Mwangi v Mensire (Environment and Land Appeal E001 of 2023) [2024] KEELC 3825 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3825 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E001 OF 2023

A OMBWAYO, J

MAY 9, 2024

BETWEEN

DAVID MWAURA MWANGI .... APPELLANT

AND

JOB OBIERO MENSIRE .... RESPONDENT

(Being an appeal from the Judgment of Hon. Y. I Khatambi Principal Magistrate delivered on 9th June, 2023 in Nakuru C.M ELC Case No. E081 of 2021)

JUDGMENT

1. This is an appeal arising from the judgment of Honourable Y.I Khatambi Principal Magistrate, Nakuru delivered on 9th June, 2023 in Nakuru CMC ELC No. E081 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 14th September, 2021 appealing against the said judgment on the following grounds: -
    1. That the learned trial magistrate erred in law and fact in holding that the Appellant failed to prove his case on a balance of probabilities when there was overwhelming evidence to that effect.
    2. That the learned trial magistrate erred in law and fact when she failed to critically examine and analyze the evidence presented before her by the Appellant.
    3. That the learned trial magistrate erred in law and fact when she held that there was no decree compelling the late Dishon Karanja to transfer 2 acres to the Appellant herein.
    4. That the learned trial magistrate erred in law and fact in holding that the Land Dispute Tribunal's findings were set aside by the Provincial Appeals Tribunal when there was no evidence to that effect.

5. That the learned trial magistrate erred in law and fact in failing to find that the title relied on by the Respondent was obtained illegally and through a corrupt scheme there was sufficient evidence before the court to that effect.

6. That the learned trial magistrate erred in law and fact when she failed to find that the Respondent's title deed was issued in order to defeat a decree issued by the court in favour of the Appellant.

7. That the learned trial magistrate erred in law and fact when she failed to hold that the Respondent's sale agreement was a forgery despite the Respondent's own admission and it could not lead to a clean title capable of protection by the court.

8. That the learned trial magistrate erred in law and fact in failing to consider the Respondent's admission before the court that he was aware that the Appellant registered a caution against the title deed before the same was removed in circumstances that the Respondent was aware of and the Respondent could not claim to hold a clean title to the suit land.

9. That the learned trial magistrate erred in law and fact in holding that the suit land was available for sale to the Respondent herein contrary to the evidence presented before the trial court.

10. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's written submissions.

11. That the learned trial magistrate arrived on the decision due to consideration of extraneous circumstances and threats issued to the court and the Appellant by the Respondent herein.

3. The Appellant seeks orders setting aside the trial court's judgment and an order entering judgment for the Appellant as prayed in the plaint.

Brief Facts

4. The Appellant filed a suit against the Respondent vide a plaint dated 1st April, 2021 seeking a declaration that he is entitled to one acre of Bahati Settlement Scheme/659 vide the judgment in Nakuru CM Land Disputes No. 12 of 2008, a perpetual injunction against the Respondent from the Appellant's land Bahati Settlement Scheme/659 and costs of the suit.

5. The Appellant's case was that he is the lawful owner of Bahati Settlement Scheme/659 the suit property herein. That the Respondent has unlawfully, illegally and through a corrupt scheme caused the suit land to be transferred to himself with full knowledge that one acre of the property belongs to the Plaintiff.

6. The trial magistrate found that the suit property belonged to the Respondent and that the Appellant did not adduce any evidence to prove existence of the alleged facts. The trial magistrate held that the Respondent proved her case on a balance of probabilities and proceeded to enter judgment in her favour.

7. The Appellant being dissatisfied with the judgment lodged the instant appeal before this court.

8. This court on 31st January, 2024 directed that the appeal be canvassed by way of written submissions.

Submissions

9. The Appellant filed his submissions on 21st February, 2024 where he gave a background of the case and identified three issues for determination. The first issue is whether the Appellant proved the case on a

balance of probability. He cited the cases of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1KLR 526 and the Court of Appeal case in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR. He submitted that there was sufficient evidence for the trial court to find that he had proved his case on a balance of probabilities. He argued that the decree was not fully complied with as Dishon Karanja only transferred one acre of the land to the Appellant and not the other one acre.

10. The second issue is whether the Appellant is entitled to one acre of the suit land. He submitted that the dispute revolves around the remaining one acre which he purchased for Kshs. 160,000 as compelled by the court. The Appellant submitted that he still lives on the suit land and added that having paid the amount as agreed, he is entitled to the one acre already transferred and the other acre he paid.

11. The third issue on whether the Respondent's title was lawful, the Appellant argued that the trial magistrate misdirected herself in finding that the Appellant did not plead particulars of fraud as required by law. He submitted that the finding was erroneous as the Appellant did not challenge the Respondent's title on fraud but on illegality and corruption. He also submitted that he did not plead fraud in his plaint. The Appellant relied on Section 26(1) of the *Land Registration Act* and submitted that the trial magistrate erred when she combined two separate grounds for impeachment of a title. He submitted that he had registered a restriction against the suit which was illegally removed by the Respondent. He further submitted that the Respondent was issued with a title on 30th January, 2017 which he could not explain how it was registered in his name yet there was a pending restriction.

12. He submitted that by 14th April, 2013 the suit land had not been excised from the original title as the mutation for Bahati Settlement Scheme/506 was drawn in 2015 and the R.I.M annexed on 1st October, 2015. It was his submission that title to the suit property did not exit and therefore no valid agreement could refer to the said number which was not in existence at the time. He further submitted that there was no evidence to show that the Respondent lawfully purchased the suit land from Dishon Karanja Kamau and argued that the Respondent does not hold a clean title to the suit property.

13. The Appellant submitted that during the pendency of the suit, the Respondent engaged in communication that tended to show disrespect to the court. He submitted that in view of the Respondent's hostility to the court and the Appellant's counsel, there was a strong likelihood that the trial magistrate was weighed into dismissing the Appellant's case to avert adverse publicity by the Respondent.

14. In conclusion, the Appellant urged the court to find that the Appellant discharged his burden in law and allow the appeal.

15. The Respondent on the other hand in response to the appeal did not file his submissions, he instead filed a letter dated 30th January, 2024 alleging that his life was being threatened. This court on 31st January, 2024 addressed the said allegations and directed that the Respondent makes a formal application on the said allegations.

Analysis and Determination

16. Having considered the lower court record, the memorandum and record of appeal and the issues proffered by the parties' submissions, the court has condensed the grounds of appeal as follows:

    1. Whether the learned trial magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before her.

    2. Whether the learned trial magistrate erred in law and fact in holding that the Appellant failed to prove his case on a balance of probabilities.

3. Who should bear the cost of the appeal.

17. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

18. Further, in the case of *Mwangi v Wambugu* [1984] KLR 453 it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

19. It is not in dispute that the Respondent testified during exam in chief that he bought the suit land from one Dishon Karanja (deceased) on 14th April, 2013. He also testified that the suit property number 659 was issued in 2015 from the subdivision of number Bahati Settlement Scheme/506 resulting from the mutation done in August, 2015. The Appellant testified that in line with the court's decree issued on 29th September, 2008, he was to pay his late brother Dishon Karanja Kshs. 160,000 but he did not accept payment prompting him to deposit the said amount in court on 25th March, 2015.

20. This court has perused the sale agreement dated 14th April, 2013 as produced by the Respondent. It has also perused the title deed issued to the vendor Dishon Karanja (deceased) and it shows that the same was issued to him on 15th December, 2015. It is this court's finding that the trial magistrate was right in finding that the suit land was available for sale to any willing buyer as found by the Appeal's Committee. However, she failed to appreciate that the Appellant was a willing buyer despite the squabbles he had with his brother. The trial magistrate at paragraph 10 of her judgment found as follows:

> "...The Defendant entered into a sale agreement with the deceased on 14th April, 2014 and the title deed was issued on 15th December, 2015. The Plaintiff on the other hand deposited the purchase price of Kshs. 160,000 in court on 25th March, 2015. It is worth noting that at the time the deposit was made there was no land available for sale since the same had already been sold to the Defendant herein."

21. It is this court's view that the trial court erred in failing to establish how the title deed to the suit land issued on 25th March, 2015 precede mutation form dated 3rd August, 2015 giving rise to the same suit property. It is this court's view that on 14th April, 2013 when the parties were executing the sale agreement, it meant that subdivision had already taken place. This is because as evidenced from the sale agreement under the description of property, the same indicates Bahati Settlement Scheme/659 the suit property herein, meaning subdivision of Bahati Settlement Scheme/506 ought to have already taken place. However, that was not the real position and this ought to have been interrogated by the trial court.

22. The Appellant in paragraph 8 of his plaint did not plead fraud or raise any particulars of fraud. It was his claim that the Respondent illegally and through a corrupt scheme caused the suit property to be transferred to himself with full knowledge that the same belonged to the Appellant. It this court's view that the learned trial magistrate erred in raising the issue of fraud yet the same was never pleaded.

I therefore find that the learned trial magistrate misdirected herself on the same and ought to have considered the evidence before her vis a vis what was pleaded.

23. Section 26 (1) of the *Land Registration Act* states as follows:

> "The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –
>
> a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme." [Emphasis mine]

24. In the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR the court held as follows:

> "...the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-
>
> > "...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."

25. This court finds that from the evidence there were glaring question marks as to how Dishon Karanja (deceased) came to acquire the suit property and the trial magistrate ought to have considered this in making her determination.

26. In view of the same, it is this court's view that the trial magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before her. It is evident that the Respondent failed to explain how title to the suit property preceded subdivision of Bahati Settlement Scheme/506 giving rise to the suit land. In view of the same, this court finds that the Appellant proved his case to the required standard.

27. In the upshot, the appeal is merited and this court sets aside the orders in trial court's judgment.

28. Consequently, I enter judgment for the Appellant as prayed in the plaint.

29. Each party shall bear its own costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF MAY 2024.

A.O.OMBWAYO

JUDGE