



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 42 OF 2017

BETWEEN

PETER SIRIRIA.....APPELLANT

AND

RAPHAEL KIBUSI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court

at Kitale, (Obaga, J.) dated 13th day of May, 2015

in

HC ELC NO. 74 OF 2011)

JUDGMENT OF THE COURT

[1] Peter Siriria who is the appellant herein was the 2nd defendant in a suit that was filed by Raphael Kibusi (now the respondent) in the Land and Environment Court (ELC) at Kitale. The 1st defendant in the suit was Maua Naibei Siriria who died during the pendency of the suit. As a result, the suit against her was withdrawn. The respondent had filed the suit as the registered owner of a land parcel known as Saboti/Saboti Block 6/Sukwo 151 (herein suit property), by virtue of a title deed dated 10th December, 1998.

[2] In his plaint, the respondent averred that the appellant had trespassed onto the suit property, and erected structures on it, in complete disregard to the respondent's right as the registered owner. The respondent averred that he acquired the property through shares purchased from a company called Sukwo Farmers Company Limited (The Company).

[3] The appellant filed a defence in which he denied trespassing on the suit property. He admitted that the respondent is the registered owner of the suit property, but maintained that the registration of the respondent as the sole proprietor of the suit property was done fraudulently, without regard to the rights of the appellant and his family who were in occupation of the suit property and who had interests thereon. The appellant counterclaimed for a declaration that the registration of the respondent as a sole proprietor of the suit property was fraudulent, and an order that his title be cancelled, and the suit property registered in the name of the appellant.

[4] At the hearing of the suit, the respondent testified and told the court that after independence, he and other individuals incorporated Sukwo Farmers Company Limited and the members made contributions to be shareholders with each member having shares in the Company. The Company then bought land from European Settlers. The land bought was known as Sukwo Farm. The farm was subdivided and each member of the Company allocated land according to the shares held in the Company. In support of this, the respondent produced in evidence receipts showing his contributions as a member and a share certificate issued by the Company. He testified that the Company allocated him the suit property which he proceeded to register after paying survey fees and obtaining the Land Control Board's consent. The respondent testified that the appellant's father was the owner of Saboti/Saboti Block6/Sukwo/153 in which the appellant was residing.

[5] The appellant also testified at the trial and told the court that his father was never in occupation of the suit property but occupied Saboti/Saboti Block 6/Sukwo/153 where his deceased mother was buried. He testified that no one was residing on the respondent's suit property as alleged or that he (the appellant) was utilizing the suit property in any way.

[6] The learned Judge upon considering the evidence and the submissions of the parties, found the respondent to be the registered owner of the suit property, and gave judgment in favour of the respondent granting the order of eviction against the appellant. This is the judgment that triggered this appeal. In dismissing the appellant's counterclaim the learned Judge stated inter alia as follows:

“Though the defendant claimed in his defence that the plaintiff obtained his title in a fraudulent way, he did not adduce any evidence to show that the plaintiff obtained his title fraudulently. I therefore find that the plaintiff did not obtain his title in a fraudulent way.”

[7] In his memorandum of appeal the appellant has raised three grounds of appeal, namely:-

(i) That the learned Judge erred in law and fact in entering judgment and ordering the eviction of the appellant from the suit property despite the respondent admitting that he sued the appellant because the appellant's father was deceased.

(ii) That the learned Judge erred in law and fact in issuing eviction orders against the appellant.

(iii) That the learned Judge failed to appreciate the pleadings and evidence and erred in finding that the respondent had proved his case.

[8] During the hearing of the appeal, learned counsel, Ms. Munialo appeared for the appellant, while learned counsel Mr. Kuria appeared for the respondent. Ms. Munialo made oral submissions in which she submitted that the learned Judge erred in ordering eviction of the appellant, as the respondent had failed to prove his case; that although the respondent's case was grounded on trespass the respondent admitted during trial that the appellant was not occupying his suit property which is known as Plot No. 151 but was occupying an adjacent piece of land known as Plot No. 153; that in addition the respondent testified that the only reason he sued the appellant was because the appellant's father, who was in occupation of Plot No. 153 had passed away. Counsel thus sought to demonstrate to the Court that the respondent's evidence and his pleadings were at variance. Ms Munialo urged the Court to find that the learned Judge erred in ordering the respondent's eviction from the suit property.

