



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 46 OF 2015

BETWEEN

PETER OKIABERA OMWENGA.....APPELLANT

AND

SAMWEL NYABIBA NYAKERI.....RESPONDENT

(An Appeal from the Judgement of the Eldoret Environment and Land Court (Hon. Ombwayo, J) dated 12th March, 2015

in

ELC CIVIL APPEAL NO. 2 OF 2014)

JUDGMENT OF THE COURT

[1] This appeal arises from a decision made by the Environment and Land Court in Eldoret in its appellate jurisdiction over a matter decided upon by a Resident Magistrate in the Magistrates' Courts at Eldoret. Therefore being a second appeal Section 72 of the Civil Procedure Act restricts the appeal to matters of law as follows:

“72 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely -

(a) The decision being contrary to law or to some usage having the force of law;

(b) The decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

[2] The dispute leading to the appeal was a land dispute over a commercial plot measuring 25' by 100' feet at Matunda Township (hereinafter referred to as the suit property). Samuel Nyariba Nyakeri (Nyakeri) who is now the respondent had sued Peter Okiabera Omwenga (Omwenga) who is now the appellant, claiming ownership of the suit property pursuant to a written agreement entered into between him and Nyakeri on 13th February 1994. The agreement was for Nyakeri who was the owner of a commercial property measuring 15ft by 100ft situated at Langas within Eldoret Municipality to exchange the same with a commercial plot measuring 25ft by 100ft situated at Matunda Township owned by Omwenga. Upon signing the agreement each party took possession of the exchanged property.

[3] The parties occupied the respective properties and enjoyed quiet possession until on or about March 1998 when Omwenga made a complaint to the village elders that Nyakeri had encroached into his land without his consent, and had occupied and let out portions of the suit property in complete violation of their agreement.

[4] The elders considered the matter and resolved that Nyakeri should purchase an alternative plot for Omwenga measuring 25' by 100 feet at Matunda centre. On or about January 1999, Omwenga lodged another complaint, with the District Officer at Kapseret Division reiterating his

previous allegations against Nyakeri. The District officer deliberated on the complaint with assistance from the area Chief, and village elders and resolved that Nyakeri should give Omwenga a commercial plot within three months from the date of the deliberation, failure to which the agreement between the parties dated 13th February 1994 would prevail.

[6] Pursuant to that ruling Nyakeri purchased a plot measuring an eighth of an acre in favour of Omwenga at Langas-Kasarani area within Eldoret municipality which had a four-roomed residential structure, a borehole and toilet. According to Nyakeri the property purchased extinguished Omwenga's right of ownership with respect to the suit property and estopped him from claiming ownership. However, Omwenga who was dissatisfied still claimed ownership of the suit property thereby rendering Nyakeri's suit necessary.

[7] In an amended defence dated 10th February 2006, Omwenga admitted the agreement dated 13th February, 1994; taking possession of the suit property; and carrying out extensive development on the suit property. He maintained that Nyakeri had in breach of the agreement and without his consent or permission encroached into a portion of the suit property, let out and occupied portions. Omwenga contended that in the absence of the plots that were exchanged, there was no legally enforceable contract and that if Nyakeri did not want to relinquish the suit property then he had no basis for retaining Omwenga's Matunda Plot. He therefore prayed that Nyakeri's suit be dismissed as incompetent and lacking merit.

[8] In his counter-claim Omwenga sought *inter alia* a declaration that there was no consideration given by Nyakeri to Omwenga for exchange of the plot at Matunda; and that the agreement dated 13th February, 1994 was unenforceable for want of consideration. He urged the Court to order Nyakeri to be evicted from the Matunda Plot; and the plot if already registered in the name of Nyakeri, transferred to Omwenga.

[9] The trial court having heard the evidence of witnesses called by both parties, found that the agreement dated 13th February, 1994 was not enforceable as it did not meet the provisions of the law of contract act as there was no consideration given to Omwenga in exchange of the suit property. He therefore dismissed Nyakeri's case and gave judgment in favour of Omwenga making orders that Nyakeri should vacate the suit property and transfer the property to Omwenga's name.

[10] Nyakeri was aggrieved by that judgment and filed an appeal in the High Court challenging the judgment of the trial court on the grounds *inter alia* that the trial magistrate had no jurisdiction to issue an eviction order against Nyakeri or to reverse the registration of the suit property in Nyakeri's name. And further that Omwenga's counter-claim was time barred and that the trial magistrate had no pecuniary or geographical jurisdiction to determine the dispute.

[11] Hearing of the appeal in the first appellate court proceeded before Ombwayo J by way of written submissions that were duly highlighted before the learned judge. In his judgment, the learned judge identified three issues for determination as follows:

“(i) Whether the land exchange agreement is enforceable?”

(ii) Whether the honourable trial court had general jurisdiction over the suit land;

(iii) Whether the counter claim was time barred”.

[12] The learned judge ruled that, the agreement entered into between Nyakeri and Omwenga on 13th February, 1994 was not enforceable as it did not meet the threshold set by section 3(3) of the Law of Contract Act as the signatures of the parties in the agreement were not attested. On the issue of geographical jurisdiction, the learned judge found that under section 12 of the Civil Procedure Act, the suit could be filed within the locality of Omwenga's residence, or where the disputed plots were located; and that since the disputed plots were in Matunda and Eldoret, the suit could be filed either in Kakamega or Eldoret. On pecuniary jurisdiction, the Court noted that although, no valuation report was produced in regard to any of the two plots, the court ought to have taken judicial notice of the fact that the plots in question were all developed, with the Matunda Plot having a petrol station; and that since section 159 of the Registered Land Act limited the jurisdiction of the trial court to 25 thousand pounds, the trial court may have lacked jurisdiction but in the absence of the valuation report it could be given the benefit of doubt.

[13] The learned judge further noted that Nyakeri was the first registered owner of the suit property, and that by virtue of section 27, 28, 29 and 30 of the Registered Land Act (now repealed), the title of Nyakeri could only be vitiated by overriding interests contemplated by that Act, and that the interests advanced by Omwenga do not qualify as overriding interests. The learned judge therefore faulted the trial judge for ordering the transfer of the suit property to Omwenga.

[14] On the issue of limitation, the learned judge noted that the agreement for exchange of the two properties was made on 13th February, 1994 while the counter claim was filed on 10th February, 2006; that under section 7 of the Limitation of Actions Act the period of limitation was 12 years; that the counter-claim was filed two to three days before the limitation period and was therefore not statute barred. The learned judge therefore allowed Nyakeri's appeal on the ground that the trial court erred in transferring the suit property to Omwenga. However, the learned judge also dismissed the appeal to the extent of upholding Omwenga's counter-claim and the declaration that the agreement dated 13th February, 1994 cannot be enforced. On costs, each party was ordered to bear their own costs.

[15] Being aggrieved by that judgment, Omwenga lodged this appeal contending that the learned judge erred in finding that because the suit land was registered pursuant to a first registration it could not be transferred to him; that the decision of the learned judge is legally untenable because there is nothing which prevents transfer and acquisition of an interest on land acquired on a first registration; and that the decision is wholly unjust and ought to be set aside as Omwenga has been rendered remediless.

[16] Hearing of the appeal proceeded by way of oral submissions, Omwenga being represented by Mr. Momanyi and Nyakeri by Mr. Samba. Mr. Momanyi reiterated that the claim in the lower court was to prevent Omwenga from claiming or interfering with the Matunda property

that he had exchanged with Nyakeri; that no issue of first registration or rectification of title arose from the pleadings; and that the issue was raised for the first time in the first appellate court. Mr. Momanyi urged the court that all the appellant wanted was an order for restoration, and section 143 of the Registered Land Act could not aid Nyakeri nor was the section relevant as there was no claim for rectification.

[17] Mr. Momanyi pointed out that Omwenga had been left without any remedy having lost both the Matunda property and the Eldoret property as the Matunda property was now in the name of Nyakeri, while the County records also indicate Nyakeri as the owner of the Eldoret property; that although Omwenga was using a portion of the Eldoret property, the respondent was also collecting rent from buildings that he has put up on the same property.

[18] Mr. Samba, for Mr. Nyakeri, urged that the appeal had no merit. He submitted that the learned judge of the first appellate court properly evaluated the evidence and arrived at his own conclusions that the Matunda plot was a first registration; that the two plots were exchanged when both were vacant; that the Matunda plot exchanged was different from the one that had a commercial building and a petrol station; and that Nyakeri had sold the Matunda plot. Mr. Samba pointed out that according to the agreement the total area of the Eldoret property that was exchanged by Omwenga was only 30 by 100, Nyakeri having retained part of the land. He therefore urged the Court to dismiss the appeal.

[19] In reply, Mr. Momanyi pointed out that the evidence of Nyakeri in the subordinate court was clear that his children occupy the Eldoret plot that was given to the appellant; that no certified copy of the register was produced to prove that there was a first registration of the Matunda property. Mr. Momanyi maintained that the petrol station was on plot No. 54 that was not subject of the proceedings as there was no demarcation on the ground.

[20] We have considered this appeal, bearing in mind that it must be restricted to issues of law, our mandate being that of a second appellate Court. We start with considering the issue of jurisdiction and note with concern the following extract from the judgment of the learned judge:

“ ... it is quite clear that by dint of section 159 of the RLA the trial court lacked jurisdiction over this matter whose subject matter obviously exceeds twenty five thousand pounds in my view. Be that as it may, (sic) court of law neither does in (sic) act in vacuum nor on speculations. In the absence of the valuation report, the trial court ought to be given benefit of doubt”.

[21] The learned judge had earlier on in the judgment properly quoted ***Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Ltd KLR [1989] 1***, that jurisdiction is everything and that without jurisdiction a court has no power to make one more step. Therefore the learned judge having found that the trial court lacked jurisdiction over the subject matter, he could not contradict himself by purporting to infer jurisdiction by the exercise of discretion or giving the benefit of doubt. The issue of jurisdiction had to be conclusively determined. If indeed as the learned judge found, the trial magistrate had no pecuniary jurisdiction to determine the dispute, then the whole trial was a nullity, and both Nyakeri’s claim and Omwenga’s counter claim ought to have failed. On this ground alone Nyakeri’s appeal in the first appellate court ought to have failed.

[22] That the parties entered into an agreement dated 13th February 1994 for exchange of the Matunda property and the Eldoret property was a matter that was not in dispute. The issue that arose was the validity of that agreement. There were concurrent findings made by the trial court and the learned judge that there was no witness who attested the signatures of Nyakeri and Omwenga. We have no reason to depart from this finding of fact. Indeed a copy of the agreement was produced in evidence and it confirms this position. This means that the agreement was not enforceable, as section 3(3) of the Law of Contract Act was not complied with. The logical consequence of this is that each party was entitled to revert back to ownership of his original property.

[23] This was well captured by the trial magistrate when he stated in his judgment:

“In all fairness and in the interest of justice what would happen is that in the event the contract fails, the plaintiff would refund the consideration for the Matunda plot which consideration was the plot at Racecourse Eldoret. The consideration for the Racecourse was the Matunda plot which consideration was taken away by the plaintiff with due respect to the plaintiff. I find that once he took the Langas Racecourse plot, the agreement ceased to exist as there was no consideration given by the plaintiff for the plot at Matunda. The plaintiff has failed to perform his part of the bargain. The upshot is therefore, that in absence of consideration for the Matunda plot and no alternative parcel of land to replace the Racecourse plot, plaintiff’s claim must fail”.

[24] Although the learned judge addressed the issue of the validity of the agreement dated 13th February, 1994, he did not address the pertinent issues that were raised and dealt with by the trial magistrate regarding the consequences of that agreement being unenforceable and the effect of the unenforceability on Nyakeri’s claim.

[25] Of greater concern to us are the contradictory and inconclusive findings and orders that the learned judge made as evident from the following concluding part of the judgment:

The appellant’s suit ought to fail due to the fact that the plaintiff sought a declaration to the effect that he is a sole owner of a commercial plot measuring 25’ by 100’ at Matunda Township on the strength of the exchange agreement and a permanent injunction restraining the defendant from interfering with the said plot as he gave evidence that this plot does not exist. Moreover the plot is not properly defined. The said agreement of exchange does not meet the conditions set out under section 3(3) of the Law of Contract Act as amended in 1990 and hence cannot be enforced. However the appellant’s appeal succeeds on the ground that the trial court erred in transferring the suit land Registration No. Nzoia Sisal/Moi’s Bridge Block 1/3406 to the respondent given the fact that the appellant was the first registered owner the order of transfer is hereby set aside. On the other hand the respondent’s counterclaim partially succeeds in that a declaration to the effect that the said agreement dated 13/2/94 cannot be enforced, ought to be granted and is hereby granted. Both parties are at liberty to seek competent orders. This is a dispute between relatives hence I do encourage them to settle the matter out of court as it is not too late. For the above reason I do order that each party to bear his costs.

[26] This excerpt of the judgment reveals that the learned judge made a finding that Nyakeri's suit was not sustainable for three reasons. That is, that the Matunda property was no longer in existence; that the property was not properly defined; and that the agreement of exchange was not enforceable as section 3(3) of the Law of Contract Act was not complied with. One would have expected the logical conclusion to this finding to be dismissal of Nyakeri's appeal, but the learned judge then proceeds to find that the appeal succeeds because the trial magistrate erred in ordering transfer of the suit property to the respondent because Nyakeri was the first registered proprietor. The findings of the learned judge becomes even more bizzare with the finding and declaration in favour of Omwenga that the agreement dated 13th February 1994 is not enforceable. For if the exchange agreement was not enforceable then Both Nyakeri and Omwenga were each entitled to their original property, and Nyakeri could not retain the Matunda property. The findings of the learned judge become even more puzzling with his final order *"both parties are at liberty to seek competent orders."*

[27] Halsbury's Laws of England 4th Edition [1979] volume 26 at 273 states as follows:

"A judgment is conclusive between the parties and there privies and is conclusive against the whole world of its existence, date and legal consequences unless it has been amended or set aside".

[28] Therefore the judgment of the court in a suit or an appeal must be precise and conclusive in determining the respective rights of the parties. We come to the conclusion that the judgment of the learned judge cannot stand as the learned judge failed to properly address the law and to make conclusive determination of the issues before him.

[29] The issue is what would be the appropriate order to make in the circumstances of this appeal? Nyakeri contradicted himself regarding the existence of the Matunda plot. He claimed in his evidence that it was no longer in existence as he had sold it. Yet in his plaint Nyakeri adverted to having acquired the Matunda plot from Omwenga and sought a declaration that he was the sole owner. The trial magistrate who visited the scene confirmed that the Matunda property was indeed in existence. He found that Nyakeri was registered as the owner of the Matunda property which was registered as **Nzoia Sisal/Moi's Bridge Block 1/3406** hence the order for cancellation of this title and an order for it to transferred to Omwenga. Therefore the learned judge was wrong in finding that the Matunda property did not exist.

[30] Given that Nyakeri's right to the Matunda property (now **Nzoia Sisal/Moi's Bridge Block 1/3406**) was anchored on the agreement of exchange, and that this is what led to Nyakeri's registration as the proprietor of the Matunda property, it would be inequitable unfair and unjust to allow Nyakeri to retain the Matunda property while he is at the same time hanging onto the Eldoret property. In **Kanyi v Muthiora [1984] KLR 712**, a case that was cited by the appellant, this Court held that under Section 163 of the Registered Lands Act, registered land in Kenya is subject to the common law of England as modified by the doctrine of equity which brings in the doctrine of implied, constructive and resulting trusts.

[32] **Halsbury's Laws of England, 4th Edition, Volume 48** at paragraph 690 states as follows:

"A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate".

[33] In this instance the circumstance prevailing were that Nyakeri had frustrated the exchange agreement by building on the Eldoret property and allowing his children to occupy the property. His conduct was such that it would be inequitable and unjust to allow him to deny Omwenga's interest in the Matunda property, particularly Omwenga having given him possession of the Matunda property in the belief that he would get the Eldoret property. Secondly the exchange agreement was not enforceable. Therefore in presenting himself as the owner of the Matunda property and being registered as the proprietor, a constructive trust must be implied by law that Nyakeri's registration as the owner of the Matunda property, was in trust for the true owner who was Omwenga.

[34] In **Kanyi v Muthiora (supra)** the Court of appeal upon holding that a constructive trust arose held that a first registration or any subsequent registration is not relieved by anything in section 28 of the Registered land Act from any duty or obligation in which he is subject as a trustee, and that a prohibition of rectification of a first registration under section 143 of the Registered Land Act (now repealed) would not bar another entry making a lawful transfer. The following distinction drawn by Kneller JA is instructive:

"To rectify, however, is to correct or define something which is erroneous or doubtful. Rectification is often used for making an entry in a register and that in my judgment is its meaning in section 143 of the Act. It is not define in the Act itself..... This is different from making another entry recording a lawful transfer by a court order after a first registration. The first registration is not struck out. The register is not rectified at all."

[34] In the circumstances the learned judge erred in allowing Nyakeri's appeal merely on the ground that Nyakeri was the first registered owner. It is apparent that there was sufficient evidence in support of Omwenga's counterclaim that the agreement dated 13th February 1994 was not enforceable and that Nyakeri failed to give consideration for the Matunda property. Consequently we allow this appeal and set aside the orders made by the learned judge.

[35] It would be appropriate for us to substitute the orders made by the learned judge with an order for Nyakeri to transfer the Matunda property now registered as Nzoia Sisal /Moi's Bridge Block I /3406 to Omwenga. However, taking cognizance of the evidence that was adduced in the trial court that Nyakeri had developed the Matunda Property, our final orders shall be as follows:

(i) That the appeal shall be allowed and the judgment and order made by the learned judge set aside.

(ii) That Nyakeri shall transfer the Matunda property now registered as Nzoia Sisal /Moi's Bridge Block I /3406 to Omwenga but suspend the order for 9 months and give Nyakeri an option of transferring an alternative commercial property of the same size as the Matunda property to Omwenga.

(iii) That the alternative property may be in Matunda or any other area acceptable to Omwenga.

(iv) That during the suspension period Nyakeri shall not transfer to any person other than Omwenga, or charge or part with possession of the Matunda property.

(v) Should Nyakeri fail to transfer an alternative property to Omwenga within 9 months from the date hereof, Omwenga shall be at liberty to initiate execution proceedings to have the Matunda property now registered as Nzoia Sisal /Moi's Bridge Block I /3406 transferred to him in accordance with (ii) above and an order shall issue for the eviction of Nyakeri from the Matunda property.

(vi) Nyakeri shall pay Omwenga the costs of the appeal.

Those shall be the orders of this Court.

Dated and delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.