



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: VISRAM, KOOME & OKWENGU, J.J.A.

CIVIL APPEAL NO. 81 OF 2008

BETWEEN

STEPHEN MUANGE MUTUA.....APPELLANT

AND

**KARIUKI KIRUBI
MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENTS**

**(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Khaminwa, J)
dated 10th February, 2006**

in

HCCC NO. 392 OF 2002)

JUDGMENT OF THE COURT

1. **NAHASHON GICHUHI NYAGA** was allotted Plot No. 1480 Mikindani (suit premises) by the Municipal Council of Mombasa (2nd respondent). On the 17th December 1995, Nahashon wrote to the Municipal Council informing them that he had transferred all his rights and interests in the suit premises to Kariuki Kiribu (1st respondent). By a letter dated 7th December, 1995, the Municipal Council accepted the transfer and directed the 1st respondent to pay the transfer fees amounting to KShs. 1,250/-.

2. By a suit filed in Mombasa HCCC No. 392 of 2002, the 1st respondent sued the Municipal Council and Stephen Muange Mutua (appellant) seeking for the following orders:

“(a) Injunction to restrain the defendants by themselves, their agents or servants from dealing, selling, transferring or in any other manner from interfering with the plaintiff’s Plot No. 1480 Mikindani.

(b) An order concerning the re-allocation and prayer for the plot by the 1st defendant to the 2nd defendant.

(c) A declaration that the subsequent re-allocation of Plot No. 1480 Mikindani to the 2nd defendant was fraudulent, illegal and unlawful.”

3. Both the appellant and the Municipal Council filed their written statements of defence. The

Municipal Council denied the allegation of collusion or fraud and pleaded on paragraph 5 of the defence as follows:

“5. The 2nd defendant firmly states that the suit premises were allocated to one Mwanaisha Salim and have never at any time been transferred to the alleged Nahashon Gichuki Nyaga or the plaintiff and any purported sale was not effected by way of transfer and is thus not binding upon third parties and particularly the defendants and is thus of no legal consequence.

6. The 2nd defendant made the appropriate enquiries and firmly established that the suit premises was repossessed by the 1st defendant after the allottee, i.e. Mwanaisha Salim failed to pay the rates in breach of the conditions of allotment and the premises were allocated to one Kombo Juma Mzee who later sold and transferred it to the 2nd defendant and the 2nd defendant is thus a bona fide purchaser for value.”

4. On the part of the appellant, he adopted the same line of defence as the Municipal Council and contended on paragraph 5 of the statement of defence that:

“5. In the alternative and entirely without prejudice to the foregoing, if, which is denied, it is proved at the hearing that the plaintiff lawfully bought the suit plot from Nahashon G Nyaga in 1986 or any other time, the defendant shall aver that the plot was lawfully repossessed from him and reallocated to another person due to failure on the part of the plaintiff to comply with the conditions of the letter of offer and/or the sale and transfer agreement in the possession of the 1st defendant

7. The 1st defendant avers that it is due to the plaintiff’s failure to respond to the defendant’s notice to pay arrears of plot charges that led to the suit plot being repossessed by him.”

5. The hearing of the dispute commenced before the High Court on 23rd October, 2003, when Kariuki Kirubi, the 1st respondent, gave evidence in support of his claim. He testified and produced documents to show that he purchased the suit plot from Nahashon in July 1986. He produced a copy of the sale agreement and a power of Attorney donated by the said Nahashon. The seller wrote a letter to the 2nd respondent who duly accepted the transfer and directed him to pay the transfer fees which was done. Kariuki denied receipt of any demand letter for rates from the 2nd respondent which in any event could not have given him only one day.

6. The 1st respondent also produced the minutes of the Housing Committee of the Municipal Council that was chaired by Kombo Mzee. That was the meeting that passed the resolution to repossess the suit plot. Apparently the suit plot was repossessed after a one day notice, and was immediately allotted to the chairman who transferred it to the appellant.

7. Paul Mutuku Kavoi, the Deputy Director of Housing of the Municipal Council of Mombasa, gave evidence on behalf of the Municipal Council and gave the history of the plot which was allotted to Mwanaisha Salim. The first allottee transferred the suit plot to Nahashon and then to the appellant. This witness produced a letter dated 30th July, 1986, which was issued to the 1st respondent requiring him to pay a sum of KShs.52,233/- being the outstanding rates. Since the payment was not made, the suit plot was repossessed and was allotted to Kombo Mzee who in turn sold it to the appellant.

8. The appellant also gave evidence and confirmed that he purchased the suit plot from Kombo Mzee on 6th August, 1998. He paid arrears of KShs.30,252/- to the Municipal Council and he was issued with a letter of allotment. When the appellant started fencing the suit plot, that is when the dispute arose, he contended that the original allottee of the suit plot was Mwanaisha Salim and, therefore, the claim by the 1st respondent was without basis.

9. This dispute was heard by Khaminwa, J and after analyzing the evidence, in a short, stern and well reasoned judgment, the learned Judge made the following observations in part of the judgment:

“The vendor to 2nd defendant being the chairman of the allocating body, acted fraudulently by purporting to repossess the plot and reallocating himself and proceeding to sell to 2nd defendant. This is extremely irregular.

The evidence shows that at the time the plaintiff acquired the ownership of the plot, there were no arrears. Three years later the plot is said to have been repossessed. Upon considering the conduct of the first and second defendants, I am satisfied that there was fraudulence clearly on their part. They are not entitled to keep the proceeds of such a transaction. In the present, I find the plaintiff has proved his case on a burden (sic) of probabilities. I enter judgment as prayed in the plaint with costs to be taxed by the taxing officer of this court.”

10. Being aggrieved by that judgment of the superior court, the appellant, Stephen Muange Mutua, appealed. Mr. Mutisya, learned counsel for the appellant relied on the twelve [12] grounds of appeal which he presented in three [3] clusters. Firstly, counsel for appellant argued that the consent of the Municipal Council was never obtained for the alleged transaction of sale from Mwanaisha Salim to Nahashon Gichuhi Nyaga and to the 1st respondent. Further, there was no evidence that Nahashon had a title capable of being transferred; the 1st respondent was issued with a demand notice to pay the rates, although he alleged in his evidence that the file was missing at the Municipal Council’s offices, there was no evidence to show that he made efforts to trace the missing file.

11. The second cluster of arguments were that the appellant lacked *locus standi* to bring the suit; that the plot was allotted to Mwanaisha Salim by the Municipal Council, thus the appellant cannot rely on a contract contained in the letter of allotment where he was not a party; that the allottee of the plot was supposed to comply with conditions set out in the letter of offer and in the event of breach, there was no provision for issuance of a notice: that the property was rightfully repossessed by the Municipal Council and offered to somebody else. Counsel also faulted the findings by the learned trial judge that there was fraud involved in the transfer and also the allegation of collusion and conflict of interest on the part of the Chairman of the Committee, Kombo Juma Mzee. Finally, counsel for the appellant argued that damages would have been a suitable remedy for the appellant.

12. On the part of the 1st respondent, learned counsel Mr Ouma, supported the judgment of the superior court which he submitted was based on cogent evidence that the 2nd respondent consented to the transfer to the 1st respondent; that the 2nd respondent also accepted the transfer fees; that the 2nd respondent could not have issued a notice to repossess the suit land by giving only one day’s notice as the plot was sold the next day by Kombo Juma Mzee; that there was overwhelming evidence of collusion and abuse of office; and that the evidence by DW 1 that the plot was repossessed from Mwanaisha lacked credibility as the 2nd respondent had already consented to a transfer to the appellant and accepted transfer fees.

13. We have carefully considered the evidence in this matter and the arguments by counsel, against the background that this being the 1st appellate court; we have the disadvantage of not seeing or hearing the witnesses when they testified. However, we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions. The evidence before the superior court is clear that the suit plot was transferred to the 1st respondent and the Municipal Council approved the transfer of the suit plot from Nahason to the 1st respondent. We were urged to subject to a further re- evaluation the evidence on whether the suit plot was legally repossessed from 1st respondent by the 2nd respondent, for failure to develop and to pay the rates.

14. The letter that was produced in evidence by the Municipal Council to prove that the suit plot was repossessed from the 1st respondent is dated 30th July, 1986. It would seem from the date of this letter, the notice was issued even before the 1st respondent became the owner of the plot. The letter read:

“RE: TRANSFER OF PLOT NO. 1480 MIKINDANI

Further to my letter HD/MRS:190/9 of 7th December, 1995 you are required to pay KShs.52,333/- as at

31st July, 1996 being plot charges outright payment before formalization of plot transfer can be continued.”

15. The 1st respondent denied having received this letter and the learned trial judge who heard the evidence believed him. Apart from there being no evidence to show the letter was delivered to the 1st respondent, there is another glaring irrationality demonstrated in that the letter required the 1st respondent to pay the outstanding rates in one day (*assuming the letter was written on 30th July 1995 and not 1986*). Further, there was no other step(s) taken to notify the 1st respondent that the plot was being repossessed such as filing of a suit or any publication even a gazette notice that was issued to the 1st respondent.

16. Besides the issue of the letter giving one day’s notice of repossession of the suit plot, the learned trial judge addressed the issue of conflict of interest by Kombo Mzee, Chairman, Housing Departmental Committee, which purportedly repossessed the suit plot, allocated it to himself and purported sell to the appellant. We agree with Mr Ouma’s submissions that Kombo Mzee had a duty to disclose his interest and to recuse himself from determining the matter. Instead he presided over the meeting and allocated the repossessed plot to himself. By purporting to repossess the 1st respondent’s plot and allocating it to himself and then selling it to the appellant, Kombo derived direct pecuniary profit from his own decision and actions thus, the learned judge cannot be faulted for making a finding that there was fraud and collusion involved in the transaction.

17. Finally, we find it was too late for the appellant to challenge the 1st respondent’s ownership of the suit plot after the transfer was duly approved by the Municipal Council. If there was a defect in the title to the suit plot, the Municipal Council, should have raised it before approving the transfer. The Municipal Council should have issued proper demand notices for the payment of any outstanding rates and instituted proper recovery proceedings. On the issue that the 1st respondent did not have *locus standi*, this was far fetched as the Municipal Council recognized him as an owner and that is why even Kombo Mzee as Chairman of the Housing Committee purported to send him a notice.

For the foregoing reasons, we are satisfied that the learned judge correctly analyzed the evidence and the law in reaching her conclusion. We, therefore, find no merit in this appeal. We order that the same be dismissed with costs to the 1st respondent. There will, however, be no costs to the 2nd respondent who did not appear for the hearing of the appeal although served.

Dated and delivered at Mombasa this 19th day of July, 2012.

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR