



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & ODEK JJA)

CIVIL APPEAL NO 72 OF 2009

BETWEEN

JAMES MWANGI CHEGEAPPELLANT

AND

BERNARD KAMAU MATHU.....1ST RESPONDENT

DOMINIC NJOROGE MATHU.....2ND RESPONDENT

***(Being an appeal from the judgement and decree of the High Court sitting at Nairobi (Osiemo J.,)
delivered on 19th February, 2009***

in

Nairobi High Court Civil Case No. 1587 of 2001)

JUDGEMENT OF THE COURT

[1] The dispute in this appeal involved a determination of who the lawful owner of title No. *Ndumberi/Ndumberi /T.164* (suit land) is. It is common ground from the evidence before the trial court that both parties, that is, the appellant and respondents, purchased the suit plot from the same person, namely, Kariuki Kiiru *alias* Wanjoya, albeit at different times. The respondents bought the plot in 1964 but they were issued with a title that indicated a different parcel No. *Ndumberi/Ndumberi/T.590*; apparently this title number belonged to the vendor's step brother whose name, Kariuki Kiiru, is nearly similar to that of the vendor. It is also common ground that the respondents took possession of the plot from 1964 until 2001 when, according to their claim, they were evicted by the appellant.

[2] The appellant also contended that he bought the same piece of land in 1983 from the same person, one Kariuki Kiiru Wanjoya and after carrying out due diligence which involved ensuring the vendor, changed his names on the identity card to comply with the names that were indicated in the title for the suit plot, and following up all the laid down procedures, such as obtaining the land board consent to transfer, and ensuring the vendor entered into a written agreement. Thereafter the appellant was registered as proprietor of the land and proceeded to take its possession from the respondents after giving them a reasonable notice to vacate.

[3] In order to put the whole dispute into perspective, it is imperative to restate the brief background information. The 1st respondent in this appeal, Bernard Kamau Mathu and his brother, Dominic Njoroge Mathu, the 2nd respondent, filed suit in the High Court against the James Mwangi Chege the appellant. They were seeking a declaratory order that they are the legal owners of a parcel of land known as *Ndumberi/Ndumberi/T164* (suit land); they sought vacant possession of the suit land and damages for what they termed illegal eviction and value of crops destroyed by the appellant.

[4] The respondents, in their claim contended that they bought the suit land in 1964 from the late Kariuki Kiiru Wanjoya, and upon completing the sale transaction, they were issued with the title; they took possession and occupied the suit plot until the time they were evicted by the appellant sometimes in May 2001, the suit plot was by then fully cultivated and fenced by the respondents. They challenged the eviction by the appellant which was done without a valid court order. They also blamed the appellant for taking law into his hands when he evicted them as he had filed a suit over the suit land in HCCC No 3587 of 1989 which was dismissed for lack of evidence. That notwithstanding, the appellant entered the suit land, destroyed the respondents' crops and evicted them.

[5] On his part, the appellant, filed a statement of defence and denied the respondents' claim of ownership of the suit premises. The appellant contended that by a written agreement duly entered into between him and the late Kariuki Wanjoya Kiiru, he purchased the suit premises for valuable consideration at an agreed price of Kshs 35,000/=. Upon purchase, the suit plot was duly transferred in his name and he was issued with a title over the same. After giving due notice to the respondents who he claimed had no legal basis to occupy the suit plot and were mere trespassers, and upon their failure to hand over vacant possession of the suit plot to him, he proceeded, rightfully in his view, to evict them from the said plot. The appellant denied the respondents suffered any loss or damage.

[6] The matter proceeded to hearing before Osiemo, J. Upon evaluation of the aforesaid evidence, the learned judge held that by the time the seller, that is Kariuki Kiiru Wanjoya, sold the suit plot to the appellant in 1983, he had no title to sell as he had already sold the suit land to the respondents in 1964. The judge further held that although there were two different title deeds, the vendor sold one plot but due to a mistake at the lands office, the respondents were given the wrong title No Ndumberi/Ndumberi T 590 but they were in physical occupation of Ndumberi/Ndumberi T 164. Thus the vendor sold the same plot to two people and one was in physical occupation but holding a wrong title while the appellant was holding the correct title.

[7] This being a first appeal, we are mandated to re-evaluate the evidence make our own findings and arrive at our own conclusions. In *Selle and Another V Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123 (CAZ)*, this Court stated the principle as follows:

“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 demeanour 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).”

[8] Based on the above principles, we revisit the evidence before the trial court. On the part of the respondents' claim, evidence was given by Bernard Kamau Mathu. He told the trial court that in 1964, Kariuki Kiiru alias Wanjoya, sold to him and his brother Dominic the suit premises whose title is *Ndumberi/Ndumberi T 164*; however the title issued to them erroneously read *Ndumberi/Ndumberi/590*, a fact they remained oblivious about, until the respondent approached them sometimes in 1983, laying a claim over the same plot and waving a title No T164 which was in respect of the same suit plot. In other

words, the respondents alleged that they were issued with the wrong title, a mistake they attributed to the lands office. This aspect was established during a long trial before the Magistrate's Court at Kiambu where the Land Registrar testified that the respondents were issued with a wrong title due to a mistake at the lands office. Upon purchase of the suit land the respondents took possession from 1964, until sometimes in 1983 when the appellant confronted them wanting to take possession of the suit land on the ground that he purchased the same suit plot from Kariuki Kiiru *alias* Wanjora. The respondents visited the lands office at Kiambu and established the original owner sold the same plot to the appellant while taking advantage of the fact that the respondents were issued with a title with a different plot number which related to a parcel of land belonging to the vendors step brother.

[9] Following complaints by the respondents, the original owner of the suit land that is Kariuki Kiiru Wanjora was charged before the Senior Resident Magistrates' Court at Kiambu in Criminal Case No. 1365 of 1984 with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code. The particulars of the charge stated that on or about the 5th day of October 1983 at Ndumberi village in Kiambu District of the Central Province with intent to defraud he obtained Kshs 35,000/= from James Mwangi Chege falsely pretending that he was selling him plot no *Ndumberi/Ndumberi/ T 164* which he had already sold to Dominic Njoroge Mathu and Bernard Kamau Mathu. After a lengthy trial, Kariuki Kiiru who sold the parcel of land was acquitted of the charge. This is what the trial magistrate concluded in his own words in a judgement delivered on 23rd April 2006:

“I therefore find that PW1 is the rightful owner of *Ndumberi/Ndumberi T164* having acquired it for value and that the transfer of this plot to him was legal and proper. If PW3 and PW4 have a claim against the accused person for actually selling plot no T.590 them while plot T590 does not actually belong to the accused person then PW3 and PW4 have a right to go ahead and complain to the proper authorities so that the accused person can give them what he (accused) person sold to them way back in 1964. It is my finding that one accused person never transferred to PW3 and PW4 plot no T/ 164 as alleged in the charge sheet nor at any other time. I therefore find that the charge as framed has not been proved at all and I therefore acquit the accused person of the charge.”

[10] It would appear the appellant had also filed another suit in the High Court over the same subject matter being HCCC No. 3587 of 1989 which was dismissed presumably for non-attendance. Once the said suit was out of the way, the respondents tried to regularize the title by getting the correct title over the suit land rectified but they were informed by the Land Control Board members that it was necessary for the appellant to surrender the original title for the said plot for cancellation. Meanwhile the appellant obtained a loan from a bank offering the said title as security. When the respondents were evicted from the suit premises, they reported the matter to the police, but the appellant had lodged a complaint of trespass. The respondents were arraigned in court with the charge of trespass, although Bernard was acquitted of the charge, his brother Dominic was convicted of the charge.

[11] James Mwangi Chege, the appellant also testified before the trial court. He narrated how he conducted due diligence over Plot No *Ndumberi/Ndumberi T 164* which was in the name of Wanjora Kiiru before he purchased it. He and the late Wanjora Kiiru went to see the land Registrar because the names of the seller as indicated in the title did not tally with the name on his identity card which read Wanjora Kariuki Kiiru. They were advised to go before the chief for him to confirm the two sets of names referred to the same person. The chief gave the seller a letter confirming the names; he also swore an affidavit confirming the two sets of names were his

[12] The transfer was successfully effected in favour of the appellant against which the appellant paid the purchase price of Kshs 35,000/= and he was issued with a title deed. The appellant and the seller also entered into a sale agreement which was duly witnessed by a mutual friend. However upon going to the suit premises to take possession, the respondents claimed that the land was sold to them by Kariuki Kiiru although they had a different title *Ndumberi/Ndumberi T.590*. The land was occupied by the family of the respondents. The appellant issued them with a notice to vacate but they did not yield so he reported the matter before the area chief. The appellant filed RMMCC No. 37 of 1984 in Kiambu seeking orders to evict the respondents. That is the suit that was transferred to the High Court Nairobi being HCCC No

3587 of 1989 but it was unfortunately dismissed for lack of evidence. Thereafter the respondents filed the suit in the high court the subject matter of this appeal.

[13] This is what Osiemo J., posited in part of the judgement the subject matter of this appeal:-

“Although there were two different title deeds on the ground there was only one piece of land. This was caused by the fact that the vendor shared the names with his brother and what was purportedly transferred to the plaintiffs was the land occupied by vendor’s brother who had his own title. This was a genuine error. When the defendant discovered that he had been sold a non-existent land the same having been sold to the plaintiffs in 1964, he complained to the police and the vendor was arrested and arraigned in court for the offence of obtaining the defendant’s money by false pretences. That being the position the vendor had no interest in the suit land to pass to the defendant moreover even assuming the plaintiffs did not possess the title which is admitted contained some genuine error, having been in occupation of the of the land openly, and continuously and without interruption for over 19 years they had acquitted proprietorship by the doctrine of adverse possession.”

[14] Aggrieved by the above judgement, the appellant has filed the instant appeal in which he has raised some 18 grounds of appeal as per the amended memorandum of appeal which can be summarized to avoid repetition and obvious proliferation of spelling mistakes;

That the learned judge erred in law and fact in:-

1. Failing to consider the evidence before the trial court; that the appellant conducted due diligence, by ensuring the vendor effected the correct names on the identity card before the transaction.
2. Ignoring the sale agreement exhibited by the appellant to support the appellant’s case as opposed to the respondents who had no sale agreement.
3. Failing to consider the principle of *res judicata* as the suit was time barred as the matter came to an end vide HCCC 3587 of 1999.
4. There was no evidence by the Land Registrar to confirm both parcels of land *Ndumberi/Ndumberi/T164* and 590 were for the same parcel of land and also ignored the evidence in Criminal Case No 1365 of 1984 which were produced in evidence in particular the evidence of the land registrar.
5. Relying on the evidence of one of the respondents which was not corroborated.
6. Ignoring the judgment of the court in Criminal Case No. 1365 of 1984 in which the learned magistrate made a definitive finding that the appellant lawfully acquired title of the suit land, which finding was virtually set aside without an appeal.
7. The finding that the respondent was in adverse possession of the suit land was without basis.
8. The appellant’s advocate was denied an opportunity to present written submissions for consideration before the final judgment.
9. The judgment and decree is a violation of the appellant’s rights to property that is specifically protected under Section 75 of the Constitution of Kenya, then in force.
10. The registrar could not be ordered to rectify the register which was a violation of the express provisions of section 142 of the Registered Land Act which protected the appellant’s proprietary interest in the suit land.

11. In view of the acknowledged mistake regarding the identity of the subject matter, the respondent's claim was null and void and the judge should have made declared so.

12. The respondent failed to produce a sale agreement or land board consent in respect of their alleged purchase of the suit land.

[15] During the hearing of this appeal, Mr. Wachira, learned counsel for the appellant elaborated on the above grounds of appeal. He told us the evidence adduced in court did not support the impugned judgment; the judge ignored a sale agreement which was produced in evidence by the appellant in support of his position that he purchased the property after following a due process. Counsel for the appellant further submitted that the subject matter, being the suit land was involved in an earlier suit being HCCC No 15 of 1987 which was determined on merit and involved the same parties, thus the issue is *now res judicata*. The trial judge was also faulted for ignoring the evidence of the land registrar that was adduced and was relied upon by the magistrate's court in

Criminal Case No. 1365 of 1984; merely relying on the evidence of the 1st respondent which was not supported by any documents of ownership. Lastly counsel submitted that the judgment that purported to rectify a title disposed his client of proprietary interests as the registered owner which violated his constitutional rights.

[16] This appeal was opposed by both Bernard Kamau Mathu and Dominic Njoroge who were unrepresented. It is Bernard who addressed the court at length while Dominic merely adopted his brother's submissions. Bernard stated that he and his brother Dominic Njoroge bought the suit property in 1964 from Wanjoya Kariuki Kiiru. They obtained consent from the land control board at Kiambu and Kiambaa. Upon transfer of the suit property, the respondents were given a wrong title being No. *Ndumberi/ Ndumberi /590* which belonged to the vendor's brother by the name Kariuki Kiiru. They were however oblivious of this mistake from 1964, when they took possession of the suit land, until sometimes in 1983, when the appellant laid a claim over the suit plot. This prompted the respondent visit to the lands office at Kiambu, and that is when it transpired, the respondents were issued with a wrong title number T590 due to a mistake by the lands office. The original owner took advantage of that mistake and sold the same suit plot to the appellant. The respondents reported the matter to the police, whereupon the vendor was charged with the offence of obtaining money from the appellant by false pretence, a charge that was however not proven by evidence and as a consequence the vendor was acquitted.

[17] We have fastidiously gone through the rival submissions, and the record of appeal. The key issue for determination is whether the learned trial judge erred by declaring the respondents as legal owners of title No. *Ndumberi/Ndumberi T164*, and by ordering the Land Registrar Kiambu to rectify the register by replacing the name of the appellant with that of the respondents. Originally Plot No. *Ndumberi/Ndumberi T590* belonged to Kariuki Kiiru a step brother of Kariuki Kiiru Wanjora who was the registered owner of *Ndumberi/Ndumberi T164* and who is alleged to have sold the suit plot to the respondents and then to the appellant.

[18] Evidence was adduced by both parties in support of their respective prepositions. Unfortunately by the time the suit was heard before the learned trial judge, the original owner, or the vendor of the suit Plot Wanjora Kariuki Kiiru had passed away. He had nonetheless given evidence before a magistrates' court in Kiambu in Criminal Case No 1365 of 1984. He admitted that he allowed the respondents to utilize the suit plot, to cultivate and admitted when the court visited the suit property that the crop and fence on the suit property belonged to the respondents. He denied that he had sold the suit property to the respondents but admitted having sold it to the appellant. In our view this is a natural defence in a criminal case. The said Kariuki Kiiru alias Wanjora who sold the suit plot was the accused person, charged with the offence of obtaining money by false pretences by selling the suit plot to the appellant while knowing he had sold the same plot to the respondents in 1964. The criminal culpability of the vendor was not proved beyond reasonable doubt because he admitted to have sold the suit plot to the appellant and denied having sold to the respondents. It is not lost to us that in the circumstances of a criminal trial, if the vendor admitted that he sold the land to the respondents that would have resulted in an automatic plea of guilt. We also hasten to add that the test in civil matters is different; the evidence is tested on a balance of probabilities

[19] The respondents claimed that they purchased the suit land in 1964 and they took possession. They were however issued with a wrong title for Plot T 590 and it was not until the appellant staked his claim over the suit property in 1983, when the respondents realized there was a mistake over the title; on visiting the lands office, it transpired that they were holding the wrong title for a different plot No T590 while the plot they were occupying was plot No T164 that was now transferred to the appellant.

[20] On the part of the appellant, he purchased the suit plot from Wanjoya Kariuki Kiiru who was the registered proprietor, he was issued with a title after following the due procedure of signing an agreement and obtaining the land control board consent. He therefore challenges the decision of the High Court largely because the respondents did not support their claim of purchase with a sale agreement and a land board consent to transfer thereby terming the claim by the respondents unsubstantiated. Another key factor relied on by the appellant is the fact that a decision by a Kiambu senior resident magistrate in criminal case no. 1365 of 1984 made a definitive finding that he lawfully purchased the suit plot a decision that has not been upset on appeal.

[21] Did the judge err in arriving at the foretasted conclusions? The appellant's main contention is that he was the registered proprietor of the suit land; however this is not as simple as the appellant states as he held the title to a plot that was occupied by the respondents, whose evidence that they purchased the same suit plot in 1964 from the same vendor was believed by the learned trial judge. The evidence that was before the trial court and even what we can gather from the criminal trial is indisputable that the respondents were in possession of the suit plot from 1964, and that they had purchased the same from the same vendor. Counsel for the appellant made heavy weather of the fact that the trial judge disregarded the evidence before the criminal court. We have taken trouble to go over those proceedings. As aforesaid, there is a marked difference between a civil and a criminal trial, although the learned magistrate, declared in what we may call *obiter* that the appellant lawfully purchased the suit plot, this pronouncement was made without key consideration, which is the respondents were also in lawful occupation of the same suit plot which was matter of paramount consideration as occupation gave the respondents beneficial rights in law.

[22] This further leads us to the critical issue in this appeal which is whether the appellants' registration over the suit plot was sacrosanct and not **capable of being challenged?** The suit property was registered under the repealed **Registered Land Act, Chapter 300. Section 143(1)** of the **Registered Land Act** provided:-

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

[23] The law on first registration under the repealed *Registered Land Act* was settled. In *David K. Kipsang –vs- James Kipchenger, - Civil Appeal No. 214 of 2001* this Court held:

“This makes it clear that even if fraud had been established in obtaining of the appellant's first registration (which we do not think it has) the registration could not have been cancelled or amended.” See also *Mugogo –vs- Sihowa, (1988) KLR 256.*

[24] There is a marked difference in this case, as the appellant was not the first registered owner of the suit plot. The learned trial judge, found the respondents were issued with title no T590 by mistake, they were in occupation and remained oblivious of the mistake until the appellant confronted them with a correct title and the realization that the title they were holding for the suit plot was registered in the name of the vendors brother when in actual fact they were in occupation of plot No.T164 from 1964. We have fastidiously scrutinized all the records, testimonies and just like the trial judge, we are satisfied and we make a finding that the respondents purchased the suit plot from Wanjoya Kariuki Kiiru in 1964, they took possession of plot T164 but they were mistakenly issued with the title for plot T 590 which belonged to the vendors step brother whose names were almost similar to that of the vendor.

[25] The vendor purported to sell the same plot to the appellant in 1983, while capitalizing on the mistake

on the title. It is a fact that the appellant, ensured the vendor changed his name on the identity card to comply with the names on the title before the transfer was effected; he also obtained a land control board consent; entered into an agreement with the vendor, but he did not undertake a vital step in his quest for due diligence; and that was to make an enquiry to establish the basis upon which the respondents were occupying the suit plot. The suit plot was not vacant thus under the provisions of **Section 30** of the repealed **Registered Land Act (Cap 300)**, it made provisions of what constitutes an overriding interest regarding a registered title as follows:-

“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register –

a.

g. The rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed.”

[26] By virtue of their possession of the suit plot, the respondents had equitable rights which are binding on the land. Just like the learned trial judge, it is our view that the possessory rights of the respondents are binding. See the case of;- *Mwangi & Another v Mwangi (1986) KLR 328*. We therefore find the appellant bought a plot that only existed in title but not on the ground, unfortunately he was conned or defrauded of his money by the vendor and for reasons that he did not cause an enquiry on the state of the plot on the ground before paying for it, the provisions of **Section 75** of the retired Constitution cannot come to his aid, he paid for a plot that was occupied and the occupation had crystallized into legal rights.

[27] The other issue to consider is whether the claim filed by the respondents was res judicata. This issue was not raised by the appellant in his defence; or during the trial, moreover, we have not seen the proceedings, judgment and decree in HCCC 3587 of 1999. For this reason we hasten to state that the appellant who alleged the matter was res judicata had a legal burden to prove the same, through pleadings and production of relevant documents to show the matter was adjudicated in a previous judgment. He did not.

[28] Lastly, the judge held that the respondent’s had acquired prescriptive rights over the suit plot by way of adverse possession. It is obvious the issue of adverse possession was not raised in the pleadings which went against the cardinal rule in pleadings that parties are bound by their own pleadings. It is however discernable from the evidence, the fact of prolonged occupation of the suit plot by the respondents was quite palpable. We are alive to the provisions of **Order 15 rule 2** of the Civil Procedure Rules, which provide that a court has power to frame issues it considers pertinent for the determination of a dispute between the parties. In this case the aforementioned issues were relevant and arose from both the pleadings, submissions and sworn depositions. See also the case of *Odd Jobs vs Mubia, 1970 EA Page 476*, where it was held:

“(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

(ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it.

[29] In view of the above findings, the trial judge was justified to arrive at what we would call an alternative finding that by virtue of prolonged occupation of the suit plot, the respondents had acquired prescriptive rights by virtue of adverse possession. They entered into the suit land by virtue of a sale transaction and remained in occupation, and uninterrupted occupation for a period between 1964 to 1983. Accordingly we are satisfied the learned trial judge did not err in issuing the orders; it would be inequitable to allow the appellant to assert absolute ownership of the suit property given the evidence on record that he purchased the suit plot in occupation by the respondents who by virtue of the history of

their occupation had crystallized their beneficial interests.

[30] We have said enough to demonstrate that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 27th day of May, 2016

M.K. KOOME

.....

JUDGE OF APPEAL

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR