



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 193 of 2010

BETWEEN

DR. C. O. OKERE.....APPELLANT

AND

ESTHER NDUTA KIIYUKIA.....1st RESPONDENT

ESTHER MUTHONI.....2nd RESPONDENT

CITY COUNCIL OF NAIROBI.....3rd RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Rawal , J.) dated and delivered on 4th May 2007

in

High Court Civil Case No. 2 of 2004)

JUDGMENT OF THE COURT

1. The appellant, **Dr. C.O. Okere**, by a Complaint dated 6th January 2004 and amended on 28th January 2004 filed suit against the respondents seeking the following orders:

“(a) A permanent injunction restraining the respondents from trespassing upon, wasting, fencing, alienating, constructing or interfering or in any way dealing with all that parcel of land known as Nairobi/ Block/63/305 originally known as Nairobi Plot No. 281 Jamhuri Phase II.

(b) A declaration that the appellant is the owner of title No. Nairobi/ Block 63/305 originally Plot No. 281 Jamhuri Phase II.

(c) General damages, interest and costs of the suit.”

2. The appellant asserts that at all material times, he was the owner of **Nairobi/ Block/63/305** originally **Nairobi Plot No. 281** Jamhuri Phase II and which plot was legally allotted to him by the 3rd respondent on 10th February 1992. It is alleged that the 3rd respondent unlawfully and fraudulently sold the suit land to the 2nd respondent **Esther Muthoni** Who in turn sold it to the 1st respondent, **Esther Nduta Kiiyukia**. Subsequently, the 1st and 2nd respondents have fenced off the land, taken possession thereof and have embarked on construction of a permanent home on the suit land.

3. In the Complaint, no particulars of fraud are pleaded. However, particulars of negligence on the part of 1st and 2nd respondent are pleaded. The particulars are:

(i) Taking possession of the suit land as purported owners fully knowing that the said action is null and void, and without consent and knowledge of the appellant.

(ii) Selling the suit land to third parties without consent of the appellant.

(iii) Entering into a transaction which is null and void.

(iv) Obtaining an illegal lease document.

4. Founded on the alleged negligence, the appellant avers that he has been deprived of ownership and enjoyment of the suit property and has suffered loss and damage. Consequently, he seeks a permanent injunction against the respondents and general damages for the unlawful conduct. He seeks an order declaring him to be the owner of LR Nairobi/Block 63/305 original Nairobi Plot 281 Jamhuri Phase II.

5. The 1st respondent denies in entirety all the allegations in the Plaintiff. She asserts that she is a bona fide purchaser for value of the suit property. On 4th June 2002, she entered into a sale agreement with the 2nd respondent who was the registered proprietor of Nairobi/Block/63/305. She purchased the property for valuable consideration and became the registered proprietor thereof. She took immediate possession and commenced construction thereon.

6. The 2nd respondent in her statement of defence denies all the particulars of negligence and avers she was issued a Lease by the **City Council of Nairobi** upon following all legal procedures. She acquired lawful title to the suit property and has since transferred title to the 1st respondent.

7. The **City Council of Nairobi** in its statement of defence denies all the particulars of negligence; that the title of the 1st respondent and contemporaneous possession of the suit property is legal rendering the appellant's claim a legal travesty.

8. Upon hearing the parties, the trial court delivered its judgment on 4th May 2007 dismissing the appellant's suit. In dismissing the suit, the trial court expressed herself as follows:

“I respectfully disagree with the Plaintiff's contention that there was fraud or collusion or negligence on the part of any of the defendants, solely because there is no evidence to even suggest the same. The 2nd defendant derived a lawful title from the 3rd defendant which is, in any event, indefeasible even on the face of fraud and the 1st defendant was a bona fide purchaser for value without notice and thus obtained a lawful title in respect of the suit property.

The interest of the Plaintiff, even if I do believe the same to be in existence, is an inchoate one and cannot defeat the registered proprietorship of the 1st and 2nd defendants. Even as per the provisions of Section 143 of the Registered Land Act both are entitled to registration of title in their respective names. Even if I am wrong on the aforesaid findings, which I hope I am not, the Plaintiff has only shown that he was allotted a plot bearing LR No. Nairobi/Block/63/281 and not the suit property which is LR No. Nairobi Block/305. I do not have any evidence to find that both these plots are the same.

In the premises, I do find that the allocation of LR No. Nairobi/Block 63/281 in the name of the Plaintiff cannot defeat the registered proprietorship of the 2nd defendant and 1st defendant respectively in respect of LR No. Nairobi/Block/ 305.”

