



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAL, J.J.A.)

CIVIL APPEAL NO. 160 OF 2015

BETWEEN

WAWERU MWAURA ..... APPELLANT

AND

MARY WANJIRU NJENGA .....RESPONDENT

*(An Appeal from the Judgment of the Environment and Land Court at Nairobi, (Mutungi, J.) dated 12th February, 2015*

*in*

ELC NO. 49 OF 2002

Formerly H.C.C.C. No. 49 OF 2002)

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JUDGMENT OF THE COURT

[1] On 12<sup>th</sup> February 2015 the Environment and Land Court (ELC), Nairobi, (Mutungi, J.) delivered a judgment in which orders were issued as follows:

- (i) That the Defendant be and is hereby ordered vacate and deliver vacant possession of title number Karai/Gikambura/2275 to the plaintiff within 30 days from the date the decree herein is served on him.
- (ii) In the event the Defendant defaults in vacating the plaintiff shall be entitled to an eviction order on application.
- (iii) The costs of the suit and of the counterclaim are awarded to the plaintiff.

[2] The appellant who was the defendant in the suit was aggrieved by the judgment and lodged an appeal before us seeking to have the judgment set aside. The plaintiff in the lower court was the respondent who is the registered proprietor of land title no. **Karai/Gikambura/2275** (*hereinafter referred to as the suit property*). By a plaint dated 11th January, 2002, the respondent claimed that in January 2001, the appellant wrongfully entered into the suit property and built a house, and has continued cultivating the suit property without her permission thereby depriving her of enjoyment of the suit property. The relief sought in the plaint included orders that the appellant vacates the suit property.

[3] The appellant filed a defence and counterclaim in which he admitted that the respondent was the registered proprietor of the suit property but contended that the registration was obtained fraudulently, and that the respondent's suit was in any case barred by virtue of **section 6** of the **Civil Procedure Act**. In his counter claim, the appellant pleaded that the respondent procured the transfer of the suit property to herself fraudulently, without paying any due consideration or obtaining the relevant land control board consent. In addition, that the respondent used threats and intimidation to compel the appellant into agreeing to refund her Kshs.240,000-. The appellant set out particulars of duress, pleading that the respondent used her position as a police officer to threaten him. He sought an order for rectification of the register of the suit property by cancellation of the respondent's registration as the proprietor of the suit property, and an order for refund of Kshs. 40,000/- that he was forced to pay to the respondent under duress.

[4] The respondent's case as presented during the trial in the ELC, was that she was the registered proprietor of the suit property. Initially,

the suit property was part of land title no. **Karai/Gikambura/409** (hereinafter referred to as the **original parcel**), measuring one acre which was registered in the name of one John Stephen Wanyoike (Wanyoike). By an agreement dated 27th August 1999, Stephen Wanyoike agreed to sell the original parcel to the appellant at a consideration of Kshs. 800,000/-. The appellant failed to raise the agreed consideration, but advertised the original parcel for sale through a daily newspaper. In response to the advertisement, the respondent agreed to purchase two plots from the original parcel each measuring quarter acre totaling to half acre. According to the information given to the respondent, the purchase price for each quarter acre of the original parcel was to be Kshs.400,000/- and the total purchase price for the two plots was Kshs.800,000/-.

[5] The respondent negotiated with the appellant who agreed to sell to her, each quarter acre from the original parcel, at Kshs. 320,000/-, adding to Kshs.640,000/ for two quarter acre plots. The respondent paid the purchase price through a banker's cheque drawn in favour of John Stephen Wanyoike, after which the original parcel was transferred to the appellant and respondent jointly. It

was the respondent's testimony that the understanding was that the respondent was entitled to two quarters forming half acre while the appellant was entitled to one quarter and two other buyers were to receive the other quarter. Consequently, the original parcel was subdivided into four titles the suit property which was registered in the name of the appellant being one of the quarter acres.

[6] Following the transfer, the respondent discovered that the appellant had misled him as Stephen Wanyoike, was actually selling the original parcel which was one acre at Kshs. 800,000/-and that every quarter acre plot from the original parcel was being sold for Kshs. 200,000/- and not Kshs. 320,000/- as the appellant had informed the respondent. The respondent further learnt that the appellant had only paid Stephen Wanyoike a deposit of Kshs. 160,000/- as per the agreement dated 27/8/1999 and had a balance of Kshs. 640,000/- which was covered by what the respondent actually paid.

[7] The respondent demanded refund of Kshs. 240,000/- from the appellant being what she had paid over and above the actual cost of Kshs, 400,000/ for the two quarter acre plots comprising the half acre that she had bought. The appellant agreed to refund the respondent the sum of Kshs. 240,000/- and conceded that in default of the money being refunded, the suit property which was one of the two remaining quarter acre plots would be transferred to the respondent. The appellant only refunded a sum of Kshs. 40,000/- and the suit property was therefore transferred to the respondent. The respondent explained that the appellant facilitated the transfer by signing the transfer, the Land Control Board applications for consent forms, and also attending the land control board meeting. Consequently, the suit property was transferred and respondent was registered as the proprietor.

[8] The appellant conceded at the trial that he indeed placed a newspaper advert for the sale of the original parcel measuring one acre; that the price for each quarter acre was Kshs.400,000/-; that the respondent agreed to purchase two quarter acre plots from the original parcel; that the agreed purchase price for each quarter acre was Kshs.320,000/-; that the original parcel was later divided into four quarter acre parcels and the respondent issued with a title over the half acre piece of land comprising two quarters; that upon learning that the appellant had bought the original parcel for Kshs.800,000/- the respondent using threats, intimidation and undue influence through her position as a police officer, forced the appellant into transferring to her the suit property which was one of the two remaining quarters. The appellant maintained that the respondent attained ownership over the suit property without his consent.

[9] Gideon Mungai Chungwa (Gideon) who was at the material time a member of the Kikuyu Land Control Board testified on behalf of the appellant. He stated that the application for consent to transfer the suit property was presented by both the appellant and respondent, but only the respondent was present during the board meeting; that the board did not grant the consent on that day and asked the respondent to avail the appellant. On cross examination, he told the court that he did not have the minutes of the board for that date.

[10] The trial Judge delivered a judgment in which he considered the evidence and summarized two main issues for consideration. These were whether the registration of the respondent as the owner of the suit property was procured through fraud, and/or duress, undue influence, intimidation or harassment on the respondent's part; and whether the appellant was entitled to an order for rectification to have the respondent's name cancelled from the suit property's register and replaced with the appellant's name.

[11] The learned Judge found the appellant's allegations of duress and or undue influence or intimidation unsubstantiated. He also found that the appellant acted wrongly when he failed to disclose to the respondent that the property, he was selling did not belong to him.

[12] As we have already stated the learned Judge found in favour of the respondent, dismissed the appellant's counterclaim, and ordered the appellant to vacate the suit property and deliver vacant possession. In his memorandum of appeal dated 6th July, 2015, the appellant has set out fourteen grounds of appeal, from which we discern the following eight grounds as the main grounds of appeal:

- a) **That the learned Judge erred in law in invoking equity to oust statute and in failing to appreciate that he was at all material times enjoined to uphold the law and not morals**
- b) **That the learned Judge erred in finding that the appellant was less than honest in his dealings with the respondent and that he wanted to derive a benefit out of the transaction with the plaintiff without making full disclosure**
- c) **That the learned Judge erred in finding that the respondent's registration as owner of the suit property was not supported by a contract for its transfer**
- d) **That the learned Judge erred in failing to find that the respondent's registration over the suit land was obtained fraudulently**
- e) **That the learned Judge erred in failing to find that no valid land control board consent could be issued in the appellant's absence.**

f) That the learned Judge erred in failing to find that the respondent signed the transfer document under duress, intimidation and harassment.

g) That the learned Judge erred in failing to find that the appellant was not entitled to an order of rectification to have the respondent's title over the suit land cancelled and for failing to declare the appellant as the registered owner of the suit land pursuant to Section 143 of the Registered Land Act (repealed) and or Section 80 of the Land Registration Act.

h) That the learned Judge erred in dismissing the appellant's counterclaim.

[13] At the hearing of the appeal, learned counsel Mr. Kahonge appeared for the appellant and learned counsel Mr. Mwicigi was present for the respondent. Both parties relied on written submissions that had been duly filed by the parties.

[14] In summary the appellant submitted that there was only one contract for sale between him and the respondent arising from the newspaper advert in which he had offered to sell the original parcel at a price of Kshs. 320,000/- per quarter acre. This transaction was separate from the agreement between him and Stephen Wanyoike for the sale of the original parcel comprising one acre as the earlier agreement was only between the appellant and Stephen Wanyoike, and the respondent was not a party to that agreement. He argued that the learned Judge erred in awarding an equitable remedy to the respondent, as this resulted in the court rewriting the terms of the contract between the parties and unjustly enriching the respondent at the expense of the appellant. The appellant cited **National Bank of Kenya Ltd –vs- Pipeplastic Samkolit & Another, Civil Appeal No. 95 of 1999** in support of his submissions.

[15] The appellant further maintained that the respondent used illegal tactics to acquire the Land Control Board consent. This was because the appellant only agreed to transfer the suit property to the respondent due to threats of violence from the respondent. He asserted that the registration of the respondent as the proprietor of the suit property was perpetuated by fraud, and faulted the learned Judge for failing to grant the order for rectification which the appellant was entitled as provided for under the provisions of **Section 80(1) of the Land Registration Act 2012**. The appellant argued that since he was in possession of the suit property, a constructive trust existed and the respondent who was the registered proprietor held the land in trust for him as he had acquired the registration fraudulently. The appellant relied on **Maingi Mutisya Nzioka –vs- Mbuki Kisavi, Civil Appeal No. 97 of 2004**. For these reasons, this Court was urged to allow this appeal.

[16] In response to the appellant's submissions, the respondent maintains that the appellant never sold any land to her, nor was there any contract of sale between the appellant and the respondent. She argued that having paid Kshs.640,000/ to Wanyoike for purchase of half acre of the original parcel, and since Wanyoike was selling the original parcel at Kshs.200,000/ per quarter acre she had overpaid the consideration and the appellant who had misled her on the price and used the overpayment to finance him to acquire the other half acre of the original parcel, was to refund her the sum of Kshs. 240,000/.

[17] The respondent asserted that the appellant having managed to refund only Kshs.40,000/ voluntarily agreed to surrender the suit property to her as he was unable to raise the remaining Kshs.200,000/-. She maintained that no duress, intimidation or harassment was exerted on the appellant; that the appellant authorized the Kikuyu Land Control Board to grant consent to transfer the property to the respondent; and thus the transfer of the suit property to the respondent was obtained without any coercion. She therefore urged the court to dismiss the appeal.

[18] The appeal being a first appeal, the jurisdiction of this Court is well settled. Pursuant to rule **29 (1)** of the Court of Appeal Rules, this Court has the obligation to re-appraise the evidence tendered and draw its own inferences of fact. This mandate has been addressed and developed in many decided cases. The *locus classicus* case remains **Selle v Associated Motor Limited Company [1968] EA 123**, where the duty was enunciated as follows;

***“...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 that 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.”***

[19] It is not disputed that the respondent is the registered proprietor of the suit property. Under section 28 of the Registered Land Act under which the suit property was registered, the respondent's right as a registered proprietor can only be defeated if it is established that the same was procured through fraud. The main issue is therefore whether the respondent's registration as the owner of the suit property was procured through fraud, duress, and/or intimidation. This requires this Court to ascertain how the respondent acquired the suit property.

[20] The facts leading to the dispute between the appellant and the respondent are substantially not in dispute. The original parcel was initially owned by Wanyoike who entered into an agreement with the appellant for sale of the land that comprised of one acre at a consideration of Kshs.800,000/-. The appellant only paid Kshs.160,000/ and before the original parcel was transferred to him, he advertised the land for sale at a consideration of 400,000/-for a quarter acre. The respondent being interested in the land negotiated with the appellant and agreed to buy two quarters from the original parcel at a consideration of Kshs.320,000/- per quarter acre. The respondent paid Kshs.640,000/- to Wanyoike for two quarter acres in the original parcel. In the process of getting the two quarter acres transferred to her, the respondent discovered that the appellant had inflated the actual purchase price at which Wanyoike was selling the original parcel. She demanded that the appellant refunds her the overpayment of Kshs.240,000/- or transfer another quarter acre to her. This was because although the appellant had only paid Kshs. 160,000/ he had remained with two quarters. The appellant failed to refund the money and consequently the suit property which was the remaining quarter was transferred to the respondent.

[21] In his counterclaim the appellant sought rectification of the register of the suit property pursuant to **section 143** of the former Registered Land Act (now repealed). That provision is now section 80(1) of the Land Registration Act No. 3 of 2012. Under that provision the Court can only rectify the register if it is satisfied that any registration was made or obtained by fraud or mistake. The appellant being

the one who is alleging that the respondent's registration was fraudulent, has the burden under **section 107** and **109** of the **Evidence Act** to establish the allegations of fraud. (See **RG Patel vs. Lalji Makanji [1957] EA 314**).

[22] The undisputed facts show that the appellant misled the respondent on the purchase price for the original parcel. It is apparent that the appellant after failing to raise the price agreed between him and Wanyoike, tried to leverage on the inflated purchase price he had got the respondent to agree to, to acquire the suit property. The respondent having discovered the appellant's ploy, insisted on what she had paid over and above the actual price to be refunded to her, or her getting the suit property as an additional quarter acre. In his particulars of fraud the appellant contended that the transaction between him and the respondent was for sale of half share of the original parcel at the price of Kshs.640,000/-, and that there was no variation of this agreement. Nevertheless, as at the time of the agreement between the appellant and the respondent, the appellant did not have any interest in that property as he had not paid the agreed consideration nor had the property been transferred to him. He could not therefore contract to sell what he did not own. The respondent got the original parcel transferred to her directly from Wanyoike who informed her that the price for the whole parcel was Kshs.800,000/-. The appellant cannot therefore rely on the agreement between him and the respondent.

[23] In addition the appellant acknowledged having duly signed the transfer form for the transfer of the suit property to the respondent. He also acknowledged that he signed a letter authorizing the Land Control Board to issue the respondent with the consent to transfer. Although the appellant alleged that the respondent used undue influence using her position as a police officer to exert pressure on him, the appellant did not produce any evidence in this regard, nor was there any attempt on his part to raise any complaint in that regard before the litigation commenced. In the premises we are in agreement with the finding of the learned Judge that the appellant failed to prove his allegations of fraud.

[24] The appellant has not denied taking possession of the suit property. He relies on his possession to contend that the respondent who is the registered proprietor holds the suit property in trust for him. However, the appellant has not established that he has any rights to the suit property that could be protected under **section 28** of the Registered Land Act. His occupation of the suit property is no more than trespass and his claim anchored on trust cannot stand.

[25] For the above reasons we come to the conclusion that this appeal must fail as the appellant's defence and counterclaim had no substance. Accordingly, we dismiss the appeal and award costs to the respondent.

Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of November, 2019. M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**