



**Lempaka & another v Gathigi (Environment and Land Appeal
5 of 2021) [2024] KEELC 6152 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 5 OF 2021
CG MBOGO, J
SEPTEMBER 26, 2024**

BETWEEN

SAMANTE LEMPAKA 1ST APPELLANT

BENJAMIN NENJORE SINGILA 2ND APPELLANT

AND

NJUGUNA KABUE GATHIGI RESPONDENT

*(Being an appeal from the Judgement and Decree of the Chief Magistrates Court at Narok
delivered by Hon. S. Mungai on 26th May, 2021 in CMCC ELC Case No. 83 of 2019)*

JUDGMENT

1. The appellants herein being aggrieved by the whole judgment and decree of the Hon. G.N. Wakahiu, delivered on 26th May, 2021 have appealed to this court vide the memorandum of appeal dated 10th June, 2021 on the following grounds: -
 1. That the learned honourable magistrate erred in law and fact by failing to consider the evidence of the defendants and critically analyse the same and accord it due weight to the extent that the defendants were able to prove their case.
 2. That the learned honourable magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and submissions of the parties.
 3. That the learned honourable magistrate erred in law and in fact in applying his own theory in assessing the pleadings, evidence and exhibits which made him fall into error of speculation and inserted his facts and findings which was not supported by the pleadings, evidence and the exhibits.



4. That the learned honourable magistrate erred in law and in fact in holding that the appellants had established a prima facie case based on the pleadings on the record and evidence but failed to award as per the prayers sought.
2. The appellants therefore pray for the following orders: -
 - a. That the appeal be allowed.
 - b. That the judgment delivered on the 26th May, 2021 in the Narok Chief Magistrates ELC Case No. 83 of 2019 be reviewed and judgment entered in favour of the appellants against the respondent in terms of prayer (a), (b), (c), and (d) of the defence.
 - c. That the respondent do bear the costs of this appeal.
3. The grounds of appeal were canvassed by way of written submissions. The appellants filed their written submissions dated 15th January, 2024. The appellants submitted that the trial court failed to appreciate that the suit property was acquired by the 1st appellant from the 2nd appellant as evidenced through the exhibits produced in court. Further, they submitted that the 1st appellant purchased 10 acres, and went ahead to erect buildings with the assumption that he had acquired a good title, and that he was not aware of any case that had been brought to court in regards to the suit property. The appellants relied on the case of *Ephantus Mwangi & Another v Duncan Mwangi, Civil Appeal No. 77 of 1982* [1982-1988] 1 KAR 278.
4. The appellants further submitted that they established a prima facie case where they produced evidence that the 1st appellant had purchased 10 acres from the 2nd appellant, and further went ahead with the process of subdivision. They submitted that the trial court did not consider this evidence. The appellants further submitted that the 1st appellant will suffer irreparable injury which cannot be compensated by way of damages as he will have lost the parcels of land and the structures erected on the parcels of land.
5. The respondent filed his written submissions dated 31st January, 2024 where he raised one issue for determination which is whether in arriving at the decision to grant the respondent in ELC No. 83 of 2019 the orders sought, the learned magistrate erred in law and in fact as alluded in the grounds of appeal by the appellants.
6. On this issue, the respondent submitted that the appellants during the hearing of the matter before the trial court, did not in any way challenge the title, which stands as true reflection of the ownership by the respondent. To buttress on this submission, the respondent relied on the case of *Tarabana Company Limited v Sebmi & 7 Others (Civil Appeal 463 of 2019)* [2021] KECA 76 (KLR) (8 October) (Judgment).
7. The respondent submitted that he is the registered owner of the suit property having acquired the same for valuable consideration, and that the appellants have invaded and trespassed onto the said land on the strength of documents which cannot sustain a claim of ownership of land. He submitted that he will stand to suffer irreparable damage as a result of the appellants' action. He submitted that the trial court did not err in law in determining that the respondent was a bonafide innocent purchaser to the suit property. Reliance was placed in the case of *Katende v Haridar & Company Limited* [2008] 2 EA 173.
8. I have considered the grounds of appeal and the written submissions filed by both parties. In my view, the issue for determination is whether the memorandum of appeal has merit. This being a first appeal, I am mindful of the duty of this court as set out in the decision of *Selle & Another v Associated*



Motor Boat Co. Ltd & Others [1968] EA 123 is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* [1968] KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* [1968] EA 93.

9. The respondent filed a plaint dated 9th May, 2018, seeking the following orders: -
 - a. Permanent order evicting the 1st defendant, his agents, servants or otherwise evicting him from the parcel of land Narok/Cis-Mara/[Olombokishi/1093](#) registered in the name of the plaintiff.
 - b. A permanent order against the 1st and 2nd defendants for demolition of all erected structures on the parcel of land Narok/Cis-Mara/[Olombokishi/1093](#) registered in the name of the plaintiff.
 - c. That the OCS Narok to assist in effecting the orders in a and b above.
 - d. The costs of the suit be paid by the defendants.
 - e. Any other relief that this honourable court deems fit to grant.
10. In the plaint, the respondent averred that on 24th October, 2001 he entered into a sale agreement with the 2nd appellant for purchase of 5 acres of land out of parcel no. Cis-Mara/ Olombokishi/ 80 for a total consideration of Kshs. 75,000/- and he made a deposit of Kshs. 45,000/- and another instalment of Kshs. 30,000/- where the 2nd appellant acknowledged receipt. Further, he averred that despite paying the full purchase price, the 2nd appellant refused to transfer the land to him and he filed Civil Suit No. 34 of 2004 where judgment was delivered on 10th August, 2010.
11. The respondent further averred that the judgment was entered in his favour and the 2nd appellant was directed to execute transfer of the 5 acres out of Cis-Mara/ Olombokishi/ 80. That despite the same, the 2nd appellant refused to execute the said transfer documents which necessitated the authorization of the Executive Officer Narok Law courts to execute the relevant documents in his favour. He pleaded that the due process was followed, and he was issued with a title deed on 21st July, 2015 being Cis-Mara/[Olombokishi/1093](#) measuring 2.02 hectares. That previously, the 1st appellant had registered a caution on the said land which was later removed on 1st July, 2015. Further, that he obtained orders of eviction against the 1st appellant who had constructed a permanent house on the suit property and the same was granted on 9th February, 2015.
12. The respondent further averred that even though he had a valid judgment from the court, he has never enjoyed the fruits thereof nor his parcel of land. He averred that the appellants have violated his proprietary rights with the continuous illegal occupation causing him damage which has been detrimental to him.
13. The 1st appellant filed his statement of defence dated 17th August, 2018. While denying the contents of the plaint, the 1st appellant averred that he is a bonafide purchaser of 12 acres from the parcel of land known as Cis-Mara/ Olombokishi/ 80 which he purchased from the 2nd appellant in March 2001, and immediately took possession thereafter. The 1st appellant further averred that he has made substantial developments on the same with the consent of the 2nd appellant, and he had obtained consent to subdivide and transfer his portion of land.
14. The 1st appellant further averred that the respondent had intended to purchase an unsurveyed portion of land measuring 5 acres but he had breached the contract by failing to pay the balance of the purchase price, and that he had also not been shown the portion on the ground, thus he had not taken possession. Further, that the respondent has no basis in choosing his portion of land on the ground and causing



it to be subdivided and issued with a title deed out of the whole land measuring 38 acres belonging to the 2nd appellant.

15. The 2nd appellant filed his statement of defence dated 17th August, 2018. The 2nd appellant averred that he entered into an agreement with the respondent for the sale of 5 acres, but the respondent breached the contract by failing to pay the balance of the purchase, and he was therefore not obliged to subdivide and allow the respondent to take possession. He averred that he never showed the respondent the portion on the ground to occupy. He averred that he sold 12 acres to the 1st appellant and granted him possession which he has established his home. Further, that the respondent has no right to disturb the 1st appellant, and that he is ready to refund the respondent the part of the purchase price that was paid and rescind the agreement.
16. The hearing of the respondent's case proceeded on 3rd March, 2020. In his examination in chief, the respondent testified and supplied evidence as to how he obtained the 5 acres of land. During cross-examination, the respondent testified that he paid the 1st instalment of Kshs. 45,000/- and the balance later but he never took possession. The respondent supported his averments with P. ex. 1 and 2 being a copy of the sale agreement and the acknowledgment of the balance of the purchase price of Kshs. 30,000/-. The respondent testified that the 1st appellant bought the land from the 2nd appellant and lodged a caution but the 1st appellant was not involved in Case No. 34 of 2004. The respondent stated that since the 2nd appellant refused to execute transfer documents, the same was done by the executive officer, Narok law courts who followed the due process. Further, that he opted to take portion A since there was corruption in portion no. C. The respondent produced the exhibits as contained in his list of documents.
17. The appellants' case proceeded for hearing on 28th October, 2020. The 1st appellant stated that he took possession of his land in May, 2001 and the 2nd appellant has sold portions of his land to 17 other people. During cross-examination, the 1st appellant testified that he bought 10 acres out of the 38 acres owned by the 2nd appellant, and that the first agreement was in the year 2001. It was his testimony that he does not have a title deed for the area he constructed. He testified that he did not know that there was case until the year 2015, when an eviction order was issued, and that the 2nd appellant did not inform him that he had sold the land to someone else.
18. The 2nd appellant admitted that he sold the land to the respondent on 24th October, 2001 but that he did not pay him the entire purchase price, and as such P. Ex. 2 is false. He further stated that the respondent has never been on the suit property and that he sold the land to the 1st appellant who paid the purchase price. On cross-examination, the 2nd appellant testified that the respondent has a title on someone's land, and that he would like to refund him his money. It was his testimony that he has never reported the respondent on the issue of a fake title, and he maintained that the respondent never paid him the balance of the purchase price. He testified that he is ready to refund the Kshs. 45,000/- paid by the respondent.
19. In the judgment delivered by the trial court, that is the subject of this appeal, the trial court identified the issues for determination as whether the respondent was the lawful owner of the piece of land known as Narok/Cis-Mara/ Olombokishi/ 1093, whether the 1st appellant is the bona fide purchaser for value without notice, whether there is privity of contract between the respondent and the 1st defendant, and whether the plaintiff has made out a case against both defendants jointly.
20. In finding that the respondent is the lawful owner of Cis-Mara/ Olombokishi/ 1093, the trial court considered the arguments raised by both parties. Particularly the trial considered the fact that whereas the appellants alleged forgeries of the documents produced by the respondent, there was no evidence



to support their claim of fraud. Further, the trial court went ahead to note that the appellants did not challenge the title held by the respondent until a suit was filed. In faulting the trial court in arriving at its decision, the appellants, in their grounds of appeal argued that it did not critically analyse the evidence they produced in court. Contrary to the averments raised by the appellants and upon analyzing the evidence produced, it is not disputed that the 2nd appellant sold land to the 1st appellant at the agreed price. There was also intention to subdivide Cis-Mara/Ololmbokishi/ 80 into 27 portions, which the 2nd appellant admitted to have sold certain portions of land to other individuals. More importantly and as indicated during the trial, the 1st appellant testified that the 2nd appellant did not inform him that he had sold the suit property to someone else.

21. Key focus is on the allegation that the respondent failed to pay the 2nd appellant the balance of the purchase price. The respondent produced P. Ex No. 2 which is an acknowledgement dated 5th November, 2001 indicating that the 2nd appellant received the balance of the purchase price being Kshs. 30,000/-. While the 2nd appellant stated that the document is false, he did not produce evidence to counter this allegation, or prove that the same was a forgery. The respondent in my view had a legitimate claim, and he produced all the documents in support of his case. It is quite unfortunate that since purchasing the land, he has never taken possession and utilized the same.
22. The appellants on the other hand, have had an unfair advantage which is unlawful and by all means detrimental to the respondent. The trial court was correct in arriving at its conclusion which in my view was reasonable, and served justice on the respondent.
23. The upshot of the foregoing is that the memorandum of appeal dated 10th June, 2021 totally lacks merit. The same is hereby dismissed with costs to the respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 26TH DAY OF SEPTEMBER, 2024.

HON. MBOGO C.G.

JUDGE

26/09/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

