REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 123 OF 2011

JOHN KARIUKI THUO.....1ST APPELLANT

WAMITHI THUO.....2ND APPELLANT

VERSUS

TEMAN MACHARIA MUGO…….....RESPONDENT

(Being an appeal against the Judgment of G. Macharia – Senior Resident Magistrate (Kiambu) delivered on the 17th April, 2007)

JUDGEMENT

1. By a plaint dated 13/5/1987 the Respondent who was the Plaintiff in lower court sought prayers for:-

(1) Order that Appellants/Defendants to do vacate land by moving out with their agents and all their belongings.

(2) General damages for trespass.

(3) Interest; and

(4) Costs.

2. The Appellants who were the Defendants in trial court denied the claim and claimed the land belonged to them.

3. On 3/4/07 the matter came for hearing and the trial court ruled that the Appellants who were in court in absence of their advocate; had no evidence as they had not paid adjournment fees.

4. Therefore, the matter proceeded to full hearing without Appellants being allowed to cross-examine the Respondents nor tender the defence.

5. The court thereafter on 17/4/07 granted orders prayed triggering the instant appeal in which the Appellants set out 4 grounds –

(1) The learned magistrate erred in fact and in law in denying the Appellants audience on the ground that they had not paid court adjournment fees as previously ordered yet the payment of the court adjournment fees had not been made a condition precedent to granting the Appellants or their counsel audience before the court.

(2) The learned magistrate erred in law in not calling the Appellants to give evidence in support of their defence yet they were present in court.

(3) The learned magistrate erred in law in failing to appreciate that the Appellants had acquired an overriding interest over L.R NO. ESCARPMENT/JET SCHEME/202 and had acquired the status of 'irremovability' therefrom.

(4) The learned magistrate lacked jurisdiction to decide on the ownership of the land.

6. The directions were given that the matter be canvassed by way of submissions of which all parties filed.

Appellants' Submissions:

7. The Appellants submitted that the matter in the subordinate court proceeded to hearing on the 3rd April 2007. The Appellants were in court but their advocate was not in court. The court denied the Appellants audience and/or participation in the proceedings on the ground that they had not paid court adjournment fees as ordered on the 13th June 2006.

8. It is submitted for the Appellants that the trial magistrate erred in law and fact in that;

(a) The trial magistrate failed to exercise his discretion judicially. He ought to have allowed the Appellants to give evidence in support of their defence or granted them adjournment to enable them avail their advocate on the next hearing date.

(b) When the matter was adjourned on the 13th June 2006 the court did not inform the Appellants that they would not be heard if the court adjournment fees was not paid.

(c) They relied on ***Court of Appeal No. 180 of 2001 - Gateway Insurance Co. Ltd vs Mohammed Athman Mjahid Court of Appeal No. 180 of 2001*** and ***Civil Appeal No. 329 of 2001 - CMC Holdings vs James Mumo Nzioki*** where the court held;

> **"Except in some exceptional circumstances a litigant should not be denied a hearing in court and that where adjournment is sought with good reason it should be granted and the other side compensated with costs or throw away costs for any delay occasioned by the adjournment."**

9. On the 13th June 2006 when the subordinate court granted the Appellants the last adjournment and ordered that they pay court adjournment fees, the record does not show if they were in court. They may not have been aware of the order made by the court.

10. L.R NO. ESCARPMENT/JET SCHEME/202 was purchased from the Appellants' father by one PETER NJOROGE KAMAU in the year 1985. The Respondent purchased the suit land from PETER NJOROGE KAMAU in 1986. The suit in the subordinate court was filed on 13th May 1987. At the dates when PETER NJOROGE KAMAU and the Respondent purchased the suit land the Appellants were living and cultivating the land.

11. As children of the vendor to PETER NJOROGE MACHARIA (Purchaser) and beneficiaries to the land they had an equitable interest in the land. Under section 28 and 30(g) of the then REGISTERED LAND ACT [Cap 300 now repealed] the 1st Purchaser PETER NJOROGE KAMAU acquired the suit land subject to the Appellants' overriding interest in the land.

12. The Appellants' defence in the subordinate court raised triable issues of the alleged sale of the suit land to PETER NJOROGE KAMAU who later sold it to the Respondent. These are matters that the trial magistrate did not consider or advert to in his judgment. The Appellants ought to have been given an opportunity to explain their defence.

13. A parent holds his land in trust of his children. This was so held in ***Court of Appeal Civil Appeal No. 281 of 2000 – Mbui Mukangu vs Gerald Mutwiri Mbui***.

14. They submit that the evidence on record is that L.R NO. ESCARPMENT/JET SCHEME/202 was purchased by PETER NJOROGE KAMAU in 1985 at Kshs. 350,000/=. PETER NJOROGE KAMAU later sold the parcel of land to the Respondent.

15. The dispute over ownership of the said parcel of land was heard in 2007, 12 years from 1985. The value of the land must have appreciated greatly. The value of land could have been excess of Kshs. 500,000/= as the land measured 5 acres or thereabouts.

16. It is submitted that under section 159 of the REGISTERED LAND ACT [Cap 300 now repealed] but in force in 2007, the subordinate court had no jurisdiction to hear and determine the matter. This judgment violates Article 159(1)(d) of the Constitution of Kenya 2010.

Respondent's Submissions:

17. The Respondent submit that the Appellants in their memorandum of appeal claimed that the magistrate erred in fact an in law in denying audience on the ground that they had not paid court adjournment fees. The said ground in itself appears to be wrong on the face value before even delving deeper into the matter.

18. The reason is because, the general law is that a contemnor has no right of audience in any court of law until he is either punished for it or he purges the contempt.

19. This is the reasoning of **Justice A. Mabeya** gave in ***Albert Kigera Karume & 2 Others vs Kungu Gatambaki & Margaret Nduta Kimathi (sued as Trustees of the Njenga Karume Trust & 5 Others [2015] eKLR*** where the court held that, **".....once an allegation of contempt is raised in whatever manner; courts hasten to deal with them before undertaking any other business before them."**

20. This is a sound principal in that, since the courts are institutions that are charged with the administration of justice in society, interference with that business not only puts their existence in jeopardy, but there is risk in the society degenerating into chaos and anarchy. They also relied on decision in ***Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR.***

21. It therefore goes without saying that the magistrate in SPMCC No. 66 of 1987 was justified during the trial hearing on 23rd April 2017 when he ordered that, **"the defendant will not have a right in participating in the trial on grounds that the adjournment fees ordered to be paid by the defendant has not been paid."**

22. It is obvious that the court adjournment fees was ordered to be paid before the hearing date and the appellant had sufficient notice but ignored to obey the court order.

23. Further, the court in giving the said order could therefore not call the Appellants to give evidence in support of their defence despite being present in court during the trial hearing as the Appellants allege in ground 2 of their memorandum of appeal.

24. The trial court addressed itself in its judgement by considering the pleadings of both parties and the evidence adduced in court by the Respondent and his witness during the trial hearing. The court ruled the case in favour of the Respondent herein as he had proved his case on a balance of probabilities. It is clear that the case was heard on its merit.

25. On the question of the magistrate lacking jurisdiction to decide on the ownership of land, the issue should have been raised from onset during the institution of case at the magistrate's court as there would have been no basis for a continuation of proceedings and the court would have laid down its tools.

26. The Appellants herein go on to contradict themselves as they claim that the magistrate lacks jurisdiction to decide on the ownership of land on ground 4 of their memorandum of appeal and yet they pray this court for orders that the judgment be reversed, set aside and the case be remitted to the magistrate court for hearing to be heard on merit.

27. If the magistrate lacked jurisdiction, which he did not, then the Appellants could not be seeking or orders for hearing. It should be noted that the case had been referred to the trial court by the High Court after a previous appeal.

28. As per the Practice Directions on Proceeding Relating to the Environment and the Use and Occupation of Title the Land, published on 9th November 2012, the Chief Justice then, **Willy Mutunga**, in gazette notice number 16268, in rule 8, it provided that;

> **"Magistrates Courts shall continue to hear and determine all cases relating to hear and determine of all cases relating to the environment and the use and occupation of land title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction."**

ISSUES, ANALYSIS AND DETERMINATION:

29. After going through the evidence on record and the submissions tendered, I find the issues are;

> ***i. Whether the court was justified in denying appellant audience on account of non-payment of the court adjournment fees?***
>
> ***ii. Whether trial court had jurisdiction in adjudicating on the matter herein?***
>
> ***iii. If in (i) and (ii) above are in negative, did respondent prove case to the required standards?***

30. On the first issue, the record shows, that on the 13th June 2006 when the subordinate court granted the Appellants the last adjournment and ordered that they pay court adjournment fees, the record does not show if they were in court. They may not have been aware of the order made by the court. However the appellants do not deny that they were aware of the same orders.

31. They submit that, when the matter was adjourned on the 13th June 2006 the court did not inform the Appellants that they would not be heard if the court adjournment fees was not paid.

32. They relied on the cases of *Court of Appeal No. 180 of 2001 - Gateway Insurance Co. Ltd vs Mohammed Athman Mjahid* **Court of Appeal No. 180 of 2001** and **Civil Appeal No. 329 of 2001 - *CMC Holdings vs James Mumo Nzioki*** where the court held;

> **"Except in some exceptional circumstances a litigant should not be denied a hearing in court and that where adjournment is sought with good reason it should be granted and the other side compensated with costs or throw away costs for any delay occasioned by the adjournment."**

33. On the respondent side, they submit that, the general law is that a contemnor has no right of audience in any court of law until he is either punished for it or he purges the contempt. This is the reasoning of **Justice A. Mabeya** gave in ***Albert Kigera Karume & 2 Others vs Kungu Gatambaki & Margaret Nduta Kimathi (sued as Trustees of the Njenga Karume Trust & 5 Others [2015] eKLR*** where the court held that;

> **".....once an allegation of contempt is raised in whatever manner; courts hasten to deal with them before undertaking any other business before them."**

34. The court notes that the record did not state clearly the consequences of none payment of the adjournment fees nor record appellants presence on the material date. Am persuaded in the holding in ***Gateway Insurance Supra*** by the court of appeal that, except in some exceptional circumstances a litigant should not be denied a hearing in court and that where adjournment is sought with good reason it should be granted and the other side compensated with costs or throw away costs for any delay occasioned by the adjournment.

35. This holding is in tandem with ***Art 159 (2) (b) and also Art 50 (1)*** of the constitution on doing substantial justice without undue regard to procedural technicalities and according parties hearings in disputes they are party to. Perhaps further costs would have been imposed and even order of execution to recover the same but not shut them out.

36. There were no substantial circumstances which warranted denial of hearing of the appellants. This matter is on rights over land which is very emotive and court ought to exercise all reasonable options to ensure parties are heard on merit in their dispute.

37. Thus the first issue succeeds and court finds that denial of audience was unjustified and on that ground alone the appeal succeeds.

38. On the other 2 grounds, I find it moot to deal with them after first ground succeeds. However on jurisdiction, the court notes that the appellants had admitted jurisdiction in their defence. The court has also taken judicial notice that the ELC Act was amended to mandate magistrate court with pecuniary jurisdiction to entertain land matters.

39. Thus this matter will be referred back to Chief magistrate court Kiambu for the directions on hearing thereof and in event there is no magistrate with jurisdiction to hear the same, then the file will be forwarded to ELC court in Thika for hearing and determination.

40. Thus court makes the following orders;

i. The lower court judgement is set aside

ii. The costs awarded to the respondents as appellants are to blame for delay in hearing this matter.

iii. The file to be sent back to the CMs court Kiambu for directions and hearing thereof vide para 38 above.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE