



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 53 of 2010**

**JOYCE MWATHIRA M'ECHENGI (representative of the**

**Estate of M'Echengi Kiriga (deceased) ..... APPELLANT**

**AND**

**GERALD NGEERA .....RESPONDENT**

*(Appeal against the Judgment and Decree of the High Court of Kenya at Meru (Emukule J.) delivered on  
15<sup>th</sup> January 2010*

*in*

***HC Civil Appeal No.76 of 2005)***

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**JUDGMENT OF THE COURT**

1. The suit property is Plot No. 341 "C" located in Miathene Market in Nyambene County Council. The appellant filed a plaint in the Chief Magistrates Court at Meru on 27<sup>th</sup> December 2000 claiming that he is the bona fide registered owner of Plot No. 341 "A" & 341 "C" situated in Miathene Market in Nyambene. Two defendants were named in the suit namely the respondent as the 1<sup>st</sup> defendant and Nyambene County Council as the 2<sup>nd</sup> defendant.
2. The allegation in the plaint is that on 26<sup>th</sup> July 2000 or thereabouts, the respondent applied to the Town Planning sub-Committee of Nyambene County Council for approval of allocation of a new plot which was supposed to be "imposed" on Plot No. 341 "C" which belonged to the appellant. The appellant avers that the respondent in collusion with Nyambene County Council committed a fraud and conspired to make it be seen that the respondent owned Plot No. 341 "C" in Miathene Market. The particulars of the fraud were itemized in the plaint. The appellant sought a permanent injunction to issue against the respondents or their agents and servants from transferring or transacting or building any structure on Plot No. 341 "C" situate in Miathene Market. The trial magistrate dismissed the suit against Nyambene County Council who was the 2<sup>nd</sup> defendant. In the words of the trial court:

***"firstly, the plaintiff had not proved its case against the 2<sup>nd</sup> defendant noting that the***

***testimony on record was that the 2<sup>nd</sup> defendant was not in existence at the time of the purported fraudulent transaction in 1981 and as such, the 2<sup>nd</sup> defendant could not have been in a position to commit any offence; secondly, the plaintiff had indicated fraud and collusion of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. This was merely pleaded and no evidence was led in support of such pleading”.***

3. The defence to the plaint contends that the appellant sold Plot No. 341 “C” in 1981 to the respondent for value which plot was excised by the appellant from Plot No. 341 “A” and consequently, the appellant is not the bona fide registered owner of Plot no. 341 “C”. The respondent denied any and all particulars of fraud pleaded in the plaint.
4. At the conclusion of the case, the learned magistrate dismissed the suit against the 2<sup>nd</sup> defendant and issued a permanent injunction restraining the respondent in this appeal, his agents or servants from transacting, transferring or building any structures on Plot No. 341 “C” within Miathene Market belonging to the appellant. The trial magistrate in the judgment expressed himself as follows:

***“It is not in dispute that Plot No. 341 “C” belonged to the Plaintiff. It is also not in dispute that the plot was sub-divided into 3 parts. The argument is was there any transfer? The defendant states that he purchased the suit property from the plaintiff on 7<sup>th</sup> April 1981 at Ksh. 8,000/=. If we rely on the exhibits produced by the defence (being Exhibit 3) and if the word transfer is not used anywhere, the two documents simply refer to a sub-division in which the two plots are registered in the names of the plaintiff and the defendant. As it is, there was no consent to transfer even if there was a sale of the plot. This is a matter of land, and any sale agreement must be reduced into unequivocal writing. That was not done. The purported sub-division and/or transfer were done after the approval made on 21<sup>st</sup> August 1981... I do make a finding that the defendant has not proved that he indeed bought this land from the plaintiff. It is claimed transfer forms were filled and signed even before the exchange of consideration. No such forms have been presented to this court for perusal.... I do find that the plaintiff never transferred his plot to the defendant... and a permanent injunction shall issue restraining the defendant from transferring or interfering with Plot 341 “C” which belongs to the plaintiff.***

