



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO 28 OF 2020**

**JANE NJERI NDERI.....APPELLANT**

**VERSUS**

**PETER NJUGUNA KABUCHO.....RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate Court at Githunguri, Honourable M. Ochieng PM, delivered on 18th May 2020 in Githunguri PMC Environment and Land Case No 1 of 2018)*

**JUDGMENT**

**Background**

1. In May 2013, the respondent in this appeal, Peter Njuguna Kabucho, filed a plaint dated 17/5/2013 in the Environment and Land Division of the High Court at Nairobi, to wit, **Civil Case Number 577 of 2013**. An amended plaint dated 19/9/2013 was subsequently filed in the same Division of the High Court on 3/10/2013. Upon establishment of the Environment and Land Court as contemplated under **Article 162(2)(b)** of the Constitution, the case was transferred to the Environment and Land Court at Nairobi. On 7/3/2018, the case was transferred to Githunguri Principal Magistrate Court and registered as **Githunguri Principal Magistrate Court Environment and Land Case No. 1 of 2018**.

2. Through the amended plaint dated 19/9/2013, the respondent sought orders that the defendant together with her agents be evicted from Land Parcel Number **Githunguri/Gathangari/3005**; that the appellant and her agents/servants/employees be permanently enjoined against interfering with the respondent's possession and quiet enjoyment/use of the suit property; and that costs of the suit be awarded to the respondent.

3. The case of the respondent in the said suit was that, vide an agreement for sale dated 13/4/2012, the appellant's mother, Rachael Wangari Nderi, sold to the respondent the suit property at a consideration of Kshs 1,600,000. The respondent duly paid the said consideration and the appellant's mother transferred the suit property to him. He contended that, despite the appellant having been given her own piece of land by her mother, she infringed on his right of occupation and enjoyment of the suit property by illegally occupying the suit property. Consequently, he sought the above reliefs.

4. In answer to the claim, the appellant filed a statement of defence dated 12/6/2013. Save for the descriptive part of the claim, she generally denied all the allegations made by the respondent in the plaint. She also denied having been served with a demand notice. Further, she averred that the suit property was the subject of adjudication in **Succession Cause No. 2630 of 2011** where the respondent had been joined as a 2nd respondent. She urged the court to dismiss the respondent's suit.

5. Trial proceeded before **Hon M. Ochieng, PM**, culminating in a judgment dated and signed by the said Magistrate on **9/4/2020** and read on his behalf by Hon B Ojoo SPM on **18/5/2020**. The Learned Magistrate found that the appellant had not shown why the respondent who was the registered proprietor of the suit property should not have possession of the suit property. He granted the plea for eviction.

6. Aggrieved by the Judgment of the trial court, the appellant brought the present appeal through a memorandum of appeal dated **13/6/2020**. He urged the court to allow the appeal, set aside the judgment, and substitute the judgment of the trial court with an order that the respondent (plaintiff) did not prove his case.

7. The appellant advanced the following seven (7) verbatim grounds of appeal:

*a) The learned magistrate erred in fact and law in placing the burden of proof on the appellant by laying too much emphasis on the unpleaded matters in the appellant's case and not laying an emphasis on the respondent's case who bore the burden of proving his case and which burden he failed to discharge.*

*b) The learned magistrate erred in law in holding that the respondent had proved his case on the validity of his title while the respondent did not adduce any evidence of the Land Control Board consent approving the purchase of the land as required under Section 6 of the Land Control Act.*

*c) The learned magistrate erred in law in holding that the respondent had proved his case on the validity of his title while the respondent did not adduce any evidence of payment of a consideration for the purchase of the land.*

*d) The learned magistrate erred in law in holding that the respondent had proved his case on the validity of his title while the respondent did not adduce any evidence of the leave of court approving the purchase of the land as required under the Law of Succession Act.*

*e) The learned magistrate erred in law in holding that the respondent had proved his case on the validity of his title while the respondent did not adduce any evidence of issuance of requisite notices to the appellant who was and is in possession of the land before purchasing the same.*

*f) The learned magistrate erred in fact in finding that the mental capacity of the appellant's mother had not been established while it is the respondents who declined to call her as witness for cross examination and observation by court as required under Section 26 of the Mental Health Act and Order 32 Rule 15 of the Civil Procedure Rules.*

