Mwatu v Ngumbao & another (Environment and Land Appeal E006 of 2023) [2024] KEELC 6087 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6087 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E006 OF 2023

SM KIBUNJA, J

SEPTEMBER 25, 2024

BETWEEN

KAVATA MULI MWATU ..... APPELLANT

AND

KHAMIS NGUMBAO ..... 1ST RESPONDENT

AGNES MWANGI ..... 2ND RESPONDENT

([Being an appeal against the judgement of Hon. M. Nabibya, PM, delivered on the 27th October 2022 in Mombasa ELC CMC No. 15 of 2018(Formerly ELC No. 129 of 2018))

JUDGMENT

1. The appellant, being dissatisfied with the judgement of the trial court, delivered on the 27th October 2022 in ELCC CMCC No. 15 of 2018, preferred this appeal, premised on eight (8) grounds, which are summarized as herein below:

    a. That the learned magistrate erred in law and in fact by failing to find that the appellant was the rightful proprietor of the parcel of land situated at Mkilo/Kichinjoni at Mariakani, measuring 60 x 50, the suit property;

    b. That the learned magistrate erred in law and in fact by declaring the 2nd respondent an innocent purchaser of the suit property, for value without notice, yet the appellant had built a house to lintel level on it:

    c. That the learned trial magistrate erred in law and in fact by failing to hold the 1st respondent liable to refund to him the market price of the suit property as per the valuation report presented by the 2nd respondent, and instead awarding her Kshs.85,000, which was the purchase price in 2011;

d. That the learned trial magistrate erred in law and in fact by failing to consider his evidence, dismissing his suit and failing to award him costs.

The appellant seeks for the judgement to be varied, set aside and or vacated and the costs to be awarded to him.

2. The learned counsel for the appellant, 1st and 2nd respondents filed their submissions dated the 1st March 2024, 15th April 2024 and 26th March 2024 respectively, which the court has considered.

3. The issues for determination by the court are as follows:

a. Whether there was a valid sale agreement between the appellant and 1st respondent capable of being enforced, or alternatively, whether the agreement dated 8th August 2011 between the appellant and the 1st respondent was a sale or lease agreement.

b. Whether the 2nd respondent was an innocent purchaser for value without notice.

c. Who pays the costs?

4. The court has after considering the grounds on the memorandum of appeal, record of appeal, submissions by learned counsel, superior courts decisions cited thereon, come to the following determinations:

a. In the case of *Mursal & Another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021*) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) while citing with approval the case of Santosh Hazari versus. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179 held as follows:

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

b. With the above legal position in mind, it is important that this court understands the parties' claims, defences and evidence tendered. Thereafter, the court will consider the learned trial magistrate's judgement or decision rendered thereof, and make its determinations. The plaint dated 28th May 2018, that is at pages 4 to 6 of the record of appeal, shows the appellant had alleged she was the owner of the suit property, having purchased it from the 1st respondent on 8th August 2011, at Kshs.90,000. That she had commenced construction of a house thereon, that had reached lintel level and was waiting to do the roofing, when she learnt in April 2018 that the 1st respondent had sold the same property to the 2nd respondent, who had continued with the construction of the building thereon. That the sale of the property to the 2nd respondent was illegal, unlawful and fraudulent. The appellant sought for a declaration that she was the rightful proprietor of the suit property; permanent injunction against both respondents and costs.

c. Vide the statement of defence dated the 1st October 2018, that is at pages 32 to 33 of the record of appeal, the 1st respondent opposed the appellant's claim, inter alia averring that the appellant had leased from him a 50 by 50 feet plot out of plot No. 224 Mariakani, measuring 110 by 100 feet, to construct a residential house; that appellant paid the hire charges of Kshs. 90,000, and was to start paying ground monthly rent of Kshs.2,000 with effect from 31st January 2013. That the appellant took possession and started constructing the house, but refused to pay the monthly ground rent; that on 20th January 2018, he asked the appellant for the six years monthly ground rent arrears totaling Kshs.144,000, but she asked him to be given more time to settle the debt; that in February 2018, the appellant told him she was returning the plot to him, as she had been unable to pay the ground rent arrears for six years, and would be collecting her building materials, which she did not; that on 18th May 2018, he reported the matter to the chief, Mavumbo location, who asked the appellant to remove her materials; that no demand notice was served to him and the appellant's suit should be dismissed with costs.

d. The 2nd respondent also opposed the appellant's claim vide her amended statement of defence, dated the 20th July 2019, that is at page 97 to 100 of the record of appeal, inter alia averring that she purchased the suit property with the structures thereon, from the 1st respondent for Kshs. 500,000 on 12th February 2018 and took possession. She averred that she was an innocent purchaser for value without notice, and denied any fraud in the transactions. She prayed for the suit to be dismissed with costs. In her counterclaim against the 1st respondent, she prayed for the 1st respondent to refund Kshs. 1,300,000 to her, being the value of the development and costs of the plot; she also sought for interests and costs of the suit property.

e. The proceedings that are at pages 265 to 270 of the record of appeal shows that the appellant testified as PW1, and called one witness who testified as PW2. The appellant adopted the contents of her statement dated 28th July 2018 as her evidence in chief. She testified that she purchased the suit property, which had no title deed at the time, for Kshs. 90,000 from her neighbor, the 1st respondent. That she commenced construction, but later learnt the 1st respondent had sold the same plot to the 2nd respondent. That she had paid 1st respondent Kshs.85,000, leaving a balance of Kshs.5,000. She added that they did not involve the area chief in the transaction. That she never agreed to the sale of the suit property to 2nd Respondent, and the purchase price she had paid was not refunded to her. She produced her documents, which included the sale agreement dated 8th August 2011 and photographs of the house. The sale agreement which is in Kiswahili, is duly signed, and witnessed. Mwangani Ndingi, the appellant's son, testified as PW2, and inter alia stated that he was a witness when the appellant bought the suit property from the 1st respondent on 8th August 2011. He stated that he thereafter constructed a 4-bedroomed house to lintel level. Then on 27th February 2018, the 1st respondent informed them he had sold the suit property, and he would refund them their expenses at the chief's office on 14th March 2018, but he did not do so. That the dispute was heard before the chief's elders but no agreement was reached, and no minutes were taken during the meeting. That the 2nd respondent completed the house they had built. He produced the copies of the receipts for the materials used in the construction that are at pages 87 to 90 of the record of appeal. I have calculated the amounts thereon and totals Kshs.54,550.

f. The proceedings that are at pages 273 to 281 of the record of appeal further show the 1st and 2nd respondents testified as DW1 to DW2 respectively, and called Ephantus Waweru, a valuer, who testified as DW3. DW1 adopted his statement dated 2nd September 2019 as his evidence in chief, and testified that the purchase price was Kshs. 80,000 and there were witnesses whom

he couldn't recall; He testified that he had leased the suit property measuring 50 by 50 feet to the appellant but he did not have a copy of the lease agreement. That the appellant paid him Kshs.90,000 and was to start paying him ground rent of Kshs.2,000 per month from 31st January 2013 but did not do so. That on 20th January 2018, he asked the appellant for the ground rent arrears that had accumulated to Kshs.144,000 but she pleaded to be given more time. That in February 2018, the appellant told him that she was returning the plot to him as she had been unable to raise the arrears of ground rent, and would arrange to remove her building materials thereon. Then in May 2018, the 1st respondent reported the matter to the chief who heard them, and then ordered her remove her materials from the suit property. The 1st respondent then sold the plot, and the incomplete structure thereon, to the 2nd respondent at Kshs.500,000. DW2 adopted her statements dated the 3rd June 2019 and 4th August 2020 as her evidence in chief and testified that she bought the suit property, measuring 50 by 100 from the 1st respondent at Kshs.500,000, without knowledge of the appellant's claim. That the suit property and the development thereon has been valued at Kshs.1,300,000, that she claimed from the 1st respondent, should the court find in favour of the appellant. That when she bought the plot it had a one-meter structure, that was almost at window level. DW3, a registered and practicing valuer, produced his report giving the plot value as Kshs.500,000 and development thereon at Kshs.800,000. In cross examination, he estimated the value of the structure from foundation to walling at Kshs.536,000.

g. The learned trial magistrate delivered her judgement on 27th October 2022, dismissing the plaintiff's suit and finding partially in favour of the 2nd respondent's counterclaim. The trial court inter alia held that:

> " ..... What comes out is that the 1st defendant was in control of the unsurveyed land which he sold to the plaintiff and 2nd defendant. The 2nd defendant was not aware of any other transaction preceding hers, she was not aware of any court order or even the case before she was summoned to appear in court. ....
>
> I therefore believe that she was an innocent purchaser for value and allow her counterclaim on the first part by holding so.
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> For the plaintiff, I find she indeed purchased the portion from the 1st defendant but it was sold away and somebody else already occupies. Since I have already made a declaration that 2nd defendant was an innocent purchaser for value without notice, I will not make the same declaration in favour of the plaintiff.
>
> The plaintiff can only be entitled to a refund of the purchase price paid together with the value of her development then, at the current market rates. However, this prayer was not pleaded, and cannot be given.
>
> I therefore conclude by allowing the counterclaim for a declaration that 2nd defendant was an innocent purchaser for value and without notice. The plaintiff's claim, as is, is dismissed.
>
> The 1st defendant shall bear the burden of costs to the 2nd defendant."

h. That even though no title deed to the suit property was exhibited by any of the parties before the trial court, as section 26 of the *Land Registration Act* No. 3 of 2012, or its predecessor required, it is apparent that the 1st respondent's ownership of the suit property by the time he sold it, has not been disputed by both the appellant and the 2nd respondent. Kevin Gray and

Susan Francis Gray on Elements of Land Law, 5th Edition at page 185 stated as follows on evidence of unregistered title to land:

> " Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time. These historic documents of title (or 'deeds bundles') are privately controlled, being retained normally within the custody of the proprietor of the estate to which they relate. These deeds provide the "essential indicia of title" since the information contained in them, when coupled with the fact of undisturbed possession, generally identifies the person who currently has the best 'title' to any relevant estate in the land. Title to an estate can also be claimed, however, by one who holds no supporting documentary evidence but relies instead on the sheer fact of his own possession."
>
> The trial court took the 1st respondent to have been the owner of the suit property, and therefore with capacity to sell it. I do not find any basis to fault that position.

i. The appellant's claim is that she had bought the suit property from the 1st respondent under the agreement dated the 8th August 2011, while the 1st respondent claimed that he had leased the said plot to her, and that she failed to pay the monthly ground rent. The copy of the agreement they exhibited dated 8th August 2011 leaves no doubt that it was a sale, and not a lease agreement. That position has been corroborated by the evidence of PW2, who was also a witness to the said agreement. I therefore find that the appellant had through the evidence tendered before the trial court, confirmed her averments, and had discharged her burden of proof, as required by Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya that states as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

In the case of Raila Amolo Odinga & Another versus. IEBC & 2 Others (2017), eKLR the Supreme Court of Kenya had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof:

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the appellant, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

133. It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....."

The learned trial magistrate had in her judgement come to a similar finding, but as she had already made a finding that the 2nd respondent was an innocent purchaser proceeded to hold that "The plaintiff can only be entitled to a refund of the purchase price paid together with the value of her development then, at the current market rates." However, as the appellant had not pleaded for the said refund, the learned trial magistrate held that "However, this prayer was not pleaded and cannot be given."

j. Section 7 of the *Land Control Act* chapter 302 of Laws of Kenya, provides as follows:

> "If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

That it is not clear whether the transaction between the appellant and 1st respondent over the suit property was subject to consent of the Land Control Board being obtained in accordance with section 6(1) of the *Land Control Act*. It is however apparent the appellant had not pleaded for refund of purchase price paid, but it is a fact the 1st respondent acknowledged receipt of Kshs.85,000 from the appellant, under the sale agreement of 8th August 2011. The 1st respondent then proceeded to resell the same land plus the structure erected by the 1st respondent thereon to the 2nd respondent, without the 1st respondent being compensated first, and or consent. Is it just or fair to let the appellant go without any compensation for her structure and refund of the purchase price paid, and in so doing allow the 1st respondent be unjustly enriched by keeping the whole purchase price paid for the same by the 2nd respondent? To hold so would mean the appellant must either forget about the refund and value of her investment, or consider filing another suit for the same against the 1st respondent. That would mean more expenses and delay in getting justice.

k. That while the holding by the learned trial magistrate that a party is not entitled to a relief that is not pleaded, may be correct, the court is reminded of the guiding principle under Article 159(2)(d) of *the Constitution* of Kenya, that:

> "Justice shall be administered without undue regard to procedural technicalities;"

Section 18(c) of the *Environment and Land Court Act* No. 19 of 2011 reiterates the principle at Article 159(2)(b) of *the Constitution*, while Sections 1A, 1B and 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya requires the court to inter alia facilitate a just, expeditious, proportionate and affordable resolution of civil disputes in an efficient manner, and in so doing ensure the ends of justice are met, and abuse of court process avoided. In my view, having come to the finding that the appellant was the first to buy the suit property from 1st respondent, and that the latter had resold it together with the appellant's structure thereon to 2nd respondent, without first compensating the appellant, the trial court should not have left the appellant without an order of compensation, and refund being made in his favour. To do otherwise, as the trial court did was to sanction the 1st respondent's greed and allow him to unjustly enrich himself by keeping the purchase price paid by the appellant and the value of the appellant's structure that he sold to the 2nd respondent together with the suit property.

l. While the appellant had not given any reliable valuation for the development she had erected on the suit property after buying it from the 1st respondent, PW2 produced receipts of building materials purchased totaling Kshs.54,550. DW3, the valuer gave an estimated value of the structure up to walling level to be about Kshs.536,000. While that value may not be taken to be what the appellant had actually expended, and in the absence of any other way of coming to a definite figure, and if the court was to find the 2nd respondent was an innocent purchaser for value, I would take Kshs.400,000 as a reasonable value of the structure developed by the appellant on the suit property, and order 1st Respondent to compensate the appellant that amount together with the purchase price paid, with interest at courts rates. I would also award the appellant costs as against the 1st respondent.

m. This therefore means that after close of the appellant's case the burden of proof shifted to the 1st respondent who was the original owner of the suit property. Although the 1st respondent claimed that the transaction between him and the appellant was a lease agreement, he did not produce any lease agreement in support. None of the respondents' witness corroborated the narrative that the agreement of 8th August 2011 was a lease. The issue of forged signatures and size of the plot are matters not dealt with at the trial stage, and hence this court cannot make any determinations on them at the appellate stage. The agreement dated 8th August 2011 was an agreement for sale with clear terms on the purchase price. It did not contain any provision or clause on payment of monthly ground rent. The 1st respondent had no basis of demanding from the appellant any monthly ground rent or arrears without its payment having been expressly provided for in the agreement, and he had no right to grab the plot and resell it with the development thereon to the 2nd respondent.

n. An innocent purchaser for value without notice was discussed in Katende versus Haridar & Company Limited [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

> " For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:
>
> (a) he holds a certificate of title;
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> (b) he purchased the property in good faith;
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> (c) he had no knowledge of the fraud;
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> (d) he purchased for valuable consideration;
>
> (e) the vendors had apparent valid title;
>
> (f) he purchased without notice of any fraud;
>
> (g) he was not party to any fraud."

From the evidence presented before the trial court, the 2nd respondent was not diligent in carrying out due diligence, other than appearing before the chief and relying on the 1st respondent's representation that he had a good title. The fact that the 2nd respondent appeared before the chief should have alerted her of the appellant's claim over the suit property, and the structure developed thereon. She ought to have satisfied herself that the 1st respondent had settled the appellant's claim over the suit property before she agreed to enter into a new sale

agreement with him over the same property. I find she was not an innocent purchaser for value without notice, as she knew of the appellant's prior claim.

o. The 2nd respondent's claim that she paid the 1st respondent Kshs.500,000 as purchase price for the plot has not been disputed. Her valuation of the development she completed on the plot at Kshs.800,000, as per the report produced by DW3, has not been challenged by any of the other parties. Indeed, the 2nd respondent has in her counterclaim against the 1st respondent, sought for inter alia refund of Kshs.1,300,000, being the value of her development and the purchase price of the plot. She would therefore, be adequately compensated, if granted her counterclaim. The court therefore finds that the learned trial magistrate erred in fact and in law in dismissing the appellant's claim.

p. Under Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, the cost follow the event unless where there is a good reason to depart from that general rule. I find no reason to order otherwise and the 1st respondent will bear the costs, in the main suit and counterclaim.

1. Flowing from the foregoing, the court finds and orders as follows:

a. That the judgment of Hon. Nabibya delivered on 27th October 2022, dismissing the appellant's claim and granting the 2nd respondent's counterclaim, is hereby set aside and substituted with the following orders:

i. That judgement be and is hereby entered in favour of the appellant as prayed in the plaint dated 26th May 2018.

ii. The 2nd respondent's counterclaim dated 20th July 2020, against the 1st respondent, for refund of Kshs.1,300,000, being the purchase price paid for the plot and value of the development erected thereon, is granted.

b. The 1st respondent to bear the costs for both the appellant and 1st respondent in the trial court and this appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF SEPTEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Appellant: M/s Kioko for Mutugi

1St Respondent: Mr. Mkan for Asige

2Nd Respondent: No Appearance

COURT ASSISTANT: Leakey

S. M. KIBUNJA, J.

ELC MOMBASA.