



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 168 OF 2016

BETWEEN

GEORGE MWAI MBURU.....APPELLANT

AND

MARY WAMAITHA KAITANY.....1ST RESPONDENT

NAIROBI CITY COUNCIL.....2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (H. P.G. Waweru, J.) delivered on 9th October, 2012

in

H.C. C.C. No. 687 of 2002)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Waweru, J.**) dismissing the appellant's suit and allowing the respondents' counter-claim for vacant possession and *mesne* profits.

[2] The appellant's suit was based on the re-amended plaint dated 14th February, 2007. In response, the 1st respondent filed a defence and counter-claim dated 13th March 2007 and the 2nd respondent filed a re-amended defence dated 15th March, 2007. The appellant gave evidence in support of the claim and called one witness, **Benson Ndegwa Gichohi**. The 1st respondent gave evidence in support of the defence and counter-claim but did not call any witness. The 2nd respondent did not give evidence or call any witness.

[3] The appellant's case according to the pleading and the evidence was briefly as follows.

By an agreement dated 17th March, 1992, the 1st respondent leased to him two adjoining plots then known as B1 and B2, **Kombo Munyiri Road (Gikomba Light Industrial Area) (suit Premises)** for a term of five years which was to terminate on 30th April 2002. He took possession in January, 1997 and constructed a perimeter fence with the approval of the 1st and 2nd respondent.

[4] In January, 2001 and during the currency of the lease, the 1st respondent agreed to sell the suit premises to the appellant for Shs.3,000,000/= and the appellant paid Shs.714,000/- as part payment of the purchase price. The balance of the purchase price was to be financed by a loan to be advanced to the appellant on security of the title documents of the two plots which the 1st respondent agreed to surrender to the appellant but which she failed to do. On representation that the 1st respondent would avail title documents, the appellant constructed two commercial blocks comprising of 16 shops, ablution block, temporary structures, installed electricity all valued at Shs.2,845,000/- with the consent of the two respondents. The agreement of sale was not in writing. However the 1st respondent failed to avail the title documents and thus the appellant failed to obtain the loan and the sale was not completed.

[5] On 28th January, 2002, the appellant received a notice from the 1st respondent requiring him to remove the structures and vacate the premises on the grounds that he had failed to complete the sale and also that the 1st respondent had sold the premises to a third party. The appellant also received a copy of a letter dated 19th March, 2002, addressed to the 1st respondent by the 2nd respondent indicating that the

structures were illegal and should be demolished within 7 days. The appellant filed the present suit and obtained an interlocutory injunction restraining the respondents from demolishing the buildings.

[6] Thereafter, the appellant followed up the matter with the 2nd respondent and discovered that there were no records showing that the two plots had been allocated to the 1st respondent. The appellant then asked the 2nd respondent to allocate the two plots to him. Thereafter, the 2nd respondent allocated plot Nos. 6 and 7 to the appellant by letters dated 12th November 2002 respectively as leasee for 99 years. The appellant paid the standard premium and annual rent to the 2nd respondent for both plots. The appellant's case was that Plots B1 and B2 were fraudulently allocated to the 1st respondent and that Plots No. 6 and 7 allocated to him are the same as B1 and B2 and the plots that he had been occupying.

[7] The reliefs sought by the appellant were a prohibitory injunction prohibiting the respondents from demolishing the buildings; a declaration that the appellant is the owner of the two plots by virtue of letters of allotment dated 12th November, 2002; and a declaration that the purported allotment of the suit premises to **Hezron K. Kipkosgei** on 12th May, 1992 and to the 1st respondent on 27th October, 1992 was illegal null and void, and that the said allotments and the agreement dated 25th November, 1997 be cancelled.

[8] The 1st respondent's case as disclosed by the pleading and the evidence is in summary hereunder.

The suit premises belonged to her. Her husband **Hezron Kipkosgei Kaitany** who died on 14th December, 1994, was allotted plot No. B1 by the 2nd respondent by a letter of allotment dated 12th May, 1992. After the death of her husband she obtained a Grant of the Letters of Administration of his Will and on 25th November, 1997 she was granted a lease of plot B1 by the 2nd respondent. Plot B2 was allotted to her by a letter of allotment dated 27th October, 1992 and she was eventually issued with a lease dated 25th November, 1997. In 2001, the two plots B1 and B2 were surveyed and she was issued with Deed Plans for the two plots. After the survey, the two plots were given new plot numbers LR 209/12068 and LR 209/12070 respectively. In 2002, she paid all required charges and was issued with a clearance certificate for each plot.

[9] By a lease agreement dated 17th March, 1997, 1st respondent leased the premises to the appellant for a period of 5 years and 7 months which lease was to expire on 30th April, 2002. In 2001, she agreed to sell plot No. B1 to the appellant for a price of Shs. 4,000,000/- which purchase price was to be paid within three months. The appellant paid Shs. 714,000/-, and she set off Shs. 426,000 towards rent due and retained Shs. 288,000 as part of the purchase price. The appellant never renewed the lease nor completed the sale.

[10] The allotment and lease granted to 1st respondent were never revoked and the allotment of plot Nos. 6 and 7 to the appellant when the suit was pending was fraudulent. She only permitted the appellant to construct a perimeter fence and did not permit him to construct other structures.

[11] By the counter claim, 1st respondent claimed vacant possession and *mesne* profits at the rate of Shs.30,000/= per month from 1st May, 2002 until delivery of the vacant possession.

[12] The 2nd respondent by the re-amended defence pleaded, *inter alia*, that the purported allotment of plots 6 and 7 to the appellant is invalid and contrary to law as the suit premises were not available for allotment; that plots 6 and 7 are non existent and that it issued a notice to the 1st respondent as registered owner and not to the appellant to demolish the illegal structures.

[13] The learned Judge framed four main issues thus:

“(i) was there in fact and in law allocation of plots B1 and B2 to the first respondent?

(ii) was there in fact and in law allocation of plots 6 and 7 to the plaintiffs?

(iii) are plots 6 and 7 the same as Plots B1 and B2 on the ground?

(iv) if there was allocation of plots 6 and 7 to the plaintiff did those allocations cancel allocations to the 1st defendant of plots B1 and B2?”

[14] Upon consideration of the evidence, the learned judge made findings, *inter alia*, that plots B1 and B2 were fully allocated to the 1st respondent and could not have been subsequently available for allocation to the appellant; plots 6 and 7 appear to be fictitious allocations and in all probability do not exist; that plots B1 and B2 which were later surveyed were not the same on the ground as plots 6 and 7 and that allocations of plots No. 6 and 7 could not have cancelled allocation of plots B1 and B2 to the 1st respondent as they were not, and, could not have been the same plots. The learned Judge dismissed the appellant's suit and made a finding that the appellant's continued possession of the suit premises after termination of the lease by effluxion of time was trespass and entered judgment for the 1st respondent for vacant possession and *mesne* profits as claimed and costs of the suit.

[15] The decree issued on 5th November, 2012 indicated that *mesne* profits at the rate of Shs. 30,000/= per month from 1st May 2002 to 31st October 2012 amounted to Shs. 3,390,000/=. By a notice of motion dated 25th October 2012, the appellant applied to the High Court for stay of execution of the decree pending appeal. The application was allowed by **Waweru, J.** on condition that the appellant pays within 60 days **“all the *mesne* profits decreed to her and so accrued and thereafter, to pay *mesne* profits by 10th of each succeeding month pending hearing and disposal of the intended appeal. In default stay shall lapse.”**

[16] The appellant's counsel, **A.G.N. Kamau** summarised the grounds of this appeal into three broad grounds, namely that:

- i. the learned judge erred in fact and in law in finding that the 1st respondent was the owner of the suit premises; that the plots No. 6 and 7 were fictitious and in disregarding the evidence of Benson Ndegwa Gichohi on the existence and allocation of Plots No. 6 and 7.
- ii. the learned Judge erred in law and in fact in failing to deduct Shs.714,500 paid to the 1st respondent from mesne profits.
- iii. the learned Judge erred in fact and in law in disregarding the fact that the appellant has been in the suit premises since 1996 and has developed the suit premises and paid rates to the 2nd respondent when due.

[17] It is necessary to understand at the outset the nature of the appellant's claim at the time of the trial since the character of the appellant's suit changed in the course of the proceedings. It is an uncontested fact that the appellant was given possession of the suit premises by the 1st respondent in 1997 pursuant to a lease.

During the continuance of the tenancy, the appellant and the 1st respondent entered into an oral agreement for sale of one of the two plots but the sale did not go through. The appellant filed the suit on or about 23rd April 2002 just about a week before the date of expiry of the lease on 30th April, 2002. The basis of the suit was that he was a protected tenant and also that he was entitled to specific performance of the contract of sale. The plaint was later amended and re-amended and the appellant now claimed that he was entitled to ownership rights of the suit premises by virtue of a letter of allotment issued to him by the 2nd respondent on 12th November, 2002.

[18] At the hearing of the suit, the appellant clarified that he was not claiming right to possession by virtue of the lease or agreement of sale but by virtue of the fact that he was now the owner of the premises. He reiterated that the foundation of his claim was that he was the owner of the two plots, comprising the suit premises. During the currency of the lease he was estopped as a tenant by **section 121** of the **Evidence Act** from denying that the 1st respondent had a valid title to the suit premises. However, after the relation of landlord and tenant was terminated by the expiry of the lease, there is nothing to bar the appellant from challenging the title of the 1st respondent.

[19] At the commencement of the hearing of the appeal, the appellant's counsel submitted that the course the Court should adopt in the evaluation of the evidence is that the 2nd respondent had no authority to grant leases over the suit premises to either the appellant or the 1st respondent as the land did not belong to the 2nd respondent. He contended that both leases were a nullity and the Court should nullify the proceedings leaving it upon the appellant and the 1st respondent to pursue the National Land Commission for allocation. In support of the assertion that the suit premises did not belong to the 2nd respondent, counsel referred to the provision of the lease to the 1st respondent which states in part:

“WHEREAS:

a. The Council is entitled to a grant of a lease for a term of years from the President of ALL THAT piece of parcel of land situate in the city of Nairobi “in Nairobi Area of the said Republic of Kenya known as GIKOMBA LIGHT INDUSTRIES AREA – KOMBO MUNYIRI ROAD” but the President is unable to issue a grant thereof to the Council in the form prescribed by law as the said piece or parcel of land has not yet been surveyed...”

[20] The appellant's counsel further submitted that the decision of the court was based on the wrong premises; that the suit premises belonged to the 2nd respondent: that whatever decision the Court takes will result in the issuance of title to any party, and, that, the appeal should be allowed on that ground.

On his part **Okeyo** for the 1st respondent submitted that he does not know if the National Land Commission is willing to allocate the land while **Orengo** for the 2nd respondent submitted that he has no instructions on the issue raised by the appellant's counsel.

The issue now raised by the appellant's counsel is an afterthought. The appellant's counsel has submitted at length in the written submissions that the 2nd respondent had ownership of the huge portions of land within its jurisdiction for allocation and that it had legal capacity to grant leases over properties within its jurisdiction. Moreover, the 2nd respondent was allocating the land without hiding that fact from the Commissioner of Lands, the agent for the Government. The letter dated 28th May, 2001 allocating the plots to the 1st respondent is addressed to the Commissioner and requests him to make direct allocation to the 1st respondent and issue title deeds to her. There is no evidence that the Commissioner of Lands or the National Land Commission has questioned the jurisdiction of the 2nd respondent to allocate the land or that the 2nd respondent is not entitled to the grant of the Gikomba Light Industrial Area from the National Land Commission

[21]The appellant was represented by a counsel throughout the ten years that the case was pending in the High Court. The appellant had the opportunity to raise the issue at the trial. He did not also raise the issue in the memorandum of appeal. He is bound by the pleadings and the memorandum of appeal. It would be a travesty of justice to decide the appeal on the speculative ground which was never raised at the trial and which was not the basis of the decision of the trial court. We decline to entertain the new issue and proceed to determine the appeal on the basis of the grounds raised in the memorandum of appeal.

[22] As regards the allocation of plots B1 and B2 to the 1st respondent, the appellant pleaded that the allocations were tainted with fraud and corruption. He gave the particulars of fraud as follows:

- a. The purported allotments were procured using clandestine and fraudulent methods as the purported allottees used their**

influence within the 2nd defendant to procure the allotment.

b. the allotment did not follow the laid down procedure and therefore irregular and consequently illegal *ab initio*.

c. The defendant did not comply with the legal and administrative requirements laid down prior to and even after the purported allotment in procuring the allotments in favour of the defendant.

[23] It is submitted by the appellant's counsel that the original proposed allocation to the 1st respondent lapsed as the 1st respondent did not comply with the terms contained in the letters of allotment, such as failure to pay the requisite consideration. The burden of proof was on the appellant. We have studied the evidence of the appellant and his witness Benson Ndegwa Gichohi at the trial. None of them gave any evidence relating to the allotment of plots B1 and B2 to the 1st respondent. Thus, other than the pleadings, the appellant did not give any evidence to show that the allotment of the two plots to the 1st respondent was either illegal or irregular in any manner whatsoever. It follows that the allegations in the pleadings were unsubstantiated.

[24] That notwithstanding, the 1st respondent demonstrated in her oral evidence supported by documentary evidence that the suit premises was lawfully allocated to her and that she had paid all the outstanding charges and had in fact been granted formal leases by the 2nd respondent after the two plots were surveyed and renumbered. She further produced a letter dated 25th May, 2001 from the 2nd respondent to the Commissioner of Lands confirming that the two plots had been allocated to her and that she had paid all charges and asking the Commissioner of Lands to make direct allocation to her and issue title deeds. Furthermore, the 2nd respondent has supported the allocation throughout the proceedings.

[25] The appellant testified that plots 6 and 7 were allocated to him by letters of allotment dated 12th November, 2002 signed by **Godfrey Mate**, the Town Clerk and that he paid the standard premium and ground rent for both plots. He produced receipts to support the payment. He also produced a letter dated 5th April, 2007 signed by **J. M. Maina** on behalf of Director of City Planning which confirms that plots No. 6 and 7 were allotted to the appellant. The appellant claimed that Plots No. 6 and 7 are the same as Plots B1 and B2 on the ground. He however stated at the trial that he did not have documents to show that plots B1 and B2 are the same as plots 6 and 7 and that he had not received demand letters to pay rates nor has he been issued with formal leases. He did not produce any documents to show that he accepted the allotments. The appellant's witness Benson Ndegwa Gichohi is not the one who allocated the plots to the appellant. He only produced the letter dated 5th April, 2007 signed by J. M. Maina. He testified that he could not tell the location of the two plots on the ground and, that other documents such as Beacon Certificate and Plot Development Plan are necessary to know the location. Plots Nos. 6 and 7 are un-surveyed plots. The official and vital documents on which the letters of allotment were based such as the physical development plan were not produced at the trial.

[26] There was no evidence that the allocation of plots Nos. B1 and B2 to the 1st respondent had been revoked by the 2nd respondent. It is not probable that after plots Nos. B1 and B2 were surveyed and given Plot Nos. LR.209/12068 and 209/12070 respectively could have been the same as un-surveyed plots No. 6 and 28. Further, it is not probable that the 2nd respondent could have allotted the same plots on the ground to the appellant after writing to the Commissioner of Lands on 28th May, 2001 requesting him to issue titles deeds to the 1st respondent.

[27] On evaluation of the evidence, we are satisfied that the learned Judge reached the correct findings that plots B1 and B2 were duly allocated to the 1st respondent and that they are not the same as plots Nos. 6 and 7.

[28] The remaining grounds of appeal relates to the computation of mesne profits. The appellant's counsel submitted that the appellant should have been given credit for Shs.714,500/-; rates paid and compensation for the perimeter fence and developments. The 1st respondent by the counter-claim claimed mesne profits at the rate of Shs.30,000/= per month with effect from May, 2002 until delivery of vacant possession. The appellant did not reply to the claim for mesne profits in his defence to the counter-claim. His defence was implicitly that as the owner of the two plots, he was not required to pay mesne profits. The appellant's counsel in his written submissions at the trial submitted that the mesne profits at Shs.30,000/= per month had not been proved.

[29] The lease dated 17th March, 2007 indicated in paragraph 2 that the parties agreed that the rent would escalate to Shs.30,000/= per month from 1st October, 1998. In addition, the 1st respondent produced at the trial a statement of mesne profits claimed. The appellant does not say in this appeal that the Shs.30,000/= was not the correct assessment of mesne profits per month. His complaint is that he was not given credit for Shs.714,500/=-, value of the perimeter fence, rates and other developments. We are satisfied that the award of mesne profits of Shs. 30,000/= was supported by the evidence.

[30] The appellant did not raise the issues that he is now raising at the trial. He did not claim credit for Shs. 714,500/=-, rates, value of perimeter fence and other developments. The learned Judge cannot be faulted for failing to determine issues which were not before the trial court.

[31] For the reasons stated above, we find no merit in the appeal. Accordingly, the appeal is dismissed with costs to the respondents.

It is so ordered.

Dated and Delivered at Nairobi this 22nd day of June, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. 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