REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 278 of 2007

NTIKA MUNORU……...…….…..…...…1ST APPELLANT

JACOB MEME IKELENYA……...……..……..2ND APPELLANT

AND

ISAAC KABERIA ETIRIKIA…….....…….....……RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Meru, (Lenaola J.) dated 30th October, 2007

in

HCCA NO.157 OF 2001)

****

JUDGMENT OF THE COURT

In this second appeal, the appellants *NTIKA MUNORU* and *JACOB MEME IKELENYA* have challenged the judgment of Isaac Lenaola J, dated 30thOctober 2007 in Meru HCCA No. 157 of 2001. They have asked this Court to set aside the said judgment and to reinstate the judgment of the subordinate court dated 19th July 2001. The appeal is premised on the following grounds:-

(1) ***The learned trial Judge erred in law in failing to appreciate the provisions of Cap 284 and particularly Sections 2 and 30 as pertains to the interests to land under adjudication area.***

(2) ***The learned trial Judge erred in law in not finding that there was no prima facie case with probability of success yet the records in the adjudication office showed that the appellants were entered as holding interests capable of being registered and there was no legal challenge to the same by the respondent.***

(3) ***The learned trial Judge erred in law in not finding that the appellants were entitled to protect their interests to the subject matter herein by way of injunction.***

(4) ***The learned trial Judge erred in law in not finding that appellants interests to the subject matter herein were not only protected by the provisions of Cap 284 but also the provisions of the Constitution of Kenya, Common Law and doctrines of Equity.***

(5) ***The entire decision of the Judge is unfair and unconstitutional***.

A brief recapitulation of the evidence before the two courts below is that one *Gichunge M'Inyinge* who testified before the subordinate court as PW4 was allocated Plot No. 1170 Maua which was in an adjudication area before the adjudication process was completed.

He then sold the same to the appellants vide an agreement of sale dated 20th August 1994 at a purchase price of Kshs 250,000/=. Thereafter, the plot was subdivided into two, i.e Plot No. 9049 and 9048, which were then registered in the names of the appellants herein. They later on decided to fence off the plots and it was then that the respondent herein, *ISAAC KABERIA ETIRIKA*, came up and destroyed the fence claiming that the property in question belonged to him. The appellants therefore, rushed to court seeking orders of injunction against the respondent to stop him from entering, constructing or in any other manner interfering with the two plots. The matter was heard before the Magistrate's Court at Meru with the same being decided in favour of the appellants.

Isaac Kaberia (the respondent) then moved to the High Court to challenge the learned Magistrate's decision. He proffered five grounds of appeal as hereunder:-

"(1) The judgment is clearly against the weight of evidence adduced by the defendant/appellant and his witnesses.

(2) The learned magistrate erred in fact and law by failing to consider the entire defence by the defendant/appellant.

(3) The learned Magistrate erred in fact and in law by relying on extraneous facts in the arrival at the judgment.

(4) The learned trial Magistrate erred in fact and law in entertaining and determining issues pertaining to land in a Land Adjudication Area and yet the adjudication process in the said area had not yet been completed.

(5) The learned trial Magistrate erred in fact and law by acting out of its jurisdiction by virtue of determining matters which ought to be determined by the germane Land Adjudication Office."

His appeal was successful and the orders of the subordinate court were set aside with the result that, the suit that the appellant had filed before the Magistrate's Court was dismissed. It was that dismissal that provoked this appeal whose grounds we have enumerated at the beginning of this judgment.

In allowing the appeal, the learned Judge of the High Court held that:-

"The suit land is not registered but land held under the provisions of the Land Adjudication Act. This is the reason why P.Exh 3 was issued, it being a consent to the respondents to institute civil proceedings pursuant to Section 30 and Section 8(1) of the Land Adjudication Act, Cap 284. So far as I know, no title can be said to be conferred by that Act as it is purely a transitory legislation whose import is the "ascertainment of interests in trust land" and the registration thereof is done pursuant to other laws……. No interests can be ascertained within a section until the provisions of Section 27(3) have been invoked."

In other words, the learned Judge was saying that no rights can attach to an occupier of land which is subject to the adjudication process until the adjudication register is complete and the land is finally registered under the relevant statutes that confer proprietary rights to the registered owner.

The learned Judge went on to pronounce himself thus;

"Clearly a prima facie case has not been made out because even the interests of the purported vendor, Gichunge M'Inyinge has not lawfully crystallised for him to pass on any lawful title or interests in land. When his interest is doubtful, and it is, there is nothing that the plaintiffs are holding onto."

Is this the correct position in law? Indeed, this entire appeal revolves around that one issue.

Learned counsel for the appellant *Mr. Kariuki* submitted that the Judge had erred in law on that point. He submitted that there was no pending dispute in respect of the properties in question before the arbitration committee; that the respondent had not appealed to the minister as provided for under the Land Adjudication Act; and that the respondent had not filed any Judicial Review proceedings to have the adjudication process quashed. He said that the adjudication process was complete save for the final registration as there were no pending undetermined issues on the ownership of the parcels of land in question. He was simply saying that even at that point, the appellants rights to the said properties had already been ascertained and all that remained was the physical act of registering the same.

Learned counsel for the respondent *Mr. Kimathi* on the other hand supported the learned Judge's stand and urged us to find that it was the correct position in law. He submitted that there were undetermined issues that were still pending before the Arbitration Board and that all pending issues should have been determined before the matter could be filed before the subordinate court. He further submitted that the respondent herein was in occupation of the land in question and could not therefore have been displaced.

We have made reference to the trial court's record. We note that *Benjamin Kalemu (PW3),* who was the adjudication officer in Maua produced the records in respect of the plots in question. He confirmed that the plots originally belonged to *Gichunge M'Inyinge* who sold them to the appellants herein. He also confirmed that the respondent herein owned plot No. 9361 which borders the appellants' plots. He also adduced evidence to the effect that *Isaac Kaberia* – the respondent herein had filed an objection but the same was heard and dismissed with orders that the plot in question belonged to *Gichunge* who thereafter transferred the same to the appellants herein. This therefore, meant that there were no pending issues on the ownership of the plots in question.

Indeed, in his evidence before the subordinate court, the respondent's defence was that his land was No. 2221 and that plot No. 1170 which was sold to the appellants was superimposed over his land. If that be the case, why did he not file an appeal to the minister after his appeal to the arbitration board was dismissed?

The sum total of this argument is that indeed, the appellants had a solid claim over the two properties as no appeal was pending over their ownership as at the time they moved to the subordinate court seeking injunctive orders. Those orders were necessary to enable them protect their rights over the said properties which rights were already determinable.

We must therefore respectively differ with the learned Judge in his finding that the appellants could not be the "owners" of the suit land. We find that the adjudication process had been completed in respect of the two parcels of land and all that was remaining was the registration itself. It is not the correct position in law that an "owner of" land under the Land Adjudication Act before final registration cannot seek the protection of the law where his interest in the property is threatened. Even if the appellants had not yet been registered as the owners of the said plots, their equitable interest in the said properties had already crystallized and was enforceable as against any other third party. To quote the same Treatise by Howard C. Joyce cited by the learned Judge, i.e A Treatise on the Law relating to Injunctions,1909 , at 2 – 3

"An Injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience; as a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction; and as a writ issuing by the order and under the seal of a court of equity.''

In our view it would be contrary to equity and good conscience to deny the appellants herein their right to defend their undisputed interests in the plots in question. As aptly submitted by learned counsel for the appellants, if that were to be the case, then the law of the jungle would rule supreme as aggrieved persons would resort to extra judicial means to protect their interests in such land. That would result in total breakdown of the Rule of Law and it cannot be encouraged.

Indeed if the learned Judge's finding was the correct position in law, then the respondent would suffer the same fate as he had no "crystallised" rights of ownership over the plot in question or any other plot within that adjudication area that would be capable of being protected by the law. If that were the case, then neither party would have any rights over the property and they would all be deemed as trespassers.

Having considered all the material before us which includes the able submissions of both counsel and the authorities referred to us, we are satisfied that this appeal has merit. We find and hold that the appellants were the rightful owners of the parcels of land in question since all the adjudication procedures had been carried out and determined in their favour and all that remained was the formal registration as the proprietors. Their rights had therefore crystallised and were enforceable in law. They were entitled to the orders of injunction which they had sought before the subordinate court. In the circumstances, we allow it with the result that the judgment in High Court Civil Appeal No. 157 of 2001 is hereby set aside and the judgment of the subordinate court is hereby reinstated. We order that the appellants herein be paid half costs of this appeal and of the two courts below.

Dated and delivered at Nyeri this 11th day of December, 2012.

E. M. GITHINJI

…….
JUDGE OF APPEAL

W. KARANJA

……..
JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR