



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 42 OF 2012.

BENARD SIMIYU WANYAMA.....APPLICANT

VERSUS

EMILY NAFULA KHAEMBA.....RESPONDENT

JUDGMENT

[1]. The appellant filed this Appeal and set four grounds of Appeal as follows;

1. The learned trial Magistrate erred in law and fact when she failed to appreciate that the appellant was in actual possession and occupation of land Parcel No. E. Bukusu/E. Sang'alo/287 the portion that later came to be known as E. Bukusu/E. Sang'alo/2782 with the knowledge of the respondent the magistrate failed to apply the principle of Caveat Emptor.

2. The learned trial magistrate erred in her judgment when she failed to consider section 30(g) of the Land Registration Act Cap 300 which protected the rights of the appellant against subsequent purchaser of land parcel No. E. Bukusu/Sang'alo/287 emerged.

3. The learned trial magistrate failed to apply the principles of equity when issuing the equitable remedy and thus perpetuated injustice against the appellant.

4. The learned trial magistrate failed to critically analyze the evidence placed before her so as to arrive at the decisive conclusive matter.

[2]. In his submission the appellant argued that the land purchased was encumbered in that there was grown crops on the land and that the appellant was in full occupation of the land and that the court erred in not appreciating the principle of Caveat Emptor.

[3]. It is also argued that the learned trial Magistrate did not consider Sec. 30(g) of the Registered Land Act and that she therefore failed to appreciate the rights of the appellants arising out of the said Section 30(g) of the RLA Cap 300 (now repealed).

[4]. Finally the Appellant also argued that the fact that he was prosecuted and convicted with the offence of forcible detainer Vide Bungoma Cr. Case No. 429 of 2005 does not in any way affect the rights of the Appellant pursuant to Sec. 30(g) of the Land Registration Act. The appellant relied on the case of *Mbui Mukangu -Vs- Gerald Mutwiri Mbui* referring to *Kneller, J's Judgment in Esiroyo Vs. Esiroyo [1973] E.A. 388* on overriding interests which is said to be equitable rights.

[5]. The respondent in reply made oral Submissions and argued all grounds collectively. He she argued that the respondent was the registered owner of East Bukusu/East Sang'alo/2782. The documents of title were annexed to the record and the certificate of official search. The respondent stated that the she purchased the land from a third party, the father of the appellant who subdivided his land obtained the necessarily consents and the suit land was created and transferred to the respondent. The appellant argued that after the land was registered

in her name, the appellant trespassed into her land and purported to build permanent structures on the land. The respondent complained to the police. The appellant was charged with the offence of forcible detainer in Bungoma SPM Criminal Case No. 2063 of 2006 and was convicted and fined Kshs.5,000/=. The proceedings and Judgment were produced and are on page 65 of the record of Appeal. It was argued that this is a final Judgment under Sec. 47A of the evidence Act Cap 80. It was also argued that if he was entitled to the land as he claims, he should not have been convicted of the Criminal case aforesaid. The respondent also argued that the appellant had earlier filed a case in Bungoma HCCC No. 58 of 2006 in which he sought orders for injunction a declaration that the respondent (his father) held title East Bukusu/East Sang'alo 2782 in trust for him. He also sought for a cancellation of title. However, on 24/9/2014 the applicant withdrew that case with no orders as to costs against the respondents. It is the respondents case that therefore, the title of the respondent was not impeached and that he is entitled to quiet enjoyment of the suit land.

[6]. The respondent said that the land of the appellants father was 9.9 acres and not 35 acres as alleged by the respondent. The respondent further argued that the respondent cannot benefit from the provisions of Sec. 30(g) of the replaced Cap 300 because the inquiry showed that he was a trespasser and was convicted with the offence of forcible detainer. In any case, his father gave him the 8 acres of that land. It was argued that the authorities sighted herein cannot assist the appellant since he was a trespasser on the suit land.

[7]. I have looked at the Judgment of the learned Magistrate and the argument advanced to arrive at her Judgment. I cannot fault her reasoning or findings. All the due processes were followed in creating the suit Land. The respondent was issued with a clean title. The appellant filed a suit against his father and the respondent herein which he withdrew. There is a conviction against him for forcible detainer when he attempted to build structures on the suit land. Meaning that he was not entitled to the suit land. He never appealed against the Criminal Conviction. The learned Magistrate did not err or misdirect herself. The appeal is without merit. I dismiss it with costs.

Judgment read in Open Court in the presence of the Counsels.

Dated at Bungoma this 28th day of March, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy: Court clerk

Madam Isiye for the appellant

Mr. Murunga for the Respondent



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