



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 11 OF 2016

BETWEEN

DANIEL MUCHANGA NYUKURI.....APPELLANT

VERSUS

RICHARD KIPROTICH KENDUYWO.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya

at Kitale, (Obaga, J.) dated 7th July 2015)

in

ELC Case No. 59 OF 2013

JUDGMENT OF THE COURT

Background

1) This is a first appeal from the judgment of the Environment and Land Court at Kitale in Environment and Land Case No. 59 of 2013. **Richard Kiprotich** (the respondent) had instituted the suit in the Environment and Land Court (ELC) vide a plaint dated 17th May 2013 seeking orders for, *inter alia*, eviction of **David Muchanga Nyukuri** (the appellant) from plot no 2964 Tuwan Farm and orders restraining the appellant from interfering in any manner with plot nos. 2963 and 2964 Tuwan Farm Limited.

2) Vide its Statement of Defence filed on 2nd July 2013, the appellant contended that he had legally acquired Plot nos. 2963 and 2964 and that accordingly, the respondent was not entitled to the eviction orders it sought against him. After considering the evidence of both parties, the ELC delivered a judgment in favour of the respondent and issued an eviction order directing the appellant to vacate plot No 2964 and to stop interfering with plot no 2963. Aggrieved by this decision, the appellant preferred this appeal.

3) The appellant raised five grounds contending that the learned judge erred in law and fact: in holding contrary to the evidence, that the respondent had proved his case on a balance of probabilities; in disregarding the evidence of Christopher Jackton Louman (Louman), the appellant's witness who clarified that the appellant indeed owned the disputed plots; in holding that the sale agreement dated 11th November, 1988 (defence exhibit 2) was a forgery yet there was no expert evidence to prove it was a forgery; in using extraneous matters to arrive at his findings; and in disregarding the appellant's evidence which was clear and unambiguous.

Submissions by Counsel

4) At the hearing of the appeal, both parties made oral submissions. Learned counsel, Ms. R. Arunga appeared for the appellant while learned counsel, Mr. R. Chebii appeared for the respondent. Ms. Arunga submitted that the respondent's deceased's father had sold five(5) plots to the appellant and that the appellant was subsequently issued with a share certificate in respect of the five plots; that the respondent's plaint before the ELC contained allegations of fraud against the appellant but without providing any particulars; that this was a fatal mistake that the ELC ought to have noted; and that the ELC set out the particulars of fraud in its judgment yet these particulars were neither set out in the plaint nor in the respondent's evidence.

5) Ms. Arunga further submitted that the learned judge erred in law and fact when he disregarded the evidence of the appellant and his witness, Joseph Bett (Bett); that this evidence was clear and was not contradicted by the respondent's evidence; that the learned Judge would have arrived at a different finding had he considered that evidence; and that there was no evidence of forgery;

6) Mr. Chebii for the respondent opposed the appeal and submitted that from the proceedings, it emerged that the appellant forged some documents particularly with regard to the measurement of the plot that was originally sold by the respondent to the appellant; and that there had been some alterations and additions to the sale agreement produced by the appellant. The upshot of Mr. Chebii's submissions on this limb was that the appellant had falsified the documents he presented before the ELC.

7) Mr. Chebii further submitted that Barnabas Mutimba Obonyo (Obonyo), a surveyor, confirmed that the appellant was the owner of only three plots namely Plot no 2960, 2961 and 2962 and that the appellant's father was the owner of Plot No 2963 and 2964; that there were contradictions between the appellant's evidence and that of Christopher Jackton Louma; that while Nyukuri testified that the appellant bought a piece of land which measured 100 by 100, Louma stated that the said piece of land measured 80 by 80 metres.

8) On the share certificate issued to the appellant, Mr. Chebii submitted that the share certificate bore the name of Tuwan Farm Urban Project yet the minutes produced by the appellant bore the name Tuwan Farm Limited; that these were two different enterprises and that the differences in the names confirmed that the appellant and his witnesses had forged some documents. Mr. Chebii urged us to find that the appeal lacks merit and dismiss it with costs.

Determination

9) This being a first appeal, our duty as imposed by the law is to evaluate afresh the evidence before the trial court in order to reach our own independent conclusion. (See **Selle V Associated Motor Boat Co. Ltd** (1968) EA 123). This duty was stated with clarity by this court. In **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**, as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

10) We have considered the record of appeal, the authorities cited, the rival submissions by the parties and the law. The single issue that commends itself for our determination is whether the appellant has a legal claim to plot Nos.2964 and 2963.

11) From the record, the share certificate issued to the appellant indicated that he was the registered owner of Plots No 2960, 2961, 2962, 2963 and 2964 was granted by Tuwan Farm Urban Project while the minutes produced in support of the appellant's claim refer to Tuwan Farm Limited. We note that while the two entities share a postal address, the appellant has not produced any evidence to demonstrate that the two entities were one and the same company.

12) We also note from the record that the appellant bought the parcels of land from Tuwan Farm Limited. In the absence of a clear explanation why the share certificate bears the name of Tuwan Urban Firm Project, we are unable to find that the share certificate produced by the appellant establishes his ownership of the five properties as he claimed.

13) The appellant also referred us to the sale agreement dated 30th March 1992 in support of his contention that he had purchased Plot No 2963. The said sale agreement indicates that it related to sale of a plot measuring “length 20 yards by 16 yards and width 14 yards by 10 yards”. The relevant clause in the sale agreement does not refer to the sale of Plot No 2963 even though there is mention of Plot No 2963 just after the heading of the sale agreement. To that extent, we agree with the findings of the ELC that the appellant has not demonstrated that the sale agreement relates to the purchase of Plot No 2963.

14) While Louma testified that the appellant was the owner of five plots of land, his evidence contains a number of gaps. For instance, Louma testified that he was not a witness to either of the sale agreements between the parties herein. Louma did not produce to the court the report of the survey that allegedly established that the appellant was entitled to the two additional plots. We also note that the deceased or the respondent herein did not endorse the minutes during which it was allegedly agreed that the appellant was entitled to the two additional plots. The upshot of the foregoing is that we are not satisfied that the evidence of Louma establishes that the appellant was entitled to the two additional plots of land which he claims.

15) From our review of the evidence, we are not satisfied that the appellant demonstrated that he bought five plots of land from the respondent. Our evaluation of the evidence leads us to the conclusion that the appellant purchased three plots of land and not the five that he claims.

16) We also note that while the ELC made findings on fraud and forgery, the particulars of fraud were not specifically pleaded. In **Kinyanjui Kamau vs George Kamau Njoroge, (2015) eKLR** this Court affirmed the well settled principle of law when it observed that, “It is trite law that any allegations of fraud must be pleaded and strictly proved”. In the **Kinyanjui case (supra)**, this Court further held that where fraud is alleged, it is not enough to simply infer fraud from the facts. In fortifying this position, the Court cited with approval this Court's earlier decision in **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)** where it was stated that:

“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.”

17) Accordingly, we find that the ELC erred in making findings of fraud yet the pleadings did not contain any particulars of fraud.

18) Nevertheless, from our finding in paragraph 15 above, we see no reason to interfere with the findings of the ELC. It follows that we find that this appeal lacks merit and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR