant's rights were violated and maintained that the appellant was given his day in court and that he had sought to call four witnesses

who were not made available and that as the four witnesses had not recorded any witness statements, it was evident that the appellant did not have the said witnesses and as such, the trial court did not violate his rights.

18. We have carefully scrutinized the available record which shows that when the matter came up for defence hearing on February 24, 2015, before Mshila, J it transpired that the appellant was not ready to proceed as he was indisposed. On June 29, 2015, when the matter was slated for defence hearing the matter was not listed and the court directed that the defence hearing do proceed on November 19, 2015. On November 19, 2015, when the matter came up for defence hearing before Mulwa, J the appellant intimated to court that he was unwell and that he had not filed his witness statements. The court further directed him to file his witness statement by December 24, 2015 and slated the matter for defence hearing on February 8, 2016. Again, on February 8, 2016, the appellant was absent despite the date having been taken in court and in the presence of the appellant, whereupon the court directed the matter to be heard on April 26, 2016.

19. On April 26, 2016, when the matter eventually came up for defence hearing, the appellant testified and indicated that he had 4 witnesses who were not in court and sought an adjournment to look for them. Mr Kibe for the respondent opposed the application for adjournment on the grounds that none of the witnesses had recorded statements. The court subsequently denied the application for adjournment noting that it would be prejudicial to the respondent who had already closed her case. The appellant thereafter closed his case and intimated to court that he would file submissions having dispensed with the calling of the four witnesses.

20. From the record, it is evident that the appellant was given ample time to present his witnesses, which he did not. Additionally, he did not appeal against the decision by the learned judge declining the application for adjournment to enable him "look" for his witnesses. In view of the above, this ground of appeal is without merit and the same is hereby dismissed in its entirety.

21. Finally, the learned judge was faulted for failing to recuse herself. On the other hand, it was submitted for the respondent that it was evident that after the ruling for recusal, the appellant filed an appeal and his appeal was dismissed. As we had alluded to earlier, the record herein is incomplete. It is indeed not in dispute that vide an application dated November 24, 2016, the appellant had sought recusal of the learned judge and vide a ruling dated February 13, 2017, the learned judge declined to recuse herself. A copy of this ruling was however not provided to this Court. Additionally, the record on May 11, 2017 reads inter alia as follows:

> " I have received a court of appeal order in CA No NAI 64 of 2017 (VR 48/2017) given on the 10/5/2017 the order suspends the delivery of judgment in this suit until after the court of appeal delivers its ruling on 26/5/2017."

22. On July 18, 2017, the record again shows that the court was informed that the Court of Appeal decision was delivered on June 2, 2017 and that the application was dismissed. It is not clear which application was dismissed as the said Court of Appeal proceedings were not made available in this matter. Equally, the ruling in which the learned judge refused to recuse herself was not provided for this Court's perusal and as such we do not know why the learned judge declined to recuse herself. In view of the above we find no merit in this ground of appeal and we accordingly dismiss the same.

23. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR