



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CIVIL APPEAL NO. 33 OF 2008

BETWEEN

EPAPHRUS MUTURI KIGORO..... APPELLANT

AND

WILLIAM MUKUI NYAGA..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (Khaminwa, J.) dated 12th July, 2007

in

H.C.C.C. No. 28 of 2003)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court dated 12th July, 2007, wherein the appellant's title over *L.R No. Mbeere/Mbita/T29 (suit property)* was cancelled. This is a first appeal, that being so, it is our duty to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This Court in *Sumaria & Another –vs- Allied Industries Ltd., (2007) KLR 1*, expressed itself as follows:

“Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did”.

The essential background facts are that **William Mukui Nyaga**, (respondent) filed suit against the appellant, Joseph Kimemia Muthondu (Joseph) and the Attorney General seeking *inter alia*:-

- ***The suit property be transferred to him.***
- ***The defendants therein be ordered to pay general damages with interest.***

The respondent's claim as we understood it was that in the year 1972, during the land adjudication and demarcation in Mbeere District, he was allocated the suit property. After the allocation, he claimed that he took possession of the suit premises, occupied it and carried out extensive developments thereon. However, sometimes in 2001, he discovered that the suit property had been transferred to Joseph when he went to collect the title from the lands office. According to him, he was not aware of the said transfer and neither did he give his consent. He later discovered that Joseph was trying to sell the suit property; he made frantic efforts to forestall the transfer; his efforts to register a caution over the suit property to stop further dealings were frustrated by the Land Registrar in Embu. Thereafter, he contended the suit property was fraudulently transferred to the appellant who was at all material times aware of the respondent's interest thereon. The respondent averred that the transfer and all consequential transactions in respect of the suit property were done fraudulently. He averred that the appellant did not have a legal title over the suit property. The respondent claimed in the alternative that he was entitled to the suit property through adverse possession since he had been in possession of the same for over 12 years.

Joseph filed a statement of defence and admitted that the suit property was originally allocated to the respondent during the land adjudication and demarcation period. It was his case that in the year 1972, the respondent's father, one Naftali Nyaga, approached him and offered to sell the suit property in order to raise the respondent's school fees; the respondent was then in secondary school. He purchased the suit property for a consideration of Kshs. 1050/= and the same was registered in his favour; the said registration was a first registration hence indefeasible. Thereafter, in the year 2001 he sold the suit property to the appellant for a consideration of Kshs. 120,000/=. He maintained that he transferred his legal title of the suit property to the appellant.

The appellant in his statement of defence averred that he acquired title over the suit property legally. He denied that the respondent had acquired interest over the suit property through adverse possession.

In his evidence before the trial court, the respondent testified that after the suit property was allocated to him his mother, PW2, **Martha Njura** (Martha), cultivated the same. He further testified that he had informed the appellant prior to the purchase that the suit property belonged to him and that Joseph had fraudulently acquired title over the same. According to the respondent's mother, when the suit property was allocated to the respondent he was still in school; she started cultivating the land and had continued doing so until the appellant evicted them. Martha testified that the appellant was well known to both the respondent and herself; the appellant was aware at all material times of their occupation and interest in the suit property. She denied that her husband had sold the suit property to Joseph.

PW3, **Dickson Njeru Kingangi** (Dickson), gave evidence that his land bordered the suit property; since the land adjudication and demarcation period the respondent was in occupation of the suit property. He confirmed that the respondent's mother was the one who was cultivating the suit property from the time of demarcation and adjudication until they were evicted.

Joseph reiterated in his evidence the averments in his defence as set out hereinabove. The appellant did admit that he knew the respondent and his mother; they were his neighbours; they had cultivated the suit property until he purchased the same. He maintained that he was not a party to the fraud alleged by the respondent and that he has remained in occupation of the suit property since the year 2003.

After considering the aforementioned evidence, the trial court entered judgment in favour of the respondent. The High Court cancelled the appellant's title over the suit property and directed it be registered in the respondent's name. It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in finding for the plaintiff (respondent) while the evidence adduced did not prove any case against any of the defendants.***
- ***The learned Judge erred in law and in fact in cancelling the 3rd defendant's title when he was only a purchaser for value without notice and against who the plaintiff gave no evidence of being involved in fraud against him. sic***

- ***The learned Judge erred in law in framing issues for determination which issues were not raised at the trial and brought to the attention of counsel.***
- ***The learned Judge erred in law and in fact in introducing into the case matters of the Adjudication Act which matters were never canvassed in court by any of the parties in the suit.***
- ***The learned Judge erred in law and in fact in holding that the plaintiff's case was not based on tort while clearly the pleadings were couched in a manner to show that the plaintiff's case was based on fraud and gave particulars of fraud against the 1st and 2nd defendants.***

Mr. Muhoro, learned counsel for the appellant, submitted that there were no allegations that were leveled against the appellant; moreover there was no evidence of fraud on the part of the appellant in respect of the suit property. He argued that the appellant was an innocent purchaser for value; that there was no basis for the learned Judge to cancel the appellant's title over the suit property. Mr. Muhoro submitted that the findings by the High Court were a serious departure from the pleadings on record; the orders issued had not been sought by the respondent. According to Mr. Muhoro, the respondent's suit was based on allegations that the sale of the suit property was fraudulent and not on recovery of land wherein a third party was in possession. He contended that this was a case for issuing a declaratory order to the effect that the suit property was illegally taken. He maintained that since the registration of the title in favour of Joseph was a first registration, the same could not be revoked even if it was obtained through fraud; the appellant obtained title over the suit property from Joseph hence the learned Judge erred in cancelling his title. He urged us to allow the appeal.

Mr. Muyodi, learned counsel for the respondent, in opposing the appeal submitted that the appellant did not have any legal title capable of being altered. The purported transfer was a nullity. He argued that the respondent was registered as the proprietor of the suit property in the adjudication register; there was an alteration of the aforementioned entry which was not supported by any documents to show how the suit land was transferred to Joseph. According to Mr. Muyodi, there was no evidence of the purported sale of the suit property to the appellant. He submitted that the respondent had demonstrated that he tried to block the transfer to the appellant by lodging a caution over the title but his efforts were frustrated by the Land Registrar. The appellant knew of the respondent's efforts to stop the transfer, thus he was part of the conspiracy that defrauded the respondent of his parcel of land. Counsel also pointed out that it was not unusual for a Judge to frame issues for determination which are mainly drawn not only from pleadings, but also from the evidence adduced before the court. He urged us to dismiss the appeal.

Mr. Masaka, learned state counsel appearing for the Attorney General opposed the appeal, he submitted that the appellant was not an innocent purchaser; he was always aware of the allegations of fraud and the same was evident from the evidence on record. The appellant was aware that there was a dispute over the suit property before the same was transferred in his favour. According to him, Joseph did not have good title over the suit property capable of being transferred to the appellant. He argued that the law protected first registration if the same was lawfully acquired.

Based on the foregoing summary of the pleadings and evidence that was before the learned Judge of the High Court, we discern the following issues which we think fall for our determination:-

- ***What issues should have been framed for determination in a suit?***
- ***Was the title for the suit premises a first registration, if so was it capable of being challenged?***
- ***Was the appellant an innocent purchaser for value without notice?***
- ***Did the High Court err in cancelling the appellant's title over the suit property?***

Straight to the first issue, this is how the learned trial Judge expressed herself regarding the issues she formulated for determination:-

“In my view the issues for determination can be stated as follows:-

- 1) Was there a valid sale agreement between the plaintiff (respondent) and 1st defendant (Joseph) in respect of the plaintiff’s land Mbeere/Mbita/729?***
- 2) Did the 1st defendant acquire a legal interest in the plaintiff’s land to pass the same to the 3rd defendant?***
- 3) Did the land registrar participate and assist the 1st and 3rd defendants to fraudulently acquire the plaintiff’s land?***
- 4) What orders can be given in the circumstances?”***

The appellant faulted the learned Judge for framing the aforementioned issues on the ground that they had not been raised at the trial. In ***First Assurance Co. Ltd. –vs- Seascapes Ltd - Civil Appeal No. 246 & 263 of 2002*** this Court observed as follows:-

“In our view the learned Judge was not bound to deal with each and every issue the parties had framed. The agreed issues are intended to enable the trial court appreciate the matters in controversy between the parties upon which they are obliged to call evidence. If at the close of the hearing he is convinced that some of those issues were unnecessary he is not precluded from saying so. Order XIV rule 1(5) places the burden on the court to ascertain upon what material propositions of fact or law the parties are at variance. And by Order XIV rule 3 the court may frame issues either from the allegations made on oath by or on behalf of the parties, or from allegations made in the pleadings or from contents of documents.”

Pursuant to ***Order XIV rule 3*** of the former Civil Procedure Rules (equivalent to ***Order 15 rule 2*** of the current ***Civil Procedure Rules***) which was in force at the time of the hearing and determination of the suit, 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 and the evidence adduced at the trial. See also the case of ***ODD JOBS V MUBIA, 1970 EA Page 476***, where it held:

“(i) a court may base its decision on an unled 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.”

Was the first registration 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.”

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.***

It is on the basis of the foregoing that Joseph maintained that since his registration was a first registration

his title over the suit property was indefeasible.

In this case it is not in dispute that the respondent was allocated the suit property on 13th September, 1973, during the land adjudication and demarcation period. This fact is admitted by Joseph and confirmed by the extract of the adjudication register which was tendered in evidence. Joseph averred in his statement of defence that he had purchased the suit property from the respondent in the year 1975. However, in his evidence before the trial court, Joseph testified that he had purchased the suit property from the respondent's father one Naftali Nyaga for a consideration of Kshs. 1050; the respondent's father sold the same in order to raise school fees for the respondent. Based on the foregoing contradictory evidence by Joseph, it is not clear to us, the same way it was not clear to the trial Judge, how he acquired the suit property. Further, the trial court noted that Joseph did not provide proof of the alleged sale. In fact during cross examination Joseph admitted that he had no documentary proof of the sale agreement or payment of the purchase price.

Joseph testified that after the alleged purchase of the suit property the respondent's name was substituted with his in the adjudication register. The extract of the adjudication register indicates that the respondent's name was cancelled and substituted with one Simon Kimemia Muthondu on 16th January, 1978. It is the said Simon Kimemia Muthondu who was registered on 14th January, 2000, under the **Registered Land Act** as the proprietor of the suit property. Subsequently, on 20th December, 2000, the said register was corrected and the name Simon Kimemia Muthondu was cancelled and replaced with Joseph Kimemia Muthondu.

It is important to note that no reason was indicated in the adjudication register for the substitution of the respondent with the said Simon Kimemia Muthondu. It is also noteworthy that Simon Kimemia Muthondu and Joseph Kimemia Muthondu refer to two distinct persons. From the extract of the title of the suit property no explanation was given for the correction of the name of the registered proprietor.

The respondent gave evidence that he had never sold the suit property to Joseph; he only discovered the same had been transferred to Joseph when he went to collect the title in the year 2000. It is imperative to consider whether in light of the foregoing and the provisions of **Section 143** of the **Registered Land Act** (repealed) the first registration could be challenged.

In ***John Teleyio Ole Sawoyo –vs- David Omwenga Maombe, - Civil Appeal No. 297 of 2009***, this Court expressed itself as herein under:-

“That leads us to a brief discussion of the effect of Section 143(1) of the Registered Land Act (now repealed) on the registration of the appellant as proprietor thereof. The section reads as follows.....

The learned Judge described the section as a legal absurdity, he showed his revulsion to the section in terms we find unfortunate, with all due respect to him. There was a rationale in enacting the said provision given the process leading to the registration. Before registration, elaborate opportunities were open to anyone who had reason to complain. Complaints were entertained at every stage during the process of consolidation, adjudication and registration. The entire process was adequately publicized in print and electronic media. Public ‘barazas’ were used to educate the public of the process. Final appeals were determined by the Minister responsible for land matters. And even if one still felt dissatisfied with the Minister’s determination, one would resort to the remedy of judicial review orders of mandamus, certiorari and prohibition. At the conclusion of the elaborate process, it was necessary to protect the final register. Looked from that perspective, there would appear to be justification for the enactment of Section 134(1) of the Registered Land Act.

Nevertheless, it would appear that the complaint made by the respondent in this case was not envisaged by the framers of Section 143(1) of the Registered Land Act. In his case the process leading to his being adjudicated as the owner of the suit piece of land was never challenged. He could not therefore make any complaint at any stage of the adjudication and registration

process. He expected his name to appear in the final register which was presented to the Chief Land Registrar under the Land Adjudication Act from which the register of the suit land was opened. But to his shock he was not so registered and instead it was the appellant who was registered as proprietor of his piece of land”.

Similarly in this case, the adjudication process which led to the allocation of the suit property to the respondent was never challenged and his name was entered in the adjudication register. At no point was the respondent involved or even made aware that the adjudication register had been altered and the title issued to somebody else. The respondent was shocked when he went to collect the title from the lands office, only to learn that the suit property was registered in favour of Joseph. The dilemma the respondent faced which must have been confounded by the provisions of **Section 143(2)** of the **Registered Land Act** was enormous. Was he to sit back and watch his land being taken away fraudulently because under the provisions of **Section 143 (2)** of the **Act** sanctified a title simply because first registration cannot be challenged. The circumstances under which the respondent’s title was transferred perfectly entitled him to come to court under the overriding interests over his parcel of land because when the purported transfer was effected, he was in possession of the suit land. Before a first registration is effected, there are several steps including an enquiry of the persons who were in occupation that ought to be conducted. Under the provisions of **Section 30** of the **Registered Land Act (Cap 300)**, it makes 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”.

The issue that we find most vexing in this matter as in other matters involving a claim of land by a registered proprietor, is the issue of whether before the Land Registrar issued the title to Joseph or to the appellant an enquiry of the persons who were entitled and who were in possession of the subject title was carried out. There are several correspondences on record which were exchanged between the respondent, the Provincial Administration, the Land Control Board and the respondent’s attempt to register a caution over the suit land in October, 2001. The Land Registrar must have been aware of the respondent’s claim of beneficial interests over the suit land because the caution was received in the lands office of the 17th October, 2001. While all that was happening the appellant was registered as proprietor of the suit land on 23rd May, 2002. This is why the appellant cannot be described as an innocent purchaser for value without notice. This now brings us to the last issue of whether the appellant was an innocent purchaser for value without notice.

Section 143(2) of the **Registered Land Act** provided:-

“The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

Apart from the above flurry of correspondence and concerted efforts by the respondent, it was also admitted in the evidence by the appellant that the respondent was his neighbour and they came from the same clan. He was aware at the time of the purported purchase that the respondent and his mother were in possession and cultivated the suit property. In his evidence he confirmed that the respondent cultivated the suit property until he was evicted in the year 2003. He also testified that he never inquired from the respondent about his interest on the suit property.

Further, the respondent testified that when he learnt that Joseph wanted to sell the suit property to the appellant he tried to register a caution to stop further dealings but his efforts were frustrated by the Land Registrar. He wrote a letter to the appellant informing him about the dispute over the suit property. The respondent also appeared before the Land Control Board and raised an objection in respect of the transfer of the suit property to the appellant. Consequently, the Land Control Board initially declined to give its consent. The appellant never denied the foregoing. Therefore, it is clear that appellant was aware of the respondent's interest and allegations of fraud in respect of Joseph's title over the suit property when he purchased the same.

The trial court cancelled the appellant's title and expunged Joseph's name from the suit property's register. The trial court found that the registration of the suit property in favour of Joseph was suspect and fraudulent; the appellant was at all material times aware of the allegations of fraud. The trial court found that the appellant had acquired the suit property in circumstances which made it inequitable for him to be allowed to retain the same.

In *Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri, - Civil Appeal No. 6, 26& 27 of 2011*, this Court held,

“This Court is a Court of law and a Court of equity; equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”.

The trial court did not err in issuing the orders it did. This is because it would be inequitable to allow the appellant to assert absolute ownership of the suit property given the evidence on record and the respondent's beneficial interests over the same.

We have said enough to demonstrate this appeal lacks merit and it is hereby dismissed with costs to the respondent

Dated and delivered at Nyeri this 24th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR