



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 4 OF 2011

DAVID NYAMWEYA..... APPELLANT

VERSUS

MICHAEL NYAMWEYA NYAMWE..... RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Nyamira, Hon. J.Wanjala, SPM, delivered on 29th December, 2010)

JUDGMENT

1. Background:

This appeal arises from the judgment that was delivered by J. Wanjala, SPM on 29th December 2010 in Nyamira Principal Magistrate's Court, Civil Case No. 42 of 2010, David Nyamweya –vs- Michael Nyamweya Nyamweya (hereinafter referred to only as “the lower court or the lower court case” where the context so admits) in which she dismissed the appellants suit against the respondent with costs. In the lower court, the appellant had brought a claim against the respondent seeking; an order of injunction to restrain the respondent by himself or through his servants, employees or anyone acting on his instructions from removing the body of one, Kemunto Michael from Nyamira District Hospital or wherever it was lying and burying it on land parcel known as LR No. West Mugirango/Bosamaro/689 (hereinafter referred to as “the suit property”) until the hearing and determination of the suit (sic). In his plaint dated 27th April 2010, the appellant averred that he is the registered proprietor of the suit property which he purchased for his exclusive use. The appellant averred that he allowed the respondent to live with him on the suit property on the understanding that the respondent who is his younger brother would move and settle on their ancestral land namely, LR No. West Mugirango/Bosamaro/686 (hereinafter referred to as “Plot No. 686”) when he becomes of age. The appellant averred that when the respondent became of age, he declined to move out of the suit property despite several notices that were served upon him by the appellant to do so. The appellant averred that the respondent had made preparations to inter the body of his daughter Kimunto Michael (hereinafter referred to as “the deceased”) on the suit property without his consent. It is on account of the foregoing that the appellant was constrained to institute the lower court suit against the respondent to restrain him from carrying out the said activity.

2. The appellant's claim in the lower court was defended by the respondent. In his statement of defence dated 28th July 2010, the respondent admitted that the suit property was registered in the name of the appellant but contended that the same was so registered fraudulently. The respondent contended that the suit property was at all material times registered in the name of one, Kemunto Nyamweya, deceased and that the appellant caused the same to be transferred to his name without Grant of Letters of Administration in respect to the estate of the said Kemunto Nyamweya having been obtained. The respondent averred that the said Kemunto Nyamweya was the mother of the

respondent and the appellant and that it was her wish that was expressed in an oral will that the suit property be shared between the appellant and the respondent upon her death. The respondent contended that he had an equitable right over the suit property and as such had the right to bury the deceased on the said property which he had occupied openly for uninterrupted period of over 25 years.

3. When the suit came up for hearing in the lower court, the appellant gave evidence and called one witness. The respondent on his part gave evidence and called two witnesses. The learned magistrate considered the parties' respective cases as pleaded and the evidence that was tendered by them and made a finding that the appellant had failed to prove his case against the respondent on a balance of probability. Consequently, she dismissed the appellant's claim against the respondent with costs.
4. **The appeal before this court:**

The appellant was aggrieved with the decision of the lower court and preferred this appeal against the same in which he has put forward six (6) grounds of appeal namely:

- i. **"The trial magistrate misdirected herself when evaluating the evidence on record before occasioning a miscarriage of justice to the owner of title to land.**
- ii. **The trial magistrate erred in failing to appreciate that the plaintiff (now appellant) had established a case with a probability of success.**
- iii. **The trial magistrate's judgment was bad in law as she never considered sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed).**
- iv. **The trial magistrate's judgment in the circumstances was oppressive to the plaintiff and the plaintiff's title was absolute and indefeasible and that the respondent had no right whatsoever under customary law to bury his deceased child on the land of the plaintiff known as West Mugirango/Bosamaro/ 689.**
- v. **The trial magistrate erred in law in failing to address her mind to the basic principles in granting an injunction.**
- vi. **The trial magistrate erred in failing to appreciate that the defendant now the respondent was a trespasser upon the plaintiff's/appellant's land known as West Mugirango/Bosamaro/689 and burying the deceased's body should not be a basis of obtaining the land."**

5. The appellant has asked this court to:

- i. Allow the appeal.
- ii. Set aside the decree issued by the lower court on 31st December 2010.
- iii. Order that the body of Kimunto Michael be exhumed from the suit property and taken to Nyamira Hospital Mortuary for disposal on the defendants own parcel of land.
- iv. Order the respondent to pay the costs of the appeal.
- v. Grant any other relief deemed fit.

6. When the appeal came up for directions on 5th February, 2015, the advocates for the parties agreed to argue the appeal by way of written submissions. Both parties filed their submissions and the same are on record. In their submission, the appellant's advocates argued the grounds of appeal seriatim. On ground one of appeal, the appellant submitted that the appellant had adduced sufficient evidence in proof of his ownership of the suit property whereas the respondent had placed no material before the court in support of his claim to the suit property. The appellant submitted that the respondent is a trespasser on the suit property who should have been restrained from burying the body of the deceased on the said property. The appellant submitted that in declining to issue an order of injunction, the lower court occasioned a miscarriage of justice to the appellant whose title to the suit property is protected under the provisions of sections 24, 25 and 26 of the Land Registration Act, 2012 and sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The appellant submitted that the court ought to have found that the respondent could only bury the body of the deceased on the suit property with the consent of the appellant.
7. In their submission in support of ground two of appeal, the appellant's advocates submitted that

the lower court erred in failing to find that the appellant had established a case with a probability of success. The appellant's advocates submitted that the appellant had furnished the lower court with sufficient proof of his ownership of the suit property and that the respondent had land elsewhere. The appellant submitted that the respondent on the other hand adduced no evidence in proof of his claim over the suit property. In support of his ground three of appeal, the appellant submitted that the lower court's judgment is bad in law in that the lower court failed to consider the provisions of sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). On ground four of appeal, the appellant submitted that the decision of the lower court was oppressive to the appellant in that the appellant whose title to the suit property was absolute and indefeasible was denied an injunction to restrain the respondent who had no right on the suit property from burying the body of the deceased on the suit property. With regard to ground five of appeal, the appellant submitted that the trial court erred in failing to address its mind to the principles for granting injunction that were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. The appellant made no submissions with regard to ground six of the appeal. I think that this ground of appeal was covered fully by the appellant's advocates in their submissions on ground one of appeal. In their submissions in reply, the respondent's advocates supported the lower court's judgment and dismissed each of the grounds of appeal put forward by the appellant as baseless. The respondent urged the court to dismiss the appeal with costs.

8. I have considered the proceedings and judgment of the lower court. I have also considered the appellant's grounds of appeal and the submissions that were made by the appellant's advocates in support thereof. Finally, I have considered the submissions by the respondent's advocates in opposition to the appeal. The appellant's case in the lower court as I have set out at the beginning of this judgment was that, he is the registered owner of the suit property and that, without his permission or consent, the respondent wanted to inter the body of the deceased on the suit property. In his plaint, the appellant sought only one relief namely, an injunction to restrain the respondent from burying the body of the deceased on the suit property. What the appellant sought was a temporary injunction pending the hearing and determination of the suit. In my view, such order could only be granted in an interlocutory application and was indeed granted by the lower court on 8th July 2010 by J. Macharia R. M (see the ruling at pages 27 and 28 of the record of appeal).
9. What the appellant should have sought in the plaint is a permanent injunction. I don't see how the lower court could grant at the trial, an injunction "until the hearing and final determination of this suit". It is surprising that neither the advocates for the parties nor the lower court detected this anomaly in the pleadings that had fundamental effect on the suit by the appellant. The relief sought by the appellant in the lower court could not be granted. Without an amendment, the appellant's suit in the lower court was liable to be struck out. A court of law would not make an idle and ineffectual order. The relief that was sought by the appellant in the lower court if granted would have been idle and meaningless. The parties in the lower court however proceeded as if the appellant had sought a permanent or perpetual injunction. I would consider this appeal on that basis although I would revert to the issue of the appellant's defective pleadings in the lower court and the need to make amendments to the same later in this judgment.
10. The lower court after considering the evidence that was tendered by the parties made a finding that the appellant had not made out a case that would justify the injunction that he had sought. The lower court did not make any finding on the issue of the ownership of the suit property. On this aspect of the case, the lower court stated that: **"In my view ownership of this plot is in dispute. This court was not asked to decide who owns the land..... In any case the title deed that (sic) the plaintiff is being challenged the actual ownership of that plot will have to be decided on by another court in a different case."** (See pages 69 and 70 of the record of appeal). The lower court limited itself to the determination of only one issue namely, whether the respondent could be stopped from burying the body of the deceased on the suit property. I have found the approach that was taken by the lower court to the issues that were raised before it flawed. I have set out at the beginning of this judgment the parties respective cases as they were set out in the pleadings in the lower court.
11. At the core of the dispute was the ownership of the suit property. The appellant had claimed that he is the owner of the suit property. This was the basis on which he sought an order of injunction to restrain the appellant from burying the body of the deceased on the suit property without his

consent. The respondent's contention was that the appellant had acquired title to the suit property fraudulently and that he (the respondent) had an equitable interest in the suit property and as such was entitled to bury the deceased on the property. These are the issues that played out at the trial. Each party tried to assert his ownership claim over the suit property. In my view, the lower court appreciated the fact that it had to determine the issue of the ownership of the suit property while considering whether or not to grant the injunction that was sought by the appellant. At page 69 of the record of appeal, the lower court stated as follows:-

“Hence before this court issues an injunction as the one prayed for in this case, the court must be satisfied that the plaintiff is the absolute owner of the land and there is no challenge to it which can be entertained by a court of law.”

12. How was the lower court going to satisfy itself that the appellant was the absolute owner of the suit property without determining the issue as to who owns the suit property as between the appellant and the respondent? How could the lower court determine whether or not the appellant was entitled to the injunction that he had sought without determining his ownership claim over the suit property vis-a-vis the respondent's claim? In **Halsbury's Laws of England, 4th Edition, Volume 24** the authors have stated as follows at page 523 paragraph 927 with regard to the principles for granting perpetual restrictive injunctions:

“Right at law must be established. The general rule is that if a plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right, or the facts of its violation is denied, he must establish his right at law. Having done that, he is except in special circumstances entitled to an injunction to prevent a recurrence of that violation.”

In **Snell's Equity, 29th Edition** at page 648 the authors have stated as follows on general principles relating to perpetual injunctions:

“A perpetual injunction is granted only when the party who seeks it has a cause of action (which includes statutory as well as private rights of action) justiciable before the court, and in order to obtain the injunction, he must show either that there is an actual or threatened injury to some legal or equitable right of his or that the other party has behaved or threatened injury to some legal or equitable right of his or that the other party has behaved or threatened to behave in unconscionable manner.”

13. It is clear from the foregoing that while considering whether or not the appellant was entitled to a perpetual injunction, the lower court had to determine the parties' respective rights over the suit property on which the appellant had sought to restrain the respondent from burying the deceased. The appellant had led evidence that he purchased the suit property from one, Kemunto Nyamweya and that he was the duly registered owner thereof. He produced a copy of the title deed for the said property bearing his name in proof of his proprietorship of the same. The respondent on the other hand led evidence that the suit property was at all material times registered in the name of Kemunto Nyamweya, deceased who was their mother (Kemunto Nyamweya had married their mother in woman to woman marriage under Gusii Customary Law). He contended that Kemunto Nyamweya had during her lifetime directed that the suit property be shared between the appellant and the respondent. The respondent contended that the appellant fraudulently caused the suit property to be transferred to his (the appellant) name after the death of Kemunto Nyamweya without first obtaining a Grant of Letters of Administration in respect of her estate. The appellant and the respondent called witnesses who supported their respective contentions. During the submissions in the lower court, the appellant cited the provisions of sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) and contended that he was the absolute owner of the suit property and that his rights could only be defeated as provided under the said Act. The appellant submitted further that the respondent's customary law claims over the suit property could not defeat the appellant right over the suit property. The respondent on the other hand submitted that the provisions of sections 27 and 28 of the Registered Land Act (now

repealed) applied only to land registered on first registration of which the suit property is not since the appellant was not the first registered owner thereof. The respondent maintained that the appellant had acquired the suit property fraudulently and as such his title to the suit property was unlawful.

14. The lower court had a duty to determine whether the plaintiff acquired title to the suit property lawfully as he claimed or fraudulently as claimed by the respondent. The parties' did not agree on issues for determination. However, the lower court had a duty under Order 15 rule 2 of the Civil Procedure Rules to frame issues for its determination. Order 15 rule 1 (1) of the Civil Procedure Rules provides that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. In the case that was before the lower court, the issues which arose for determination by the court includes, whether the appellant was the lawful proprietor of the suit property and whether he was entitled to an order of injunction. The lower court was not correct in its assertion that it had not been asked to decide who owns the suit property. It is not clear to me which court the lower court had in mind when it stated that the issue as to who owns the suit property would be determined by another court in a different case.
15. I am of the view that the lower court abdicated its duty by failing to determine the real issues that were presented before it by the parties for determination. The issue as to whether the appellant was entitled to an injunction that the lower court purported to determine could not be determined without first resolving the issue of the legality of the appellants title over the suit property. The lower court's decision on that issue was therefore made in vacuum and had no basis. The mere fact that the respondent had occupied the suit property since he was young perse could not confer upon him an interest in the suit property. The same applies to the existence of his homestead on the suit property. As was rightly submitted by the appellant's advocates in the lower court and before this court, the respondent had to bring his claim over the suit property within the purview of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The fact that the appellant is the registered proprietor of the suit property was not disputed. That fact was expressly admitted by the respondent in his statement of defence. The onus was upon the respondent to prove his contention that the appellant had acquired the suit property fraudulently. Once the appellant placed evidence before the court that he was the registered owner of the suit property, there was a rebuttable presumption in his favour that he is the absolute owner of the said property. The onus shifted to the respondent to prove that the appellant's title was fraudulent and that he had an equitable interest in the suit property. It is after the respondent had placed material before the court showing that the appellant acquired the suit property fraudulently that the burden would shift back to the appellant to show that he acquired the suit property lawfully. I must say that no evidence was tendered before the lower court by the respondent in proof of his contention that the appellant acquired the suit property fraudulently. There was also no credible evidence placed before the lower court by the respondent to show that the portion of the suit property that he occupies was given to him by Elizabeth Kemunto when she was still alive.
16. Due to the foregoing, I am in agreement with the appellant that the lower court misdirected itself when evaluating the evidence that was placed before it. This led to its failure to identify the real issues that were before it for determination thereby occasioning a miscarriage of justice to the appellant. I am also in agreement with the appellant that the trial court failed to address its mind to the principles for granting perpetual restrictive injunction. The lower court failed to consider whether the appellant had met the condition for granting such injunction.
17. The upshot of the foregoing is that the appellant's appeal has merit. Order 42 rule 25 of the Civil Procedure Rules gives this court power on appeal to determine the case fully where the evidence on record is sufficient. Order 42 rule 26 of the Civil Procedure Rules on the other hand gives the court power to order a new trial where it appears to the court that it would serve the interest of justice to so order. I am of the view that in the circumstances of this case, justice would be better served if a new trial is conducted. This view is informed by two factors, first, as I have stated earlier in this judgment, the plaint that was filed in the lower court would require amendment of the reliefs sought so that the court can determine real issues in dispute between the parties. This court cannot determine the lower court suit having regard to the reliefs sought for reasons that I have already alluded to. Unlike the lower court; this court has no power to amend proceedings or pleadings. This can only be done by the lower court. Secondly, the lower court as I have stated above did not determine the issues that were raised before it for determination. The decision that

was arrived by the lower court had no basis at all. The court did not at all consider the merits of the parties' respective claims to the suit property. The lower court was better placed to determine issues of fact having heard the witnesses and observed their demeanor. This court has not had that advantage. The lower court having failed to determine both factual and legal issues that were raised before it, it would not be fair to the parties for this court to take it upon itself to determine those issues in the first instance on the basis only of the evidence on record. In the circumstances, the parties' interest would be better served if they are given an opportunity to present their case afresh before the court. Since the issues which were in dispute between the parties were not determined, no prejudice would be occasioned to any party if a retrial is ordered.

18. In conclusion, I hereby allow the appellant's appeal and set aside the lower court's decree issued on 31st December 2010. The lower court case is hereby remitted back to the lower court for retrial. Since the jurisdiction to hear and determine disputes over land has been removed from the lower court to this court by the Environment and Land Court, Act, 2011, the lower court case is hereby transferred to this court for fresh hearing and disposal. The deputy registrar shall assign the case a new number before this court. With a view to expedite the disposal of the case, I grant leave to the appellant to amend the plaint within 21 days from the date hereof. The respondent shall be at liberty to amend his statement of defence within 21 days from the date of service of the amended plaint. In view of the fact that the burial of the deceased that the appellant had sought to restrain has already taken place, that status quo shall be maintained pending fresh hearing and determination of the lower court case. Since there is no absolute winner in this appeal, each party shall bear its own cost of the appeal.

Delivered, Dated and Signed at Kisii this 26th day of June, 2015.

S.OKONG'O

JUDGE

In the presence of;

Mr. Ondieki h/b for Sagwe for the Appellant

Mr. Soire for the Respondent

Caroline Obura Court Assistant

S.OKONG'O

JUDGE