Kinyanjui v Njoki (Civil Appeal 298 of 2023)
[2024] KEHC 9725 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9725 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 298 OF 2023

AC BETT, J

JULY 29, 2024

BETWEEN

DANIEL MWANGI KINYANJUI ..... APPELLANT

AND

MARIAM NJOKI ..... RESPONDENT

(Being an appeal from the Judgement of Honorable J.A. Agonda (PM) delivered on 20th June 2023)

JUDGMENT

1. By a plaint dated 24th February 2022 first filed in the Environment and Land Court, the appellant filed suit against the respondent, who he claimed was his former wife pursuant to a decree dated 21st December 2019 issued in Ruiru SPMC Divorce Cause No. 12 of 2019. The appellant prayed for orders compelling the land Registrar, Ruiru to remove a caution placed by the respondent upon the land parcel known as L.R NO. Ruiru/Ruiru West Block 3/641.

2. The appellant also sought a permanent injunction against the respondent restraining her from placing any inhibition, caution or restriction upon the said land (hereinafter referred to as the suit land). The appellant stated that he needed to dispose of the land to raise funds to attend to his mother's medical needs but after securing a buyer, he discovered that the respondent had placed a caution on the land which was not matrimonial property as the respondent neither contributed towards its purchase nor invested in the same in any way.

3. The respondent filed a defence dated 6th December 2022 in which she denied ever being served with the divorce proceedings. She averred that she rightfully placed a caution over the suit land. She contested the jurisdiction of the Environment and Land Court to hear and determine the rights of parties to property acquired during the subsistence of a marriage.

4. The appellant in his reply to the defence, reiterated his averments in the plaint that the suit land was not matrimonial property.

5. After hearing the parties, the trial court delivered judgement in favor of the respondent and dismissed the appellant's suit.

6. Aggrieved by the said judgement and the subsequent decree, the appellant filed a memorandum of appeal listing eighteen (18) grounds of appeal which I will not set out seriatim.

7. The appellant faulted the trial magistrate on many fronts. First, he said that the trial magistrate erred in failing to find that he had proved his case on a balance of probabilities. Secondly, he faulted the trial magistrate for granting orders that were not prayed for by either party in the suit. Thirdly, he faulted the trial magistrate for making adverse orders against a third party who was not mentioned in the pleadings nor according the said third party an opportunity to be heard. Further, that the learned trial magistrate erred by failing to appreciate the laid-out procedures in law when granting orders of eviction against a party. The appellant averred that the trial magistrate erred in making a finding on issues of fraud and illegality in the manner of transfer of the suit property when the same was never specifically pleaded. It was also his contention that the trial magistrate erred in law and in fact in directing the Land Registrar to reconstruct or restore the original registrar when the caution on the suit land had been properly removed pursuant to a valid court order in Ruiru ELC Misc. Application No. E005 of 2022.

8. I have carefully considered the long-winded memorandum of appeal and I am of the opinion that the above summation of the grounds of appeal cover the entire scope of the appellant's grievances.

9. Under Order 42 Rule 1 of The *Civil Procedure Rules*, an appeal is supposed to be brief, concise and to the point. In the case of *Robinson Kiplangat Tuwei -vs- Felix Kipchoge Limo Langat* [2020] eKLR, the Court of Appeal emphasized the need for brevity in a memorandum of appeal when it stated as follows: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgement is impugned. What we have before us are some 18 grounds of appeal that lack forms and are repeatedly tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he had condensed the grounds of appeal. This court has repeatedly stated that counsel must take time to draw the memorandum of appeal in strict compliance with the rules of the court."

10. Many times, the courts are forced to deal with lengthy, repetitive grounds of appeal, which the appellants then say on submission that they are "condensing" into fewer and more manageable paragraphs and the court is left to wonder why the appellant did not condense the grounds of appeal from the outset so as to save on time.

11. The court directed that the appeal be disposed of by way of written submissions.

12. It was not in dispute that the appellant and the respondent got married in 1998 and stayed happily together until 2019. It was also not in dispute that the suit property and two other properties adjacent to it were acquired during the subsistence of the marriage. What was in dispute was whether the respondent contributed to the acquisition of the suit property and whether the appellant was entitled to the prayers sought.

13. Upon perusing the record of appeal and the submissions filed by the parties, I have deduced that the appeal before this court raises the following issues: -

    a. Whether the trial court had power to grant orders other than those prayed for in the plaint.

    b. Whether the appeal should be allowed.

    c. Whether the appellant is entitled to the prayers made in the lower court.

14. It is well established that a claimant in a civil suit first approaches the court by way of pleadings. The pleadings can be in the form of a plaint, notice of motion, originating summons or petition. It is also well established that the respondent in turn will file their response by way of defence, replying affidavit, or answer to petition. Once parties have filed their pleadings they are bound by those pleadings. The pleadings notify the opposing party what they should expect at the hearing. A claimant is then expected to lead evidence to the satisfaction of the court that his prayers as pleaded are meritorious. A party is therefore dependent on his pleadings to secure the orders prayed for and the court cannot award any order not specifically prayed for.

15. It has been held that a court has no jurisdiction to grant a prayer that is not pleaded. In the case of *Caltex Oil (Kenya) Limited -vs- Rono Limited* [2016] eKLR, the Court of Appeal held as follows: -

> " In the plaint, we have noted that the respondent never claimed to have suffered any damages as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead or a total disorder and abuse of the judicial process."

16. In the present appeal, the appellant faults the trial magistrate for granting orders to the respondent when the respondent never sought the same. From the Record of Appeal, it is apparent that the respondent, in opposing the appellant's prayer for removal of the caution, filed a defence dated 6th December 2022. In the defence, she specifically averred that land parcel no. Ruiru/Ruiru Westblock 3/641 is matrimonial property. She denied all other averments by the respondent and urged the court to dismiss the claim with costs while maintaining that the Environment and Land Court was not seized with the jurisdiction to hear and determine rights to parties to property acquired during subsistence of marriage.

17. Despite asserting that the suit property was matrimonial property, the respondent never lodged a counterclaim to pray for declaratory orders to affirm her position. In the end, it was only the appellant's prayers which the court was left to consider whether to grant or not to grant.

18. The trial court in its judgement rendered itself thus:

> " 1. A declaration be and is hereby issued that the suit property Ruiru/Ruiru Westblock 3/461 is matrimonial property.

2. An order for the land registrar to reconstruct and/or restore the original register to L.R. NO. Ruiru/Ruiru Westblock 3/641 be registered in the names of the plaintiff and defendant as the lawful properties of the suit land.

3. The interested party herein is directed to move out of the suit property within a period of 60 days from the date hereof and remove the illegal structures erected thereon. Failure to comply with the above directions, the defendant be at liability to evict the interested party and demolish the illegal structures erected thereon. The defendant herein to serve the plaintiff and interested party with the relevant notice.

4. The costs of the suit is award to the 1st (sic) defendant to be paid by the plaintiff."

19. In its determination, the trial court needed to confine itself to the prayers made by the appellant and the merits or demerits thereof. Instead, the trial court laboriously plunged into a discourse on matrimonial property and ended up making orders which were so far removed from the appellant's prayers, that it inevitably drove the appellant to the appellate court. It is the court's finding that in granting the orders in favor of the respondent who had not made a prayer for even a single one of the orders granted, the trial court was devoid of jurisdiction and therefore the said judgement is a nullity.

20. The said orders resulted in the confusion and disorder envisaged in the *Caltex Oil (Kenya) (supra)* case. Emanating from the said order, a decree was drawn in which a third party who was hitherto not named as a party nor present during the proceedings was now named as a defendant and issued with 60 days' notice to vacate the suit land or be evicted. This goes against the cardinal principle of audi alteram partem which requires every party to be heard before adverse orders can be made against them.

21. Turning now to the second issue as to whether to allow the appeal, the court has to determine whether the appellant proved, on a balance of probabilities, that he was entitled to the prayers sought.

22. The trial court made a finding of fact regarding the circumstances of the parties herein. She found that the suit property was matrimonial property in that it was acquired during the subsistence of the marriage and that the respondent contributed to it by taking care of the children of her marriage with the respondent. In her evidence, the respondent had stated that she had planted a fence and used to cultivate crops on the land. The appellant admitted that he sold the suit land with his second wife. He further stated that the respondent stays with the second wife in the plots that were sold. The appellant's evidence corroborated the respondent's evidence that the suit land was matrimonial property and that she lives in a house constructed on the suit land whose balcony was demolished by a third party under the appellant's instructions. It therefore emerged that the parties' matrimonial home was established on the suit land. The finding by the trial court was guided by the evidence adduced.

23. The trial court went into a well-researched and elaborate discourse on the position of the law regarding matrimonial property which this court does not find necessary to re-visit. The court rightfully established that the respondent had a spousal interest in the suit land, and it should not have been disposed without her consent. No matter how noble the cause was, the appellant was under a legal obligation to secure the respondent's consent before disposing of the suit land since it was their matrimonial home.

24. The trial court cited the case of *Mugo Muriu* [2017] eKLR where the court held as follows: -

> " Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the

> property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest. The evidence in this appeal shows that the appellant either did not do due diligence or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The Appellant took the property subject to Elizabeth's overriding interest in it and Elizabeth being a part owner could not be removed from the property.....In this appeal, the Appellant acquired the title registered in the name of S.B. subject to the registered interest of Elizabeth. In effect, the Appellant neither obtained legal title of the property as notionally it was overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth's overriding encumbrance."

25. In the end, this court finds that the appellant did not prove, on a balance of probabilities, that he was entitled to the prayers made for removal of the caution registered by the respondent against the suit property.

26. The appeal is partially allowed. I therefore set aside the judgment and decree dated 20th June 2023. I disallow the appellant's prayer for judgement to be entered as prayed in his plaint and dismiss his suit with costs.

27. The respondent shall have costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

Kimati holding brief for Ms. Nyongesa for appellant

Ms. Waithera Mwangi for respondent

Court Assistant: Polycap Mukabwa