5. Aggrieved by the judgment of the trial court, the respondent moved to the High Court which reversed the decision of the trial magistrate. The learned Judge of the High Court held that the appellant in this case had sold the plot to the respondent. In reversing the trial magistrate, the Judge stated:

***“In this case, it is clear from the reading of both the evidence of the plaintiff (appellant in this appeal) and his witnesses, that they gave unreliable evidence and were more than candid. The evidence of the appellant (respondent in this appeal) and of his witnesses is clear. The appellant was already in possession of Plot 341 “C” he (respondent) had leased it to the appellant (sic), and he used to pay Ksh. 200 per month. When the respondent (deceased) wanted to sell it (sic), the appellant called his friends PW 3 and DW 2 who witnessed the payment of Ksh. 8,000/= by the appellant to the respondent. Their evidence was not shaken in cross examination by Counsel for the respondent. The transfer was completed in writing with the sub-division and transfer of the plot in the records of Nyambene County Council. The respondent put his thumb print to these forms and he cannot deny them .... In such transactions, the approval of sub-division and transfer as recorded in the books or register of the local authority is a valid transaction, subject to the issue of title by the Commissioner of Lands. In this matter therefore, I find and hold that the respondent had sold Plot No. 341 “C” to the appellant for the consideration or price of Ksh. 8,000/= and that the transaction was duly approved and recorded in the Minutes of the Town Planning and Housing Committee of Nyambene County Council held on 21<sup>st</sup> April 1981. The appellant’s appeal succeeds.”***

6. Aggrieved by the decision of the learned Judge, the appellant in this case who was the respondent before the High Court has appealed to this court citing five grounds of appeal.
  - i. ***That the learned Judge erred in law and fact in finding that Plot 341 "C" Miathene Market was sold and transferred to the current respondent;***
  - ii. ***That the learned Judge erred in law and fact in not finding that Exhibits Nos. DMF2 (transfer form) and DMF4 (Minutes of the Committee of 21<sup>st</sup> April 1981) were defective and were not specifically for transfer of the subject matter.***
  - iii. ***That the learned Judge erred in law and fact in finding that since the claim against the 2<sup>nd</sup> Defendant in the lower court was dismissed, the whole suit should have been struck out.***
  - iv. ***That the learned Judge misdirected himself generally over this appeal and came to the wrong conclusion.***
  - v. ***That the learned Judge should not have awarded costs.***
  
7. At the hearing of this appeal, learned counsel Mr. Elisha Ogoti appeared for the appellant while learned counsel Mr. Maitai Rimita appeared for the respondent.
8. We have considered the submissions by counsel and analyzed the judgment of the High Court. It is our view that there are three issues relevant to the determination of this appeal:
  - i. ***did the learned Judge err in not finding that the sub-division form was not valid since it was not filled in Parts B, C and D and bears no signature in Part D?***
  - ii. ***did the learning Judge err in finding that the Minutes of the Town Planning & Housing Committee meeting transferred the plot to the respondent?***
  - iii. ***did the learned Judge err in finding that the appellant has sold the plot to the respondent?***
  
9. Counsel for the appellant reiterated the grounds of appeal and abandoned ground five. It was submitted that the learned Judge erred in finding that the suit property was sold. Counsel submitted that the evidence tendered before the trial magistrate revealed that the suit property Plot 341 "C" originally belonged to the appellant as part of Plot No. 341 "A"; that Exhibit No. 3 which was said to be a transfer form of April 1981 was not a transfer form but an application for sub-division of Plot No. 341 "A"; that this form was not completed in entirety as Parts B, C and D were not duly filled and of importance is that Part D which should bear a signature was not signed. To the appellant, the absence of signature on part D was proof that no transfer of the plot was executed. The appellant submitted that the learned Judge erred in relying on the Minutes of the Town Planning & Housing Committee as the Minutes tendered in evidence were a forgery because the Minutes bear a date of 2000 and are signed by Nyambene County Council which was not in existence in 1981 when the plot is alleged to have been sold; the appellant further argued that the trial Judge erred in holding that the thumb-print on the form belonged to the appellant yet no expert was called to prove the same. The appellant in his submission stated that "if the form was for any use, it was for sub-division purposes and not for the sale of the plot." On the third ground of appeal, the appellant submitted that this was an issue of mis-joinder of defendants in a suit and the learned judge erred to state that a mis-joinder of one defendant to a suit should lead to dismissal of the suit against all other defendants. On this issue, we have examined the judgment of the learned Judge and find that the decision of the learned Judge was based on merits and not on the issue of mis-joinder of parties and we say no more on this.
10. Counsel for the respondent in opposing the appeal submitted that the evidence revealed that upon the Town Planning & Housing Committee approving the sub-division of Plot 341 "A" to create Plot 341 "A" and 341 "C", the parties exchanged consideration of Ksh. 8,000/= for the sale of the Plot 341 "C" to the respondent and which transaction was witnessed by DW2 and DW3. Counsel for the respondent submitted that the main issue in this appeal is the interpretation of two documentary evidence submitted before the trial magistrate and analyzed by the trial Judge. The two documents to be interpreted are the transfer or sub-division form (Exhibit 3) and the excerpts/extract of the Minutes of the Town Planning & Housing Committee (Exhibit 4).
11. The appellant contend that the Minutes are a forgery because it has a 2000 date and certified by Nyambene County Council which was not in existence when Plot 341 "C" was sold in 1981. On this issue, the respondent submitted that in 1981 when Plot 341 "C" was sold, it was Meru County

Council that was in existence; that the application to sub-divide and transfer Plot 341 “A” into two was made to the Town Planning and Housing Committee and the Minutes approving the sub-division and transfer are of the Town Planning & Housing Committee. That Meru County Council was divided and it gave rise to among others, Nyambene County Council. That all documents pertaining to the area of Nyambene County were given to the new Nyambene County Council. When the respondent applied for certified copies of the Minutes relevant to the transfer of the suit property in the year 2000, the extracts/excerpts of the said Minutes were produced by the now existing Nyambene County Council and duly signed/certified by officers of the Council. The date on which the excerpts of the Minutes were certified was 28<sup>th</sup> November 2000. Counsel submitted that the appellant has misinterpreted the date and year of certification to mean the date of the Minutes; that the excerpts is clear in its title which shows that the excerpts are for the Minutes of the Town Planning & Housing Committee held on 21<sup>st</sup> April 1981. Counsel for the respondent submitted that there was no forgery and it is a misdirection to state that the Minutes were signed when Nyambene County Council was not in existence.

12. In response, counsel for the appellant stated that the respondent had not explained why the transfer form was not signed in Part D and why the Minutes were not certified. We have perused the excerpts of the Minutes on record which shows that it was certified by the Clerk of Nyambene County Council and confirmed and counter-signed by the Committee Clerk, the Surveyor and the Works Officer. We are satisfied and hold that the Minutes are duly certified and the learned Judge did not err in finding that the Minutes were neither defective nor a forgery.
13. Having heard the submissions, we find that the provisions of the **Evidence Act, (Cap 80 of the Laws of Kenya)** on documentary evidence are relevant to the interpretation of the excerpts of the Minutes of the Town Planning & Housing Committee and the transfer form used in the transaction. **Section 79 of the Evidence Act** defines what constitutes public documents. The following documents are public documents:

a. *documents forming the acts or records of the acts:*

*(i) of the sovereign authority; or*

*(ii) of official bodies and tribunals; or*

*(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country.*

15. **Section 80** the **Evidence Act** provides that:

*(1) “Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.*

*(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.*

16. **Section 82** of the **Evidence Act** stipulates that :

*“Without prejudice to any other mode of proof, prima facie evidence of the following public documents may be given in the manner hereinafter shown, that is to say:*

*(a) deleted by L.N. 22/1965;*

**(b) deleted by L.N. 22/1965;**

**(c) .....**;

**(d) .....**;

**(e) proceedings of any local authority, or of any corporate body created by Act or Ordinance, by a copy of the proceedings certified by the person having the lawful custody of the original thereof, or by a public document purporting to be printed or published by or by the authority of such authority or corporate body;**

**(g) .....**

17. **Section 96** of the **Evidence Act** deals with presumptions relating to documents over 20 years old. The Section provides that:

***“(1) Where any document purporting or proved to be not less than twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.***

***(2) Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.***

18. Based on the provision of **Section 79 (a) (ii) and (iii)** and as read with **Sections 80 and Section 82** of the **Evidence Act**, we find that the Minutes of the Town Planning & Housing Committee constitute a public document. The Minutes are dated 21<sup>st</sup> April 1981 which means the document is over 20 years old and the presumption contained in **Section 96** of the **Evidence Act** is applicable. The appellant has not been able to demonstrate that the Minutes produced are not true and accurate. The appellant has not proved that no meeting of the Town Planning & Housing Committee did take place on 21<sup>st</sup> April 1981 to approve the application for sub-division of the plot 341 “A”. We are satisfied that the a meeting of the Town Planning & Housing Committee did take place on 21<sup>st</sup> April 1981 and approval was granted to sub-divided Plot 341 “A” to read 341 “A” in the name of M’Changi Kirigia and side 341 “C” to be in the name of Gerald Ngeera. We are further satisfied and hold that the Minutes produced before the court was not a forgery. The excerpts of the Minutes clearly indicate that the meeting took place on 21<sup>st</sup> April 1981 in the Council Chamber and the said excerpts were issued and certified by Nyambene County Council on 28<sup>th</sup> November 2000. Section 100 of the Evidence Act stipulates that “When the language used in a document is plain, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts”. We agree with counsel for the respondent that the date of 28<sup>th</sup> November 2000 which appears on the face of the excerpts of the Minutes is a date which refers to the date when the excerpt was certified and not the date of the meeting. With due respect to the counsel for the appellant, we find that the allegation that Nyambene County Council did not exist as at the date of the meeting is a misinterpretation of the evidence contained on the face of the excerpts of the Minutes. The record clearly reflects that the application to sub-divide the plot was submitted to Town Planning and Housing Committee and approval was granted.

19. The other issue for our consideration is whether the appellant sold the plot. The learned Judge made a finding that the plot was sold by the appellant to the respondent. The Judge also found that upon sub-division of the plot, consideration was paid in the presence of two witnesses; the Judge found this testimony was not controverted; the appellant did not dispute that a sum of Ksh.

8,000/= was paid to him. Counsel for the appellant further submitted that ***“the form that was filled if ever it had any use, it was for an application for sub-division and not transfer of the plot.”*** This statement by itself shows that the appellant is aware of the existence of the form and that it was submitted to the Town Planning & Housing Committee. We are constrained to state that the appellant cannot deny the existence and validity of the form and at the same time admit its existence.

20. The other concern raised by the appellant is that Parts B, C and D of the application form for sub-division were not filled. We have perused the form and we are satisfied that this contention is not true. Part B is for recommendation as to whether the application to sub-divide is recommended for approval or not. This part has been filled and signed on 7<sup>th</sup> April 1981 by the Administrative Assistant with a recommendation for approval. Part D is for the official use to indicate if the Council approves or does not approve the sub-division. Though this part has not been filled, we are satisfied that the Minutes of the Town Planning & Housing Committee of 21<sup>st</sup> April 1981 provided the approval. Part D could not be signed unless and until approval for sub-division was obtained from the Council. We find that the learned Judge did not err by holding that the transaction was duly approved and recorded in the Minutes of the Town Planning and Housing Committee held on 21<sup>st</sup> April 1981.
21. For the above reasons, we find that this appeal lacks merit. We confirm and uphold the judgment of the High Court dated 15<sup>th</sup> January 2010 and dismiss the appeal with costs.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of June, 2013.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**