*g) The learned magistrate erred in fact in finding that the mental capacity of the appellant's mother had not been established while the appellant had filed an application for her examination but she passed on before the same could be heard.*

## Submissions

8. The appeal was canvassed through written submissions dated 23/7/2021, filed through the firm of **Chege Kamau & Co Advocates**. Counsel for the appellant identified the following as the six issues falling for determination in the appeal: (i) *Whether the respondent discharged his burden of proof and whether the burden can be discharged by placing the burden of proof on the appellant by laying too much emphasis on the unpleaded matters in the appellant's case;* (ii) *Whether in the absence of requisite notices and consents, the respondent had proved the validity of the purchase and title;* (iii) *Whether in the absence of evidence of a consideration, the respondent had proved he was a bonafide purchaser for value;* (iv) *Whether in the absence of court's leave to sell the land by the appellant's mother, the respondent had proved his case on the validity of the sale and his title;* (v) *Whether in the absence of requisite notice to the appellant prior the purchase the respondent had proved his case on the validity of the sale and his title (sic);* and (vi) *Whether the appellant's mother was mentally sound to enter into a sale agreement with the respondent.* [Note: The issues have been reproduced verbatim].

9. On whether the respondent discharged his burden of proof and whether the burden could be discharged by "placing the burden of proof on the appellant by laying too much emphasis on the unpleaded matters in the appellant's case, counsel submitted that **Section 107** of the **Evidence Act** placed the burden of proof on the party making the allegation. Counsel contended that a plaintiff always has the burden of proof and that burden shifts to the defendant only after the plaintiff has discharged the burden. Counsel further argued that although the general rule was that cases would be determined on the basis of pleadings, there were situations when a court of law would determine unpleaded matters. Counsel relied on the decisions in **Odd Jobs v Mubia [1970] EA 476** and **Habib Bank A. G Zurich v Rajrikant Khetshi Shah [2018] eKLR**. Counsel contended that the trial magistrate erred by laying emphasis on the appellant's case as pleaded in the defence. Counsel contended that even if the appellant raised unpleaded issues, the trial court ought to have determined the issues as the same had been raised in the course of trial and evidence had been led on them.

10. On whether, in the absence of requisite notices and consents, the respondents had proved the validity of the purchase and title, counsel argued that **Sections 36** and **37** of the Law of Succession Act required that immovable assets of an intestate estate be sold only with the consent of all the "adult children of the deceased". Counsel contended that there was no proof that sale and transfer of the suit property to the respondent was effected with the consent of all the "family members". Counsel added that the respondent had failed to adduce evidence relating to the consent of the Land Control Board in tandem with the requirements of **Section 6(1)**

of the **Land Control Act**.

11. On whether, in the absence of evidence of consideration, the respondent had proved he was a bonafide purchaser for value, counsel cited **Section 26** of the Land Registration Act and argued that the respondent did not adduce evidence to prove that he paid consideration in pursuance of the alleged purchase, hence he did not satisfy the threshold of a bonafide purchaser for value.

12. On whether the appellant's mother was mentally sound to enter into a sale agreement with the respondent, counsel for the appellant contended that it was trite law that one of the essential elements of a valid contract is the capacity to enter into a contract, hence in the absence of mental capacity to enter into a contract, the contract would be deemed void. Counsel contended that although the appellant had insisted on her mother being brought to court vide an application dated 11th August 2016, the respondent failed to call her mother to testify. Although counsel for the appellant identified six issues, he only submitted on the four issues as summarized above.

13. The respondent filed written submissions dated 5/10/2021 through the firm of **Selina Musungu & Co Advocates**. Counsel for the respondent identified the following as the two issues falling for determination in the appeal: (i) *Whether the respondent discharged his burden of proof in the lower court proceedings, to wit: Whether he obtained a good title from the seller; and Whether he went through the due process of obtaining the title;* and (ii) *Whether the trial court reached a just and fair conclusion considering the evidence on record.*

14. On whether the respondent discharged his burden of proof, counsel for the respondent cited the provisions of **Section 107** of the **Evidence Act** and submitted that the respondent adduced evidence to demonstrate how he acquired the suit property and presented relevant exhibits to support his case. Counsel added that the issue of legality of the title acquired by the appellant's mother had been adjudicated and

disposed by the High Court in **Succession Cause No 2630 of 2011** and the respondent had presented evidence to that effect. Counsel added that the respondent presented evidence confirming that he had paid the full purchase price and that the seller had the mental capacity to sell the suit property. Counsel argued that the burden of proof thereafter shifted to the appellant.

15. Counsel for the respondent argued that parties were bound by their pleadings and because the appellant never pleaded for cancellation of the respondent's title, the issue of cancellation did not arise. On the appellant's contention that consent of family members was not obtained, counsel referred the court to the evidence at **pages 112 -120** of the record of appeal and submitted that there was a meeting of the appellant and all the siblings of the appellant and they all agreed that the suit property be sold by their mother. On the contention that there was no evidence of consent of the Land Control Board, counsel submitted that parties were bound by their pleadings and because this issue was never raised in the appellant's defence and never came up during trial, it should not be entertained in the appeal.

16. On whether the trial court reached a just and fair conclusion considering the evidence on record, counsel for the respondent submitted that based on the evidence on record, the trial court reached a just and fair conclusion. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

17. I have examined and considered the full record of the trial court; the seven grounds of appeal set out in the memorandum of appeal; and the parties' respective submissions together with the issues they identified and authorities that they cited. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues falling for determination in this appeal. Parties to this appeal did not present a common statement of issues to be determined by the Court. I will, in the circumstances, analyse and dispose each of the seven grounds of appeal chronologically in the order in which they were itemized in the memorandum of appeal.

18. As a general principle, the jurisdiction of the first appellate court is to re-

evaluate and re-assess the entire evidence with a view to arriving at proper inferences of fact and independent conclusions. [See the Court of Appeal decisions in: (i) **Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & company Advocates [2013] eKLR**; and (ii) **Mwana Sokoni v Kenya Bus Services Limited [1985]**.

19. The first ground advanced in this appeal is that the trial magistrate erred in fact and in law in placing the burden of proof on the appellant by laying too much emphasis on the unpleaded matters in the appellant's case and not laying emphasis on the respondent's case given the fact that the respondent bore the burden of proof which burden the respondent failed to discharge.

20. The cardinal role of pleadings in a civil trial cannot be gainsaid. Pleadings constitute the foundation upon which parties' respective cases are tried and determined. Secondly, pleadings are the foundation upon which evidence is built. Without pleadings, there is no basis for leading evidence. Underscoring the key role of pleadings in a civil trial, the Supreme Court of Kenya stated as follows in **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR**.

***“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....”***

21. The respondent pleaded his case as summarized in the background part of this judgment. On her part, the appellant, though represented by a firm of advocates, elected to put forth pleadings that were merely general denials of the averments made in the plaint. Other than pleading in passing that the suit property was the subject of a pending succession cause, the appellant did not challenge any of the matters pleaded by the respondent. She did not challenge sale of the suit property to the respondent by her mother; she did not challenge or question the validity of the title held by the respondent; she did not plead fraud or irregularity in the defendant's title; She did not raise the issue of notices or consents; and she did not plead a counterclaim. Generally, she did not bother to file in court and serve on the respondent pleadings setting out a defence or counterclaim that would have prompted the respondent to do more than he did. In the absence of any other pleadings by the appellant, what was required of the respondent was to prove the matters pleaded in the amended plaint and address the single issue relating to **Succession Cause No 2630 of 2011** which was the only issue raised in passing in the appellant's defence.

22. I do not, in the circumstances, agree with the appellant on her contention that the trial magistrate laid too much emphasis on the fact that the appellant had raised matters which she had not pleaded. I entirely agree with the trial magistrate that parties to a civil suit are bound by their pleadings and no party is allowed to travel beyond his pleadings.

23. I have looked at the analysis made by the trial magistrate on the key issue which fell for determination, which was the question as to whether or not the appellant should be evicted from the suit property. The trial magistrate correctly observed that; (i) based on the evidence before him, the succession dispute relating to the appellant's father's estate had been determined by the High Court and the estate had been distributed; (ii) the respondent was the registered proprietor of the suit property; (iii) the appellant had not shown why the respondent who was the registered proprietor of the suit property should not have vacant possession of the suit property; (iv) that there was no evidence placed before the trial court to suggest that the appellant's mother lacked the requisite mental capacity to dispose the suit property at the time she disposed it; and (v) that there was no evidence placed before the court to suggest that the title held by the respondent was obtained fraudulently or through misrepresentation. The above findings by the trial court were indeed reflected in the record before the trial court. The respondent properly presented evidence to support his case and even went the extra mile of responding to issues that had not been pleaded in the appellant's defence. The court is therefore in agreement with the trial court that the respondent properly discharged the burden of proof. Consequently, I find no merit in the first ground of appeal.

24. The second ground of appeal is that the trial magistrate erred in holding that the respondent had proved his case on the validity of his title yet he did not adduce any evidence relating to the consent of the Land Control Board approving the purchase. First, the validity of the respondent's title was never challenged in the appellant's defence. Secondly, the issue of consent of the Land Control Board was never raised either in the defence or in the appellant's evidence. It was therefore not an issue for determination before the trial court. I do not, in the circumstances find merit in this ground of appeal.

25. The third ground of appeal is that the trial magistrate erred in law in

holding that the respondent had proved his case on the validity of his title yet the respondent did not adduce evidence of payment of consideration for the purchase of the suit property. The issue of payment of purchase price to the appellant's mother was not raised in the appellant's defence. It was similarly not raised in her evidence. The respondent nonetheless led evidence by PW1 – Tabitha Waithera Nderi, a sister to the appellant. She testified that she was a witness to the sale of the suit property. She confirmed that the agreed consideration of Kshs 1,600,000 was paid to their mother as reflected in MFI-5. The respondent similarly testified that he paid the full purchase price of Kshs 1,600,000 to the appellant's mother at the lawyer's office. The contention that there was no proof of payment of purchase price is therefore without merit. I find no merit in this ground of appeal.

26. The fourth ground of appeal is that the trial magistrate erred in holding that the respondent had proved his case yet the respondent did not adduce evidence of leave of the court approving purchase of the suit property "as required under the Law of Succession Act." The issue of approval of sale by the court was not raised in the statement of defence. Similarly, it was not raised in the evidence presented by the appellant. If the appellant wished to challenge the sale of the suit property by her mother, to the respondent, she had the liberty to file proper pleadings, plead the issue, canvass the issue in the trial court, and invite the trial court to determine it. That is not what the appellant did. She is raising the issue in this appeal while aware that it was neither pleaded nor canvassed in the trial court. Without saying much, for the above reasons, I reject this ground of appeal.

27. The fifth ground of appeal is that the trial court erred in law in holding that the respondent had proved his case on the validity of his title yet the respondent did not adduce any evidence on issuance of requisite notices to the appellant who was in possession of the suit property before purchasing it. Validity of the respondent's title was never pleaded as an issue in the defence. Secondly, it is not clear how the validity of the respondent's title would be affected by the notice which the appellant contends should have been issued to her. I do not find merit in this ground of appeal.

28. The sixth and seventh grounds are one and the same. The appellant's gravamen is that the trial court erred in finding that the mental capacity of the appellant's mother had not been established yet it is the respondent who had failed to call her as a witness. First, the mental capacity of the appellant's mother was never pleaded as an issue to be determined by the trial court. Lack of mental capacity to dispose the suit property was similarly not pleaded. No evidence was adduced by the appellant to demonstrate that the appellant's mother lacked the requisite mental capacity to dispose the suit property at the time she disposed it. If it was the position of the appellant that her mother lacked the requisite mental capacity, she should have pleaded the issue and led evidence to prove it. It was not the duty of the respondent to lead evidence to prove an issue that had not been pleaded. There is therefore no merit in this ground of appeal.

29. The result is that the court finds no merit in this appeal. The appeal is hereby dismissed for lack of merit. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr. Chege Kamau for the Appellant

Ms Musungu for the Respondent

Court Assistant: Phyllis Mwangi

**NOTE:**

This Judgment was not delivered on 14/12/2021 as earlier scheduled because I was assigned duties outside the Station.

**B M EBOSO**

**JUDGE**