



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJ. A)

CIVIL APPEAL NO. 81 of 2016

BETWEEN

JOHN K. MALEMBI.....APPELLANT

AND

TRUFOSA CHEREDI MUDEMBEI1st RESPONDENT

NEVIN EGESA JEDEVERA2nd RESPONDENT

THE SETTLEMENT FUND TRUSTEES.....3rd RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret, (Kanyi Kimondo, J.) dated 17th November 2015 in Eldoret HCCC No. 248 of 2000)

JUDGMENT OF THE COURT

1. The suit property in dispute in this appeal is Land Parcel No. Kakamega/Mabusi/14 measuring 22 Hectares. By a Plaintiff dated 23rd October 2000, the 1st respondent filed suit against the appellant and the Settlement Fund Trustees (STF). The 1st respondent is the widow of the late William J. Mudembei who died on 25th April 1982.
2. At all material times to the suit, the deceased William Mudembei was the allottee by the Settlement Funds Trustees of Land Parcel No. Kakamega/Mabusi/14. In order to purchase and acquire title to the property, the deceased took a loan from the SFT. It is alleged that the deceased continued to repay the loan until 17th March 1979 when he sold his interest to one, Charles O. Machungo. It was alleged that in April 1998, the appellant entered the suit property claiming to have bought the same from the Settlement Fund Trustees.
3. Upon the appellant entering the suit property, the 1st respondent made inquiries and established that the appellant became registered as proprietor of the property on 25th March 1998 allegedly as a purchaser for a consideration of Ksh. 5,400. The 1st respondent then filed suit against the appellant and the Settlement Fund Trustees (as the 2nd defendant) seeking a declaration that the transfer and registration of the property in the name of the appellant was fraudulent, illegal, null and void.
4. In the plaint, the 1st respondent prayed for an order of cancellation of the appellant as the registered proprietor of the property; an order for eviction of the appellant and a permanent injunction restraining the appellant from remaining, entering or in any way interfering with the suit property.
5. The 1st respondent claimed that both the appellant and the SFT 2nd defendant) committed fraud on her and the deceased. The particulars of fraud were itemized to include forging the signature and authority of the deceased (William Jadevera Mudembei) when he was already deceased and putting it on transfer documents illegally; ignoring all rights of the owner or occupiers of the suit property; failing to inquire who was the owner of the property; transferring the property to the appellant without caring about the rights of the original allottee or his personal representative; transferring the property to the appellant at a throw away and reckless consideration without the knowledge of the deceased or his personal representative and fraud by the appellant in acquiring the property at a miserable and unrealistic consideration.
6. The appellant in his defence averred that he legally entered the property as the bona fide owner thereof. That he was not fraudulently registered as proprietor of the property; that he paid valuable consideration to purchase the property; that he is the first registered proprietor of the property.

7. The SFT in its defence denied all the allegations of fact and particulars of fraud pleaded in the plaint.

8. Upon hearing the parties, the trial court in a judgment delivered on 17th November 2015 dismissed the 1st respondent's suit against the SFT; but restored the title of the property to the name of the Settlement Fund Trustees with direction that the title be transferred to the estate of the deceased; the court declined to issue an order evicting the appellant from the property and a permanent injunction was issued against the appellant restraining him, his servants or agents from dealing in any manner whatsoever with the property.

9. In declining to issue an order for eviction of the appellant, the learned judge, (Kimondo, J) observed that as neither the 1st respondent nor the deceased was the registered proprietor of the property, an order for eviction of the appellant could not issue.

10. Aggrieved by the judgment and decree of the trial court, the appellant lodged the instant appeal raising the following grounds:

(i) The judge erred in failing to find and hold that the suit property had already been sold to a third party who divested the respondents the right to sue.

(ii) The judge erred in trying to find the right of a third party over the suit property yet he was not a party to the suit (*sic*).

(iii) The judge erred by shifting the evidentiary burden of proof to the appellant.

(iv) The judge erred in failing to hold that the appellant's title was indefeasible.

(v) The judge erred in failing to find that the respondents did not deserve the orders they were claiming as they did not have proprietary interest nor was the land a free estate as per the Succession Act. (*sic*)

(vi) The judge erred in failing to dismiss the suit when he found that fraud had not been established against the appellant or the Settlement Fund Trustees.

(vii) The judge erred when he made findings contrary to **Section 6 (1)** of the **Land Control Act**.

(viii) The judge erred when he considered the provisions of **Section 3 (3)** of the **Law of Contract Act** on fraud.

(ix) The judge erred when he failed to consider that the appellant had obtained the consent of the Land Control Board.

(x) The judge erred when he went outside and considered matters not urged in the pleadings.

(xi) The judge ignored submissions by the appellant.

(xii) The judge erred in failing to take into account the history, full facts and circumstances under which the appellant acquired title to the suit property.

(xiii) The judge erred by rendering a judgment that was contrary to the facts and law.

11. At the hearing of this appeal, learned counsel Mr. Mamai Maina appeared for the appellant. Learned counsel Mr. Ibrahim Onyinkwa appeared for the respondent. Despite service of the hearing notice upon the State Law Office, there was no appearance for the 3rd respondent - the SFT.

APPELLANT'S SUBMISSIONS

12. The appellant contended that whereas the learned judge considered the issue of fraud and found that it had not been proved, the judge erred in going ahead to deliver a judgment in favour of the respondents. It was further submitted that the judge erred in framing issues that were not pleaded by the parties; that the court delved into the issue of the validity of the sale agreement and transfer of the property to the appellant although this was not one of the agreed issues filed in court; that the judge erred and did not use the proper statutory and legal regime to arrive at his determination; that the judge erroneously lay emphasis on the validity or non-validity of the sale agreement between the appellant and the deceased and ignored the element of constructive trust that arises when a vendor takes the purchase price and does not complete the transaction – that the doctrine of part performance is proof of sale; that the judge ignored the fact that the sale between the appellant and the SFT was registered at the SFT and that the trial court ignored the provisions of **Section 6** of the **Civil Procedure Act** which forbids an action proceeding in the knowledge of an existing suit.

13. In further support of the appeal, it was submitted that the 1st respondent had acknowledged in the pleadings that there was in existence another civil suit being Eldoret HCCC No. 78 of 1998. That the trial court ignored the existing suit and erred in not staying the instant suit or ordering consolidation of the case.

14. The appellant further submitted that the respondent averred that the deceased had sold the property to one Charles Machungo. That upon sale of the property to the said Machungo, the deceased divested himself the entire proprietary interest in the property and as such, the 1st respondent as the personal representative of the deceased also has no proprietary interest in the property. That the respondents have never challenged the ownership of the property by the said Charles Machungo. That the trial judge erred when he made a finding that the sale to Charles Machungo was not complete.

15. In concluding his submissions, the appellant contended that upon the trial judge making a finding that fraud had not been proved against the appellant and SFT, the judge ought to have dismissed the 1st respondent's suit since the entire claim was premised on fraud that had not been proved.

16. Lastly it was submitted the trial court erred in awarding full costs against the appellant and ignored the principle that costs follow the event. That the 1st respondent was partially successful and the full costs ought not to have been awarded against the appellant.

1st and 2nd RESPONDENTS SUBMISSIONS

17. In opposing the appeal, the respondents submitted that the trial judge did not shift the evidentiary burden of proof to the appellant. That the judge was quite conscious of the burden of proof and he correctly applied the burden and standard of proof in fraud cases. That the judgment entered against the appellant was not determined only on the basis of fraud; that there were more grounds upon which the trial court entered judgment in favour of the respondents. That the critical grounds upon which judgment was entered in favour of the respondents include: (i) that the instrument of transfer of the property to the appellant was signed at Kitale on 13th July 1982 while the deceased who purportedly transferred the property had died on 25th April 1982; (ii) that a dead person cannot transfer property and thus the instrument of transfer was false on the face thereof; (iii) that the appellant admitted he had no written sale agreement with the deceased; that since there was no written sale agreement between the appellant and the deceased, no interest in land could be transferred as per **Section 3 (3) of the Law of Contract Act**; (iv) that the appellants letter of consent of the Land Control Board was not dated and the appellant did not know who chaired the Board meeting.

18. The respondents further submitted that if at all the appellant had bought the property from the deceased, he is guilty of laches following delay of over 16 years before he laid claim to the property. That the appellant asserted he paid Ksh. 200,000/= as purchase price for the property in 1982 and only entered the same in 1997 after a lapse of 15 years. The respondent questioned how could a person who paid purchase price seek to get possession 15 years later?

19. Responding to the submission that the trial judge considered issues not raised in the pleadings, it was urged that the judge was entitled to consider and answer any other issue that was necessary to do justice in the case before him. That the only issue considered *suo motu* by the judge was the issue of the trial court's jurisdiction. That jurisdiction is a preliminary issue that must be considered by a court either *suo motu* or on application by a party. That in this matter, the trial court was entitled to *suo motu* determine if it had jurisdiction to hear the dispute.

20. It was further submitted that the learned judge followed the proper statutory regime in resolving the dispute between the parties. That the dispute between the parties did not involve the concept of constructive trust. That the main issue was existence of an alleged oral agreement for sale of an agricultural land. That the law of contract requires that an agreement relating to sale of land be evidenced in writing. That in the instant case, there was not even a single receipt showing that the appellant had paid the purchase price of Ksh. 200,000. That no proper evidence was led to show that the appellant paid the deceased any purchase price.

21. On costs, it was urged that the respondent was the successful party in the suit and the trial court correctly awarded costs against the appellant who was the losing party. Based on the foregoing submissions, the respondents urged us to dismiss the appeal.

ANALYSIS and DETERMINATION

22. We have considered the grounds of appeal as well as submission by counsel and the authorities cited. 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**).”*

23. Upfront, we consider the ground that the trial court rendered a judgment that was contrary to facts and that the judge erred when he ignored submissions by the appellant. We also consider the contestation that the judge ignored the historical circumstances under which the appellant acquired title to the property.

24. There is no uniform method for evaluation of the evidence on record. What is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. With a tooth comb precision, we have analyzed the judgment of the trial court. We find that the judge distilled the legal and factual issues for consideration by the court. At paragraph 21 of the judgment, the judge properly captures the agreed issues for determination by the court and adds the jurisdictional question. Premised on the agreed issues, we find that the trial court, item by item appraised the evidence on record and identified the relevant law to be applied in the determination of each contested issue. Accordingly, upon our analysis of the judgment of the trial court, we are satisfied that the judge properly evaluated the evidence on record and considered the historical background and circumstances under which the appellant acquired title to the property. It is in the context of the historical journey that the judge delved into the issue of validity or otherwise of the instrument of transfer of the property to the appellant dated 13th July 1982. It is also in the historical context that the judge pondered whether indeed both the appellant and the deceased appeared before the Kitale Land Control Board. The grounds of appeal that the judge ignored historical circumstances, rendered judgment contrary to the fact and ignored the appellant's submissions have no merit.

25. The pivotal issue in the appeal is when, and from whom, the appellant acquired title to the property.

26. The instrument of transfer of the property to the appellant is dated 13th July 1982. The instrument shows that the appellant purchased the property from the deceased Mr. William J. Mutembei. The deceased died on 25th April 1982. The transfer of the property to the appellant is thus by an instrument executed by a deceased person. It is trite law and pure common sense that a deceased person can neither execute an instrument nor transfer any interest in property. In **Fahiye & 2 others –v- Omar & 4 others, [201] 2KLR, 224 at 227** it was stated that a document for sale of land executed by a person who has no capacity and authority to execute is null and void. Such a document is void for lack of authority, power and competence.

27. Further, we have examined the instrument of transfer dated at Kitale on 13th July 1982. The instrument expressly states that the deceased William Mudembei appeared before a Mr. G. N. Muindi who witnessed the deceased's signature. It does not need rocket science to fathom that no such person appeared before Mr. G. N. Muindi to execute the instrument of transfer as the alleged transferor was already dead.

28. It follows that the instrument of transfer dated 13th July 1982 in the name of a deceased person that was used to transfer the property to the appellant was null and void. The appellant thus acquired no interest or title to the property. Consequently, we find that the title acquired by the appellant over the property was a nullity.

29. Another ground urged is that the trial court erred on the issue of burden of proof on the allegations of fraud pleaded in the plaint. The learned judge in considering the allegations of fraud arrived at the finding that the allegations were generalized and the alleged fraud was not proved. In finding that fraud was not proved, the trial judge stated *"I have said that the standard of proof of fraud is beyond a balance of probabilities. The bottom line is that the plaintiffs have not proved fraud against either defendant to required standard."*

30. In our considered view, the trial judge properly applied the law on burden and standard of proof as relates to fraud. In the judgment, the trial court correctly held that the allegations of fraud were generalized, that no handwriting expert was called to show that the thumb print impressions on the application for Land Control Board consent or signature thereon was not that of the deceased; that on 13th July 1982 when the application Form was filled, the deceased was long dead. Founded on these facts, we find that the contestation that the judge erred on burden of proof as relates to fraud has no merit.

31. An issue urged in this appeal is that the trial judge considered matters not raised in the pleadings. The appellant contends that the issue of validity or otherwise of the sale agreement between the appellant and the deceased was never pleaded by either party. That the judge erred in considering the issue and invoking the provisions of the **Section 3 (3) of the Law of Contract Act** when the matter had never been pleaded.

32. On the other hand, the respondent submitted that the only issue considered by the judge which was not pleaded relates to the jurisdiction of the trial court to hear the dispute between the parties.

33. In the judgment, the trial court *suo motu* raised the issue of the court's jurisdiction and expressed as follow:

22. I would add the general question of jurisdiction. I stated at the beginning that this is a claim for recovery of title.... It is a matter squarely within the sphere of the Environment and Land Court. Jurisdiction is everything..... This suit predates the Constitution. It was presented to court on 23rd October 2000 at the High Court. The first six witnesses were heard by my predecessors, Ibrahim J (as he then was) and Azangalala, J (as he then was). I took the evidence of the last witness. Under the Land Court Act, all land matters partly heard by the High Court were to proceed before the High Court. I thus find the court has jurisdiction to determine the suit. None of the parties has contested the jurisdiction of the court.

34. On our part, we find it was proper for the trial court to *suo motu* raise and determine the issue of its own jurisdiction. The suit before the trial court was instituted on 23/10/2000 at the High Court prior to the 2010 Constitution before and establishment of the Environment and Land Court. We are of the view that the learned High Court Judge misdirected himself that he had jurisdiction pursuant to Paragraphs of the Practice Directions on Proceedings in the Environment and Land Court vide Gazette Notice No. 5178 dated 25/7/2014.

35. In the Practice Directions issued by Hon. Chief Justice paragraphs 4 and 5 thereof provides that:

4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge.

36. From the foregoing, it is clear that the Environment and Land Court has original jurisdiction to hear all matters pertaining to the environment and to the use and occupation of land. We cannot disregard the supremacy of our Constitution whence all other laws flow and must be consistent with. It confers powers to various institutions of Government including the Judiciary. We are also aware of our responsibility to interpret the Constitution as per the dictates of **Article 259(a)** in the promotion of its purposes, values and principles. **Article 2(2)** is crystal clear that no person may claim or exercise State authority except as authorized under the Constitution. The Supreme Court emphasized on this in relation to authority conferred to the courts in **REPUBLIC V KARISA CHENGO & 2 OTHERS [2017] eKLR**;

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

37. The respondent submitted that since the High Court had conduct of the matter before the promulgation of the Constitution and the consequent introduction of the Land and Environment Court, then it still had jurisdiction by virtue of a transitional clause in **Section 30** of the **Environment and Land Act**;

(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

38. The respondent based their submission on the part where the Act states that **as may be directed by the Chief Justice or the Chief Registrar**. Counsel quoted practice directions by the former Chief Justice via GAZETTE NOTICE NO. 5178 dated 25th July, 2014 which stated;

“PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS.

The Overriding Objective of Proceedings in the Environment and Land Court

.....

4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.”

39. On perusal of the record, it is clear that as at the time when the Gazette Notice was published the suit was part heard. Therefore the practice directions purported to invest the High Court with authority to conduct the matter until its conclusion.

40. The fundamental question to ask is whether practice directions could confer jurisdiction and the answer is an emphatic no. The confusion seems to stem from the words “...**as may be directed by the Chief Justice**...” The confusion, to our mind, is more apparent than real. The Chief Justice could not direct that the High Court exercise a jurisdiction it did not have. All that the transitional clause did was allow him to direct otherwise than the continued hearing of the matters pending in the hiatus between the promulgation of the Constitution and the coming into operation of the Environment and Land Court. That direction could foreseeably take the form of some or all of the cases being held in abeyance until that Court was operationalized. Once it was operationalized, however, the Chief Justice had no further role.

41. It has long been established that jurisdiction is everything and without it the Court must down its tools otherwise everything after that becomes a nullity. Nyarandi, J famously made the point in **OWNERS OF THE MOTOR VESSES “LILLIANS” V CALTEX OIL (KENYA) LTD (Supra)**;

“A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

42. For the foregoing reasons, we find that the learned judge misdirected himself on issue of jurisdiction. We hereby set aside in entirety the judgment of the High Court delivered on 17/11/2015 in Eldoret HCCC NO. 248 of 2000. We direct the suit between the parties be and is hereby transferred to the Environment and Land Court which has jurisdiction to hear and determine the matter. Each party to bear his/its own costs.

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

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.