REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: OMOLO, SHAH & O'KUBASU, JJ.A

CIVIL APPEAL NO. 155 OF 1999

BETWEEN

BENSON MUNGAI KAMITI .....APPELLANT

AND

ATTORNEY GENERAL

DIRECTOR OF SETTLEMENT

COMMISSIONER OF LANDS

PETER MUCHIRI MWANGI .....RESPONDENT

(An appeal against the judgment and decree of the

High Court of Kenya at Nakuru (Rimita, J) dated 4/3/98

in
H.C.C.C. NO. 341 OF 1993)
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JUDGMENT OF THE COURT

The appellant, ***Benson Mungai Kamit***i was the plaintiff in Nakuru H.C.C.C. NO. 341 of 1993. He had sued the ***Attorney General of Kenya*** in his capacity as representative of the Government of Kenya, ***the Director of Settlement , The Commissioner of Lands*** and ***Peter Muchiri Mwangi .*** His claim was for the following reliefs:

> ***"a) A declaration that the plaintiff is the legal owner of Title No. NAKURU/PIAVE BLOCK 1/1097 consisting of 200 acres or 80.94 Hectares and that he is entitled to a quiet enjoyment of the same.***
>
> ***b) A declaration that the purported acquisition of 22.5 acre s of the plaintiff's Title Number NAKURU/PIAVE BLOCK 1/1097 by the Defendants is unlawful and the consequent allotment to the 4th Defendant (Peter Muchiri Mwangi) is null and void.***

c) A perpetual injunction to restrain the 4th defendant from acquiring T itle or the five(5) acre portion of the Plaintiff's land or from trespassing or cultivating on the said land.

d) General Damages

e) Mesne Profits

f) Costs of this suit with interest at court rates."

The basis of the appellant's claim was that he had purchased the said parcel of land (then plot No. 1149) from one Mrs. Mary Wanjiku Mburu for a sum of Shs.680,000/= in or about July, 1980. He took possession thereof and still is in possession of part thereof. Eventually plot number 1149 was renumbered as plot number 1097 when the certificate of title was issued. In 1992 the Director of Settlement issued a certificate of outright purchase and the Commissioner of Lands issued the title deed showing that the appellant was the legal owner of 80.94 hectares of the land under that title. In December, 1992, the appellant decided to sell 120 acres out of his said land when he discovered that the land, after all, was not 200 acres and that the Director of Settlement and the Commissioner of Lands had unlawfully caused 22.5 acres of his land to be "slashed away" and had allotted the same to the fourth defendant (the fourth respondent here), Peter Muchiri Mwangi.

The agreement for sale of the said parcel of land made on 3rd July, 1980 between Mrs. Mburu and the appellant recites that Mrs. Mburu was selling some 200 acres of land to the appellant at a price of Shs.670,000/=. The first special condition in the said agreement of sale reads as follows

: "1. The purchaser (that is the appellant) having inspected the property has notice of the identity thereof and of its actual state and condition and he takes it subject to such state and condition and the vendor shall not be called upon to repair, renew or improve it in any manner whatsoever nor shall the vendor be required to point out the beacons or fit or replace any missing or misplaced beacons save at the expense of the purchaser."

Mrs. Mburu executed the transfer of the said parcel of land on 29th September, 1980. The title deed was issued in February, 1993 and the approximate area mentioned therein was 80.94 hectares. When the appellant was attempting to sell 120 acres of his land, he was informed by his surveyor Gibson Wahome Werugia (PW2) that the suit land was not 200 acres but approximately 170 acres. Faced with this information the appellant looked around and concluded that the adjoining land occupied by the fourth respondent must have been part of his original 200 acres. The appellant's claim to the fourth respondent's land did not stand the scrutiny of the superior court (Rimita, J). The learned Judge relied primarily on the evidence of Mr. Werugia to find that the error in the acreage of the land must have crept in when the land was originally surveyed. The learned Judge dismissed the appellant's claim to the fourth respondent's land and that judgment has provoked this appeal.

Mr. Mirugi Kariuki who appeared for the appellant first took issue with the learned Judge's finding to the effect that the suit as against the first three respondents was incompetent as no notice under Section 13A of the Government Proceedings Act was given to the Attorney General prior to the institution of the suit. Whilst that issue was pleaded there was no evidence called by either side to prove or disprove that pleading. It was, as Mr. Kariuki pointed out, a nonissue. Unfortunately no issues were framed and the mandatory requirement of Order XIV rule 1(5) were not complied with. Whilst non-compliance does not vitiate the trial, complying with the sub-rule helps the court and the parties to know what issues they are not agreed upon and, therefore, are asking the court to adjudicate on. We would urge the Judges in the superior court to either get the parties to agree the issues or frame the same in the event of a dispute.

The appellant did not say if he served notice of intention to sue on the A.G. He was not even cross-examined on that point. The first three respondents did not call any evidence to show that the notice was not given. In these circumstances the question of whether or not the notice was served was a non-issue and the learned Judge was wrong in saying that the suit against the first three respondents was incompetent.

However, the suit had otherwise proceeded to hearing on merits and the issues that emerged during the trial can be summarized as follows:

> ***"1. Did the appellant agree to buy a 200 acre piece of land from Mrs. Mburu and if he got only 170 acres, were the first three respondents liable to the appellant in respect of that shortfall?***
>
> ***2. Was the appellant entitled to bring a suit against the first three respondents some thirteen years after he occupied the suit land?***
>
> ***3. Did the fourth respondent unlawfully obtain the land adjoining that of the appellant and even if so did his land in q uestion form part of the land which the appellant bought in 1980?***
>
> ***4. Is the fourth respondent liable to surrender his land to the appellant in any event?"***

The answer to these issues is that the appellant thought he was buying 200 acres of land but he got only 170 acres. He was put on notice by the vendor (Mrs. Mburu) as regards the acreage of the land in question. She was not obliged to point out the beacons to the appellant and it was for the appellant to make sure that he got what he bargained for.

As regards the respondents' liability, to the appellant, if any, the evidence of Mr. Warugia is relevant. Mr. Werugia did concede that there could well have been an error when the land in question was first surveyed. He did also say that the land in possession of the fourth respondent was inside the Piave Settlement Scheme whereas the appellant's land is outside the scheme. He went on to say that the fourth respondent's land (Plot No. 1062) was marked as a dam area and was outside the appellant's land. He also confirmed that the land claimed by the appellant (Plot No. 1062) existed independently from the appellant's land. He confirmed that he could not find any connection between the appellant's land and the fourth respondent's land. He was unable to establish that the two parcels of land were one piece or parcel of land. He was a witness called by the appellant and he was not certain that the disputed land was part of the appellant's land. This evidence fails to establish the appellant's claim and it was for the appellant to prove his claim.

What we have stated so far answers the first two issues in that although the appellant thought he was buying 200 acres of land from Mrs. Mburu it was for him to check the acreage at that time and that the Director of Settlement and Commissioner of Lands were not bound to look at the acreage when a willing buyer was buying the land from a willing seller. If the appellant had any cause of action at all and if not timebarred, it was against Mrs. Mburu.

The fourth respondent acquired land parcel number 1056 from the Ministry of Lands & Settlement. The original number was 1062. He had lived on that parcel of land since 1979. Exhibit (i) which was produced by the fourth respondent and which purports to set out "Final Area List" puts plot number 1062 as a separate plot, that is to say, separate from plot number 1149 and is shown to be an 8 hectare plot. This list (exhibit (i) was checked on 20th March, 1981 and registered on 21st March, 1981 according to notations thereon.

On 14th July, 1987 the Settlement Fund Trustees sold plot number 1062 to the fourth respondent and this is confirmed by a certificate of outright purchase issued in respect thereof by the said trustees. The mutation form in respect of plot number 1062 was filled in on 22nd November, 1989 and plot number 1062 was given new parcel numbers, 1075,1076,1077,1078 and 1079 consisting of about 1.7 hectares each and the relevant title deeds were issued to the fourth respondent on 30th March, 1993. It is quite clear therefore that the fourth respondent acquired title to plot No. 1062 (later plot numbers 1075, 1076,1077,1078 and 1079) quite legitimately and that it was not part of the appellant's land and that answers the third issue propounded earlier by us.

The fourth issue is therefore automatically answered. There is no warrant in law to order the fourth

respondent to surrender his land to the appellant. The appellant must bear his loss, if any. We are satisfied that the learned Judge came to a correct decision and we see nothing to show that he erred. This appeal has no merit and is accordingly dismissed with costs.

The appellant will pay the costs of all the respondents.

Dated and delivered at Nakuru this 22nd day of March, 2002.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR