REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 267 of 2001

MAHIRA HOUSING COMPANY LTD .....APPELLANT

AND

MAMA NGINA KENYATTA & KRISTINA WAMBUI PRATT

(*Suing as Trustees of Waunyomu Ngeke Ranch*) .....RESPONDENTS

(Being an appeal from judgment of the High Court of Kenya at

Nairobi (O'Kubasu, J.) dated 26th May 2000

in

H.C.C.C. No. 4415 of 1994)

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JUDGMENT OF THE COURT

This appeal is against the judgment and order of E. O'Kubasu J, as he then was, dated 26th May, 2001. It arose from the case filed in the superior court by *Mama Ngina Kenyatta* and *Kristina Wambui Pratt* as trustees of Waunyomu Ngeke Ranch, herein the respondents, against *Mahira Housing Company Limited*, herein the appellant. The dispute was over a portion of land known as *L. R. No. 10901/7/R* South of Ruiru otherwise subdivided and given numbers *10901/36* and *10901/37*, which, by an agreement for sale dated 20th May, 1986 made between the parties, the appellant agreed to purchase from the respondents at a price of *Kshs.5,000,000/=* (five million shillings). According to the respondents the appellant did not to honour the terms of the said agreement when it failed to pay the full purchase price as agreed and that in terms of *Clause II* of the said agreement the respondents rescinded the same in May 1987. Further that on 28th March 1990 the appellant filed proceedings in the superior court being *HCCC No. 1570 of 1990* seeking orders, inter alia, for specific performance of the said agreement and an injunction to restrain the respondents from alienating the said portion of land. Further that the said appellant filed an application in the same case seeking orders for an interim injunction in the above mentioned terms which application was dismissed by the High Court on 5th June 1990 – and eventually the whole suit was dismissed for want of prosecution on 2nd November, 1994. According to the respondents, after the commencement of the suit subject to this appeal, the appellant, through their representatives or agents forcefully and unlawfully took possession of parts of the said land and refused to vacate the same despite several requests from the respondents to do so and they had retained such possession as trespassers. The plaint

dated 15th December, 1994 stated that despite demand made and notice of intention to institute legal proceedings given, the appellant had refused to vacate the suit property. The respondents sought possession of the said land, eviction of the appellant or their agents there from, payment of mesne profits, costs of the suit and interest thereon.

A defence filed in court on 13th February, 1995 averred amongst others that it was not responsible for the circumstances which led to the dismissal of *Nairobi High Court Civil Case No. 1570 of 1990* and that the dismissal was caused by the negligence of the appellant's advocates then on record but that this did not create any right or cause of action on the 1st respondent nor any liability on the appellant. That members of the appellant had occupied the piece of land lawfully and legitimately bought from the 1st respondent. They prayed for the dismissal of the suit with costs.

The case was heard by the superior court between 30th October, 1998 and 5th April, 2000 when counsel for the parties wound up their submissions. In his reserved judgment, the learned Judge concluded that:

"*This is a sad case in which the members of the defendant must have contributed money to buy land but through dishonest officials of the company and Lands office the members have landed in a situation in which they have to lose what they have always thought to be lawfully theirs.*

This case is a living example of what misery the dishonest officials of the Lands office and company officials can bring to the poor of this country.

Since evidence on record shows that the defendant never bought the land in dispute and the contract was rescinded, then the plaintiff is entitled to judgment as prayed in the plaint. The result of this case will be painful to the members of the defendant company but it is unfortunate that they were cheated by the officials of Mahira Housing Company. Hence, there will be judgment in favour of the plaintiff but the issue of mesne profits may be set down for arguments at a later date should it be necessary. Since the members of Mahira Housing Company are on this land they will be given three (3) months from the date of this judgment in which to vacate. Costs of the suit will be awarded to the plaintiff. Order accordingly."

The appellants were aggrieved by this decision and they filed a memorandum of appeal dated 17th October, 2001 and lodged in the Court Registry at Nairobi on 18th October 2001.

It had 19 grounds of appeal, namely:

"*1. THAT the learned Judge erred in law and in fact in failing to consider and give due weight to the evidence tendered by the defendants/applicants such failure occasioning a miscarriage of Justice.*

2. THAT the learned Judge erred in law and in fact in admitting that the two receipts (sic) marked as exhibit (b) and (c) were forged and not the same as exhibit A without engaging expert evidence to confirm the authenticity of the receipts.

3. THAT the learned Judge erred in law and fact in finding that the defendants/applicants had not paid the whole purchase price hence rescission of contract on the part of the plaintiffs/respondents.

4. THAT the learned Judge erred in law and in fact in failing to consider the land parcels occupied by defendants in 1984 were quite different from the ones in dispute.

5. THAT the learned Judge erred in law and fact in failing to consider that the head titles were actually surrendered to Lands office at Thika and new titles issued.

6. THAT the learned Judge erred in law and in fact in coming to a finding that the title deeds were forged without engaging an expert to contradict/confirm the same.

7. THAT the learned Judge erred in law and fact in failing to appreciate that a dispute arose later in regard to purchase price.

8. THAT the learned Judge erred in law and in fact in coming to a conclusion that the defendants/applicants were actually in breach of a clause in sale agreement without actually considering the real and true facts before the court.

9. THAT the learned Judge erred in law and in fact in arriving at a conclusion/finding that the receipts were forged by the defendant and not the plaintiff.

10. THAT the learned Judge erred in law and in fact in coming to a finding that the defendants occupied the land parcels in dispute illegally without the plaintiff's permission.

11. THAT the learned Judge erred in law in refusing to issue witness summons to issue to the Principal Witness, namely Mama Ngina Kenyatta and failure by the plaintiff to call the principal witnesses in this case occasioned a serious miscarriage of justice disentitling the plaintiffs of the prayers sought.

12. THAT the learned Judge erred in law and in fact in finding that there was fraud on the part of officials of Mahira Housing Corporation without actually proving (sic) the same.

13. THAT the learned Judge erred in law in finding the receipts were not the same without engaging an expert to contradict the same.

14. THAT the learned Judge erred in law and in fact in failing to appreciate the defence submissions that the issue before the court could not and ought not to resolve without the Commissioner of Lands being enjoined as a party to the suit. The plaintiff in so failing to enjoin the Commissioner of Lands made a fatal error.

15. THAT the learned Judge erred in law and in fact when he made far reaching orders relating to the suit land without considering that other third parties in their thousands were already settled in the suit land with proper titles.

16. THAT the learned Judge erred in law and in fact when he ordered the defendant to vacate the suit land without appreciating that the suit land no longer belonged to the defendant but has since passed to new owners with titles.

17. THAT the learned Judge misdirected himself in law and fact on the applicable statute to the suit land and in so doing he failed to recognize that individual titles issued after the cancellation of the head title were registered under the Registered Land Act as a first registration hence absolute and indefeasible.

18. THAT the learned Judge erred in narrowing the scope of issue for determination of whether the defendant paid the whole purchase price and thus misdirected himself.

19. THAT the learned Judge erred in law and in fact in admitting prejudicial and in admissible evidence from the plaintiff even long after he had closed his case such error leading to miscarriage of justice".

A supplementary Record of Appeal lodged in the Court Registry on 18th June 2004 composed of correspondences in relation to the suit land, names of new registered owners of plots in the suit land and their title documents.

Counsel for both parties submitted before us on this appeal on 8th July 2008. Mr. Letangule, learned counsel for the appellant gave the background information of the dispute between the parties and said at all material time the respondents were represented by a firm of advocates known as Shapley Barret & Company; both during the sale transaction and the hearing of the case and that though there were

principals in the transaction they were not called as witnesses in the case. According to the counsel, it was important for one of the principals, Mama Ngina Kenyatta, to testify in order to shed light on whether or not the suit land was sold to the appellant.

Counsel stated further that the Judge did not take into account that over 1600 members had settled on the suit land in 1984 even before the agreement was entered into and that copies of their titles were with one Peter Githuka (DW1); that the land had been subdivided into smaller plots upon which the over 1600 members had settled and that such settlement could not have taken place without the knowledge of the vendor; that though counsel for the respondents alleged they had the head title for the suit land, this title was cancelled and new titles issued to the new owners and since the new titles had not been cancelled then the judgment of the superior court could not stand.

Mr. Letangule submitted further that though the principals to the transaction were in existence it was surprising that only one of their lawyers and his clerk appeared in court to testify. At the same time since all those people who had been issued with titles and settled on the land were not joined in the suit and hence unaware of the dispute in court, orders made by the superior court could not be effected upon them; and that no single parcel of land in the disputed area was registered in the appellant's name hence orders made against it were in vain. He stated that by failing to call the principals to testify in the case, it gave the perception that the allegations made by the appellant against the said principals were true. And though the respondent termed some receipts produced by the appellant as forgeries, there were no specific pleadings of fraud in the plaint nor was there any strict proof of that allegation.

Learned counsel for the respondent, *Mr. Wananda*, in opposing the appeal stated that the Judge was not wrong in finding the receipts produced by the appellant as forgeries because there was corroborative evidence to establish this and referred the Court to the evidence adduced in the superior court by *Mirabeau H. Da Gama Rose* (PW1) a senior partner in the firm of Shapley Barret & Company Advocates and *Louis Manud De Souza* (PW2) a clerk in the firm, and the application in *High Court Civil Case No. 1570 of 1996* which was dismissed. According to counsel although the Judge was wrong in not considering the subdivisions, these were not in issue in the case before the superior court. And since the suit plot was registered under the Registration of Titles Act, it could not be converted to that under Registered Land Act.

According to counsel, the head title was not surrendered and that the 1st Respondent, Mama Ngina Kenyatta, did not execute a transfer of the land to any other person and the occupation of the suit land by other people was illegal.

Counsel for interested parties, *Mr. Ndege* submitted that the suit land had been subdivided and his clients issued with titles thereon and that they were now absolute holders of their respective plots. They were not given any opportunity to be heard by the superior court hence the order made by the learned Judge cannot be executed against innocent title owners. Counsel stated that the suit land was not in existence and that the appellant had never occupied the suit land and could not give up possession of what it did not own. That since the respondents did not file any suit or application for the cancellation of the titles issued to his clients, the orders made by the superior court were in vain.

This is a first appeal and quoting *Sir Clement De Lestang, V. P*. in *Selle v. Associated Motor Boat Company [1968] E.A. 123* at page 126,

"*An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, 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 witness and should make due allowance in that 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, or if the impression based on the demaeanour of a witness is inconsistent with the evidence in the case generally.*"

The case proceeded before the superior court in a rather unique way in that although the trustees of Waunyomu Ngeke Ranch (*the suit land)* were in existence, they having filed the suit in the superior court, none of them appeared to testify in the case. Instead it was only Mr. DaGama Rose and his clerk (PW2) who testified as the only witnesses for the respondents. It is worth to note that their firm was the same one which prepared the sale agreement (exhibit 1). PW1's evidence was that after the initial deposit of Kshs.500,000/= was paid by the appellant, no further payments were made and in terms of Clause II of the sale agreement the respondent rescinded the agreement on 5.5.87 and the deposit was forfeited in favour of the vendor. The agreement was rescinded because of non-payment of the balance of the purchase price on the due date; namely, either on:-

(a) "the 90th day after the date upon which the purchasers' advocates are notified that the Deed Plan in respect of the said property has been issued by the Director of Survey; or

(b) 90th day after the date on which the purchasers' advocates are notified that the consent of the appropriate Land Control Board has been duly granted."

But Peter Githuka (DW1) did not agree that the appellant did not pay the full purchase price. He was the treasurer and the only surviving official of the appellant at the time of testifying in the case on 28th January, 1999. According to him when the agreement was entered into with the 1st respondent, it was agreed that initially 10% of the purchase price in the sum of Kshs.500,000/= be paid and that this was done on 30th April, 1986 through the appellant's firm of lawyers Messrs. Githuka & Mbugua Advocates. DW1 stated that two pieces of land, *L.R. Nos. 10901/33* and *10901/34* were initially involved in this transaction. But at some point during the transaction the appellant realized they were being cheated over the two pieces of land by PW1 and decided to see a brother of the 1st respondent, one Gathecha, who took them to talk to the 1st respondent. He stated that it was him, Gathecha, Chairman of the appellant, one Kariuki Muiruri and the 1st respondent who went to the offices of PW1 where the 1st respondent asked PW1 why he was cheating the appellant by refusing to give them the suit land but instead selling it to Family Finance Limited. A suggestion by PW1 to give the appellant an alternative land on application was rejected by the 1st respondent who directed PW1 to give the appellant *L.R. Numbers 10901/36* and *10901/37*.

That on this new arrangement the parties entered into a fresh agreement in relation to the new parcels of land on 14th May, 1986 by which time shareholders of the appellant had already been allowed to settle on these parcels of land by the 1st respondent. The balance of the purchase price of *Kshs.4,500,000/=* (Four million five hundred thousand shillings) was paid by Muiruri in cash; the receipts whereof were issued and brought to DW1 and produced in the superior court as exhibits B and C. It would appear after the full purchase price was paid for the two parcels of land, PW1 released the deed plans of the parcels of land to the appellant whereupon the necessary consents were applied for and obtained, the parcels were subdivided and each member given title to his/her portion of land. That about 1600 members were settled on the suit parcels of land by the appellant. DW1 even produced some copies of title deeds in respect of individual plots on which members had been in occupation since 1984. This witness testified that plot number *10901/36* and *10901/37* had been transferred to the present occupants and that the members had titles to their respective plots. This is the evidence adduced before the learned Judge from which, together with that of the respondents, he made the findings as herein before stated in favour of the respondents.

