



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 73 OF 2018

BETWEEN

ROBERT MBUI.....APPELLANT

AND

KENNEDY MWANZIA MUSEMBI.....RESPONDENT

(An appeal from the Judgment of the Environment Land Court of Kenya at Machakos (A.O Angote, J), dated 26th January, 2018

in

ELC Case No. 176 of 2010)

JUDGMENT OF THE COURT

The appellant filed suit at the High Court against the respondent for the following orders;

- a) A declaration that he was the owner of Mavoko Town Block 3/7084 and Mavoko Town Block 3/7085.
- b) Vacant possession of the Mavoko Town Block 3/7085 and the eviction of the respondent there from.
- c) Mesne profits from the respondent until delivery of vacant possession.

It was the appellant's claim that he purchased Mavoko Town Block 3/7084 and Mavoko Town Block 3/7085 from Mr. Timothy Musembi Kinama, who is the respondent's father. By two separate agreements both dated 20th May 2010, the appellant purchased them at Kshs. 2,000,000 each. At the time of the said purchase the respondent was residing, with the permission of his father, on Mavoko Town Block 3/7085 (suit property).

On or about 1st July 2010, the appellant completed the purchase price and lawfully acquired the two aforementioned parcels of land. Vide a letter dated 23rd July 2010, the appellant informed the respondent of the completion of the sale transaction and the subsequent transfer of ownership of the suit property where he was residing. He gave the respondent a one (1) calendar month notice to vacate the suit property. The notice lapsed and the respondent refused to surrender vacant possession of the suit property to the appellant.

The appellant contended that the respondent lacked any proprietary rights over the suit property, since his possession of the same was by virtue of his father's ownership which extinguished upon transfer of the suit property to the appellant. Thus, the respondent's continued stay amounted to trespass and was a denial of the appellant's just entitlement to possession and use of the suit property. The appellant bought the parcels of land to enable him to expand the school he was running and as a result stood to suffer irreparable loss and damage if the respondent was not evicted therefrom.

The respondent filed an amended defence and affirmed that he had been living on the suit property and Mavoko Town 3/7084, initially known as Mavoko Town Block 3/1388 before it was subdivided, since 1991. The said occupation was not as a licensee but pursuant to his status as the son of Mr. Timothy Musembi Kinama and further that the said land was family property, which was subject to a matrimonial dispute in Machakos High Court Civil Case No. 161 of 2010. He averred that the sale was illegal as it was tainted with fraud which he particularised as; a collusion between the appellant and his father to sell the suit property in full knowledge that the respondent was residing on it; obtaining consent for the sale without involving the respondent and; deliberately lying to the Land Control Board in order to obtain its

consent.

Due to the aforementioned fraudulent transaction, the respondent's father was unable to give the appellant vacant possession, and the appellant had no locus standi to issue him with a valid notice to vacate the suit property. Because he had been in occupation of the suit property for more than 19 years, he was otherwise entitled to it by way of adverse possession.

O.A. Angote, J considered the suit and delivered a judgment on 26th January 2018, wherein he held as follows;

“49. PW2 allowed the Defendant to occupy the suit land since 1991. Indeed, the Plaintiff, who is a Member of Parliament, and who has been a neighbour of the Defendant, knew that the Defendant has been occupying and utilizing the suit properties.

50. Having known that the Defendant has always been in occupation of the land, and that he had objected to the division and sale of the land, the Plaintiff should not have purchased the land from PW2.

51. Consequently, and notwithstanding that the suit properties are registered in favour of the Plaintiff, I find and hold that it is the Defendant who is entitled to the land by virtue of the doctrine of constructive trust.

52. For those reasons, I dismiss the Plaintiff's Complaint dated 26th August, 2010 with costs.”

Being dissatisfied with the judgment, the appellant preferred the current appeal to this Court. The memorandum of appeal contains ten (10) grounds which, condensed, are that the learned judge erred in law and in fact by;

a) Failing to find that upon the sale of Mavoko Block 3/7084 and Mavoko Town Block 3/7085 by the registered owner in due process, the respondent's continued occupation of the said parcels was illegal and amounted to trespass.

b) By introducing issues of overriding interests and constructive trusts while the same was not pleaded.

c) Making findings on issues raised in other suits where the appellant was not a party and where no conclusive findings were made.

d) Relying on findings by a lands disputes tribunal granted in excess of its jurisdiction and without taking into account the ownership rights of the registered owner of Mavoko Block 3/7084 and Mavoko Town Block 3/7085.

e) By adjudicating issues that arose between the respondent and PW2, whence PW2 was not party to the suit.

During the hearing of the appeal, learned counsel **Mr. D.O Olonde** appeared for the appellant while **Mr. J.M Mutia** appeared for the respondent. Both parties had filed written submissions which they highlighted before us.

Mr. D.O Olonde submitted that not only did the respondent not accrue ownership of the suit property by adverse possession but neither did he follow due procedure for laying a claim for it as provided for in **Order 37** of the **Civil Procedure Rules** and the **Law Reform Act**, by way of an originating summons. He submitted that failure to follow the laid down procedure is fatal to a suit as was held in **GACHIRA V GACHIRA, CIVIL APPEAL NO. 325 OF 2003**. No such procedure was initiated by the respondent and further evidence adduced indicates that the respondent's father is the one who settled him on the suit property. Hence the respondent settled as a licensee with the owner's permission hence the same cannot be acquired adversely.

Counsel continued that the suit property was not ancestral land as it was acquired by the respondent's father from Lukenya Ranching Limited. Therefore customary trust cannot arise and in any case the respondent did not plead customary trust or overriding interests as occupier in his pleadings. The respondent employed an ambush tactic by raising new issues at the point of submissions. In any event, occupation subject to licence is not the occupation contemplated under **Section 30** of the **Registered Lands Act** (repealed) and the current **Land Act**.

The trial court's holding on constructive trust was not pleaded in the defence or in the counterclaim. The same popped up in the submissions. Moreover, the respondent's father allowed him to settle thereon since he was facing hardships and the house upon which he settled was also constructed by his father. When the respondent's father wanted to sell the suit property, he offered to resettle the respondent on another piece of land, hence there is no evidence of his intention to confer proprietary rights to the respondent. The learned judge therefore erred in making a finding based on constructive trust.

Counsel stated that the learned judge erred in relying on the divorce matter that was filed by the respondent's late mother yet the same was not heard nor determined on merit due to the petitioner's death. The learned judge also erred by relying on the finding of the Lands Tribunal which acted outside its jurisdiction which was limited to disputes over boundaries not ownership disputes. Further, the Chief Magistrate's adoption of the tribunal's order did not confer proprietary rights on the respondent, who never appealed the said decision.

Concluding, it was Counsel's contention that the respondent was in possession by virtue of a licence and the same was terminable upon issuance of reasonable notice. The principle of constructive trust was not available to the respondent under the circumstances. The respondent also failed to prove fraud and the learned judge delved into the arena of conflict by introducing in the judgment matters that were not pleaded and therefore were not in issue. He urged the Court to allow the appeal and find that the respondent's occupation as unlawful.

Mr. J.M Mutia opposed the appeal and submitted that the respondent was not a mere licensee, since he settled on the suit property with the

consent of his father who ferried him in a pick-up in 1991. The fact that his father allowed him to occupy the suit premises means that he was not just a mere licensee as the act can only be interpreted to mean that he had given his son a place to establish a home and raise his family. The respondent went ahead and applied for connection of water and electricity on the suit property.

Counsel argued that the respondent's father's indication that he needed to subdivide the land meant that the same was family land. The issue of fraud therefore arose because the respondent's interest in the land was not put into consideration when the consent was obtained from the Land Control Board. Further, the divorce proceedings instituted by the respondent's mother could not be ignored since it confirmed that indeed the suit property was family land and was sold without her consent. There was also no evidence tendered to show that the rest of the family was put in the picture regarding the sale.

In conclusion, the respondent had a legitimate expectation that his father intended to settle him on the suit property. Therefore, the creation of trust flowed from the circumstances of the occupation which had already been pleaded. It was not a new issue absent from the pleadings and in evidence. Further, it was a matter of interpretation. For this, Counsel relied on the holding in **MBUI MUKANGU V GERALD MUTWIRI MBUI [2004] eKLR**. Counsel urged that the learned judge analysed the evidence and applied the law correctly, hence the appeal ought to be dismissed with costs to the respondent.

As the first appellate Court, we are aware of our duty as was spelt out in **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.”

The first issue is whether the learned judge entered into the arena of conflict and gave orders that the respondent had not specifically pleaded and delved into issues not before it. It is trite law that parties are bound by their pleadings. Nigerian Judge Pius Aderemi J.S.C in **ADETOUN OLADEJI (NIG) LTD V NIGERIA BREWERIES PLC S.C. 91/2002** put the principle thus;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The question before the Court is whether the learned judge overstepped his mandate by delving into matters not properly before the court. From the record it is clear that in defence of his position, the respondent, in his amended defence claimed that the sale transaction was tainted with fraud and that by virtue of staying on the suit property for more than 19 years, he had acquired the same by adverse possession. The respondent also asserted that the suit property was family property. However, the learned judge held that the respondent was entitled to the land by virtue of the doctrine of constructive trust.

Did the learned judge err in essentially assisting the respondent with his case by giving a relief that was not sought? Did the learned judge concern himself with matters not within his scope as they were not pleaded by the respondent? Before we deal with these questions, let us concern ourselves with what the principle of constructive trust entails. This principle was well explicated in **MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI [2014] eKLR**;

“In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”

From the foregoing, it is clear that constructive trust can only be enforced on parties with a common intention. What common intention there was herein was between the respondent and his father, Mr. Timothy Musembi Kinama. Thus, the said remedy was not available and could not be imposed on the respondent's relationship with the appellant, between whom there was no common intention.

Be that as it may, the learned judge held that by virtue of the respondent's father settling him on the suit property in 1991, he created a constructive trust in favour of the respondent. However, this order cannot be enforced against the appellant since he is not the one who created the alleged trust. The same cannot be enforced against a party who is a stranger to the merits, facts and consideration of the issues leading to creation of the alleged trust. In arriving at its decision, the trial court was persuaded by the award in the Land Disputes Tribunal case which the respondent filed against his father and the divorce matter as filed by the respondent's mother as an indicator that the respondent's family objected to the said sale and subsequent transfer of the suit property.

It is our considered view that the learned Judge erred when he delved into matters integral to the respondent and his family and adjudicated on the same to the disadvantage of the appellant who was not a party to the on-goings and dynamics of the said family. He had at his disposal discretionary powers to enjoin the respondent's father as a party to the suit in order for him to make a just holding in the matter and direct the appropriate reliefs accordingly. This was appreciated by this Court in **CIVICON LIMITED V KIVUWATT LIMITED & 2 OTHERS** [2015] eKLR;

“The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or;

a. whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

b. the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

We have no difficulty holding that the learned acted outside the scope of his mandate and opened himself to the complaint made that he became a fact finder on behalf of the respondent instead of acting as an impartial arbiter. No matter how well intentioned he was, his conclusions were based on matters to which the appellant was a stranger and hence the odds were stacked against him from the start. Even if the appellant was the respondent's neighbour, the learned judge could not assume that he was privy to or seized of the matters between the respondent and his father. Moreover, the enforcement of the judgment can only be made against the respondent's father who was not party to the suit. Further, constructive trust being an equitable right, it is not capable of being registered against land so as to expect a third party purchaser to be aware of it prior to purchasing a property. The learned Judge unfortunately misdirected himself and as a result reached an unjust and prejudicial conclusion. Similarly the claim for adverse possession addressed before us, though not dealt with by the learned judge can only be enforced against the respondent's father.

We now deal with whether the appellant was entitled to the reliefs he sought. They were a declaration that he was the bona fide proprietor as purchaser of Mavoko Town Block 3/7084 and Mavoko Town Block 3/7085; vacant possession of the same; the eviction of the respondent there from and mesne profits from the respondent until delivery of vacant possession. In **KATENDE V HARIDAR & COMPANY LIMITED** [2008] 2 E.A.173 where the Court of Appeal in Uganda defined a bona fide purchaser thus;

“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.”***

From the record, it is not disputed that the respondent's father was the proprietor of the parcels of land and the same were sold lawfully via two separate agreements. The purchase prices was also fully settled, consent was obtained and the properties subdivided and subsequently transferred into the name of the respondent. Having said that, we note that the respondent did not provide an iota of proof of the alleged fraud in the sale transaction beyond complaining that his rights were not considered.

In the result, this appeal succeeds. We set aside the judgment and decree made on 26th January 2018 and substitute therefore an order granting the declaration and vacant possession as contained in prayers (1) and (2) of the Plaint dated 26th August 2010, with costs. The appellant shall have the costs of this appeal also.

DATED and delivered at Nairobi this 22nd day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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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