



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), GATEMBU & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 40 OF 2019

BETWEEN

JOHN KAMAU GACHINA ..... APPELLANT

AND

SAFIA SALIM KARAMA.....RESPONDENT

*(Being an appeal against the judgment of the Environment and Land Court of Kenya at Mombasa (Omollo, J.) dated 17<sup>th</sup> October, 2018*

*in*

*E.L.C. Case No. 178 of 2011)*

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**JUDGMENT OF THE COURT**

The bone of contention in this appeal, like in the trial court, is the ownership of L.R No. 8097 (original No. 4830/6) Section 1 M.N. (the suit property). On one hand, the appellant claims it by virtue of a certificate of title allegedly issued in his favour under the repealed **Registration of Titles Act (RTA), Chapter 281**.

It was his case that he had initially purchased **LR. No 8095** from the registered owner, Mzee Athman Ali Darani (the deceased) who passed away on 31<sup>st</sup> May, 2008, and who was the respondent's husband; that he fully paid the purchase price in instalments between 1995 and 1997. Subsequently, he learnt that the deceased had sold **LR. No 8095** to a third party. The deceased then agreed to give the appellant the suit property in replacement of **LR. No 8095**; that in the

result, the deceased executed a transfer dated 11<sup>th</sup> March, 2004 in his favour which was lodged at the District Land Registry on 11<sup>th</sup> May, 2004.

The appellant accused the respondent of having trespassed on the suit property after it was transferred to him by her late husband; and that, after so trespassing, the respondent has completely refused to grant him vacant possession. As a result, he instituted an action in the Environment Land Court (ELC) from which this appeal has arisen. In the suit, he prayed for, *inter alia*, vacant possession; a permanent injunction to restrain the respondent from continuing to trespass on the suit property; and damages for trespass.

The respondent's version, on the other hand, was that sometime in 1986, her deceased husband, bequeathed her, *inter vivos* the suit property as a *Hiba* (in Islamic law, an irrevocable gift). Immediately thereafter, she took possession and to this day, over 30 years, continues to occupy it. To her, the purported transfer of the suit property to the appellant was illegal and void on account of the aforesaid existing *Hiba* at the time of the alleged sale. In her counter-claim, the respondent prayed for the dismissal of the appellant's suit; and rectification of the register by cancelling the appellant's name as the proprietor of the suit property and registering her as its proprietor.

At the trial, the appellant reiterated that the initial agreement with the deceased was for the sale of **L.R No. 8095** which he fully paid for. Unknown to him, the deceased had sold **L.R No. 8095** to a third party. Consequently, he

agreed with the deceased that he would exchange **L.R No. 8095** with the suit property which he did by executing the transfer in relation to the suit property.

Asha Ali Salim, the respondent's daughter, gave evidence on behalf of the respondent pursuant to a special power of attorney dated 20<sup>th</sup> June, 2016. She testified that the respondent and her children had been in occupation of the suit property for several years; and that upon taking possession, the respondent developed the suit property and has been paying overhead bills.

Omollo, J. after evaluating this evidence rendered a judgment dated 17<sup>th</sup> October, 2018 in which she found in favour of the respondent stating as follows:-

**“In concluding, it is my finding that the transfer of the suit land No 8097 to the plaintiff is not supported by any evidence thus not valid. Secondly even if the transfer & registration was valid, the interests of the defendant were not extinguished by reason of her occupation of the land from 1995 when the plaintiff was “purchasing” the plot No 8095. Consequently, a trust was created in her favour which entitles her to be registered as the owner of the suit land. In light of the foregoing the plaintiff’s suit fails for lack of proof within (sic) a balance of probabilities.**

**Instead, I enter judgment for the defendant as prayed in the counter claim. The Land Registrar is directed to cancel the plaintiff’s title and registration as owner of plot No 8097/1/MN. In his place, the defendant shall be registered as owner and be issued with a certificate of title in her name. I also award the defendant costs of this suit.”**

It is this decision that has provoked the appeal, the subject of this judgment. The appeal is predicated on the grounds that the learned Judge erred by finding that the transfer of the suit property to the appellant was invalid; holding that the respondent was entitled to the suit property by virtue of her occupation thereof;

holding that there was a trust created in favour of the respondent; entering judgment in terms of the respondent's counter-claim without proof; directing cancellation of the appellant's certificate of title; and misdirecting herself on the burden and standard of proof.

The respondent in turn filed grounds for affirming the impugned judgment. At the hearing, Ms. Abetsa, instructed by the firm of Lumatete Muchai & Company Advocates, argued the foregoing grounds for the appellant and faulted the learned Judge for misapprehending the legal principle of sanctity of title and the circumstances permitting the impeachment of a certificate of title.

Placing reliance on the High Court decision in **Mike Maina Kamau vs. Attorney General** [2017] eKLR and **Section 26(1)(a) & (b)** of the **Land Registration Act**, counsel submitted that the title could only be challenged on grounds of fraud, misrepresentation or where it was obtained by illegal means, unprocedurally or through a corrupt scheme.

The Judge, according to the appellant, failed to acknowledge that the respondent failed, not only to particularise fraud or illegality, but also to prove their existence, hence the counter-claim was not proved; that the respondent's case was premised on a gift deed which was not dated, registered or stamped under the **Stamp Duty Act** and as such lacked probative value; and that such a claim could not override the appellant's title obtained lawfully as a *bona fide* purchaser for value.

Though served with the hearing notice, there was no appearance from the firm of Said H. Mgupu Advocate who are on record for the respondent. The respondent, however opposed the appeal in her submissions, contending that the learned Judge correctly applied the principles stipulated under **Section 26** of the **Land Registration Act** in cancelling the appellant's title; that it was clear to the learned Judge that the copy of the title produced by the appellant was in respect of **Plot No. 8095** as opposed to the suit property in view of the alteration that was apparent on the last digit of the plot number, where 7 was overwritten on 5 to make it appear as if it was for the suit property (**8095**).

Even assuming that the appellant's title was genuine, in the circumstances of the case, the respondent argued that she had an overriding interest against the appellant's title; based on the fact that the appellant proceeded with the alleged sale transaction despite being aware of the *status quo*. She added that the appellant entered into the alleged transaction in perpetuation of a mischievous and fraudulent scheme to dispossess her of the suit property while fully aware she was in occupation of the suit property;

Lastly, the respondent submitted that she was entitled to the suit property on the strength of the *Hiba*, which met all the prerequisites and requirements of Islamic law; that an oral *Hiba* is permissible and enforceable under Islamic law; and that, therefore it did not require registration as delineated under **Section 4(1) (v)** of the **Registration of Documents Act**.

We have considered the record of appeal, submissions made on behalf of the parties, as well as the law. This being a first appeal, our mandate entails re-evaluation of the evidence on record and arriving at our own independent conclusions, giving allowance to the fact that we, unlike the trial court, did not have the benefit of seeing or hearing the witnesses as they testified. See **Kenya Ports Authority vs. Kuston (Kenya) Limited** [2009] 2EA 212.

To determine whether the learned Judge correctly resolved the two competing claims over the suit property, we must re-evaluate the case and evidence of each party. It is common factor that the appellant's claim was based on a certificate of title while that of the respondent was founded on a *Hiba*.

No doubt our land registration regime recognises the principle of sanctity of title, which in turn connotes a presumption that a certificate of title issued under the regime, like in this case, the repealed **RTA**, is *prima facie* evidence that the person named as the proprietor of the land in question is the absolute and indefeasible owner thereof. We have underlined *prima facie* because the presumption of ownership is rebuttable. It can be rebutted, for example, on the grounds of fraud or mistake to which the registered proprietor is proved to be a party. See **Section 23(1)** of the **RTA**. It is on this presumption that the appellant based his claim to the suit property.

On the other hand, the respondent too was required to discharge the burden of proving her counter-claim that she was entitled to the suit property on account of *Hiba*, as well as her long occupation of the suit property that would *per se* entitle her to the suit property.

She too had the burden of proving fraud on the part of the appellant.

On record, we find that the respondent did set out the details of the *hiba* and her occupation of the suit property both in her defence and counter-claim. But the appellant contended that the *hiba*, was of no effect for lack of registration and stamp under the Stamp Duty Act. We have not seen any decision of this Court regarding the law on *hiba*, but there are decisions of the High Court in this area. For instance, in the High Court at Marsabit, in the case of **Habiba Sharu Hirbo vs. Ibrahim Sharu Hirbo & another** [2020] eKLR; and at Garissa in **Fatuma Anab Mohamed Haji & 5 others vs. Asha Abdullahi & 3 others** [2018] eKLR.

There are also persuasive authorities from India. For example, in the Supreme Court of India in **Rasheeda Khatoon vs. Ashiq Ali** [2014] INSC 742.

It is agreed, in both the cited High Court decisions and the one from India that under Islamic law, *hiba* will be valid if:

- (i) the declaration by the donor is unambiguous
- (ii) it is accepted by the donee, and
- (iii) possession is delivered.

In this dispute, we reiterate that the appellant's main argument regarding the existence of *hiba*, is that the same was neither registered nor stamped under the **Stamp Duty Act**, hence invalid. The respondent concedes this fact. The Supreme Court of India too agreed when it said;

**"In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law."** [Emphasis added]

See **Hafeeza Bibi & Others vs. Shaikh Farid (dead) By LRs. & Others (supra)**.

The three pre-requisites of a valid and irrevocable *Hiba* were met. The deceased gifted the suit property to the respondent, who, in return, accepted it and took possession thereof in 1986, before the purported purchase by the appellant. Indeed, the appellant conceded in cross-examination that the respondent was in occupation at the time her deceased husband.

According to Part V111 of the Stamp Duty Act, specifically **section 117(1)(i)**, dealing with the exemptions from stamp duty, any instrument "generally or specially exempted in the schedule" shall be exempt from stamp duty under the Act.

Clause 12B of the Schedule provides that a "Conveyance or transfer of real property between husband and wife" shall attract "nil" duty.

It is, therefore not correct to argue, as the appellant did that the transfer was invalid for reason of lack of a stamp in accordance with the Stamp Duty Act. Likewise, it not true that the exemption is based on Islamic law that a gift from a husband to a wife is exempt from stamp duty, rather it is a general exemption of the law that is not based on religion.

In our view, *Hiba*, coupled with the occupation of the suit property by the respondent gave rise to an implication that her deceased husband, who was the registered owner prior to him transferring suit property to the appellant, held it in trust for the respondent. The inference of the trust is fortified by the case of **Peter Ndungu Njenga vs. Sophia Watiri Ndungu** [2000] eKLR where this Court held,

**"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied."** [Emphasis added.]

It is evident from this that the respondent's challenge of the appellant's claim went to the root of the title he held. The appellant cannot claim that he was a *bona fide* purchaser for value without notice when there is evidence that he was aware that the respondent, the deceased's wife, had lived on the property for some time. Like this Court said in the case of **Munyu Maina vs. Hiram Gathiha Maina** [2013] eKLR:-

**"... when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and**

**the registered proprietor must go**

**beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” [Emphasis added]**

Whilst the appellant pleaded in his plaint that he had purchased the suit property from the deceased, his account before the trial court was totally different. He testified that he entered into an agreement with the deceased in the year 1995 to buy from the deceased **L.R. No. 8095** but the deceased sold the said land to a third party, prompting the deceased to offer to substitute it with the suit property, which offer he accepted. We, like the trial court, note that the appellant did not produce a sale agreement with regard to **L.R. No. 8095** or any evidence of payment of the purchase price. He produced no evidence of the substitution of **L.R. No. 8095** with the suit property to substantiate his claim. Equally, the transfer on record does not disclose the agreement suggested by the appellant.

It was the appellant’s evidence that, during the 2007 - 2008 post- election violence, he misplaced the original certificate of title which was in the deceased’s name. He testified that he reported the loss in the year 2010 at a police station and obtained a provisional title on 24<sup>th</sup> June, 2010. In cross-examination, he conceded that he did not report the loss of the title immediately since he was working in Uganda.

In our view, the delay of over two years by the appellant to report the loss of the title deed raises eyebrows. What is more, the appellant did not produce the

police abstract or divulge the circumstances under which the title was lost, apart from the general statement that it was during the post-election violence.

But of more significance in our view is the status of the copy of the provisional title document produced by the appellant at the trial court. It is obvious even to us that there is an alteration on the description of the property. It appears, *ex facie* that the original description in it was in relation to **L.R No. 8095**, which is the property the appellant had purchased from the deceased but digit 7 was overwritten on the last digit 5, to make it appear like it was for the suit property.

As a result, we agree with the respondent that the explanation offered by the appellant to the effect that the original certificate had no alteration did not dispel the question of the authenticity of the copy of the title on record, upon which the appellant’s claim is built.

To this, we may only add, by way of emphasis that during the alleged sale and transfer of the suit property, the appellant was well aware of the respondent’s overriding interest over the suit property by virtue of her occupation. Therefore, in accordance with **Section 2** of the **RTA**, we are satisfied that this knowledge imputes fraud by the appellant. The section defines fraud as follows:

**“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”**

It is clear to us from our analysis of the entire evidence, that the appellant fell short of proving the root of his title or that he was a *bona fide* purchaser. In contrast, we find that the respondent did establish her claim to the suit property to the required standard. We cannot find any material in this appeal to warrant our interference with the judgment of the ELC, with the result that this appeal lacks merit. We accordingly dismiss it with costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCI Arb)**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**