Kasera & another v Richard (Civil Appeal 52 of 2018)
[2022] KECA 1025 (KLR) (23 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 52 OF 2018

PO KIAGE, K M'INOTI & M NGUGI, JJA

SEPTEMBER 23, 2022

BETWEEN

CHARLES ODHIAMBO KASERA ..... 1ST APPELLANT

CATHRINE ACHIENG ODHIAMBO ..... 2ND APPELLANT

AND

SALOME NAFULA RICHARD ..... RESPONDENT

(Appeal from the Judgment and Decree of the Environment and Land Court at Bungoma (Mukunya, J.) dated 27th February 2018inE.L.C.C. No. 51 of 2017)

JUDGMENT

JUDGMENT OF M'INOTI, JA

1. On April 3, 2017, the appellants, Charles Odhiambo and Catherine Achieng Odhiambo, filed a suit in the Environment & Land Court at Bungoma for eviction of the respondent, Salome Nafula Richard from the parcel of land known as No. E Bukusu/S. Kanduyi/4147 (the suit property).

2. They pleaded that they were the duly registered proprietors of the suit property, having purchased the same from the respondent's brother, David Lumbasi Walusekhe (David) and nephew, Evans Oyoo Soita (Evans). In addition to the order for eviction, the appellants prayed for costs of the suit.

3. In her defence dated April 26, 2017, the respondent pleaded that the appellants' registration as proprietors of the suit property was tainted by fraud and illegality. She averred that the suit property belonged to her late mother, Nambuya Nekesa Grace (Grace) who purchased it from one Mumaina Wabuke. The family lived on the suit property but prior to its purported sale to the appellants, her brothers, David and Jamin Soita Walusekhe (Jamin) stole the title and had the suit fraudulently registered in their names, which forced their mother to register a caution on the title.

4. The respondent further pleaded that at the time of the purported sale of the suit property to the appellants, Jamin was dead and there was no administrator appointed for his estate. In the particulars of illegality and fraud, the respondent pleaded that the appellants, who were her neighbours, were well

aware that the suit property did not belong to David and Evans and that at the time of the purported sale, there was no administrator for the estate of Jamin.

5. Finally, the respondent pleaded that the suit property was family land, having been bought by Grace, and that David and Jamin held the same in trust for her and her siblings. She averred that even after the fraudulent registration of David and Jamin as proprietors, the monthly rental income generated from the suit property was shared among the members of the family. The learned judge heard the dispute in which the 1st appellant testified on behalf of the appellants, whilst the respondent testified on her behalf and called one witness. In the judgment impugned in this appeal, the learned judge held that David and Jamin were registered co-owners of the suit property on May 5, 1988 and that Jamin died on March 13, 2007. By the time David and Evans purported to sell the suit property to the appellants on November 17, 2016, there was no administrator for the estate of Jamin. The learned judge further found that as neighbours of the respondent, the appellants knew that there were family members living on the suit property and that one of the co-owners was dead. Additionally, the learned judge found that no consent had been obtained from the Land Control Board as required by the *Land Control Act* and therefore the transaction between David and Evans and the appellants was null and void. Accordingly, he dismissed the appellants' suit with costs.

6. The appellants were aggrieved and preferred this appeal. Although in their memorandum of appeal they tabulated nine grounds of appeal, in their written submissions and oral highlights, they reduced the grounds of appeal to four, in which they contended that the learned judge erred by:

    i) holding that the appellants had not proved their case on a balance of probabilities;

    ii) holding that the appellant's title to the suit property was illegal and unlawful;

    iii) taking into account irrelevant and extraneous matters; and

    iv) delivering an unreasoned and unjustified judgment.

7. On the first ground, the appellants, represented by Mr. Sifuma, learned counsel, submitted that after the sale of the suit property to the appellants, they were duly registered as proprietors and that by dint of section 26 of the *Land Registration Act*, 2012, their certificate of title must be taken as prima facie evidence that the appellants were the absolute and indefeasible owners of the suit property. Counsel added that the suit property was transferred lawfully to the appellants in accordance with section 43(3) of the *Land Act, 2012*, and therefore the learned judge erred by concluding that the transfer was unlawful, illegal or irregular.

8. Regarding the second ground, the appellants submitted that the learned judge erred by failing to appreciate that the appellant's ownership of the suit property was joint proprietorship and that upon the death of Jamin, David, as the surviving proprietor, became the sole owner of the suit property. In support of that contention, the appellants relied on section 102 (a) and (b) of the *Registered Land Act*, cap 300 Laws of Kenya, (repealed) as well as the decision of the High Court in *In re Estate of Dorica Lumire Mapesa (Deceased)* [2018] eKLR on the distinction between joint proprietorship and proprietorship in common.

9. Turning to the third ground of appeal, the appellants submitted that the learned judge took into account extraneous matters such as lack of consent from the Land Control Board, which was neither pleaded nor argued by any of the parties. They further submitted that the learned judge erred by speculating on the circumstances under which the caution placed on the suit property by Grace was removed and also by blaming the appellants for the same without any evidence.

10. On the last ground of appeal, the appellants made a bare statement that the learned judge "failed to write and pronounce a well reasoned and justified judgment" without demonstration of the manner in which the judgment was deficient.

11. On her part, the respondent, who was represented by Mr. Khakula, learned counsel, opposed the appeal. Relying on her written submissions, counsel argued that the learned judge carefully considered the evidence adduced by both sides, summarised the same and properly concluded that the suit property was family land which was irregularly sold by David and Evans to the appellants.

12. On the legality of the appellants' title to the suit property, the respondent submitted that she adduced cogent evidence which demonstrated that the appellants were not innocent purchasers for value without notice because they were neighbours and knew that the suit property was family land which was developed and occupied by the respondent and other members of her family. It was further contended that the surreptitious removal of the subsisting caution by the appellants and the purported sellers of the suit property was further evidence of the irregularity of the transaction. The respondent also questioned how Evans, who was not an administrator of the Estate of Jamin, could have been a seller of the suit property.

13. Regarding the contention that the learned judge erred by failing to appreciate the distinction between joint proprietorship and proprietorship in common, the respondent submitted that the issue was of no moment granted the other irregularities that were proved pertaining to the sale and registration of the suit property in the names of the appellants. Accordingly, the respondent urged us to find the appeal bereft of merit and to dismiss it with costs.

14. I have carefully considered the record of appeal, the judgment of the trial court, the grounds of appeal, the submissions by the parties and the authorities relied upon. I have in particular re-evaluated the evidence that was adduced in light of the pleadings. I shall consider the four grounds of appeal in the order they were addressed, save that I shall reserve the first issue for final determination.

15. The first ground of appeal is whether the learned judge erred by treating the David and Jamin as proprietors in common instead of joint proprietors. In the pertinent part of the judgment, the learned judge expressed himself thus:

> " There is no doubt that the suit land was registered in the joint names of two people. David Lumbasi Walusekhe and Jamin Soita Walusekhe. Jamin died on 30/3/2007. No one has ever taken any letters of the administration of his estate. Since the suit land was jointly owned, no sale of his joint share could be done without first having one appointed to administer his estate. The purported sale to the plaintiffs of the whole plot was therefore illegal."

16. Section 101(1) (a) of the repealed *Registered Land Act* required registration of two or more persons to show whether those persons were registered as joint proprietors or proprietors in common. Where such persons were registered as proprietors in common, section 101(1) (b) of the same Act further required the share of each proprietor to be shown.

16. Section 102 of the same Act explained away the distinction between joint proprietorship and proprietorship in common. In a joint proprietorship, none of the proprietors is entitled to any separate share in the property. Accordingly, upon the death of one of the joint proprietors, his interest vests in the surviving proprietor. However, in respect of proprietorship in common, section 103 of the Act provided that each proprietor is entitled to an undivided share in the whole property, and that upon the death of one of the proprietors, his share is to be treated as part of his estate.

17. The evidence on record shows that David and Jamin were registered as absolute proprietors of the suit property under the repealed *Registered Land Act* on May 5, 1988. There was no indication in the register of their respective shares of the suit property, thus clearly suggesting that they were joint proprietors rather than proprietors in common. The Court of Appeal in *Mukazitoni Josephine v. Attorney General* [2015] eKLR, the High Court in *In re Estate Dorica Lumire Mapesa (Deceased)* [2018] eKLR, and the Environment and Land Court in *Josephat Thuo Githachuri v. James Gaitho Kibue & 2 others* [2021] eKLR) all expressed the view that where two or more proprietors were registered without any indication of their respective shares, they were to be treated as joint proprietors rather than proprietors in common. The contrary view was expressed by the Environment and Land Court in *Moses Bii v. Kericho District Land Registrar & another* [2015] eKLR. I am not persuaded by the latter opinion for the following reason. If it was intended that where the respective shares of two or more proprietors was not disclosed such proprietors should be treated as proprietors in common, then there would have been no logical reason why the statute expressly required the respective share of proprietors in common to be indicated. If the respective shares were not indicated as required by the statute, I cannot see how the two or more proprietor would still be treated as tenants in common, absent an express provision of the law.

18. The *Land Registration Act*, 2012, which repealed the *Registered Land Act*, cap 300, retained the same principles on joint proprietorships and proprietorships in common. section 91(3) now requires registration of two or more persons to show whether they were registered as joint tenants or tenants in common, and if they are registered as tenants in common, the share of each tenant. By dint of section 91(4) (b) of the 2012 Act, upon the death of a joint tenant, his interest is to vest in the surviving tenant. Similarly, under section 91(5) upon the death of one of the tenants in common, the deceased's share is to be treated as part of his estate.

19. One of the main changes introduced by the *2012 Act* was section 91(2) which now provides a default principle as follows:

> " Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares". (Emphasis added)

20. Thus, there was created by the *2012 Act* a rebuttable presumption that where the shares of two or more proprietors were not disclosed, the proprietors were deemed by law to be proprietors or tenants in common. If the presumption is not rebutted, upon the death of one of the tenants in common, his share vests in his estate rather than in the surviving tenant.

21. The question that arises then is whether the *Registration of Land Act*, 2012, applies to this appeal. The transitional provisions of the 2012 Act, in particular section 105 (1)(a) (i), provides that on the effective date, if the title to a parcel of land is comprised in a grant or certificate of title registered under the repealed Registered Land Act, the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under the 2012 Act. The Act defines "effective date" to mean the date of commencement of the Act, which is 2nd May 2012. However, I am not persuaded that the 2012 Act is applicable to this appeal, even though the agreement between the appellants and David and Evans was entered into on 17th November 2016, for the following reason. Jamin, one of the joint proprietors with David died on March 13, 2007 before the 2012 Act came into effect. The effect of his death was to vest his share in David as the surviving joint proprietor. It is trite that a law will not be given retroactive effect if it is likely to affect or interfere with crystallised or vested legal rights. (See *Samuel Kamau Macharia & another v. Kenya Commercial Bank Ltd & others* [2012] eKLR).

22. Accordingly, I would agree with the appellants that the learned judge erred by treating the joint proprietorship of David and Jamin as proprietorship in common and by holding that the share of Jamin devolved to his estate and that to sell the same, Evans required a grant of administration. To the extent that Jamin's share devolved to David as the surviving proprietor, Evans was a totally unnecessary and inconsequential party to the agreement for sale. However, as I hope to demonstrate below, this is not the end of the matter.

23. The second ground is whether the learned judge based his judgment on irrelevant or unpleaded issues. Here the appellants' compliant is that the learned judge determined issues that were neither pleaded nor address by the parties, such as lack of consent from the Land Control Board and the circumstances under which the caution placed on the title by Grace was removed. It is readily apparent that neither of the parties raised the question of lack of consent from the Land Control Board in their pleadings. It is also evidently clear that none of the parties addressed that issue in their evidence. I would agree with the appellants that it was remiss for the learned judge to introduce and determine the suit on an issue that none of the parties raised or addressed. In *Chumo Arap Songok v David Keigo Rotich* [2006] eKLR, this Court held as follows on this issue:

> " The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties."

24. Similarly, in *Baber Alibhai Mwaji v Sultan Hashim Lalji & another*, CA No. 296 of 2001, the court stated:

> " A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."

25. (See also *Odd Jobs v Mubia,* [1970] EA 476 and *Mapis Investment (K) Ltd v Kenya Railways Corporation* [2005] 2 KLR 410).

26. Regarding the removal of caution that was placed on the title of the suit property by Grace, I cannot see how the learned judge can be faulted. The issue of removal of the caution was raised by the respondent both in her pleadings and evidence. She was relying on the surreptitious removal of the caution, without any reference to Grace or her family, to demonstrate that the registration of the suit property in the names of David and Jamin and the subsequent sale of the same to the appellants was fraudulent. The evidence on record shows that Grace placed the caution on the title on 30th June 1997 and the same was removed on 5th December 2016, a few days after David and Evans entered into the agreement to sell the suit property to the appellants. The learned judge found it telling that the caution was removed within such a short time after David and Evans had undertaken, in clause 8 of the agreement for sale, to remove the caution to facilitate transfer of the suit property within 30 days. The learned judge also found that the removal of the caution was unprocedural and did not follow the provisions of the law. In the circumstances, I am satisfied that the learned judge cannot be faulted for surmising that it was clearly David and Evans who were behind the unprocedural removal of Grace's caution in a bid to fulfil their undertaking to the appellants in the agreement for sale. I do not find any merit in this ground of appeal.

27. Turning to the appellants' assertion that the learned judge delivered an unreasoned and unjust judgment, I have already stated that beyond a mere bland and fleeting statement, the appellants did

not demonstrate in what way the judgment was unreasoned or unjust. Accordingly, I do not intend to dwell further on this unmerited ground of appeal.

28. The last ground is whether on the whole, the learned judge erred in holding that the appellants did not prove their case to warrant an order for eviction of the respondent from the suit property. In her defence, the respondent contended that the sale and transfer of the suit property to the appellants was fraudulent and illegal and that the appellants did not obtain a good title. She further contended that the suit property belonged to Grace and the registration of David and Jamin as proprietors was fraudulent and that the two held the property in trust for the family of Grace. She adduced evidence which showed that the suit property was being used by members of Grace's family and that rental proceeds therefrom was shared between the family members, rather than by David and Jamin alone. She also adduced evidence which showed that the appellants and her family were neighbours and further that the appellants knew the suit property was family land. The appellants themselves readily admitted that to their knowledge, the suit property was occupied by members of Grace's family. The surreptitious removal of Grace's caution added to this chain of irregularities.

29. Taking all the foregoing into account, I do not see how the learned judge can be said to have erred by holding that the appellants did not prove their case for eviction of the respondent from the suit property. Further, in light of the overwhelming evidence of irregularities on record pertaining to the sale of the suit property, section 26 of the *Land Registration Act*, 2012, does not avail the appellants. Their certificate of title was only prima facie evidence of their ownership, but the validity of the certificate was fully and soundly rebutted. Additionally, it must be borne in mind that article 40(6) of *the Constitution* does not protect title to property which has been unlawfully acquired.

30. Ultimately, I come to the conclusion that although the appellants have succeeded in two of the four grounds of appeal, on the whole the learned judge did not err by finding that the appellants were not innocent purchasers for value without notice and that the purported sale of the suit property to the appellants by David and Evans was unlawful. In these circumstances, I would therefore dismiss the appeal with the order that each party bears its own costs in the trial court and in this Court.

JUDGMENT OF KIAGE, JA

1. I have read in draft the judgment of my brother M'Inoti, JA. with which I am in full agreement and have nothing useful to add. The final orders shall be as he proposes, Mumbi Ngugi, JA being also agreed.

CONCURRING JUDGMENT OF MUMBI NGUGI, JA

1. I have had the benefit of reading in draft, the judgment of my brother, M'Inoti, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

Dated and Delivered at Nairobi this 23rd day of September, 2022

K. M'INOTI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR