



REPUBLIC OF KENYA



KENYA LAW
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**Wanjala v Makokha & another (Environment and Land Appeal
2 of 2021) [2023] KEELC 15789 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 2 OF 2021
EC CHERONO, J
FEBRUARY 28, 2023**

BETWEEN

SAMUEL SIMIYU WANJALA APPELLANT

AND

WYCLIFF MUKENYA MAKOKHA 1ST RESPONDENT

LAND REGISTRAR, BUNGOMA 2ND RESPONDENT

*(Being an Appeal from the judgment of Hon Dennis OgaL, Senior Resident
Magistrate, Kimilili delivered on 16.06.2021 in CMELC NO 3 of 2017)*

JUDGMENT

Background

1. The appellant, Samuel Simiyu Wanjala who was the plaintiff in the former suit in Kimilili CM-ELC No 3 of 2018 (Formerly bungoma ELC no 28 of 2017) while the respondents Wycliff Mukenya Makokha and the Registrar, Bungoma were the defendants. By a plaint dated March 9, 2015, the plaintiff averred that he was the absolute registered owner of a parcel of land described as Kimilili/Kimilili/4210 having acquired the title for valuable consideration in the year 2006. He alleged that in 2012, the first defendant/respondent working in cahoots with the second defendant/respondent fraudulently transferred the land from him to the 1st defendant/respondent. He further averred that the defendant took advantage of his schizophrenic disorder to con him off his land. He therefore sought orders for *inter-alia* rectification of the Register to remove the 1st defendant/respondent's name from land parcel No Kimilili/Kimilili/4210
2. The 1st defendant filed defence and counterclaim to the suit on March 19, 2015. In his defence, the 1st defendant/respondent averred that he purchased the said plot for a consideration of Kshs 853,000/ that was paid in terms of shop stock worth Kshs 753,000/ and cash of Kshs 100,000/. The 1st defendant/



respondent further averred that having obtained good Title, he is entitled to vacant possession and that the plaintiff ought to be evicted.

3. The case was fixed for hearing on April 13, 2021 and only the plaintiff was in attendance. He testified and closed his case. After the trial Magistrate was satisfied that the defendants were duly served and no explanation was given for their non-attendance, their defence and counter-claim was dismissed for non-attendance and for want of prosecution
4. After Judgment was delivered by the trial Magistrate dismissing the suit with cost on June 16, 2021, the plaintiff/Appellant was aggrieved and preferred the present Appeal on the following five grounds;
 1. The learned trial Magistrate erred in law and in fact when he failed to find that the Appellant had proved his case against the Respondents on a balance of probabilities.
 2. The learned trial Magistrate erred in law and in fact when he failed to find that the Appellant had proved fraud beyond reasonable doubt.
 3. The learned trial Magistrate erred in law and in fact when he found that evidence to show that at the time the Appellant was incapable of transacting or that his consent was obtained by trickery since he was mentally unsound mind was never tendered yet the Appellant produced exhibits 1 & 2 confirming that he was of unsound mind at the material time.
 4. The learned trial Magistrate erred in law and in fact in failing to understand the plaintiff evidence was stood uncontroverted after the defendants failed not to attend the hearing of the case.
 5. The learned trial Magistrate erred in law and in fact when he failed to properly form and analyse the issues for determination and thereby arrived at an erroneous decision.
4. When this Appeal came up on October 26, 2022 for directions, the parties agreed by consent to canvass the same by written submissions.

Appellant's Written Submissions

5. The Appellant through the firm of M/s Were & Co Advocates submitted on all the five grounds as follows;
 1. The learned trial Magistrate erred in law and in fact when he failed to find that the Appellant had proved his case against the Respondents on a balance of probabilities.

On this ground, the Counsel for the Appellant submitted that the Appellant was initially the registered owner of the suit land and produced a Certificate of official search as P-Exhibit No 3. He also produced another Certificate of official search showing that the land was transferred to the Respondent
 2. The learned trial Magistrate erred in law and in fact when he failed to find the Appellant had proved fraud beyond reasonable doubt

The Appellant through Counsel submitted that the Appellant proved his claim after producing a copy of Police Abstract dated June 5, 2012 from Kimilili/Kimilili/4210 and a letter by the DCIO Bungoma East. He also referred to P-Exhibit No 1 & 2 on page 178 and 179 of the record of appeal which were not controverted.
 3. The learned trial Magistrate erred in law and in fact when he found that evidence to show that at the Appellant as incapable of transacting or that his consent was obtained by trickery since



he was mentally unsound mind was never tendered yet the Appellant produced Exhibits 1 & 2 confirming that he was of unsound mind at the material time.

6. On this ground, the Counsel submitted that there was overwhelming evidence on record to prove that the Appellant was incapable of transacting and/or that his evidence was obtained by trickery since he was mentally unsound. He submitted that the Appellant produced p-Exhibits 1 & 2 confirming that he was mentally unsound. He referred to P-Exhibit 1 which is a letter by the medical superintendent Webuye Hospital showing the Appellant mental state was wanting. He also referred to P-Exhibit 2 which is a copy of a card showing that the Appellant was a member of National Consent of Persons with Disabilities Registration Number NCPWDPH44946 HQS disability is classified as mental. The Counsel further referred to P-Exhibit No 8 which is a letter dated June 18, 2013 from the Chief, Kimilili Town confirming that the Appellant is a person of ill health mental.

4. The learned trial Magistrate erred in law and in fact in failing to understand the plaintiff evidence was stood uncontroverted after the Defendants failed not to attend the hearing the case.

He submitted that the Appellant's case was uncontroverted and that the court cannot substitute itself and become the Respondent, being an independent arbitrator.

5. The learned trial Magistrate erred in law and in fact when he failed to properly form and analyse the issues for determination and thereby arrived at an erroneous decision.

The Counsel cited Order 21, Rule 4 *CPR* where he submitted that the same states that judgments in defended suit shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

Respondents' Submissions

7. The respondents' Counsel did not file submissions to this appeal

Analysis And Determination

8. I have considered the record of appeal, the rival submissions, and the law applicable.

The role of the superior court as the first appellate court was expressed in the case of *Selle & Another v Associated Motor Boat Co Ltd & Another* (1968) EA 123 as follows;

“---this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such 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 witnesses and should make due allowance in this 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

9. From the five grounds of appeal, the Appellant appears to complaint that the learned trial Magistrate did not put into consideration his evidence which was uncontroverted as the case proceeded Ex-parte,



10. A glance at the impugned Judgment clearly shows that the learned trial Magistrate analysed the evidence which was not challenged as the case proceeded Ex-parte. The trial Magistrate even framed two issues flowing from the pleadings for determination as follows;

1. Whether the first defendant fraudulently transferred PW1 Parcel of land Kimilili/ Kimilili/4210 to himself?
2. Who shall pay for costs of the suit?

11. On the first issue, the trial Magistrate at page 2 of the impugned Judgment stated as follows;

“On issue 1. PW1 testified that the first defendant fraudulently transferred his parcel of land to himself. He claimed that while in cahoots with the second defendant the parcel of land was transferred without a valid sale agreement, transfer forms and relevant consents from the land control board. Its trite law that parties are bound by their pleadings. The plaintiff in his plaint at paragraph 6 pleads fraud and at paragraph seven pleads incapacity to transact on account of a mental disorder. I am of the view that the plaintiff was thus supposed to lead evidence to show that at the time he was incapable of transacting or that his consent was obtained by trickery since he was mentally unsound. That kind of evidence was never tendered.

12. At page 3 of the impugned judgment, the trial Magistrate continued in his analysis and stated;

“In this case, the plaintiff pleaded that the first defendant conspired with the second defendant and fraudulently transferred his land to the first defendant. It therefore, means that the second defendant similarly acted fraudulently. Particulars of fraud on the part of the second defendant were not pleaded. The plaintiff therefore failed to lay a basis upon which he would tender any evidence against the second defendant on the issue of fraud.

He relied in the case of Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others (1996) KLR”.

Suffice to state that the document produced by the plaintiff/Appellant before the trial court as P-Exhibit 1 which is a letter dated October 24, 2021 by the medical Superintendent, Webuye District. I find that the trial Magistrate was properly guided in not considering the contents thereof since the maker was the proper person to produce the same and be cross-examined on the veracity of the contents thereof. Without calling the maker, that exhibit in my view carried no evidentiary value. The same applies to P-Exhibit No 2 & 8.

13. From the foregoing, I am satisfied that the learned trial Magistrate considered all the evidence and arguments of the parties as well as submissions and applied the relevant law properly before reaching her conclusion. I find no basis to interfere with the determination of the learned trial Magistrate. Accordingly, this appeal is found to lack merit and is hereby dismissed with costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH FEBRUARY, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Ogaka holding brief for Appellant



Mr. Kundu for Respondent.

C/A Joy.

