



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 187 OF 2011

JUDAH NDAMBUKI KITUKU APPELLANT

VERSUS

LEORNARD MUTUKU SESI.....RESPONDENT

(An Appeal arising out of the judgment of J. M. Munguti SRM delivered on 3rd November 2011 in Machakos Chief Magistrate's Court Civil Case No. 715 of 2005)

JUDGMENT

The Appellant was the original Plaintiff in Civil Case No. 715 of 2005 at Machakos Chief Magistrate's Court, and has appealed against the judgment of J.M Munguti SRM which was delivered in the said suit on 3rd November 2011. The trial magistrate dismissed the Plaintiff's suit in the original trial Court with costs to the Defendant, on the ground that the Plaintiff's claim was based on illegality and he had no *locus standi* to bring the said suit.

The Appellant subsequently moved this Court through a Memorandum of Appeal dated 25th November 2011 and filed in Court on the same date, wherein he has raised the following grounds of appeal:

1. **The learned trial magistrate erred in law and fact in admitting a sale agreement to the respondent yet the same was done on free property of a deceased person without letters of administration having been taken out and deciding in his judgment that the sale agreement is binding and should be followed to the latter.**
2. **The learned trial magistrate erred in law and fact in failing to consider plaintiff's exhibit 1 which was letter of administration giving him powers to bring this suit.**
3. **The learned trial magistrate erred in law and fact in failing to consider plaintiff's exhibit 2 which was high court ruling binding on the magistrate and clearly stated that the sale of plot 13 at Tala Market was null and void as the plot formed property of the deceased yet the estate had not been administered.**
4. **The learned trial magistrate erred in law and fact in the judgment in failing to consider plaintiff's exhibit 3 which was confirmed grant issued in 2005 to the appellant and other administrators and clearly stated that sale of the plot 13 was to take effect from 2005 but not the year 2000 as the judgment in lower court subject of this appeal held.**
5. **The learned trial magistrate erred in law and fact in failing to award the rent arrears to the appellant as administrator of estate of deceased from the year 2000 despite it being held it was the last time the respondent paid rent up to date the respondent would vacate.**
6. **The learned trial magistrate erred in law and fact in considering and holding a sale agreement by person not declared owners was binding on the appellant and estate of the deceased whose estate the appellant was and is an administrator.**

7. **The learned trial magistrate erred in law and fact in trying to cure an illegality in that estate of deceased had not been distributed which though admitted by the magistrate was an illegality in his judgment but went ahead to dismiss the appellant's suit.**
8. **The learned trial magistrate erred in law and fact in proceeding to hold himself as a succession court by ordering that proceeds from sale of estate of deceased should be distrusted to the appellant and if not he should sue for the amount.**
9. **The learned trial magistrate erred in law and fact in failing to consider that the sale of plot 13 Tala Market should have taken place after confirmation of grant and not to the respondent herein but to any party the family of deceased so desired as the High Court did not specify who should purchase the plot despite it being aware the respondent had attempted to purchase and rule it was intermeddling with estate of deceased.**
10. **The learned trial magistrate erred in law and fact in failing to consider the evidence of PW 2 who was also a beneficiary of estate of the deceased and did not participate in the sale of plot in 2000 as he stated was unlawful and further stated that as a family they had authorized appellant to collect rent from Tala Market Plot 13 and share it amongst beneficiaries of deceased.**
11. **The learned trial magistrate erred in law and fact in failing to give judgment as per plaint as the appellant had proved his case.**
12. **The learned trial magistrate erred in law and fact in awarding costs to the respondent instead of appellant.**
13. **The learned trial magistrate erred in law in the way he evaluated the evidence and by basing his judgment on extraneous matters.**

The Appellant is praying for orders that the said judgment be set aside and be substituted in accordance with the prayers in his plaint. Further, that the costs of the Appeal and costs of the lower court be awarded to the Appellant.

The Facts and Evidence

The brief facts of this appeal are that the Appellant instituted a suit in the lower court by filling a plaint dated 16th November 2005, wherein he claimed that he was the administrator of the estate of the late Elijah Ndambuki, who was the registered proprietor of the parcels of land situated at Tala Market known as plot 13B and 13A. Further, that by a tenancy agreement dated 1/7/1999 he let to the Respondent plot 13B at Tala Market at a monthly rent of Kshs 1,850/= up to 30th April 2001, which rent was subsequently raised to Kshs 6,000/= per month with effect from 1st May 2001.

However, that the Respondent stopped paying the said rent after 1st May 2001, and that the Appellant on 17th November 2004 issued him with a notice to terminate the tenancy with effect from 1st February 2005. It was alleged that at the time of termination of the tenancy on 1st February 2005, the Respondent was in arrears of rent of a total sum of Kshs 270,000/=. Further that since 1/2/2005 the Respondent had been in unlawful occupation of the premises as a trespasser.

The Appellant sought orders that the tenancy between him and the Respondent terminated on 1/2/2005; that the Respondent was a trespasser on Plot 13 B and to vacate the same, and in default to be forcefully evicted by an officer of the Court; that the Appellant be paid rent in arrears of Kshs 270,000/=; and that the Respondent pay the Appellant mesne profits and/or general damages of Kshs 6,000/= per month with effect from 1/2/2005

The Respondent filed a Defence in the trial Court dated 21st December 2005, wherein he admitted that the Plaintiff was a joint administrator of the estate of the late Elijah Ndambuki with two other administrators, but denied that any tenancy agreement existed between himself and the Appellant, stating that the Appellant did not have the capacity or consent to enter such an agreement. Further, that the Appellant could also not terminate a non-existent tenancy.

The Respondent claimed to be owner of plot 13 B situated at Tala Market which was sold to him by the

heirs and beneficiaries of the estate of Elijah Ndambuki, including the Appellant's joint administrators. Further, that the suit was prematurely before the trial Court as the Respondent upon being served with the termination notice had filed a reference in the Business Premises Tribunal which was still pending.

The Appellant gave evidence as PW1 in the trial Court and called one additional witness. He reiterated the contents of the pleadings in his plaint, and produced letters of administration for the estate of Elijah Ndambuki issued to him and 2 other administrators on 7th March 1994 in HCCC Succession Cause Number 23 of 1993, as well as the confirmed grant. He also produced a copy of the tenancy agreement entered into with the Respondent dated 01/07/1999.

PW2 was Titus Wambua Ndambuki who was the Appellant's brother, and he testified that the Respondent was a tenant in plot 13B at Kangundo after their family agreed to give the Appellant power to lease the house. He denied that there was an agreement by his family members to sell the plot to the Respondent.

The Respondent also gave evidence in the trial Court as DW1, and he called one additional witness. He testified that the Appellant used to be his landlord in plot No. 13 B at Tala Market, and that he stopped paying rent in March 2000 because the family of the late Elijah Ndambuki approached him and offered to sell the plot to him. Further, that the parties entered into a sale agreement dated 9th March 2000 which he produced as an exhibit. He confirmed that the Appellant was not a party to the said agreement but that the other two joint administrators were party thereto, and that he is still operating from the said plot.

DW2 was Mathew Matu Elijah Ndambuki, who stated that he is a step brother of the Appellant and that he with other family members sold a plot in Tala whose number he did not know to the Respondent. He stated that he is one of the administrators of the estate of Elijah Ndambuki.

The Issues and Determination

The Appellant and Respondent canvassed the present appeal by way of written submissions. The Appellant's Advocates J.A. Makau & Company Advocates, filed submissions dated 14th October 2015. Reliance was placed by the Appellant on section 45 (1) of the Law of Succession Act, to argue that the Respondent acquired the subject parcel of land illegally, and it was also submitted that the trial magistrate erred in failing to honour the decision of the trial judge in HCCC P&A Case No 23 of 1993 that the sale of plot 13 at Tala market was null and void as it formed part of the property of the deceased that had not been administered.

It was further submitted by the Appellant while relying on section 82(a) of the Law of Succession Act, that due to differences between himself and the other administrators he filed the suit as a bona fide representative of the estate of the deceased Elijah Ndambuki to protect the said estate. The Appellant contended that the trial magistrate erred in ruling in favour of the Respondent while finding that the sale agreement he entered into was illegal in law, and by ordering distribution of the proceeds of the said sale when he had no jurisdiction over the succession of the deceased's estate.

The Respondent's Advocate, J.M Tamata & Company Advocates filed submissions dated 30th November 2015 in which it was argued that the Appellant had introduced new prayers in his appeal that departed from those in his Plaint, namely seeking this Court to declare the sale agreement between the Respondent and his family members invalid, and that the trial court had no jurisdiction to deal with the estate of the deceased. Further, that the Appellant in his submissions avoided the issue of his capacity to bring the suit.

I have considered the evidence given in the trial Court and the arguments made by the parties. The issues I find arising are firstly, whether the Appellant had locus to bring the suit in the trial Court; secondly if so, whether the Respondent is lawfully in occupation of Plot 13B at Tala Market; and lastly, whether the Appellant is entitled to the relief he sought in the trial Court.

It is now settled law that the duty of this Court as the first appellate court is to re-evaluate the evidence in

the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court on these issues.

On the first issue as to the locus of the Appellant to bring the suit, it is settled law that no person has a right to enforce any cause of action or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration. This power is given to administrators by section 82(a) of the Law of Succession Act.

The Appellant did produce exhibits in the trial Court showing that letters of administration were issued to him, Moses Muasya Ndambuki and Charles Kieti Ndambuki on 7th March 1994 by the High Court at Machakos in HCCC Succession Cause 23 of 1993 with respect to the state of Elijah Ndambuki Kituku. Further, that the said grant was confirmed on 2nd September 2005 with the Appellant, Amos Mutua Ndambuki and Mathew Matu Ndambuki being named as the administrators. Clearly the Appellant had the capacity and power to bring a suit on behalf of the estate of Elijah Ndambuki.

The issue that was before the trial Court was thus not one of the Appellant's capacity or locus, but the form and competence of his suit in light of the provisions of Order 31 Rule 2 of the Civil Procedure Rules which provide that **where there are several trustees, executors or administrators, they shall all be made parties to a suit by or against one or more of them**. In my view the proper course of action would have been for the trial magistrate to consider the effect of the failure to join the co-administrators in the suit. Depending on the circumstances of each case the Court will consider whether the proper action is to strike out the suit for want of form, or to uphold the same in the interests of justice.

In the present appeal it was evident from the facts and evidence that the administrators were not working jointly, and specifically with respect to plot 13B in Tala market they were working at cross purposes, with some of the administrators being part of the family members that purported to dispose of the property, an issue that will be dealt with later on. In my view the Appellant was performing his duties under section 83 of the Law of Succession Act of collecting and preserving the assets of the estate of the deceased in the interests of the beneficiaries. To this extent the trial magistrate erred in finding that the Appellant had no *locus standi* to bring the suit.

As regards the issue whether the Respondent was lawfully in occupation of the disputed premises, the Respondent admitted that the Appellant was previously his landlord, but that the same changed after he bought the said premises from other administrators and beneficiaries of the estate of the Elijah Ndambuki. He produced a sale agreement dated 8th May 2000 with respect to the sale of Plot 13B Tala for Kshs 140,000/=, entered between himself and various beneficiaries and the co-administrators as an exhibit. He also admitted that he has not payed any rent since then for the premises. I am mindful that the law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant. The grant issued to the Appellant and his co-administrators was confirmed on 2nd September 2005, and it is evident that the sale of Plot 13B at Tala Market to the

Respondent on 8th May 2000 was thus illegal and of no effect, and the said property therefore still forms part of the estate of the deceased Elijah Ndambuki.

In addition the Appellant brought evidence of the tenancy agreement entered into with the Respondent with respect to Plot 13 B Tala Market on 1st July 1999, and of the notice terminating the tenancy dated 1st November 2004 as his exhibits 4A, 4B and 5. The Respondent did not bring evidence of any other agreement allowing him to be on the said premises save for alleging to be owner of the same. In the premises the Respondent has no right to be on the said premises without paying rent, and the prayer seeking him to vacate the same is merited, and also in line with section 45 of the Law of Succession Act which forbids the taking possession of, or otherwise intermeddling with, any free property of a deceased person.

On the last issue as to whether the Appellant is entitled to the reliefs sought in his Complaint, the prayers sought of termination of the tenancy between him and the Respondent, and vacation of the disputed premises by the Respondent are merited arising from the foregoing findings. However, in light of evidence that the Respondent may have paid money as purchase price to the Appellant's co-administrators and beneficiaries of the estate of Elijah Ndambuki for the said premises, the claim for rent arrears, mesne profits and/or general damages cannot lie and would be inequitable. The proper remedy in the circumstances would be for the Appellant, his co-administrators and beneficiaries of the estate of Elijah Ndambuki to account for monies received from the Respondent, and the same to be distributed amongst the beneficiaries.

I accordingly allow this appeal for the above reasons and set aside the judgment of the trial magistrate and substitute the same with the following orders:

1. The tenancy between the Appellant and the Respondent be and is hereby deemed to have terminated on 1st February 2005.
2. The Respondent shall vacate the premises known as Plot 15B Tala Market within 3 months of the date of this judgment, failing which eviction orders shall issue to the Appellant
3. The Respondent shall meet the costs in the trial court and the costs of this appeal.

It is so ordered.

DATED AT MACHAKOS THIS 26TH DAY OF JANUARY 2016.

P. NYAMWEYA

JUDGE