[9] Mr. Kuria who held brief for counsel for the respondent, also made oral submissions highlighting the written submissions that had been filed and responding to the appellant's submissions. Counsel maintained that the respondent's registration over the suit property was a first registration, hence, it could not be challenged. He submitted that the respondent was the owner of the suit property having been a shareholder and member of Sukwo Farmers Company Limited and the beneficiary of land allocated by the company as Plot No. 151 which was registered as the suit property. Counsel maintained that the appellant's father was allocated Plot No. 153. The respondent denied fraudulently procuring his registration as a proprietor of the suit property. He pointed out that the appellant was unable to produce any evidence in support of the alleged fraud. He urged the Court to dismiss the appeal.

[10] The guiding principles in considering a first appeal have been restated in many decisions of this Court but we take them from the case of Selle -vs- Associated Motor Boat Co., [1968] EA 123:

“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 vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

[11] It is not disputed that the respondent is registered as the sole proprietor of the suit property. What was in issue was whether the appellant had trespassed onto the suit property so as to justify the issuance of the order of eviction; and whether the appellant had procured his registration of ownership to the suit property fraudulently.

[12] Apart from the fact that the respondent produced a certificate of title to the suit property, the respondent also produced evidence of acquisition of the suit property, which included receipts for payment of shares and the share certificate. The documents were evaluated and accepted by the trial court and we have no reason to fault their authenticity. In Vijay Mojaria vs. Nansingh Madu Singh Dabar & Another [2000] eKLR Tunoi, JA 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.”

The standard of proof in fraud cases was laid down in the old case of Ratilal Gordhanbhai Patel vs. Lalji Makanji [1957] EA 314 wherein it was stated that:

“Allegation of fraud must be strictly proved, although the stand of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

[13] In his defence and counterclaim the appellant averred that the respondent was fraudulently registered as the sole owner of the suit property, without regard to the appellant's rights as an occupant of the property. It was therefore upon the appellant to establish the particulars of the alleged fraud and prove his claim to the required standard. In this regard the appellant failed dismally. Apart from alleging in the counterclaim that the suit property belonged to him as of right, there was nothing to substantiate that allegation nor was there anything

to substantiate his allegation that his father or the appellant himself had any rights over the suit property.

[14] To the contrary, the record shows that the appellant testified as follows:

“I am staying on Plot No. 153. I am not utilizing plot No. 151 as alleged. I do not plough No. 151. Let the plaintiff case be dismissed with costs.”

[15] In cross examination the appellant reiterated:

“I am staying on plot no. 153 am not staying on plot no. 151(witness referred to his statement of defence paragraph 4) It is true I said I have been staying on plot no. 151 since 1972.....”

[16] It was clear from the evidence adduced by the appellant that he conceded that it is the respondent who owned the suit property while the appellant’s father owned the adjacent property (Plot 153) which the appellant was occupying. The appellant’s evidence as quoted above was in stark contradiction to his counterclaim as he claimed that he was not in occupation of the suit property and that the respondent had no cause of action against him, yet in his counterclaim he pleaded that he had been staying on the suit property since 1972, and wanted the title deed in the respondent’s name cancelled and a new title issued for the suit property in his name. In the circumstances we find that the appellant failed to prove any fraud to justify the cancellation of the appellant’s title.

[17] The respondent established that he had a title to the suit property which title was obtained on first registration of the suit property. As the suit property was registered under the repealed Registered Land Act (RLA), (now repealed), and the suit was filed before the repeal of that Act, the provisions of the RLA apply to the suit property.

[18] Section 27 & 28 of the repealed RLA stated as follows:

“27. Subject to this Act –

(a) The registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) The registration of a person as a proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

–

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is express in the register, to such liabilities rights and interests as affects the same and are declared by section 30 not to require noting on the register

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

[19] In addition section 30(g) of the RLA stated as follow:

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register-

.....

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.

[20] The respondent being the first registered proprietor of the suit property and it being evident that there were no interests or claims as stated under **section 28(a)** and **(b)** of the Registered Land Act, his title was indefeasible. Moreover the appellant cannot benefit from the application of **section 30(g)** of the Registered Land Act in view of his sworn evidence that he was not in occupation of the suit property.

[21] The upshot of the above is that we are satisfied that the trial judge came to the right conclusion in allowing the respondent’s claim and dismissing the appellant’s counterclaim, as there was nothing before the Court upon which the respondent’s title could be impugned. Accordingly we find no substance in this appeal. It is dismissed with costs.

Orders accordingly.

Dated and delivered at Eldoret this 17th day of October, 2019.

P. N. WAKI

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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