REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 289 of 2003

SHADRACK KIBOR TABOT ………………………….. APPELLANT

AND

SAMUEL KIPKOECH LAGAT ……………………… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Nambuye, J.) dated 31st March, 1998

in

H.C.C.C. NO. 81 OF 1991)

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JUDGMENT OF THE COURT

This appeal arises from a long standing dispute between the parties herein but after consideration of the dispute it will emerge that the dispute can be narrowed down to whether the respondent bought or leased the land in dispute. It may be appropriate to trace the dispute to the pleadings in the superior court. The appellant herein, ***SHADRACK KIBOR TABOT,*** sued the respondent ***SAMUEL KIPKOECH LAGAT,*** in the superior court vide *High Court (Eldoret) Civil Case No. 81 of 1991*. The pertinent paragraphs of the plaint were as follows:-

"***3. By a ruling in Kapsabet RM Land Case No. 7 of 1988 the plaintiff's names were struck off the registers of land parcels Nos. Nandi/Mutwot 489 and 521.***

4. Subsequent to the aforesaid action the parcels were subdivided into land parcels Nos. Nandi/Mutwot/590 and 592.

5. By the Eldoret High Court Civil Appeal NO. 430 of 1989, the lower court's ruling in Land Case No. 7/88 was reversed.

6. The plaintiff's claim against the defendant is for an order of cancellation of all the registers relating to the land parcels Nos. NANDI/MUTWOT/590 and 592.

7. The plaintiff claims against the defendant for an order that the registers relating to land parcels Nos. Nandi/Mutwot/489 and 521 be restored and the original ownership of the plots be restored.

8. Demand has been made in vain and the court has jurisdiction

Wherefore the plaintiff prays for judgment against the defendant for:-

(a) An order canceling the registers relating to land parcels Nos. Nandi/Mutwot/590 and 592.

(b) An order restoring the registers relating to land parcels Nos. Nandi/Mutwot/489 & 521.

(c) An order restoring the original ownership of the land parcels Nos. Nandi/Mutwot/489 and 521.

(d) Cost of suit.

(e) Further or other relief deemed necessary by court."

In response to the foregoing, the respondent filed a defence in which he stated as follows:-

"***2. The Defendant admits that parcel Number Nandi/Mutwot/590 and 592 are registered in his name and avers that the plaintiff's names in parcel Numbers Nandi/Mutwot/489 and 521 had been struck off properly as the defendant had purchased certain portions in the said piece of land and received consent of the Land Control Board for the transaction of sale.***

3. The defendant avers that he has been registered against the titles for valuable consideration and its (sic) unjust and unequitable to have his names against the register cancelled.

4. The defendant avers that the plaint does not disclose a reasonable cause of action as the original Court Order in the lower court still stands and no applications have been made by the plaintiff in the lower Court to reverse the same.

5. The defendant further avers that he purchased the lands in question from the plaintiff's father who died before transferring the same to the defendant and when the plaintiff and another person obtained letters of administration it was incumberent upon the plaintiff to honour the previous transaction over the said piece of land as the same has had the blessing of the Land Control Board.

6. The defendant further avers that its (sic) unjust for the plaintiff to take advantage of the issuance of the letters of administration to deny the defendant the land which is rightly and legally his.

7. The defendant will raise a preliminary point of objection at trial of this suit that the suit is bad in law and ought to be struck off.

8. Safe (sic) as herein expressly admitted the defendant denies each and every allegation of fact or facts as if the same were specifically set forth and traversed seriatim."

The hearing of the suit in the superior court commenced on *8th March, 1995* when the appellant testified in support of his case. The gist of the appellant's evidence was that when his father died in ***1982*** his piece of land was inherited by himself, his sister and his mother but the respondent had been allowed by the deceased father to be grazing his cattle on the land in dispute. There was a Succession suit filed in the Resident Magistrate's Court where distribution of the pieces of land left by the deceased father of the appellant was to be determined. The respondent then claimed that the deceased had sold him the portions of land in dispute. The dispute was then referred to the elders for arbitration and the elders determined the dispute in favour of the respondent. The appellant filed an appeal to the High Court *(High Court Civil Appeal No. 43 of 1989)* and the decision of the elders as confirmed by the Kapsabet Resident Magistrate's Court was reversed. After that decision of the High Court the appellant carried out the subdivision but to effect this, he filed the suit seeking the cancellation of registration at the Lands Office. Hence the suit in the superior court.

The respondent on the other hand claimed that he had bought the portions of land from the father of the appellant in the year *1978*. The agreed purchase price was ***Shs.10,500/=*** and having paid it he took possession of the *7 acres* in *1978,* built and settled on the said piece of land. He and the father of the

appellant went to the Land Control Board for consent of the sale transaction and the Board gave its consent. He explained that 4 acres were excised from ***parcel No. Nandi/Mutwot/489*** and the 3 acres from ***No. Nandi/Mutwot/521*** making a total of ***7 acres***. Both the respondent and the father of the appellant signed the transfer forms. Trouble erupted when the appellant's father died and the family of the deceased filed a Succession Cause. The respondent was however awarded his ***7 acres*** of land by the elders. It was his evidence that he had resided on this piece of land since *1978*. The respondent called various witnesses who supported his claim that he genuinely bought this land from the father of the appellant.

The foregoing represents the rival positions of the parties before the superior court.

The learned Judge of the superior court *(Nambuye, J.)* considered the evidence before her and in the end came to the conclusion that the appellant had failed to prove his case. In the course of her judgment, the learned Judge stated:-

"***From the foregoing evidence it is clear that there was a verbal agreement between the deceased's father of the plaintiff and the defendant as a result of which there was exchange of K.Shs.10,500/=. The plaintiff says this was for leasing of the land but no witness was produced by him to confirm that. Even his own mother who was allegedly present during the transaction did not come to testify. The defendant has denied leasing of the land. The plaintiff himself was not present when the land was allegedly leased and so we have no evidence on leasing."***

The learned Judge went further to consider the evidence relating to the sale transaction and subdivision. In her judgment, she said:-

"***The foregoing goes to show that the transaction between the defendant and the deceased was not void and since consent for subdivision and transfer had been given what was left was for the administrator to effect the transfer to the purchaser which was not done leading to these proceedings."***

Finally, the learned Judge concluded her judgment thus:-

"***In the premises there is no need to order cancellation of the titles by virtue of the order having been upset and then order the defendant to file another suit to compel the plaintiff to effect the transfer in his favour. The best cause to take here is to confirmation (sic) that though the defendant was and still is the legal owner of two parcels and since the plaintiff will be duly bound and will be compellable to effect the transfer in his favour at the end of the day there is no need to order cancellation of the titles. This Court makes a confirmation that though the defendant was registered by a process which was later upset is nonetheless they (sic) are rightfully his and for that reason, the titles should not be cancelled.***

In the premises, the Court has no alternative but to order the plaintiffs suit dismissed with costs to the defendant."

It is that decision that provoked this appeal in which the appellant, through his advocates, set out the following grounds of appeal:-

"***1. The trial judge erred in law and fact in failing to accord due regard to a previous High Court decision reversing the lower courts decision upon which the Respondent acquired title and therefore in failing to allow the plaintiff's suit as presented.***

2. The trial judge misconceived relevant facts in the case.

3. The trial judge erred in law and fact in failing to note that the respondent's title to the suit property was improperly obtained.

4. The trial judge erred in law and fact by failing to note that the appellant's case was proved on a

balance of probability as per law established.

5. The trial judge erred in law and fact in failing to note that some of the documents produced by the respondent were not genuine.

6. The learned judge erred in law by digressing from the facts in issue before her.

7. The learned judge erred on all points of law and fact applicable."

That is the appeal that came up for hearing before us on *26th February, 2009* when Mr. M. Nyolei appeared for the appellant, while Mr. J.M. Alwang'a appeared for the respondent.

In his submissions, which appeared to consolidate all the grounds of appeal, Mr. Nyolei contended that the respondent was not entitled to the land in dispute on the ground that the learned Judge failed to give due regard to the decision of the High Court which reversed the decision of the Tribunal. Mr. Nyolei further submitted that the ownership of the land reverted to the appellant rendering the subsequent transfer and subdivision null and void. It was further submitted that the learned Judge proceeded to determine issues which were not before her.

As regards the consent of the Land Control Board, Mr. Nyolei submitted that since the land was said to have been bought in ***1978*** and consent obtained in ***1981,*** this consent contravened the Law of Contract Act. For all these reasons Mr. Nyolei asked us to allow this appeal.

In response to the foregoing, Mr. Alwang'a took us through the history of the dispute. He pointed out that when the dispute was referred to the elders the disputed pieces of land were awarded to the respondent and that decision was enforced by the Court at Kapsabet in ***Case No. 3 of 1998***. The pieces of land were subsequently registered in the respondent's name. Mr. Alwang'a contended that by the time the dispute went to the High Court the respondent was already registered proprietor of the said pieces of land. As regards the matter going to the High Court, Mr. Alwang'a pointed out that the matter was not heard on merit and that, in any case, the parties recorded a consent in which the parties were at liberty to pursue their dispute. That is when the dispute was placed before Nambuye, J. who having considered all the evidence before her gave judgment in favour of the respondent.

Mr. Alwang'a supported the judgment of the learned Judge stating that no injustice would be occasioned if this appeal were to be dismissed.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusions and as we do so, we must remember that we have neither seen nor heard the witnesses – See ***SELLE AND ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD. AND OTHERS [1968] E.A. 123, WILLIAMSON DIAMONDS LTD. V. BROWN (1970) E.A.1 and ARROW CAR LIMITED V. BIMOMO & 2 OTHERS [2004] 2 KLR 101.***

It is our view of the foregoing that we set out pertinent portions of the pleadings the summary of the evidence and the findings of the superior court.

Our re-evaluation of the evidence clearly show that the dispute herein started when the father of the appellant died in 1982. Prior to that, the father of the appellant had entered into a sale agreement with the respondent when it was mutually agreed that the respondent would buy 4 acres from ***land parcel No. Nandi/Mutwot/489*** and 3 acres from ***parcel No. Nandi/Mutwot/521***. The parties appeared before the Land Control Board for consent of the subdivision and transfer. The Land Control Board gave consent to these transactions. Unfortunately, the father of the appellant died and hence a succession cause was filed. The dispute was referred to the Elders Tribunal which considered the dispute and awarded the 7 acres to the respondent. This decision did not go very well with the appellant and so the matter went to the High Court where a consent was recorded to the effect that the parties pursue the dispute that was determined by Nambuye, J. leading to this appeal.

The rival position of the parties before the superior court was that according to the appellant the respondent had been allowed by the appellant's father to lease the pieces of land in dispute. On his part the respondent claimed that he had bought the 7 acres from the appellant's father. In the end the question before the superior court was whether the respondent was a purchaser of the suit land or a mere licencee who had been granted the right to graze on the said pieces of land. What was not in dispute was that the respondent had been in possession of this disputed land since *1978*. He settled and built on this land from *1978* and even up to the day this appeal was heard on *26th February, 2009* it was confirmed to us that the respondent was still in possession. It is instructive to note that during the hearing of the case in the superior court the respondent called several witnesses to support his claim that he had bought this land from the appellant's father. In the course of his evidence in the superior court the respondent stated inter alia:-

"***I was given the land in the title deed. The deceased before he died he had finalized everything with me. The numbers are different because we have subdivided. I have resided there from 1978 to the present day. These are the title deeds to prove my ownership of these lands exhibit 7 and 8. I have resided on the land for 20 years. I have built and settled. The lands are mine and the titles should remain in my name. I bought the shamba from his father and not him. His father had already shared out the land to the sons, daughter and myself. I ask the court to rule that the plaintiff as an administrator should not deny me my rightful share. These 2 shambas are mine."***

In our view, the above sets out the respondent's case in the superior court. The appellant had sought cancellation of the titles but the respondent resisted that claim. That, in our view, was the gist of the dispute before the superior court. We have shown how the learned Judge dealt with the matter and her conclusion thereon.

On our part we have re-evaluated the evidence as we have endeavoured to demonstrate in this judgment and have come to the same conclusion as did the learned Judge that the respondent had properly acquired title to the parcels of land in dispute and that there could be no justification in canceling the registration of the titles as claimed by the appellant.

In ***EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI WAMBUGU [1982-88) 1 KAR 278*** at p. 292 Hancox, J.A (as he then was) said:-

"***A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."***

The first holding in that case is also relevant namely that :-

"***The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally."***

Taking into account all the circumstances of this case, we are satisfied that the learned Judge cannot be faulted in her findings and conclusions. There was sufficient evidence to show that the respondent bought the parcels of land from the appellant's father way back in *1978* and took possession of the pieces of land. He has been in occupation ever since. He legally acquired ownership of these parcels of land through purchase. The appellant had no right to interfere and the learned Judge was entitled to reject the appellant's claim.

For all the foregoing reasons we find no merit in this appeal and order that the same be and is hereby dismissed with costs to the respondent. With that, the long standing dispute between the appellant and the respondent should be laid to rest. These are the orders of the court.

Dated and delivered at Eldoret this 24th day of April, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR