



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 16 OF 2013

DANIEL NJAGI MURAMITI..... APPELLANT

VERSUS

PETER NDWIGA DANIEL.....1ST RESPONDENT

ISAAC IRERI NJAGI.....2ND RESPONDENT

JOHN NYAGA DANIEL.....3RD RESPONDENT

NEPHAT MURIITHI NJAGI.....4TH RESPONDENT

(An Appeal from the Judgment of P. NANDI Ag. Senior Resident Magistrate Runyenjes in Civil Case No. 48B of 2012 on 5th July, 2013)

J U D G M E N T

The appellant was dissatisfied with the judgment of Runyenjes Senior Resident Magistrate in PMCC No. 48B of 2012 where he had sued the respondents for orders of removal of caution against title of LR. KAGAARI/WERU/446 registered in the name of the plaintiff.

The court ordered that the caution lodged against the title remains in force until the suit land is divided afresh with the respondents meeting the costs of the re-subdivision. The fresh sub-division was to be done within 90 days in default, the parties were ordered to resort to the earlier sub-division and that the caution be removed.

The brief facts of the case are that the plaintiff is the registered owner of the suit land KAGAARI/WERU/446 which he had sub-divided into seven portions, the new titles being LR. KAGAARI/WERU/7938, 7939, 7940, 7941, 7942, 7943 AND 7944. The first six parcels were purposed for transfer to the respondents and to the appellant's five daughters. The last parcel No. 7944 was to remain in the appellant's name. The balance of 3.03 Ha. was set aside as one parcel to be sub-divided among the appellant's sons who are the respondents in this appeal. The plaintiff urged the court in his plaint dated 26/3/2013 to order removal of caution to enable him proceed with further sub-division of the portion of 3.03 Ha. and eventually distribute the land to the respondents. The respondents in their defence averred that they lodged the caution against the title with the purpose of protecting their respective interests for they had developed portions of the suit land before sub-division. What they were opposed to was not the sub-division and distribution but the manner and lay out of the proposed sub-division. The parties disposed of this appeal by way of written submissions as per the directions taken on 1/8/2014.

In his memorandum of appeal, it is contended that the magistrate erred in law and fact by ordering sub-

division of the land which was not pleaded by any of the parties; that the court arbitrated on extraneous matter and that the provisions of Section 24, 25 and 73 of the Land Registration Act, 2012 were not taken into consideration in determining the case; that the principle of balance of probability ought to have been applied in favour of the appellant and that he was entitled to costs of the suit.

The respondents defended the judgment of the court which they argued was based on the issues pleaded by the parties and on issues arising from settlement meetings held by the parties while the case was pending in court. It was further contended that the elders in an attempt to assist the parties to reach settlement had decided on the manner of sub-division which justified orders of the magistrate.

The issues for determination in this case are as follows:-

1. *Whether the magistrate arbitrated on issues which were not pleaded including ordering sub-division of the appellants KAGAARI/WERU/446;*
2. *Whether the magistrate disregarded the rights of the appellant as proprietor of KAGAARI/WERU/446 as stipulated in Section 24 and 25 of the Land Registration Act, 2012.*
3. *Whether the principle of balance of probabilities was properly applied.*

In the plaint, the appellant's prayer was worded as follows:-

“That my claim against the defendant is removal of caution and any restriction lodged upon parcel No. KAGAARI/WERU/446 to facilitate transfer of various portions of land to the relevant beneficiaries.”

The duty of the first appellate court is to evaluate the evidence and draw its inferences of fact. This tantamount to re-hearing the case on the basis of evidence and material captured in the appeal record. It was held in the Court of Appeal case of **SUSAN MUNYI VS KESHAR SHIANI [2013] eKLR Nairobi Civil Appeal No. 38 of 2002** on a first appeal from the High Court that:-

“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 the evidence and arrive at our own independent conclusions.”

The evidence of the appellant was that he has already sub-divided his land KAGAARI/WERU/446 into several portions which he wanted to transfer to his children both daughters and sons. It was not possible for him to effect the transfer due to the existence of a caution which had been lodged by the respondents. Each of the appellants five (5) daughters were to get each 0.40 Ha. while the four (4) sons the respondents herein were to share one portion measuring 3.03 Ha. KAGAARI/WERU/446. The appellant was to retain one portion No. KAGAARI/WERU/7943. The respondents were not satisfied with the manner the sub-division was done which led to them lodging the caution in issue.

The defendants evidence as that they have been cultivating their respective portions on the appellant's land and have developed them by growing nappier grass and trees and would be unfair for the appellant to sub-divide the land in the manner he had done. The respondents were also opposed to being given the 11 acres portion to share among themselves. The respondents were also under the fear that the appellant may dispose off the land and they therefore lodged a caution to protect their interests.

The decree issued by the magistrate was worded as follows:-

1. *That the caution lodged on the suit parcel LR. No. KAGAARI/WERU/446 to remain until the suit land is sub-divided afresh as resolved on 27/3/2013 by family members.*
2. *That the defendants do meet the costs of the re-subdivision which shall be done within 90 days from the date herein.*
3. *That failure on the part of the defendants the earlier subdivision done by J.R.R. Aganyo & Co. Associates vide mutilation serial No. 03974112 dated 27th July to take effect and the caution lodged on the suit land be removed.*

4. *That there will be no order as to costs as the parties are family members.*

Before the appeal was heard the defendants brought an application dated 29th November 2012 seeking for orders that the Executive Officer signs all the relevant documents to facilitate transfer and sub-division of the suit premises. The court did not dispose of the application but abandoned it so that the appeal could be heard and dispensed with expeditiously.

On the issue of jurisdiction the magistrate's court was properly seized of powers to hear and determine the suit relating to removal of caution under Section 73 of the Land Registration Act. The relevant provision provides:-

73(1) *A caution may be withdrawn by the cautioner or removed by order of the court or, subject to sub-section (2), by order of the registrar.*

The procedure of removal by the Registrar is set out in sub-section (2), (3), (4) and (5).

The appellant raised the issue of the court determining matters which were not in the pleadings. Order 2 of the Civil Procedure Rules requires that the parties be restricted to their pleadings in hearing of any suit or application. Similarly, the court in hearing and determining a suit is bound by the pleadings of the parties. The pleadings contained only one prayer for removal of caution. The defendant did not have a counter-claim and as such there was no issue for determination from their pleadings.

The respondents in their evidence dealt on the manner of sub-division of the land by the plaintiff which they did not approve. They gave their own proposal that the land should be divided from top to bottom arguing that this was the mode the family had agreed on based on the reasoning that the lower part of the land was water logged. In his judgment the magistrate dwelt on the issue of sub-division of the land and took into consideration evidence of the defendant that the family had agreed on the share for each of the five (5) daughters of the appellant and his four (4) sons. He then proceeded to make orders for fresh sub-division of the appellant's land within a time limit of 90 days failure of which the earlier sub-division done by the appellant was to take effect.

In the case of **MAKUBE VS NYAMUVO [1983] KLR 403** it was held:-

“A Court of Appeal will not normally interfere with finding of fact of the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown to have demonstrably to have acted on the wrong principles in reaching the findings he did.”

In the case of **NZOIA SUGAR COMPANY VS CAPITAL INSURANCE BROKERS LTD 2014 eKLR (CA)** the Court of Appeal in citing **CURRENT ISSUES OF LAW [1960]** Sir Jack Jacob said:-

“...it is the parties themselves to set an 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 it points other than those specific may be raised without notice.”

The magistrate's court entertained extraneous issues and evidence from the respondents which was not relevant to the matters in issue and it was on this evidence and on the wishes of the respondents that the judgment was based.

The duty of the court was to adjudicate upon the specific claim before the court as pleaded. It was wrong for the court to enter into inquiry of other matters other than what the parties had presented to the court by way of pleadings. Departing from the principle of *“parties are bound by their pleadings”* puts the court in a precarious position where it may find itself acting contrary to its own character and nature of an arbiter. The magistrate in my considered opinion erred in arbitrating on matters which were not pleaded by any of the parties.

The plaintiff produced documentary of proof of ownership for LR. KAGAARI/WERU/446. The Land Registration Act Section 24(a) confers absolute right of ownership to the proprietor. It provides:-

24(a) Subject to this Act – the registration of a person as proprietor of land shall rest in that person the absolute ownership of that land together with all the right and privileges belonging or appurtenant thereto:

Section 25 provides for the rights of a proprietor which shall not be liable to be defeated except as provided for by the Act. These provisions were contained in the repealed Registered Land Act Cap. 300 and were replicated in the Land Registration Act.

The trial Court proceeded to order fresh sub-division of the appellant's land and in the alternative ordered transfer of the sub-divided portions without any legal basis. The applicant's right of absolute and indefeasible ownership of the land were not taken into consideration. The court also failed to recognize that the respondents though sons of the appellant had no legal right over his land during his lifetime and could not therefore demand that the land or any portion of it be transferred to them.

It has been held in several cases that the rights of a registered owner can only be challenged on grounds of fraud or misrepresentation. There was no claim in the defence of the respondents or any evidence to the effect that the title of the land was obtained through fraud or misrepresentation. In the case of **NAIROBI PERMANENT MARKET SOCIETY & 11 OTHERS VS SALIMA ENTERPRISES & 2 OTHERS [1977] eKLR**, in an appeal against the decision of the High Court the Court of Appeal held in dismissing the appeal said:-

“The Company as the registered proprietor of the suit land is the absolute and indefeasible owner thereof. There is no allegation of ... fraud or misrepresentation perpetrated upon the appellants in acquisition of the suit land. The appellants have not disclosed what right or interest they had in the suit land.”

Similarly, in the case of **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI & 2 OTHERS [1997] eKLR**, the respondents claimed designated shares of the appellant's land based on customary rights in their capacity as children of the appellant in a polygamous family. The appellant was the registered proprietor of the land under the Registered Land Act.

The High Court had upheld the decision of an arbitration award directing that the appellant sub-divides his land among his family against his wishes. The Court of Appeal in declaring the award a nullity and setting the High Court Judgment held:-

In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce. It was wrong the learned Judge to uphold the respondents claim against the appellant known to any law although they were claiming land from the appellant because they were his children. The award which was rendered was therefore, a nullity. We accordingly set it aside and in its place substitute an order striking out the original suit with costs.”

The plaintiff or the defendant must prove their claim on the balance of probability before the court can grant the prayers sought. I have already stated that the respondents had not lodged any counter-claim in their defence. The judgment in their favour was made without any legal basis thereby violating the principle of proof on the balance of probability.

It is my finding that the magistrate erred both in fact and law in granting the orders which were not sought by any of the parties. The court also failed to recognize the appellant's rights of absolute ownership and entertained extraneous matters.

The appellants claim for removal of caution was supported by cogent evidence including documentary proof of ownership of the suit premises and existence of the caution lodged by the respondents. The defendants did not adduce any evidence to show why they had lodged the caution against the appellant's title and yet the burden of proof was upon them. I have already said that the appellant's absolute and indefeasible right of ownership can only be challenged on grounds of fraud or misrepresentation.

In the case of *MARIA NGANGI NGWAKO VS CHARLES MWEZI NGANGI 2014 eKLR*, the eldest son of the Applicant had lodged a caution against the applicants title claiming an interest in the suit premises thus hindering the applicant from dealing with his land. Okongo, J said that:-

When the caution is objected to by the proprietor, the onus is upon the cautioner to justify the lodging and the need for it to remain in place.

The law is clear that a caution can only be lodged and maintained by a person who claims a right to obtain an interest in the land, lease or charge which is capable of creation by an instrument registrable under the Land Registration Act. The respondents herein claimed that the purpose of the caution was to protect their interest in the suit premises under Section 73 of the Land Registration Act. The appellant therefore proved his claim on the balance of probabilities. The appeal is hereby allowed by setting aside the orders of the magistrate and substituting them with judgment in favour of the appellant. The caution shall be removed forthwith.

The costs of this appeal and in the court below shall be met by the respondents.

DELIVERED, SIGNED AND DATED AT EMBU THIS 25TH DAY OF NOVEMBER, 2014.

F. MUCHEMI

JUDGE

In the absence of the parties:-

DR to issue notice of delivery of the judgment to the parties within 7 days from today.

F. MUCHEMI

JUDGE