



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL CASE NO 42 OF 2018

WITEITHIE GWAKA INVESTMENT LIMITED.....APPELLANT

=VERSUS=

ESTHER WAITHIRA NGUGI (Survived by

JOSEPH MURIU NGUGI) RESPONDENT

PAUL MUNAKU NGUGI.....1ST INTERESTED PARTY

HENRY MBUGUA KINUTHIA.....2ND INTERESTED PARTY

(Being an Appeal from the Judgment and Decree of the Chief Magistrate Court at Thika

(C. A Otieno - Principal Magistrate) delivered on 29/11/2018 in CMCC No. 1442 of 2005)

JUDGMENT

1. Through a plaint dated 20/7/2005, the late **Esther Waithira Ngugi [the deceased respondent]** initiated **Thika Chief Magistrate Court Civil Case No. 1442 of 2005** against **Witeithie Gwaka Investments Limited** [the 1st defendant in the trial court], **Paul Munaku Ngugi** [the 2nd defendant and **Henry Mbugua Kinuthia** [the 3rd defendant in the trial court]. The plaint was subsequently amended on 28/3/2013. She sought the following reliefs in the Chief Magistrate Court: (i) a declaration that Esther Waithira Ngugi was the owner of **Plot No 305** surveyed and registered as **Parcel Number Juja/Kalimoni Block 10/305** (the suit property); (ii) an order directing Witeithie Gwaka Investment Limited and Paul Munaku Ngugi to vacate the suit property and give vacant possession thereof to Esther Waithira Ngugi and in the alternative, an order directing Witeithie Gwaka Investment Limited to allocate Esther Waithira Ngugi an alternative plot within Farm No 1; (iii) an order rectifying the parcel register to replace the name of Henry Mbugua Kinuthia [the 3rd defendant] with that of Esther Waithira Ngugi; and (iv) costs of the suit.

2. In summary, her case in the trial court was that, at all material times she was a shareholder of the appellant, having succeeded her late husband, Ngugi Muriu. The appellant allocated her the suit property by dint of the fact that she was a shareholder in the land buying company. Subsequently, the appellant colluded with the 1st and 2nd interested parties and fraudulently transferred the suit property to the 2nd and 3rd interested parties.

3. The appellant filed a defence dated 4/9/2006, an amended defence dated 13/5/2006, and a further amended defence dated 24/3/2013. Their case was that, indeed the late Ngugi Muriu was a member of the appellant company. They however, denied the allegation that the deceased respondent was at all material times a shareholder of the appellant company. They further contended that the deceased respondent had never been a shareholder of the appellant company. They denied colluding with the interested parties. They also denied fraudulently transferring the suit property to the interested parties. They denied being privy to the title held by the 2nd interested party nor being privy to the transfer of the suit property to the 2nd interested party. Further, they averred that there was no vacant or alternative plot within Farm No 1 at Witeithie Estate. They urged the trial court to dismiss the deceased respondent's suit.

4. The 1st interested party filed a statement of defence dated 26/5/2006 in which he averred that if the suit property was allocated to the deceased respondent, the allocation was done fraudulently through collusion between the deceased respondent and the appellant. He itemized various particulars of fraud. He denied colluding with the appellant and the 2nd interested party. It was his case that the deceased respondent did not have a cause of action against him. He urged the trial court to dismiss the suit against him. In addition, the 1st Interested party filed a statement of claim against the appellant in which he sought indemnification on the ground that the appellant sanctioned the sale of the suit property from the original owner to the 1st interested party and further sanctioned the sale of the suit property by the 1st interested party to the 2nd interested party.

5. The 2nd interested party filed a statement of defence dated 15/6/2006 in which it denied the allegations made in the deceased respondent's statement of claim, including the allegations of fraud made against him.

6. Upon conclusion of trial, the trial court rendered a Judgment dated 29/11/2018, in which it stated that the issue falling for determination in the suit was whether there was fraud on part of the appellant and the two interested parties in this appeal (the three defendants in the trial court). The trial court found that fraud had been proved against the 1st defendant because they had made two parallel entries in their internal register and issued two parallel share certificates relating to the suit properties, indicating that they knowingly allocated the same parcel of land to two different people and made no attempt to remedy the anomaly. Consequently, the trial court issued an order directing the appellant to allocate the deceased respondent an alternative plot in Farm No. 1 or any other of its farms within 90 days from the date of judgment. The trial court exonerated the interested parties. The appellant was ordered to pay costs of the suit to the deceased respondent. The interested parties were to bear their own costs.

7. Aggrieved by the said judgment, the appellant brought this appeal advancing the following verbatim grounds of appeal:-

a) *That the trial magistrate erred in law in failing to opine that*

the respondent lacked locus standi to file the suit at the lower court being devoid of letters of administration whereas the said respondent instituted the said suit for or on behalf of the estate of her purported deceased husband.

b) *That the trial magistrate erred in law and fact by failing to opine that the respondent did not prove that she was the wife of Ngugi Muriu a purported deceased member of the appellant.*

c) *That the trial magistrate erred in law and in fact by deciding on unpleaded issue with regard to the fraud she attributed to the appellant.*

d) *That the trial magistrate erred in law in awarding costs to the respondent devoid of any demand letter.*

8. The appeal was canvassed through brief written submissions dated 14/6/2021, filed through the firm of *Mwihia & Mutai Co Advocates*. Counsel for the appellant submitted that the main ground of appeal was that Esther Waithira Ngugi [the deceased respondent] lacked the *locus standi* to institute the suit at the lower court. Counsel contended that the issue of *locus standi* was raised in the appellant's defence and in cross examination of the respondent by counsel for the appellant. Counsel contended that Esther Waithira Ngugi was not the administrator of the estate of Ngugi Muriu and did not therefore have locus standing to institute the suit in the lower court. Counsel faulted the trial court for not pronouncing itself on the issue. Counsel added that because the respondent had not adduced evidence to demonstrate that she was the beneficiary of the estate of Ngugi Muriu, transfer of the suit property to her was fraudulent, illegal, unlawful and wanton and should have been annulled. Counsel faulted the trial court for finding fraud on part of the appellant on matters that had neither been pleaded nor proved. Counsel urged the court to allow the appeal.

9. The respondent filed brief written submissions dated 23/8/2021 through the firm of *J K Ngaruiya & Co Advocates*. Counsel for the respondent submitted that the respondent had demonstrated that she was a shareholder of the appellant company and the allottee of the suit property and that the appellant had subsequently allotted the same suit property to the late **Benedict Wandalo** while aware that they had allocated the suit property to the deceased respondent. Counsel argued that the trial court properly found that the appellant had engaged in double allocation of the suit property. Counsel faulted the appellant for not leading evidence to rebut the respondent's evidence, hence the evidence that the respondent was a shareholder of the appellant company remained uncontroverted. On locus, counsel submitted that because the respondent was the allottee of the suit property, she was the proper person to file the suit. Counsel urged the court to dismiss the appeal.

10. I have considered the grounds set out in the memorandum of appeal, the entire record of the trial court; and the parties' submissions in this appeal. I have also considered the relevant legal frameworks and jurisprudence. The appellant identified one key issue falling for determination in this appeal - the question as to whether the deceased respondent had the locus standi to initiate the proceedings in the trial court. The said issue is contained in the first ground of appeal. I will dispose that issue and also make brief pronouncements on the other grounds that were set out in the memorandum of appeal.

11. The principle which guides this court when exercising jurisdiction as the first appellate court is well settled. The Court of Appeal summarized the principle in the case of **Susan Munyi v Keshar Shiani (2013)eKLR** as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

12. The first ground of appeal is that the trial court erred in law in failing to “opine” that the respondent lacked *locus standi* to file the suit in the lower court because she did not have letters of administration yet she instituted the suit for and on behalf of the estate of her purported deceased husband. First, the appellant elected not to lead any evidence despite the serious allegations of fraud which had been pleaded against it and the subsequent evidence tendered to show that there was double allocation of the suit property by the appellant. The appellant was a land buying company; the allocating entity; the surveying entity; and the custodian of the internal register relating to the land scheme out of which the suit property was surveyed and balloted.

13. The appellant was the land buying company that prepared the internal register and issued the ballot papers and the share certificates which the respondent and the interested parties were relying on. If they had any evidence relating to the *locus standi* of the respondent, they were entitled to adduce it. They elected not to lead evidence.

14. Secondly, there was nowhere in the amended plaint where the deceased respondent pleaded that she was suing on behalf of the estate of her late husband. Her claim was that she was at all material times a shareholder of the appellant company and that the appellant company had allocated her the suit property by dint of her being a shareholder of the appellant company. She tendered uncontroverted evidence

demonstrating that she was indeed a shareholder of the appellant company and an allottee of the suit property. She became a shareholder after the death of her husband and after the appellant company received money from her whereupon they issued her with share certificate No 0625 dated 22/12/2003 relating to Plot No 305.

15. Thirdly, the administrator of the estate of Ngugi Muriu testified as PW2 [**Joseph Muriu Ngugi**]. He supported the deceased respondent's case. He stated that when he carried out succession, he did not include the suit property in the assets of the late Ngugi Muriu because the appellant had already amended their internal register and assigned the suit property to his mother [Esther Waithira Ngugi]. He was privy to the said internal transfer.

16. It is therefore clear from the record of the trial court that the suit giving rise to this appeal was not a suit by the estate of the late Ngugi Muriu. The respondent instituted the suit in her own right as a shareholder of the appellant company and an allottee of the suit property. A grant of letters of administration relating to the estate of the late Ngugi Muriu was, in the circumstances, unnecessary. The result is that there is no merit in this ground of appeal.

17. The second ground of appeal is that the trial magistrate erred in law and fact in failing to "opine" that the respondent did not prove that she was the wife of Ngugi Muriu. I have made a finding that the respondent properly sued in her personal capacity. In her sworn evidence in chief, she testified that the late Ngugi Muriu was her husband. PW2 similarly testified and corroborated that fact. It is therefore not correct that the respondent did not prove that she was a widow of the late Ngugi Muriu. I do not, in the face of the pleadings and the evidence before the trial court, find merit in this ground of appeal.

18. The third ground of appeal is that the trial magistrate erred in law and fact by deciding on an unpleaded issue with regard to the fraud attributed to the appellant. I have looked at the amended plaint dated 28/3/2013 which formed the basis of the trial and the impugned judgment. Paragraph 6 of the said plaint reads thus:

"The 1st defendant in collusion with the 2nd and 3rd defendant fraudulently transferred Plot No 305 to the 2nd and 3rd

defendants.

Particulars of the Defendants Fraud

(a) Allocating Plot No. 305 without following the laid down procedure.

(b) Allocating the Plot No. 305 to the 3rd defendant who had not balloted for the same.

(c) Issuing the 3rd defendant with the title for Juja/Kalimoni Block IV/305 wrongly.

(d) Attempting to or transferring the said plot Juja/Kalimoni Block IV/305 without production of the original documents.

(e) Colluding to deny the plaintiff her right over the said Plot Number Juja/Kalimoni Block 10/305."

19. It is clear from paragraph 6 of the amended plaint that the respondent pleaded fraud and particularized the fraud. The appellant's contention that fraud was not pleaded is incorrect. I do not find merit in this ground of appeal.

20. The fourth ground of appeal is that the trial magistrate erred in law in awarding costs to the respondent in the absence of any demand letter. The general principle that guides our civil trial courts when making pronouncements on costs is contained in **Section 27** of the **Civil Procedure Act** which provides as follows:

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

21. The dispute leading to the impugned judgment was a contentious one. The appellant filed a statement of defence in which it denied the respondent's claim and put the plaintiff to strict proof. During trial, the appellant elected not to lead evidence. Based on the evidence before it, the trial court ultimately found that the appellant engaged in doubt allocation of the suit property; received money from two parallel allottees; and elected to do nothing to address the problem it had created. In the circumstances, the court properly found the appellant liable to pay the respondent's costs.

22. The result is that I do not find merit in any of the grounds advanced in this appeal. Consequently, the appeal is dismissed for lack of merit. The appellant shall bear the respondent's costs of this appeal. Because the interested parties did not participate in the appeal, there will be no award of costs in their favour.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mrs Macharia for Paul Munaku Ngugi, [the 1st interested party]

Court Assistant: Lucy Muthoni