9. Aggrieved by the dismissal of his suit, the appellant has lodged the instant appeal citing the following grounds:

“(i) The judge erred in dismissing the appellant's suit against the weight of evidence.

(ii) The judge erred in holding that the appellant did not prove fraud against any of the respondents.

(iii) The judge erred in failing to acknowledge the fact that the 3rd respondent having allotted the suit land to the appellant, the said 3rd respondent had no capacity to allot the same to any other person including the 2nd respondent and any purported transfer of the suit land by the 2nd respondent was null and void.

(iv) The judge erred in holding that the appellant had not proved that Plot No. 281 is the same as Plot No. 305; the judge further erred in referring to Nairobi /Block/63/281 which was nowhere in the proceedings or documents produced by the appellant.

(v) The judge erred in failing to assess damages payable to the appellant by the 3rd respondent or to direct how the same was to be assessed or order for a refund of the money paid by the appellant to the 3rd respondent in respect of the suit land.

(vi) The judge erred in failing to appreciate the fatal effect of the 3rd respondent's failure to offer any explanation as to how it allotted the suit property to the 3rd respondent when it had not revoked the earlier allotment to the appellant.

(vii) The judge erred in requiring the appellant to prove his case beyond the legal standard of proof on probabilities required in civil case.

10. At the hearing of this appeal, learned counsel **Ms. Mbogo** instructed by the firm of Onyoni Opini & Gachuba Advocates appeared for the appellant. Learned counsel **Ms Jane Gachuiga Okullo** appeared for the 1st respondent while the firm of Kibatia & Co. advocates are on record for the 2nd respondent. Learned counsel **Mr. Odhiambo Isaac** holding brief for **Mr. Kibet** appeared for the 3rd respondent. Counsel for the appellant filed written submissions and list of authorities. Other counsel made oral submissions.

11. The appellant submitted that the trial judge erred in evaluating the evidence on record; that the appellant was allotted by the 3rd respondent the suit property then referred to as Plot No. 281 Jamhuri Phase II. The allotment was by a letter dated 10th February 1992. The appellant paid the entire sum of Ksh. 10,800/= stated in the allotment letter. The sum paid has never been disputed by any respondent. It was submitted that the same Plot No. 281 was later allocated to the 2nd respondent who obtained a title deed and sold the land to the 1st respondent. It is not clear under what circumstances the Plot was allocated to the 2nd respondent when the same had already been allocated to the appellant. The 3rd respondent has never given any explanation how the allocation to the 2nd respondent happened. In the absence of any forthcoming explanation, it was submitted that allocation of Plot No. 281 to the appellant remains valid and the suit property was not available for allocation to any other person. The subsequent allocation of the Plot to the 2nd respondent without the appellant's knowledge, consent and notice was illegal and amounted to a fraud.

12. Counsel submitted that neither the 1st, 2nd nor 3rd respondents adduced any evidence to controvert the testimony of the appellant with the consequence that **Section 107** of the **Evidence Act** comes into play. The Section provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.”

13. It was urged that the circumstances under which Plot No. 281 was later allocated to the 2nd respondent is a fact within the knowledge of the 3rd respondent who bears the evidential burden to lead such evidence.

14. On the issue of fraud, the appellant submitted that the trial judge erred in holding that fraud was not proved. The particulars of negligence pleaded in the plaint are the particulars of fraud. On the strength of the particulars of negligence as pleaded, counsel submitted that the appellant had proved he was the original allottee of the suit property and the fact the 3rd respondent confirmed that the land had been allocated to the 2nd respondent was proof of fraud. It was stated that the appellant's original allotment has never been cancelled and the 3rd respondent has not offered any evidence to demonstrate the appellant did not comply with any conditions in the letter of allotment dated 10th February 1992. Counsel cited the case of **Commissioner of Lands vs. Kunste Hotel Limited (1997) eKLR** to support submission that a person who has been given rights over a parcel of land must be consulted before such land is alienated.

15. On the issue that the appellant did not prove Plot No. 281 is the same as Nairobi/Block 63/305, counsel stated that the appellant was allocated the same suit property and this fact is evidenced and proved by a letter from counsel from the appellant to the City Council of Nairobi where the 3rd respondent confirmed that the two plots were the same. It was submitted that the trial court erred in not appreciating the letter from City Council of Nairobi. In addition, the appellant faulted the trial judge for introducing an entirely new parcel of land known as LR No. Nairobi/Block 63/281 which parcel does not exist anywhere in the pleadings. The case of **Mbau Saw Mills Limited vs. Attorney General & another 2015 eKLR** was cited in support.

16. In concluding submissions, the appellant faulted the trial court for not assessing damages payable by the 3rd respondent despite the same having been claimed in paragraph 7 of the amended Plaint.

17. Counsel for the 1st respondent in opposing the appeal urged that during trial, neither negligence nor fraud was not proved. The 1st respondent was a *bona fide* purchaser for value without notice and her title is indefeasible. It was submitted that the trial court did not err in any of its findings.

18. Counsel for the 3rd respondent in opposing the appeal relied on submissions filed before the trial court.

19. We have considered the grounds of appeal as well as submission by counsel and the authorities filed in the matter. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle vs. Associated Motor Boat Co. [1968] EA 123**, it was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

20. The gravamen of the appellant's contestation is the contestation that the trial court erred in finding Plot No. 281 is not the same as LR No. Nairobi/Block 63/305. In addition, the appellant contends the trial judge erred in introducing a non-existent parcel of land namely LR No. Nairobi Block 63/281.

21. On the submission that the judge erred in introducing an entirely new parcel of land known as LR No. Nairobi/Block 63/281, we have perused the record of proceedings and analyzed the judgment of the trial court. We believe the reference by the learned judge to LR No. Nairobi/Block 63/281 was a typographical error. In our view, the learned judge meant Plot No. 281. Accordingly, we find no merit in this ground of appeal.

22. On the issue that the trial court erred in holding that Plot No. 281 was not the same as LR No. Nairobi/Block/63/305, we have examined the evidence on record. By a letter of allotment dated 10th February 1992, the appellant was allotted by the 3rd respondent Plot No. 281 measuring approximately 0.02 hectares. In an official search dated 4th January 2004, the registered proprietor of Nairobi/Block 63/305 is

indicated as **Esther Nduta Kiiyukia** (1st respondent) and the plot size measures 0.0186 hectares.

23. The appellant contends that Plot No. 281 is the same as Nairobi/Block 63/305. It is contended that the evidence that proves the two parcels of land is one and the same is a letter dated 20th April 2004 from the City Council of Nairobi addressed to Messrs. Julius Nyakiangana & Co. Advocates acting for the appellant. The reference of the letter from the City Council is REF: Nairobi Block 63/305 – Plot No. 281. The letter reads as follows:

“The above subject refers.

We are in receipt of your letter dated 30th March 2004 addressed to the Town Clerk and copied to the Director of Planning. Records held in this office confirm that Dr. C. O. Okere was the original allottee of this Plot which was allocated to him on 10th February vide letter of allotment Ref: CP& Arch/00/022.”

24. We have also perused the letter dated 30th March 2004 from Messrs. Julius Nyakiangana & Co. Advocates addressed to the Town Clerk City Council of Nairobi. The Reference of the letter is RE: Nairobi Block 63/305. The letter reads:

“Kindly furnish us with details of who is the first allottee in respect of the above parcel of land.”

25. It is the appellant’s submission that the letter dated 20th April 2004 from the City Council of Nairobi is proof and an admission that Plot No. 281 is the same as Nairobi/Block 63/305. Based on the contents of this letter, counsel submitted that the trial judge erred in holding that there was no evidence on record to prove that Plot 281 is the same as Nairobi/Block 63/305.

26. We have considered submission by the appellant on the issue. There is no plan, sketch map or a survey map indicating the exact position or location of Plot No. 281 or Nairobi/Block 63/305. A survey plan or duly authorized sketch map is the best evidence that shows the location of a given parcel of land. If the two plots are the same, a survey plan would reveal this fact. A letter from one party to another does not prove location of any parcel of land. Such a letter is not recognized in law as determining location of any parcel of land. The more so, the letters under reference are not letters from a qualified surveyor. A survey map or a Registry Index Map prepared pursuant to **Section 18 (1) of the Registered Land Act** or a duly approved sketch map prepared by a competent and authorized person is the best evidence that can prove location of Plot No. 281 to determine if the said Plot No. 281 is the same as Nairobi/Block 63/305. The appellant did not tender in evidence any survey map or document that can prove that Plot No. 281 is the same as Nairobi/ Block 63/305. In the absence of a survey map or approved sketch plan, we find that the trial judge did not err in holding that the appellant had only shown he was allotted a Plot No.281 and not the suit property which is LR No. Nairobi/ Block 63/305.

27. We have considered the appellants submission on fraud. In **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)** Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

28. We have scrutinized the amended Plaintiff. There are no particulars of fraud pleaded in the Plaintiff. All that is pleaded are particulars of negligence. Fraud and negligence are two different causes of action with different evidential standards of proof. Whereas negligence is proved on balance of probabilities, fraud is proved at a higher standard above balance of probabilities. To succeed, the appellant needed not only to plead and particularize fraud, but also a basis by way of evidence, upon which a trial court would make a finding. In the instant appeal, failure by the appellant to plead fraud and to give particulars thereof is fatal to submissions founded on fraud. The trial court had no pleading and particulars to consider and determine any allegations on fraud. Notwithstanding the foregoing, in the amended Plaintiff, the particulars of negligence is pleaded only against the 1st and 2nd respondents. There are no particulars of negligence on the part of the 3rd respondent. Failure by the appellant to plead and particularize fraud lead us to find that this ground of appeal has no merit.

29. The 1st respondent submitted that she was a bona fide purchaser of the suit property for value without notice. We have considered the evidence on record in support of this submission. Comparatively, in the Ugandan case of **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** it was held:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a) he holds a certificate of title;
- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;
- d) he purchased for valuable consideration;

- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud.”

30. The 1st respondent tendered in evidence her certificate of title to prove she is the registered proprietor of the suit property. She also tendered a sale agreement with the 2nd respondent. She denied knowledge of the appellant’s interest in the suit property. The appellant did not lead any evidence to prove that the 1st respondent was not a *bona fide* purchaser for value. The appellant did not lead evidence to demonstrate the 1st respondent had knowledge of the appellant’s interest in the suit property. In addition, the appellant did not adduce evidence to prove fraud and then prove that the 1st respondent had knowledge of the fraud. All that the appellant testified is that because he was the original allottee of Plot No. 281, then all transactions in relation to Plot No. 281 which is the same as Nairobi Block 63/305 are null and void. Failure by the appellant to plead and prove fraud is fatal to any claim against the 1st respondent. We find that the evidence and submission that the 1st respondent was a bona fide purchase for value without notice was not controverted.

31. The appellant urged that the trial court erred in failing to assess general damages due from the 3rd respondent; that the judge erred and failed to make an order for refund of monies paid by the appellant to the 3rd respondent. A claim for refund is a claim for special damages. The amount of refund must expressly be pleaded. In **Sande vs. Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)** this Court held that it is now trite law that special damages must not only be pleaded but must also be specifically proved.

32. We have examined the prayers in the amended Plaintiff. There is neither a prayer for refund of any monies nor has any specific amount for refund been pleaded or indicated. A trial court cannot grant an order for refund of an amount that has not been specifically pleaded nor prayed for in the Plaintiff. In **Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR**, this Court expressed as follows:

“In the plaintiff, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant’s breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary. The fundamental question is whether the respondent made a specific prayer in its plaintiff. The answer is in the negative, since the prayer was in the alternative. A prayer for damages must be specifically pleaded and particularized.

33. Persuaded by the sound reasoning and analogy quoted above, we are satisfied that the appellant having failed to plead a claim for refund, the trial court had no basis to consider refund or make an order for the same.

34. As observed earlier, this case relates to parcels of land generally referred to as "**Jamuhuri Estate allocations**" which have generated numerous complaints and court cases. Each case must, however, rest on its own facts and pleadings, and we have no doubt that there will be divergent decisions emanating from such cases. We are particularly aware of the decision in **Civil Appeal NO.254 of 2010, Dickson Ndegwa Mbugua v. City Council of Nairobi & 3 Others (UR)**, where the majority found that the plot was illegally acquired and declared the Title a nullity. In this case, the mainstay of the appellant’s case was the identity of the plot he claimed and the trial court found, which we affirm, that there was no evidence that the plot acquired by the respondent was the same as the plot claimed by the appellant. And there lies the distinguishing feature in the two matters.

35. On assessment of damages, assessment of damages can only be made when liability on the part of the respondent has been established. Whereas we agree with the appellant that the trial court ought to have assessed general damages in the event the appeal succeeded, in the instant matter, noting that this appeal has not succeeded on the issue of liability, we find that no prejudice has been occasioned to the appellant by failure of the trial court to assess general damages.

36. In totality, for the various reasons stated above, we find that this appeal has no merit and is hereby dismissed. Each party is to bear its own costs.

Delivered at Nairobi this 22nd day of March, 2019

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR