



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 131 OF 2003

BETWEEN

GERVAS MUTISO.....APPELLANT

VERSUS

THOMAS MAINGI MUIA

KAVUU MUIA

PAUL KAMULA MUIA

WANDII NDAVI

WAYUA KITETE.....RESPONDENTS

(Being an appeal from Judgment of the Resident Magistrate Court at Makindu delivered in the Civil Case No. 13 of 2000 on 21st November 2003 by Resident Magistrate R. K. Mibei)

BETWEEN

THOMAS MAINGI MUIA

KAVUU MUIA

PAUL KAMULA MUIA

WANDII NDAVI

WAYUA KITETE.....PLAINTIFFS

VERSUS

GERVAS MUTISO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd October, 2012, the Respondents herein sought general damages, permanent injunction restraining the Appellant, who was the Defendant from cultivating, remaining trespassing or putting up structures on land parcel nos. 1070 and 1074, Masue Adjudication Section. They also sought order of eviction against the Appellant from the said parcels of land as well as costs.
2. According to the plaint, the 1st and 2nd Appellants were the registered owners of land parcel no. 1074. On the other hand, the 1st Respondent was the co-owner of land parcel no. 1074 together with the 4th and 5th Respondents in the latter's capacity as the legal representatives and wives of **David Silu Kakuta** and **Kitete Silu** respectively.

3. It was pleaded that the Appellant entered onto the land parcel no. 1070 on 1st November, 1999 and started cultivating thereon. It was further pleaded that the Appellant also trespassed onto land parcel no. 1074 and put up a structure thereon without authority or consent of the Respondents. According to the Respondents, these actions on the part of the Appellant constituted trespass hence the suit.
4. It was pleaded that the dispute between the parties had been litigate in various forums which forums found in favour of the Respondents and the Appellant was ordered to vacate the suit lands but the Appellant had ignored the same.
5. In their evidence the Respondents testified that the Appellant's mother, one **Selena Kiatu**, the mother of the Appellant had been married to one **Kiatu Mutendesi** of Miaani. However, as a result of miscarriages, she left her matrimonial home after the death of her husband and returned to her maiden home where her father, **Zilu Kakuta**, gave her a portion of land no. 1074 while she was undergoing treatment and she constructed a house and stayed therein till her death in the 1980's and was buried in land no. 1074 at the request of her husband's family since there was no road to Mianni which was 40 kilometres away. **Zilu Kakuta**, the Appellant's grandfather, according to the Plaintiffs had two wives, **Loki** and **Mbuki**, the 5th's Respondent's mother in law. The other plaintiffs are the children of the 5th Respondent. It was during her stay there that the Appellant was born in 1955, and since 1995, when he went beyond the area that his mother had been given, the Appellant had been cultivating the lands in question, though. According to the Respondents, it was the chief who requested that the Appellant be given the land where he has constructed his house near his mother's grave, but the Appellant has no claim over the lands in question.
6. According to the plaintiffs, the said lands were adjudicated in 1982 and that the Appellant's mother had her own land at Miaani being Mutenderi No. 0257. He also had other two parcels of land out of which one was sold. It was the Respondents' case that the Appellant had a brother and sister and that the said brother who was chased from the home by the Appellant.
7. According to the Respondents' they had no problem over the one acre land that the Appellant's mother was given. According to the Respondents, land no. 1074 is registered in the of **Kitete Zulu, Thomas Maingi Muia** and **David Silu Kakuta**. It was the respondents' case that the land 1074 is shared between the 5th Respondent, one **Thomas Maingi** and **Kavoo Maingi** who represent the deceased owners of the said land while 1070 is owned by **Maingi Muia** and **Kavoo Muia**.
8. According to the Appellant, the Respondents are his close relatives. It was his evidence his father was called **Mutiso Maluma** though he never saw his father and therefore did not know him. Although the said **Mutiso Muluma** was dead he did not know where he was buried and therefore had nowhere to go. According to him, his mother was called **Selele Mutiso** and not **Mutiso Mutendesa**. He however testified that his mother was married to **Kiatu Mutendesa** but they had divorced. According to him, he was born on land parcel no. 1074 in 1975 and had stayed therein since then, where he built his house though he also cultivated Land Parcels 1074 and 1070. His case was that both parcels of lands were given to his mother by her father.
9. He however conceded that the registered owners of land parcel nos. 1070 and 1074 were the plaintiffs and not his mother. He testified that neither himself nor his mother raised any objection to the said registration.
10. It was his evidence that he had a brother called **Jimmy Musyimi Mutoso** who had a house in land parcel 1070 measuring about 2 and ½ acres. It was his testimony that he owned both 1070 and 1074 based on the fact that he found his mother there, the said land having been given to his mother by her father. He however refuted that allegation that his mother left her matrimonial home due to the calamity that befell her children. He however admitted that he was not conversant with the Kamba Customs and was not aware his mother owned plot no. 257 though he stated that he was not intending to sell the same hence the reason why the caution was placed thereon.
11. In his evidence, they used to stay peacefully with the Respondents till 1995 when a dispute arose between him and the 1st Respondent when the 1st Respondent wanted to grave his cows on his land 1074 and he refused. According to him, the Respondents planted sisal on his land claiming that he owned only 1 acre of land parcel 1070. According to him, house mother died in 1988 and was buried in plot no. 1074 which is about 4 acres and none of the plaintiffs complained about the said burial.
12. The Appellant called one **James Mutua Muli**, as DW2 who testified that he was in 1918 and confirmed that the mother of the Appellant was brought by her father from where she had been married following the calamity that befell her children and she was given land in 1986 by her father where she was buried. In his evidence, the Appellant's father was called **Mutiso** though he was unaware that she was married to **Mutendesa** and never saw the return of dowry as he was then in school. In his father evidence, he testified that he was unaware of the land parcel number the Appellant was staying on and was similarly unaware that the Appellant's mother had another parcel of land though in his view, she should have been buried on her land if she had one.
13. That the Appellant's mother returned to her father's home and was given a piece of land occupied by the Appellant, was also confirmed by **John Kiteko Ndunga**, who testified as DW3. According to him, this was in 1949 and nobody complained. When the Appellant's mother died, she was buried therein. It was his testimony that the Appellant's mother was married to **Mutiso** and he did not know **Mutendesa**. According to him, the Appellant's mother was given two parcels of land. According to him, he was unaware of any finding to the effect that the Appellant had no land there. He stated that survey was done in 1977. He however admitted that the Appellant had brothers who were also using the land in question though he was unaware of the registered owners thereof. However, the said parcels used to belong to the Appellant's grandfather.
14. In his judgement the learned trial magistrate found that though the Appellant's mother was married, she had been given land by her father where she was buried and that the said parcel of land later became parcel nos. 1070 and 1074. While 1070 was registered in the names of **Kavoo Muia** (2nd plaintiff) and **Muingi Muia** (1st plaintiff) plot no. 1074 was in the names of **Muingi Muia, David Silu Kakuta** and **Kitete Silu**. The names of the 3rd and 4th Plaintiffs did not appear. The court believed the Respondents' evidence that the Appellant sold parcel no. 257 Mesue Adjudication Section and leased out 8½ acres. It was therefore the court's finding that by doing so the Appellant knew where his roots were and this was supported by the fact that the Appellant's brother did not lay any claim to the suit parcels of land.

15. The court found that the Appellant did not during adjudication lay any claim to the suit parcels yet he was present during the said process. He however found that the Appellant had been given one acre from land Parcel No. 1074 which the plaintiffs did not claim. Nevertheless, it was his finding that since the 2nd, 3rd and 4th Respondents did not obtain the consent under the provisions of the **Land Adjudication Act**, and the name of the 5th Respondent had been removed, the 2nd, 3rd and 4th Respondents had no locus to sue the Appellant.

16. Despite that finding, the court proceeded to find that parcel nos. 1070 and 1074 belonged to the persons whose names appeared in the allotment letters and that the Appellant had no claim over them save for one acre carved from land parcel 1074. He therefore directed the Appellant not to encroach on the suit parcels save for the said one acre.

17. In this appeal the Appellant has raised the following grounds:

1) The learned Magistrate erred in law and in fact in finding that some of the plaintiffs were the owners of the suit premises while no evidence of ownership was produced.

2) The learned Magistrate erred in law and in fact in relying on the evidence of a party who had been struck off from the pleadings.

3) The learned Magistrate erred in law and in fact in relying on the evidence of the plaintiffs while the said evidence was not corroborated by any other independent witness.

4) The learned Magistrate erred in law and in fact by relying on the evidence of parties in the suit who had no *locus standi* to file the suit against the defendant.

5) The learned Magistrate erred in law and in fact in holding that the defendant had owned, sold and leased plot No. 257 while the same was not true.

6) The learned Magistrate erred in law and in fact in holding that the defendant knew about plot No. 257 while there was no prove of its existence and no evidence or witness was ever called to corroborate its alleged sale and or its leasing to third parties.

7) The learned Magistrate erred in law and in fact in believing the evidence of the Plaintiffs while the same was full of falsehoods and was not corroborated.

8) The learned Magistrate erred in law and in fact in ignoring the evidence of the defendant while the same was not disapproved and/or shaken by the plaintiffs.

9) The learned Magistrate erred in law and in fact in holding that the defendant's mother had been married while there was no evidence to prove the same.

10) The learned Magistrate erred in law and in fact in failing to take cognisance of the fact that the suit premises were inherited from the defendant's grandfather where the defendant's mother was a beneficiary.

11) The learned Magistrate erred in law and in fact in giving a Judgment based on untenable evidence.

Determination

18. I have considered the issues raised herein.

19. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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.”

20. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. From the evidence adduced, it is clear that the Appellant's mother was married and returned to her mother's home following the calamities that she had in her matrimonial home. As a result, her father gave her land where she stayed and constructed a home and when she died she was buried there. What the parties are unable to agree on is whether the land she was given comprised of the two parcels of lands. According to the plaintiff's, the deceased ought to have returned to her matrimonial home but was only buried in the suit parcel upon request by her husband's relatives.

22. While the Appellant claims that the suit parcels belonged to her mother, he admitted that neither himself nor her deceased mother objected to the registration thereof during the adjudication process and in his own evidence the suit parcels were in fact registered in the names of the plaintiffs. Based on the said admission on oath, the Appellant's submission that there was no proof of ownership of the suit parcels does not arise. This must be so because Order 15 Rule 2 of the **Civil Procedure Rules** provides that:

The court may frame the issues from all or any of the following materials—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;*
- (b) allegations made in the pleading or in answers to interrogatories delivered in the suit;*
- (c) the contents of documents produced by either party.*

23. It is therefore clear that issues in a suit arise, from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Therefore, as the Appellant admitted that the suit parcels were registered in the names of the Respondent's the issue of ownership of the suit parcels did not arise as it was, from the evidence adduced, not affirmed by the Respondents and denied by the Appellant.

24. It was further submitted that the issue of ownership was not pleaded and therefore the learned trial magistrate ought not to have dealt with the same. That there is a need for pleadings to be as precise as possible cannot be doubted and this requirement applies both to civil proceedings as in any other proceedings including constitutional petitions. In **M N M vs. D N M K & 13 Others [2017] eKLR**, it was held that:

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in **Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010** the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See **Odd Jobs v. Mubea [1970] EA 476**). However, that was clearly not the case in this appeal.

25. The Court of Appeal in **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR** rendered itself as follows:-

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

26. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (See **Bullen & Leake and Jacob: Precedents of Pleadings, 2th edn.** page 3). The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.**)

27. Similarly, the Court of Appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** while quoting with approval an excerpt from an article by Sir Jack Jacob entitled **“The Present Importance of Pleadings”** stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be

taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

28. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination and therefore it is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. See Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385 and Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

29. However, in this jurisdiction, the position is that a court may allow evidence to be called, and may base its decision, on an un-pleaded issue if it appears from the course followed at the trial that the un-pleaded issue has in fact been left to the court for decision. See Odd Jobs vs. Mubia [1970] EA 476 and Great Lakes Transport Co (U) Ltd vs. Kenya Revenue Authority Civil Appeal No. 106 of 2006 [2009] KLR 720.

30. Accordingly, the failure to plead facts though an irregularity is not fatal to the judgement if cured by the course of events taken at the trial, which shifted from the pleaded cause of action to the un-pleaded cause of action, a shift which did not cause prejudice to the other party who was prepared to meet that un-pleaded cause of action. See Dhanji Ramji vs. Rambhai & Company [1970] EA 515 and Transworld Safaries (K) Limited vs. Robin Makori Ratemo Civil Appeal No. 78 of 2005 [2008] KLR 339.

31. In this case however, the Respondents claimed that the Appellant was a trespasser and sought his eviction from the suit land. However, though the issue of ownership was not expressly pleaded, it is clear from the course adopted by the parties that the parties to this dispute were aware that issue of ownership was central to the determination of the case. In their evidence, the Respondents stated that the suit parcels were their properties while the Appellant claimed that the same was his based on the fact that the same had been given to his mother by his grandfather. Clearly, the parties were alive to the issue of ownership and they testified on it.

32. I therefore do not agree that the Learned Trial Magistrate dealt with an issue that was not before him.

33. It is contended that the learned Magistrate erred in law and in fact in relying on the evidence of a party who had been struck off from the pleadings. It is true that one of the Respondents was struck off from the suit. However, the mere fact of striking out a party does not mean that his evidence as a witness must similarly be disregarded. Witnesses are not necessarily parties to a suit and therefore their evidence if relevant may still be relied upon by the court in arriving at its determination.

34. According to the Appellant, the learned Magistrate erred in law and in fact in relying on the evidence of the plaintiffs while the said evidence was not corroborated by any other independent witness. The Appellant has not pointed any legal provision that required that the Respondents' evidence be corroborated by independent witnesses in order for it to be relied upon and this court is not aware of any such legal requirement. In Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

35. In this case the learned trial magistrate who had the advantage of seeing the witnesses believed the Respondents and I have no reason to

fault him for that.

36. It was submitted that the learned Magistrate erred in law and in fact by relying on the evidence of parties in the suit who had no *locus standi* to file the suit against the defendant. Whereas the Court found that some of the Respondents had no locus, their evidence in support of the Respondents' case was on record and there is nothing that barred the court from relying on their evidence to support the case of the Respondents who had *locus standi* in the matter.

37. As for the other grounds of appeal, it is my view that the findings thereon either was not germane to the final determination of the suit.

38. In the premises, I find no merit in this appeal which I hereby dismiss but with no order as to costs for failure by the respondents to comply with this court's directions to furnish soft copies of their submissions.

39. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of March, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Mutuku for Ms Mugo for the Respondent

CA Geoffrey