



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 27 OF 2014

NJUE ANDREWAPPELLANT

VERSUS

NGARI MUNENE.....RESPONDENT

(An Appeal from Judgment and decree of the Senior Principal Magistrate dated 19th August 2014 in Embu CMCC No. 172 of 2014)

J U D G M E N T

Introduction

1. This is an appeal against the ruling of Embu Senior Principal Magistrate delivered on the 19th August 2014 followed by a decree issued on 21st August 2014 in CMCC No. 172 of 2014.
2. The appellant in his plaint dated 2nd July 2014 and amended on the 17th July 2014 in his capacity as the registered proprietor of LR. Mbeti/Kiamuringa/313 sought for an order restraining the respondent, his agents and servants or anyone claiming on his behalf from burying the remains of the late Munene Kombo, the father of the respondent on LR. Mbeti/Kiamuringa/313.
3. The respondent's father and his family claimed to have settled on the land for about 40 years claiming purchasers interest for six (6) acres sold to them by the appellants father (deceased), the said portion was never excised from the land LR. Mbeti/Kiamuringa/313 despite demand by the respondent's father.
4. Pursuant to his notice of motion dated 2nd July 2014 filed together with the plaint, was granted temporary orders to restrain the respondent from burying his father on the suit premises. These orders were later set aside on application by the respondent on grounds that he was not served with the relevant application. The case was then fixed for full hearing.
5. The case was heard and determined by the Embu Senior Principal Magistrate who dismissed it with costs. The appellant applied for an order for stay of execution of the order pending appeal which order was granted on condition that the appellant pays the mortuary fees. The body of the respondent's father is still preserved at Embu Provincial and General Hospital mortuary pending hearing and determination of this appeal.

The Grounds of Appeal

6. The appellant has listed several grounds in his memorandum which will be briefly stated. Firstly, the appellant states that the trial magistrate erred in applying principles of granting an interlocutory injunction on a claim for permanent injunction. It was wrong for the magistrate to hold that mere occupation of land superseded the rights and interests of the appellant. The court erred by holding that the consent of the appellant to the burial of the deceased on the appellant's land was not necessary simply because the respondent's father had paid purchase price.

7. That the court failed to consider that the land transaction had not been consented to by the Land Board before the respondent's father died intestate. Further that the learned magistrate failed to formulate issues for determination and failed to consider and apply the doctrine of precedents. Finally that the principle of balance of probability was not applied in the appellant's case.

The Submissions

(a) The Appellant's Arguments

8. The case before the court seeking orders of a permanent injunction to restrain the respondent from burying the remains of his father on LR. Mbeti/Kiamuringa/313. The magistrate ought to have dealt with the case as a whole as opposed to dealing with it as if it was an application seeking for interlocutory injunction.

The magistrate was not justified to rely on the principles of guiding courts in granting temporary injunctions as set out in the case of *GIELLA VS CASSMAN BROWN*. The appellant was only required to prove that he was the absolute owner of Mbeti/Kiamuringa/313 and that the respondent had no right to bury his deceased father on the land.

9. It was a misdirection on the part of the magistrate to state that he was not dealing with the issue of ownership of the land or possession of the suit. The appellant argues that the rights of burial could not be separated with the rights of ownership. It was not proved that the respondent had buried other relatives on the land by merely producing burial permits.

10. The ownership of the land by the appellant is protected by Section 25 of the Land Registration Act No. 3 of 2011. It was wrong for the magistrate to allow the respondent to bury his relative on the land. This in effect amounted to dispossessing the appellant of his land.

11. The judgment of the court was shallow and did not identify issues for determination. It also failed to address itself on whether the respondent had acquired any proprietary rights on the suit premises. The same should be set aside and cost of the appeal be awarded to the appellant.

(b) The Respondent Arguments

12. It is the respondent's contention that the principles in *GIELLA VS CASSMAN BROWN* were not applicable to the case of a permanent injunction. The respondent submits that the court correctly applied the principles of balance of probability in determining whether the case had been proved and therefore, reached the right conclusion that the appellant failed to prove his case. All the issues raised in the case were considered in the judgment. The appellant's case did not raise issues of ownership, occupation or even the validity of the land transactions.

13. There was no declaratory relief sought by the appellant as to the ownership of the suit premises. The documents of ownership were never produced by the appellant in evidence and therefore the court had no business in dealing with irrelevant issues.

14. The respondent's family having lived on the suit land for over 40 years had established that a family graveyard existed on the portion the deceased's family occupied. Through production of burial permits, they demonstrated the fact that the remains of other members of the family had been buried on the portion occupied by family.

15. The appellant bound himself in a consent order that he would pay mortuary fees by first making a first deposit of Kshs.10,000/= which he failed to do. This is a demonstration that he is not a law-abiding citizen. The respondent urges the court to dismiss the appeal.

The Duty of the Court

16. The duty of the first appellate court was explained by the Court of Appeal in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN P. MACHIRA T/A MACHIRA & CO. ASSOCIATES [2013] eKLR** when it held inter alia:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The evidence

During the hearing of the case, the appellant told the court that the father of the respondent was a member of his clan and that when he died the respondent wanted to bury his remains on LR. Mbeti/Kiamuringa/313. He said that he is the registered owner of the land and had never sold the land or any part of it to the respondent or to his deceased father. It is during cross examination that the appellant admitted that the respondent resides on the suit premises. He then said that the deceased had wanted to buy three acres out of the land in 1969 but he did not pay consideration for it.

17. The appellant also admitted that he had never sued the deceased during his lifetime for trespass. He called his son PW2 as a witness who said that the appellant and the deceased had a land sale agreement for 3 acres of the suit premises but the deceased failed to pay consideration. According to the witness the deceased had stayed on the land since 2007.

18. PW2 testified that he was present when the appellant agreed to give three acres to the deceased. He told the court that the suit land belongs to the appellant and that the deceased had lived on the land for many years before he died.

However, he was not aware of the land agreement made in 2010 to give 3 acres to the deceased.

19. The respondent testified that in 1969, his deceased father bought six acres of land from the appellant to be excised from the suit premises. He paid the full consideration at the rate of Kshs.1,000/= per acre. The appellant was to change his mind later and refused to transfer the six acres to him. The sale was renegotiated between the parties and it was agreed that the deceased be given only 3 acres.

20. The respondent produced a sale agreement as an exhibit. The family of deceased has stayed on the land for about 40 years and have buried their mother and uncle on the said land and that the appellant never blocked the burial. It was his case that the family of deceased have a right to bury the deceased on the suit land.

21. The respondent's evidence was corroborated in material particulars by DW2 and DW3 who also bought portions of land Mbeti/Kiamuringa/313 from late 1960's. DW2 testified that he had bought 15 acres from the appellant and has been living on the portion. The appellant and the deceased's families have been his neighbours for many years on the disputed premises.

22. Although DW2 had not seen the sale agreement between the parties, he was aware that the appellant sold the deceased 6 acres of land and that the deceased's family has been in occupation and have buried the remains of their relatives there. I found DW3's evidence in agreement with that of PW3 the appellant's witness.

23. The appellant argued that he was the absolute owner of the land and that the deceased's family had no right over it. He said that the sale agreement produced in evidence was signed by the respondent. He could not therefore rely on the agreement where he was not a party. He denied having allowed the deceased to bury his relatives on the land. However, there was evidence from the respondent that the appellant even attended the burial of his relatives. This means that the appellant had no objection to the burial of the relatives on the land which is a recognition of some right over the land by the deceased.

24. The Land Registration Act Section 24, 25 and 26 give the registered owner all rights and privileges over the land. However, this does not bar any person with overriding interests, a purchaser or any other person claiming interest to pursue his/her cause against the registered proprietor.

The magistrate in his judgment correctly observed that the issue of who was the registered owner was not in dispute. It was indeed the appellant who was the registered owner. The deceased and his family had dealings concerning purchase of a portion of the appellant's land.

25. The appellant after denying occupation of the portion of land by the deceased's family later admitted it but pushed the period of commencement of occupation ahead from 1969 to 2007. This was disapproved by the respondent and his witnesses who said it was over 40 years occupation period. The respondent's witnesses were consistent on the issue of purchase, occupation and burial of deceased's relatives as opposed to the appellant who kept changing his story and only admitted some facts when pushed during cross-examination.

26. The letter from the Area Chief dated 7/7/2014 also supported the respondent's case. It is due to the issue of occupation and burial of other relatives on the land by the respondent that led the trial magistrate not to grant the permanent injunction sought by the appellant.

27. In Kenya, there are many burial rights disputes decided by courts from time to time. However, there is no law that exists to address burial issues in relation to land. The courts have mostly relied on only the evidence of the parties rights without any legal provisions for guidance.

28. In this case, the respondent whom the trial court found to be a credible witness established that although the appellant was the registered proprietor of Mbeti/Kiamuringa/313, the family of the deceased had lawful interest of the portion they occupied and had been allowed to use the land for many years without restriction. This was merely occupation as the appellant argued in his submissions. The appellant's assertion that the respondent and his family were strangers on the land was proved untrue.

29. The appellants relied on the case of **PETER JUNIOR GWARO VS WILFRED MONYENYE & 2 OTHERS Kisii High Court ELC No. 459 of 2013** where the plaintiff was granted a mandatory injunction restraining the defendant from entering, trespassing or burying the deceased's remains on the suit premises registered in his name. This case is distinguishable from the case before me in that:-

- *Unlike in this case, the plaintiff had sued the defendant in an earlier case concerning the same property.*
- *The plaintiff was successful in demonstrating an act of trespass on part of the defendants unlike the situation herein.*

30. In the appellant's second authority **Nairobi Civil Appeal No. 233 of 2007 MICHAEL MUSAU KITIVO VS MAURICE NDAMBUKI KITIVO** the plaintiff sought a declaratory order that land given by his father with Land Board consent issued belonged to him. His second prayer was for an injunction to restrain the defendant from burying his mother on the land. The magistrate dismissed the first prayer of declaration of ownership and granted the second one. The High Court upheld the judgment and so did the Court of Appeal. The facts in this case are not relevant to the case before me.

31. In the case of **Michael Musau Kitivo case**, there was a succession cause pending between the parties for distribution of the deceased's assets. This meant that the issue relating to entitlement of the suit land was in issue in a previous suit or proceedings. I do not find the facts relevant to the case before me in that

the appellant had not sued the deceased for trespass or for any other interest relating to the suit premises.

32. However, I may borrow from the Court of Appeal judgment in the **Kitivo** case where it faulted the superior court judge for dealing with the question of ownership of the land while the issue for determination was whether the deceased could be buried on that land or not. The court observed:-

“In summary, we say this. That Sitati, J. erred in purporting to deal with the issue of ownership of the subject land when the dispute over the same land was pending before another court”.

33. The court of Appeal holding in the **Kitivo** case answers the ground of appeal raised in this case to the effect that the trial magistrate erred for failing to determine the issue of ownership in favour of the appellant. To this I state that ownership of LR. Mbeti/Kiamuringa/313 was not in issue. The issue was whether the appellant was entitled to a permanent injunction to restrain the respondent from burying his deceased father on the land. This issue was determined in the judgment.

34. Regarding the principles in **GIELLA VS CASSMAN BROWN [1973] EA 358** the Court held that the applicant must prove that he has a *prima facie* case with probability of success and that he stands to suffer irreparable loss. The trial magistrate noted in his judgment that the respondent had overriding interests on the land pursuant to Section 28 of the Land Registration Act. The existence of overriding interests was recognized by the Court in the case of a permanent injunction. In conclusion, I find that the appellant failed to prove his case on the balance of probability.

35. However, there is nothing on record to show that the general principles in the **GIELLA VS CASSMAN** case was applied in the judgment. I am in agreement with the appellant that the principle only applies to interlocutory injunctions and not to case seeking permanent orders. The only statement in the judgment which may be the basis of the appellants grounds of appeal reads:-

“That he (appellant) may suffer irreparable loss if the defendant buries the deceased there is not true. Other graves exist”

For the court to make this statement it is highly probable that it was drawn from the appellant's evidence as he pleaded to the court to grant for a permanent injunction in his favour. I find no merit in this ground of appeal.

36. The appellant argued that the magistrate did not set out the issues for determination leading to a flawed judgment. On perusal of the judgment, I have no doubt that it captured all the relevant issues and made decisions giving sound reasons. The judgment was brief but nevertheless a sound one and in compliance with Order 21 Rule 4 of the Civil Procedure Rules.

37. The magistrate in determining the issues applied the principle of balance of probability reaching a conclusion that the appellant did not prove his case. Of course, the burden of proof in all civil cases is on the balance of probabilities. Even if the exact words are not used in the judgment sufficed when the court stated:-

“Having demonstrated that he (defendant) and his late father were on the said land with permission of plaintiff, lived there for over 40 years and buried other relatives there without any order from plaintiff. I find the plaintiffs suit not merited.”

38. I reach the conclusion that the trial magistrate used the correct principles and relied on cogent evidence in determining the suit. The mortuary charges should be cleared forthwith by the appellant pursuant to the consent order dated 10/12/2015 by the appellant to facilitate release of the deceased's body for burial by his family.

I find no merit in the appeal and dismiss it with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 21ST DAY OF APRIL,

2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ndorongo for the Respondent