At the time the learned Judge made his findings, he was aware that there were members of the appellant company who had contributed money to purchase the suit lands and who had already settled thereon as far back as 1984 and had been issued with titles to their individual plots. He was also aware they were not parties to the case before the superior court. The learned Judge was also aware that though the respondents had filed the case in the superior court as trustees of Waunyomu Ngeke Ranch none of them testified in the case. Instead it was PW1, an advocate in the firm of advocates representing the respondent which acted for the respondents in the sale transaction for the suit parcels who testified. It was even surprising that although DW1 gave evidence that at some point during the transaction the appellant

thought they were being cheated by PW1 over the suit lands and went with the 1st respondent to PW1's office and she directed him to hand over possession of land *Nos. 10901/36* and *10901/37* to the appellant, PW1 objected to the summons being issued for the appearance of the said 1st respondent to testify in the case. What was PW1 trying to conceal? After all it was only the 1st respondent who would confirm whether or not she had directed PW1 to give the appellant the suit lands after completion of the payment of the purchase price or that she had allowed the members of the appellant to occupy and/or settle on the suit lands in 1984 as alleged by DW1. We are not convinced PW1 could have provided such confirmation as he was not the proprietor of the suit parcels of land. While it is not mandatory that a plaintiff must testify in his or her case in the circumstances of this case it was necessary for the 1st respondent to testify in order to rebut the allegations made by DW1 and the learned Judge erred in overlooking this very important aspect of the matter.

There were receipts produced by DW1 confirming payment of the full purchase price for the lands in dispute by the appellant. The first receipt marked as exhibit A and dated 30th April, 1986 for the initial payment of Kshs.500,000/= was not denied by PW1. But he alleged that this amount was forfeited to the vendor on failure by the appellant to pay the balance of Kshs.4.5 million. He denied that his office issued receipts dated 30th March, 1987 for Kshs.3,100,000/= (Exhibit B) and the one dated 25th November 1988 for Kshs.1,400,000/= (Exhibit C) claiming that those receipts were forgeries. PW2 supported him in this allegation. But these two witnesses were parties directly interested in the outcome of the litigation and it was encumbent upon the respondents to call other evidence to confirm these allegations.

Order VI rule 4(1) of the Civil Procedure Rules provides that:-

"*A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God any relevant statute of limitation or any fact showing illegality:*

(a) which he alleges makes any claim or defence of the opposite party not maintainable, or

(b) which if not specifically pleaded might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading;

The issue of forgery raised by the respondents' witnesses falls in the category of fraud which the appellant did not plead in the plaint. Having failed to plead the issue of forgery it was not open to the respondents to raise it without amending the pleadings. In his judgment the learned judge stated that

"*In any case PW1 and PW2 proved to the satisfaction of this court that these receipts were not issued from Shapley Barret & Company Advocates"*.

But as we have found that PW1 and PW2 were directly interested in the outcome of the litigation we think that their evidence was suspect and did not necessarily prove that the receipts Exhibits B and C were not issued by the firm of Shapley Barret & Company Advocates. In our view the learned Judge erred in finding in his judgment that the evidence by PW1 and PW2 proved to the satisfaction of the court that the receipts dated 30th March, 1987 and 25th November, 1988 were not issued from Shapley Berret & Company Advocates in absence of corroboration.

We are also of the view that had the learned Judge taken into account the evidence adduced before him that the suit lands – numbers 10901/36 and 10901/37 had been subdivided to the members of the appellant company and new titles issued to them, he would have found that the original titles in the appellant's name had ceased to exist, and that there was no substance over which the respondents would sue the appellant. And to remove any doubts about the surrender or not of the head title to the suit land, it was important that the Commissioner of Lands be summoned to appear in court to shed light on how new titles to the plots came into existence and what happened to the head title.

Apart from mentioning *HCCC No. 1570 of 1990* in the plaint this issue was not taken up during the evidence or dealt with in the judgment of the superior court and we do not have any reason to discuss it in our judgment.

We allow the appeal and set aside the superior court's order. We direct that the costs of this and the superior court be paid by the respondents to the appellant but that third parties bear their own costs of this appeal.

These shall be the orders of this Court.

Delivered and dated at NAIROBI this 31st day of October, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR