REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 9 OF 2014

BETWEEN

ROSEMARY WANJIKU MURITHI …………………………… APPELLANT

AND

GEORGE MAINA NDINWA …………………..……………… RESPONDENT

An appeal from the Judgment of the High Court of Kenya at Embu (Karanja, J.) dated 12th May, 2010

In

H.C.C.A. No. 76 of 2006

JUDGMENT OF THE COURT

1. George Maina Ndinwa filed suit before the Senior Principal Magistrate's Court at Embu in ***Civil Case No. 80 of 2004*** against the appellant seeking orders that the appellant be restrained from entering ***Land Parcel No. INOI/NDIMI /1939***, and the appellant to stop constructing the building she is now constructing and remove the structure and fence she has erected thereon. The contention is that the appellant, Rosemary Wanjiku Muriithi, has entered ***Land Parcel No. INOI/NDIMI/1939,*** and is constructing a building thereon while the said parcel is registered in the name of the respondent. It is the respondent's case that the appellant is a trespasser.
2. In the plaint, the respondent asserts that he is the registered proprietor of the suit property and that on or about 27th February, 2004, the appellant entered the property and erected a fence and cut down 140 stems of coffee without his consent and thereafter on about 22nd February, 2004, the appellant started placing building material on the suit property. The respondent claims that the appellant's conduct is trespass to land.
3. The respondent in his plaint states that upon investigation, he learnt that his brother, a one Edward Mwai Ndinwa had sold a portion of the land measuring 0.10 ha to the appellant out of ***Land Parcel No. INOI/NDIMI/1245***. That the portion of land belonging to Edward Mwai Ndinwa was registered as ***Land Parcel No. INOI/NDIMI/1937,*** and the appellant is now registered as proprietor of ***Land Parcel No. INOI/NDIMI/1937.***
4. In her Statement of Defence and Counterclaim, the appellant alleges that she purchased the parcel of land from a one Edward Mwai Ndinwa and it is her contention that it was due to fraud on the part of the respondent and the surveyor that caused ***Land Parcel No. INOI/NDIMI/1939***, to be

registered in the name of the respondent. That the mutation forms that excised ***Land Parcel Nos. INOI/NDIMI/1939*** and ***INOI/NDIMI/1937*** out of ***Land Parcel No.1245*** was doctored and altered to indicate the respondent is the proprietor of ***Parcel No. INOI/NDIMI/1939***. That the respondent property is ***INOI/NDIMI/1937***.

5. Upon hearing the parties, the trial magistrate in entering judgment for the plaintiff/respondent stated as follows:

> ***"There is no dispute over the fact that the suit land is registered in the name of the plaintiff. It is also not in dispute that the defendant all along knew the suit land belonged to the plaintiff who is the registered proprietor thereof. It is clear to me, from the evidence on record, that the defendant has no justifiable claim, right or interest in the suit land. She had her title deed for land parcel no. INOI/NDIMI/1937 issued on 22nd December 2003 – which she should have developed if she wanted- but instead went ahead and developed the plaintiff's parcel of land. I find that for the foregoing reasons, the plaintiff has proved his case against the defendant on a balance of probabilities as required. I therefore enter judgment in favour of the plaintiff. The defendant is restrained from entering into the plaintiff's land parcel no. INOI/NDIMI/1939 and to stop constructing the building she is construction on the suit land and to remove the structure and fence erected thereon".***

6. Aggrieved by the decision of the trial court, the appellant lodged a first appeal to the High Court (Hon. W. Karanja J., *as she then was*). The learned Judge in a judgment dated 12th May, 2010 dismissed the appeal stating that:

> ***"I find that Plot No. 1939 as indicated in the title deed and in the mutation form belongs to the plaintiff/respondent herein. The defendant has no claim on that same whatsoever and she has clearly trespassed on the respondent's land. Her appeal has no merit and I hereby dismiss the same with costs both in the lower court and in this court".***

7. Aggrieved by the learned Judges' decision, the appellant has moved to this Court by way of second appeal. In the memorandum of appeal dated 3rd March, 2014, the appellant cites eight grounds of appeal which can be compressed as follows:

i. ***The learned Judge erred in law in dismissing the appeal notwithstanding that she appreciated that there was an element of fraud as raised in paragraph 11 of the statement of defence and counterclaim.***

ii. ***That the learned Judge erred in upholding the decision of the trial magistrate notwithstanding that the trial court had no jurisdiction and the issue of trespass should have been heard under Section 3 of the Land Dispute Tribunal Act.***

iii. ***The learned Judge erred when she failed to appreciate the submissions by counsel for the appellant and the decision made is unsupportable in law or by the evidence adduced.***

iv. ***The learned Judge erred in law in dismissing the appeal notwithstanding that Section 6 of the Land Control Act was not complied with.***

9. At the hearing of the appeal, learned counsel **Messrs Chigiti John** appeared for the appellant. Learned counsel **Messrs E. M. Mutahi** is on record for the respondent but despite service of the hearing notice on 17th March, 2014, did not attend hearing.

10. Counsel for the appellant in his submissions elaborated the grounds of appeal. He submitted that the learned Judge erred in apprehension and interpretation of the evidence on record. Counsel submitted that there was a sale agreement dated 17th October, 2003, between the appellant and one Edward Mwai Ndinwa whereby the appellant agreed to purchase 0.114 ha of land out of land

parcel described as ***INOI/NDIMI /1245***. That this parcel is neither ***Land Parcel No.INOI/NDIMI/1937*** nor ***INOI/NDIMI/1939***. That the learned Judge erred in stating the parcel of land purchased by the appellant was ***INOI/NDIMI/1937***.

11. Counsel for the appellant submitted that the fact that the sale agreement does not refer to ***Parcel Nos. 1937*** or ***1939,*** leaves in doubt as to which exact parcel was being purchased by the appellant. Counsel submitted that the seller of the parcel now occupied by the appellant a one Edward Mwai Ndinwa testified in court as DW1 but he did not clarify the exact location of the parcel of land sold to the appellant. It was submitted that because of doubts as to the location of the exact parcel of land purchased by the appellant, the burden of proof rested with the respondent, as the plaintiff, to prove that the land occupied by the appellant was not the one she purchased.

12. It was further submitted that the sale agreement is dated 17th October, 2003, and the Green Card in relation to ***Land Parcel 1937,*** shows that the title was issued on 16th July, 2003. That it was impossible for the land parcel no. 1937 to have been transferred to the appellant before the sale agreement; that this by itself was evidence that ***Plot No. INOI/NDIMI/1937,*** was not the subject matter of the sale agreement dated 17th October, 2003. Counsel submitted that the mutation form relied upon by the respondent in its case had alterations thereon and this fact was appreciated by the learned Judge. It was submitted that it was an error of law for the trial court and the learned Judge to rely on a mutation form that had been altered or doctored and make findings and determination based on an altered document. Counsel submitted that when a form or document has been doctored or altered, a court should not rely on such a document. It was submitted that learned Judge should have remitted the case to the trial court to resolve the issue of alterations on the mutation form. Counsel submitted that since the prayer in the plaint sought injunctive orders, the trial court and the learned Judge erred in law in not following the principles laid down in the case of ***Giella – v- Cassman Brown,*** for the grant on injunctions.

13. We have considered the submissions by counsel for the appellant and examined the record of appeal and analyzed the judgment of the High Court. In the instant case, the two courts below have established the fact that ***Land Parcel No. INOI/NDIMI/1939,*** which is the suit property is registered in the name of the respondent. It has also been established that the appellant trespassed on this land and entered the same without the consent of the respondent. This Court stated in ***Jabane – vs- Olenja, [1986] KLR 661***, 664, thus:

> ***"This Court … will not lightly differ from the findings of fact of a trial Judge …and will only interfere with them if they are based on no evidence… see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870" .***

14. This is a second appeal and in ***Kenya Breweries Limited -vs- Godfrey Odoyo,- Civil Appeal No. 127 of 2007,*** it was stated:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is preserve".***

15. The issue before us is whether the grounds as stated in the memorandum of appeal disclose a point of law that can lead us to interfere with the decision of the learned Judge. Counsel for the appellant submitted that an element of fraud had been raised in the statement of defence and counterclaim. Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. The two courts below held that fraud had not been proved. The appellant has not illustrated any error or misdirection in law on the part of the learned Judge to show that fraud was indeed proved and the Judge erred in finding that it

had not been proved. It is our view that the learned Judge correctly held that the page on the mutation form that is said to have been doctored did not in any way whatsoever change the positions of the parcels of land; that ***Land Parcel No. 1939*** is ***Plot "E"*** on the mutation form and it remains the same while ***Land Parcel No. 1937*** is ***Plot "C"*** and it remains the same on the mutation form. Edward Mwai was DW1 and he was the one who sold his plot to the appellant herein. ***Plot No. "E"*** clearly belonged to George Maina Ndinwa the plaintiff/respondent herein and this is the suit property. From these facts, the learned Judge on re-evaluation of the evidence on record found there was no forgery or fraud. We are satisfied that the learned Judge properly re-evaluated the evidence and we see no reason to interfere with the findings by the learned Judge.

15. On the issue of jurisdiction and lack of consent from the land control Board, it is our considered view that a claim based on fraud is outside the jurisdiction of the Land Dispute's Tribunal. The appellant's counterclaim is grounded on the claim of fraud and we find that the Judge correctly held that the trial court had jurisdiction to deal with the counterclaim that raised the issue of fraud. On consent of the land control board, the appellant did not canvass this issue before us and consequently we deem that this ground of appeal was abandoned.

16. The appellant contends that the sale agreement in issue was dated 17th October, 2003, and the Green Card in relation to ***Plot No. 1937*** in which ***Land Parcel No. 1937,*** was transferred and registered in the appellant's name is dated 16th July, 2003. It was submitted that it was impossible for the sale agreement to have been signed after ***Parcel No. 1937***, had been transferred to the appellant's name. On our part, we have asked ourselves how come ***Land Parcel No. 1937*** was registered in the appellant's name if this was not the parcel she was buying. The sale agreement is clear that Edward Mwai Ndinwa was selling 0.114 ha of land out of ***Land Parcel No. INOI/NDIMI/124***5. The appellant was purchasing Edward Mwai's portion of land in ***Parcel 1245***. The learned Judge observed that the appellant knew what she was doing and we concur with her sentiments as stated herebelow:

> ***"I have already said that the defence exhibit 2 shows that the Parcel of Land No. INOI/NDIMI/1937 was registered in the name of the defendant (appellant) on 16th July, 2003. The practice is that both the transferee and the transferor must execute a transfer before the same can be registered. I find it therefore dishonest for the defendant to say she was not aware that the parcel she was buying was Land Parcel No. INOI/NDIMI/1937 when even the so called Land Sale Agreement was signed by her more than three months after the parcel was registered in her name".***

16. Having analyzed the judgment of the High Court and the evidence on record, and being satisfied that the appellant purchased that portion of land that belonged to Edward Mwai Ndinwa, and noting that ***Land Parcel No. 1937*** is the portion of land that belonged to Edward Mwai Ndinwa, we are convinced that this appeal has no merit and is dismissed with no order as to costs.

Dated and delivered at Nyeri this 13th day of May, 2014.

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