



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 86 OF 2015

BETWEEN

MARIAM FADHILIAPPELLANT

AND

SAMSON MARICHO OTWEYO1ST RESPONDENT

SOUD HAFIDH RASHID..... 2ND RESPONDENT

RUKIYA SOUD BASHIR.....3RD RESPONDENT

HAIDER SOUD..... 4TH RESPONDENT

(Being appeals from the judgment of the High Court of Kenya at Mombasa (Omollo, J.) dated 18th September, 2015 in H.C. C.C. No. 118 of 2010.)

JUDGMENT OF THE COURT

By a sale agreement dated 10th October, 1999, the 1st respondent purchased from one **Maryam Mwichande** what is commonly known as “a house without land,” at a consideration of Kshs.130,000/- together with a transfer fee of Kshs.20,000/-. At the time, the house was the sole structure on the land described as **sub Plot No. 2003, Section VI Mainland North** (hereinafter “the suit land”). Prior to this, the 1st respondent had been a tenant to the 2nd, 3rd and 4th respondents on the suit land, periodically paying an unspecified amount in ground rent. Following his purchase, the 1st respondent expanded the house, by putting up an additional ten rooms, which he rented out. However, notwithstanding his acquisition of the suit land as aforesaid, he was on 11th January, 2010, confronted by some police officers from Changamwe Police Station, who, in the company of and at the instance of the appellant, purported to evict him from the suit land and all his tenants. The basis for the eviction was that the 1st respondent had defaulted in payment of ground rent to the 3rd respondent, leading to the sale of the entire suit land by the 3rd respondent to the appellant by way of public auction on 14th July, 2009, at Kshs.350,000/- for the land and Kshs.900,000/- for the house; with two separate agreements being executed in this regard.

That purported eviction sparked off the dispute between the parties. To the 1st respondent, he owed the appellant no ground rent and given his valid title to the suit land, the appellant had no legal right to eject

him therefrom. He further contended that his title to the suit land meant that the 3rd respondent had no valid claim to the same and as a result, her purported transfer of the suit land to the appellant was a nullity. Lastly, that the appellant's purported purchase of the suit land was also in violation of a subsisting court order and given the foregoing, it was fraudulent and hence invalid. With this conviction, the 1st respondent filed suit against the appellant and the rest of the respondents, seeking:-

“(a) A declaration that the plaintiff is the lawful owner of his house on plot no. 2003, Section VI Mainland North.

(b) A declaration that the defendants' actions are illegal and are null and void.

(c) An order of injunction restraining the defendants by themselves and or agents or any person claiming under them from interfering with, harassing, or in any manner trespassing in the plaintiff's house on Plot No. 2003, Section VI Mainland North.

(d) Any order that this court deems fit to grant

(e) Costs and interest.”

The suit was only defended by the appellant, who along with her defence, filed a Notice of claim against her co-defendants. In the meantime, the appellant and the 1st respondent by consent, agreed that pending the determination of the suit, they would have a joint account wherein the rental income from the house was to be deposited upon collection by their mutual estate agents, **Messrs. Kidime Enterprises Limited**. In her defence which should have ideally been intitled Defence and Counterclaim, the appellant prayed for vacant possession of the suit land from the 1st respondent since she was a purchaser for value without notice in a public auction. She also demanded of the 1st respondent in the alternative a refund of her purchase price. Finally, she averred that the eviction carried out was legal and procedural. The other respondents did not bother to defend the suit.

The hearing proceeded by way of oral evidence, with one witness each testifying for the appellant and the 1st respondent. The 1st respondent reiterated his position as earlier stated. In response, the appellant contended that she was an innocent purchaser of the suit land for value, having purchased the same from the 3rd respondent at a public auction held on 7th February, 2009 and as a result of which two sale agreements, dated 14th July, 2009 were executed. Vide a judgment delivered on 18th September, 2015 **Omollo J.**, held in favour of the 1st respondent, and determined that the 1st respondent was the lawful owner of the suit land and that the appellant, 2nd, 3rd and 4th respondent's actions were illegal and void. She proceeded to issue an injunction against them. She further held that the 3rd respondent lacked the capacity to sell the suit land to the appellant and consequently, the alleged sale if at all was null and void.

Unhappy with the judgment and decree, the appellant has preferred this appeal, in which she contests that decision on four main areas. Firstly, regarding the proprietorship of the land and validity of sale; that the Judge erroneously held that the 1st respondent derived valid title from one **Maryam Mwichande**, yet at the material time, the suit land belonged to **Ali Sood**; in addition, that the Judge erroneously found that the 3rd respondent (vendor) lacked the capacity to sell the suit land, whilst also holding that no auction took place, which holding was contrary to the weight of evidence adduced. That instead, the court ought to have found that the appellant's purchase was pursuant to a valid sale, with the appellant an innocent purchaser for value. Secondly, with regard to the ground rent; that the Judge erred in finding that the appellant's purchase was invalid and that she was owed no ground rent arrears by the 1st respondent, yet the 1st respondent had not adduced any proof of payment of the said ground rent. Further, that in utter contradiction of that finding on ground arrears and validity of the appellant's title, in her disposition of the suit, the Judge nonetheless ordered the release of the ground arrears to the appellant. Additionally, that she erroneously placed the burden of proving and ascertaining the ground rent arrears on the appellant despite the fact that a purchaser at an auction sale has no duty to inquire into the debt. Thirdly, are grounds impugning the Judge's evaluation of the evidence particularly her lack of appreciation of the fact

that there was an auction which took place, as a result of which the appellant acquired valid title to the suit land and lastly, that she failed to consider and address the appellant's claim against her co-defendants.

With leave of court, parties to this appeal were allowed to put in written submissions, which the appellant and the 1st respondent duly filed, with oral highlights at the hearing. As was the situation at the trial, the rest of the respondents opted not to participate in the appeal.

Through his written submissions and oral highlights, **Mr. Ambwere**, learned counsel for the appellant, contended firstly, that the Judge failed to address a material issue placed before her, namely the ownership of the house and the land. That instead, she went against the weight of the evidence and erroneously held that the appellant lacked proper title to the suit land. Further, that notwithstanding that erroneous holding, at the tail end of that judgment, she nonetheless ordered that the appellant be paid the accrued ground rents, out of the rent collections hitherto held in trust in a joint account; thereby contradicting herself on the matter. In addition, that she erred by placing the burden of proving the ground rent owed upon the appellant, yet it was for the 1st respondent to produce receipts showing that he was up to date in his rent payment. Counsel reiterated that the appellant was an innocent purchaser of the suit land for value at a public auction and the Judge ought to have held as much. It was not for the appellant to inquire into the circumstances of the debt and that the Judge failed to consider the appellant's claim against her co-defendants, who should have been ordered to indemnify the appellant and that this failure rendered the judgment defective.

Opposing the appeal, **Mr. Magolo**, learned counsel for the 1st respondent, supported the trial Judge's finding that the sale by public auction never took place, as not only did the 3rd respondent lack capacity to sell the suit land, but that the appellant failed to pay the deposit of purchase price at the fall of the hammer, a condition precedent to the auction sale. As a result, counsel contended, all the issues raised by the appellant fall by the wayside, for without a valid sale, they are irrelevant. With regard to the notice of claim, counsel submitted that since the appellant never adduced evidence in support of her indemnity claim against her co-defendants, the trial Judge cannot be faulted for not dealing with the issue.

This being a first appeal, this court is obliged to evaluate and analyze the evidence afresh, bearing in mind however, that it will normally not interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles (**see. Ephantus Mwangi & Another v. Dancun Mwangi Wambugu [1982-88] KAR 278**).

With that in mind, three issues fall for determination by this Court;

- (a) Who had valid title to the suit land;
- (b) Whether the trial Judge's appreciation of the evidence and issues was proper; and,
- (c) The appellant's notice of claim against the 2nd, 3rd and 4th respondents.

The first and second issues can be taken together. The appellant has impugned the judgment for failing to address the question of who owned the suit land. The appellant and the 1st respondent have varied beliefs regarding the previous and present proprietorship of the suit land. The appellant contends to have bought the suit land from the 3rd respondent at a public auction while the 1st respondent asserts that at the time of the alleged auction purchase, the suit land was already owned by himself subject to ground rent payable to the 2nd 3rd and 4th respondents.

Our land law regime is mainly dictated by statute and common law; both of which define land as not only the ground but the structures thereon. This is based on the Latin maxims '*cujus est solem ejus et usque ad coelum et ad inferos*' which translates into 'whoever's is the soil, it is theirs all the way to heaven and all the way to hell' and '*quic quid planatur solo solo cedit*' (whatever is attached to the soil becomes part

of it). From the two maxims, land has by and large been defined to mean the ground and all fixtures thereon. However, courts have taken judicial notice of the Mohammedan concept of ownership of ‘a house without land’ that is prevalent at the coast. This concept works on the premise that proprietorship of land and of the structures thereon can be mutually exclusive. A person may own one without necessarily owning the other. This proposition found support under the provisions of the **Land Titles Act cap 282** (repealed) which governed land registration at the coast. Under the Act, interests in land required registration, with **Section 55(b)** recognizing houses and coconut trees as such interests or holdings whose proprietorship could be independent of the land. (See **Muhiddin Mohamed v. Jackson Muthama & 168 others [2014] eKLR**. Upon registration, a certificate of registration would issue, which would act as proof of legitimacy of the proprietor’s interest.

Of note is that while the Act provided for registration of such holdings, it also enumerated the consequences of non-registration. Under **Section 58** of the Act, a party with a non-registered document or interest ran the risk of having their interest rendered void by any registered adverse interest. So that where two competing interests arose, and one was unregistered, the registered one would prevail.

In the present case, the main bone of contention is the suit land and not the house(s). From the record, none of the parties adduced evidence proving the registration of their interest in the house(s). The court was thus left to contend with two contracts drawn in respect of the house. In our view, in the absence of registration as aforesaid, in order to determine the rightful proprietor of the suit land, the matter was left to the realm of the law of contract. Since these are competing interests, it was for each party to prove validity and priority of their title.

Did they do so? The appellant faults the Judge for holding that Maryam Mwichande sold the suit land to the 1st respondent, yet the proper vendor was Ali Sood. However, looking at the sale agreement for the suit land dated 10th October, 1999 (the 1st respondent’s contract), the same was executed by four parties; **Miriam Mwichande**, the 1st respondent, **Ali Mohammed Sood** and one **John Opalo**. It was a rudimentary agreement which simply stated as follows;

“RE: PLOT NO. 2003/VI M.N HOUSE WITHOUT LAND MARYAM MWICHANDE

I Maryam Mwichande today October 10, 1999 ID No. 3153781 have sold my house without land to Mr. Samson Otweyo Marico ID No. 4601265 for Kshs.130,000. I have received cash from Mr. Marico.

Signed,

Maryam Mwichande

Samson Otweyo Marico

Ali Mohamed Sood (for the estate of Sood Bon Ali Bashir)

John Opalo”

Though Maryam Mwichande is said to have been the vendor, Ali Sood cannot be said to have been ignorant of the sale, having participated in the execution of the agreement albeit in an unknown capacity. Aside from his apparent knowledge and approval of the disposition, no proof was presented by the appellant at trial refuting Maryam’s capacity to sell. To the contrary, she admitted that the 1st respondent was a lawful tenant on the property who was subject to payment of ground rent. The contention that Maryam Mwichande lacked the capacity to sell the suit land or that the same ought to have been sold by Ali Sood is an afterthought. Neither in her defence nor in evidence did the appellant allude to invalidity of the 1st respondent’s purchase. It is trite law that both the court and the parties are bound by pleadings. (See. **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others, Civil Appeal No. 219 of 2013.**)

The validity of the 1st respondent's purchase of the suit land was basically uncontested. In fact, from the pleadings, what was contested was the appellant's purchase which was impugned on grounds of fraud and want of capacity by the vendor. Given that the transaction proceeded in the face of a valid court order, it was null and void.

With regard to the contestation that the 3rd respondent lacked capacity to sell the suit land, in the face of the appellant's sale agreement, duly executed as aforesaid, the legal burden to prove that the latter sale was equally above board lay with the appellant. This is because *prima facie* title, in the house having passed to the 1st respondent, any subsequent disposal of that interest lay with the respondent and no other party. Given the appellant's admission that the suit land belonged to Ali Sood, and in view of the uncontested validity of the 1st respondent's purchase, where does the appellant's transaction stand? In our view that latter transaction fails for want of capacity of the vendor and the 1st respondent's interest prevails.

Further, the appellant's case was based on a claim that she purchased the suit land at a public auction. The alleged public auction was to take place on 7th February, 2009. The condition of sale was stated "*cash or bankers cheque at the fall of the hammer.*" However, there is no evidence that there was such public auction. There is no evidence of payment by the appellant of the purchase price on the fall of the hammer nor indeed the sale. The appellant then on 14th July, 2009 entered into a sale agreement with the 3rd respondent in which the 3rd respondent purports to sell the suit land to her. This is much later after the purported public auction. The appellant cannot in the circumstances really hinge her alleged acquisition of the suit land on the public auction. In any event the 3rd respondent had no authority to sell a tenant's house even if rent was owing, the respondent having already purchased the same.

On the last issue, the appellant has faulted the Judge for not pronouncing herself on the issue of indemnity. The appellant had in her defence claimed for a refund of the purchase price from the 2nd 3rd and 4th respondents against whom she also took out a notice of claim. From the evidence adduced in support of this claim it is evident that two sale agreements were executed in respect of the suit land as alleged by the appellant. The two agreements were expressed to be between the appellant and the 3rd respondent, with evidence of payment of consideration being by way of receipts issued by the parties' mutual advocates; **Messrs Ojode Onjoro & Company Advocates**. The said receipts reflect payment of a sum of Kshs.1,210,000/-. The 2nd, 3rd and 4th respondents never disputed this.

A claim of indemnity against a co-defendant is akin to third party proceedings. By upholding the 1st respondent's title to the house, the appellant will be disentitled to the same; thereby losing the Kshs.900,000/- she had paid in respect thereof. On the matter, the learned Judge had this to say:-

"...when entering the agreement of 14.7.2009, she ought to have established proof (sic) that the owner of the house was indeed in arrears of rent and how much. There has been no proof of due diligence undertaken by her."

With the above finding, the learned Judge refrained from awarding any sort of indemnity to the appellant. It is thus not accurate to say that she never addressed the issue of indemnity. In the premises, the appeal lacks merit and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 14th day of October, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR