



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 584 of 2014

(Formerly HCCC NO. 86 OF 2003)

JOSEPH MURIITHI NJIRU PLAINTIFF

-VERSUS-

MATHENGE NJERU DEFENDANT

JUDGMENT

1. On 27th day of October, 2015 this court made the following findings concerning the plaintiff's claim:-

“The evidence adduced in this case shows that the plaintiff's father had land, in fact, it is the plaintiff's father who transferred the land to the defendant. There is no evidence that the plaintiff's father held the land allocated to him pursuant to the agreement of 5th April, 1943 in favour of the defendant.

Although there is evidence that the defendant contributed in the acquisition of the land held by his father, there is no proof that his father held the land in trust for him. In my view the contribution that the defendant made in the acquisition of the suit property does not entitle him to the entire property. The fact that the suit property was originally family land, in the absence of any evidence that the defendant's father held the suit land in trust for the defendant, and cognizant of the fact that the defendant did not plead that his father held the land in trust for him, on the strength of the evidence adduced in this case, I find and hold that the defendant holds a portion of the suit property in trust for the plaintiff.

Concerning the plaintiff's contention that he is entitled to half share of the suit property, there being evidence that the defendant contributed to the acquisition of the suit property, I am unable to agree with the plaintiff that he is entitled to half share of the suit property. In my view, the plaintiff is only entitled to half share of the parcel his father was entitled to pursuant to the agreement entered into on 5th May,1943.

Since this court is not privy to the size of the parcel of land the plaintiff's father owned pursuant to that agreement, I direct that, within 14 days of delivery of this judgment, the parties appear before me and address me on what their father's entitlement was pursuant to the agreement of 1943, before I make a determination on the plaintiff's entitlement.”

2. Pursuant to the above order by this court, the parties filed further submissions which I have read and considered.

3. In the submissions filed on behalf of the plaintiff, it is submitted that given the fact that the plaintiff's father was the 1st registered proprietor of the whole of the suit property, it should be presumed that he owned the whole property. It is reiterated that the plaintiff deviated from his pleading to the effect that he bought the suit property from Ambui clan through purchase of shares and pointed out that the defendant's testimony was that he bought the land for Kshs. 3,300/=.

4. Arguing that it was not open for the defendant to deviate from his pleading, the plaintiff's counsel terms the defendant's evidence a fraud and urges the court to award the plaintiff half share of the suit property.

5. On behalf of the defendant, it is submitted that there was only one parcel of land. Concerning the contribution of the plaintiff's father in the acquisition of the suit property, it is submitted that the evidence on record shows that, the plaintiff's father only paid Kshs.100/= as registration fee. The purchase price, Kshs. 3,300/=, is said to have been paid by the defendant in redemption of the property.

6. Explaining that the land was bought at Kshs. 300 per acre, counsel for the plaintiff submits that if the plaintiffs' father was entitled to any land, then his entitlement must have been proportionate to his contribution, that is to say a third of an acre.

Analysis and determination

7. From the further submissions filed by the defendant, it is pointed out that there was only one parcel of land to wit Mwerua/Mukure/60, the suit property herein and submitted that it is that parcel of land which the defendant redeemed after their father was unable to continue meeting his contractual obligations.

8. As pointed out in the submissions filed on behalf of the plaintiff, the foregoing submissions are at variance with the defendant's own pleadings (statement of defence) which is to the effect that he bought the suit property from Ambui clan through purchase of shares. Contrary to the said contention/allegation, the defendant alleges that he redeemed the suit property after his father was unable to meet his contractual obligations.

9. It is trite law that parties are bound by their pleadings. In this regard see the case of **Joshua Mungai Mulango & another v. Jeremiah Kiarie Mukoma (2015) eKLR** where the Court of Appeal held:-

“parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs”

10. Also see the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** where the Court of Appeal stated:-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds

on that score.”

11. In the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others** *supra* the judges of the Court of Appeal were referring to the observations in the following cases:-

1). **Malawi Railway Ltd Vs. Nyasulu** [1998] MWSC 3, in which the learned judges quoted with approval from an article by **Sir Jack Jacob** entitled “**The Present Importance of Pleadings**” published in [1960] Current Legal problems, at P174 whereof the author had 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.”

2. **Libyan Arab Uganda Bank for Foreign Trade and Development & another v. Adam Vassiliadis** [1986] UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD** [1957]2 QB 55 thus;

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

3. **Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries Plc** S.C. 91/2002, where **Judge Pius Aderemi** J.S.C. expressed himself as follows:-

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

12. The above authorities are in tandem with **Order 2 rule 6** of our Civil Procedure Rules, 2010 which provide:-

“(1). No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Sub rule (1) shall not prejudice the right of any party to amend, or apply leave to amend his previous pleading so as to plead the allegations or claims in the alternative.”

13. As pointed out above, in this case, the defendant deviated from his pleading to the effect that he

bought the suit property from Ambui clan through purchase of shares. Instead, without amending his pleading, as contemplated under **Order 2 Rule 6(2)**, the defendant raised a ground inconsistent with his said pleading by leading evidence calculated at proving that he redeemed the suit property after his father was unable to meet his contractual obligation in respect of the suit property. Moreover, his evidence to the effect that he continued paying for the suit property up to the year 1973 raises a question as to the authenticity of those allegations as the evidence on record shows that by the time the defendant began making the alleged payments, the property was already registered in the name of the plaintiff's father.

14. No explanation was given by the plaintiff why his father was registered as the proprietor of the suit property long before he had paid for the property. The evidence on record and in particular, Dexbt 4, shows that the plaintiff's father was registered as the proprietor of the suit property as early as 4th December, 1959. The payments allegedly made by the defendant to redeem the property were effected after the plaintiff's father had got registered as the proprietor of the suit property. According to the schedule of payments allegedly effected by the defendant, it is indicated that the defendant paid Kshs.3150/= long after the plaintiff's father had been registered as the proprietor of the suit property.

15. The minutes of 22nd December, 1958 are also inconsistent with the schedule of payments the defendant relies on to prove his contributions in acquisition of the suit property. I say this because where the schedule of payments shows that from 31st December, 1960 to 14th January, 1973 the clan members paid approximately a total of Kshs.30,644/= for purchase of the land the clan was buying, the said minutes show that as at 22nd December, 1958 the balance of the purchase price for the land they bought pursuant to the agreement of 8th June, 1950 was Kshs.2,250/=. The said minutes provide as follows:-

“The accounts were done to get the arrears from 1953 to 1958. The payments that have been done for six years at the rate of Kshs. 600/=. The balance is Kshs.2, 250/= which amount is supposed to be paid by the end of the year 1958.”

16. As at the time captured in the minutes of 22nd December, 1958, there is no evidence that the defendant had made any contributions to the acquisitions of the suit property.

17. Under **Section 107(1)** of the Evidence Act, Cap 80 Laws of Kenya, the burden was on the defendant to explain the circumstances that led to his father being registered as the proprietor of the suit property, yet he had allegedly failed to meet his contractual obligations in respect of the suit property.

18. As pointed out above, the defendant did not plead that his father held the suit property in trust for him. The evidence on record is also insufficient to prove that the plaintiff's father held the suit property on behalf of the defendant. At the pain of contradicting myself, now that parties have clarified that there was only one parcel of land and there being no evidence capable of proving that the plaintiff's father held the suit property or a portion thereof on behalf of the defendant, I find and hold that the defendant holds half share of the suit property in trust for the plaintiff.

19. The up short of the foregoing is that the plaintiff's claim has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 15th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

MsWambui for the defendant

N/A for the plaintiff

Court assistant - Lydia