



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC APPEAL NO. 46 OF 2014

FRANCIS KANGETHE KARURU

STEPHEN MWAURA KARURU

WANGUI KANGETHE KARURU) APPELLANTS

NANCY MUKUHI KARURU

ELIZABETH GATHONI

Versus

Teresia Njeri Karuru Respondent

**(Being An Appeal From The Judgment Delivered On 3rd June, 2014 By Hon. D. Nyaboke – R.M
At Wang’uru Principal Magistrate’s Court Civil Case No. 44 Of 2011)**

JUDGMENT

This is yet another of those family disputes over rice holdings that are a common feature in this Court.

When the matter first came before me on 29th September, 2014, what was listed for hearing was the appellant’s Notice of Motion dated 29th September, 2014. Prior to that application being filed, the appellants had filed an appeal on 17th June, 2014 against the decision of the Wanguru Resident Magistrate D. NYABOKE dated 3rd June, 2014 in Wanguru Civil Case No. 44 of 2011. The parties are acting in person and when they appeared before me on 25th November 2014 it was agreed that the appeal itself be canvassed rather than the said application dated 29th September 2014.

This judgment is therefore in respect to that appeal and I have considered the oral submissions by both appellants and the respondent who was represented by his son James Ngigi Karuru due to her advanced age. I have also considered the record in Wanguru Resident Magistrate Civil Case No. 44 of 2011 together with all other documents relevant to this case as were availed to me by the parties.

As is common when lay parties are acting in person, the Court encountered considerable difficulties in following their arguments. An attempt to have the parties settle this matter out of Court was unsuccessful notwithstanding my pleas to the parties to take that route.

As mentioned above, the parties herein are all members of one family. The 5th appellant and respondent are co-wives of one JOHANA KARURU KANGETHE (deceased) while the 1st to 4th appellants are

children of the 5th appellant. During his life time, the deceased JOHANA KARURU KANGETHE was the holder of rice holding No. 579. It is clear from the record herein that following the death of the said JOHANA KARURU KANGETHE, some of the family members appeared before the District Magistrate Wanguru S.M. JUMA and agreed by consent that the 1st appellant herein FRANCIS KANGETHE KARURU be the successor of rice holding No. 579 Tebere Section. A consent order dated 30th June 1983 was subsequently made an order of the Court and from the record, those present when that order was made were:-

1. **EDWARD GITHAE**
2. **GITAU MURAGURI**
3. **MBURU MWANGI**
4. **ELIZABETH GATHONI W/O KARURU – 5TH Appellant herein**
5. **TERESIA NJERI KARURU W/O - Respondent herein**
6. **PHILLIS NJOKI W/O KARURU**
7. **FRANCIS KANGETHE S/O KARURU – 1st Appellant herein**
8. **DANSON KIBATHI S/O KARURU**
9. **BERNARD NDUNGU S/O KARURU**

That consent should really have placed this matter to rest as adopted by the Court in WANGURU MIS CASE NO. 14 of 1983 wherein the magistrate S.M. JUMA (DISTRICT MAGISTRATE) recorded the following orders:

“The rightful successor of holding No. 579 Tebere Section is ID/5745648/68 FRANCIS KANGETHE KARURU”

It would appear that on 26th April 2006, a dispute over this rice holding was determined by the Mwea Irrigation Settlement Scheme Manager which directed that the said rice holding be subdivided as follows:-

1. **TERESIA NJERI (Respondent) be allocated 2.5 acres registered as 579(A) and**
2. **ELIZABETH GATHONI (5th Appellant) be allocated 2.5 acres registered as 579 B**

Prior to that, an attempt to review and set aside the consent order dated 30th June 1983 was dismissed on 13th September, 2001 by M. MAUNDU – District Magistrate in the same Wanguru Case No. 14 of 1983.

The 1st appellant being aggrieved by the decision of the Mwea Irrigation Settlement Scheme Manager awarding the respondent 2.5 acres out of the rice holding No. 579 to be registered as 579 A moved the High Court in Embu vide Judicial Review Application No. 67 of 2006. In a judgment delivered on 4th July 2007, Khaminwa J. dismissed the application by the 1st appellant and declined to quash the decision of the Mwea Irrigation Settlement Scheme Manager adding that the Advisory Committee of the said Scheme had the powers to do what it did. There is nothing to suggest that any appeal was preferred against the decision of Khaminwa J. in Judicial Review Application No. 67 of 2006 Embu.

By an amended plaint dated 12th April, 2012, the respondent herein moved the Senior Resident Magistrate’s Court Wanguru in a Civil Case No. 44 of 2011 seeking amongst others, a permanent injunction to restrain the appellants herein from interfering with her quiet possession of occupation cultivation and enjoyment of rice holding No. 579 A. After hearing the parties herein D. NYABOKE (RESIDENT MAGISTRATE) delivered a judgment on 3rd June 2014 in which orders were issued for the respondent restraining the appellants from interfering with rice holding No. 579 A. The Court further ordered the appellants to pay the respondent a sum of Ksh. 250,000/= being the cost of the crops harvested from the said rice holding together with costs and interest. The appellants’ counter-claim seeking a declaration that rice holding No. 579 Tebere belongs absolutely to the 1st appellant herein was dismissed. That judgment gave rise to this appeal.

In their Memorandum of Appeal, the appellants raised the following grounds:-

1. ***The learned magistrate erred in law and in fact by failing to hold that the Respondent is entitled to occupy the entire rice holding (sic)***
2. ***The learned magistrate erred in law and in fact for failing to hold that the Respondent is entitled for a refund of Ksh.250,000/= as mesne profits which the respondent never proved fully***
3. ***The learned magistrate erred in law and in fact by failing to consider material evidence adduced by the appellant including copies of Tenant cards***
4. ***The learned magistrate erred in law and in fact the Respondent is fully the rightful owner of the rice holding No. 579 and forgot to address the issue how appellant used the same***
5. ***The learned magistrate erred in law and in fact to dismiss the appellants counter-claim without being given an opportunity of being heard***
6. ***The learned magistrate erred in law and in fact to affirm that the respondent is the owner of rice holding No. 762 measuring 3 ½ acres Tebere Section***

The appellants therefore prayed that the said judgment be set aside.

The parties were acting in persons as indicated earlier and therefore the flaws in the drafting is understandable.

This being a first appeal, I am required to re-evaluate the evidence, assess it and make my own findings and conclusions though remembering always that un-like the trial Court, I did not have the benefit of observing or hearing the witnesses during the trial – **SELLE VS ASSOCIATED MOTOR BOAT CO. LTD 1968 E.A 123.**

During the trial in the subordinate Court, the respondent gave evidence and called two witnesses being JAMES NGIGE KARORO and BERNARD MUCHIRI MUTUARUBUI in support of her case. The totality of their evidence was that the respondent was the owner of rice holding No. 579 A yet the appellants were cultivating it.

The 1st, 2nd, 3rd and 5th appellants testified on behalf of the others and called the following as witnesses: NANCY MULULI MUREITHI (DW4) and BERNARD NDUGI (DW6). Their case was that their late father KARURU KANGETHE (deceased) was the holder of rice holding No. 579 and the family had agreed that the same be given to the 1st appellant since the respondent had been given another land in Maroloni which she had sold and thereafter, she had gone to the Mwea Settlements Scheme Advisory Committee which she misled resulting in her being given a portion of the said rice holding.

In the judgment subject of this appeal, the trial magistrate referred to the decision of the Mwea Settlement Scheme Advisory Committee which awarded the respondent part of the rice holding being 579 A and proceeded to issue her with Tenant Cards and since the decision had been affirmed by the Judge (Khaminwa J) in Judicial Review Application No. 67 of 2006 (EMBU), the trial Court stated that it could not vary that decision. In my view, the trial magistrate was entitled to arrive at the decision that she did. It is clear from the record herein that although a consent order had been recorded in Court awarding the rice holding No. 579 to the 1st appellant herein, that order appears to have been varied by the Mwea Settlement Scheme Advisory Committee. There may be reservations whether infact the said Committee could have done what it did but Justice Khaminwa up-held that decision and refused to quash it in Judicial Review Application No. 67 of 2006 (EMBU). The appellants did not appeal against that decision which was binding on the trial magistrate. This Court cannot revisit that decision as to do so would amount to sitting on appeal against the decision of another Judge. The appellants ought to have moved to the Court of Appeal if they were aggrieved by the decision of Khaminwa J. This Court is not sitting on appeal against the decision of the Mwea Settlement Scheme Advisory Committee. Since Khaminwa J. up-held that decision, it binds all the parties. The Judge must have addressed her mind to all that transpired during the process that led to the decision of the Mwea Settlement Scheme Advisory Committee before deciding to up-hold it and it was not open to the trial magistrate to go round that decision. In the judgment subject of this appeal, the trial magistrate observed as follows:-

“The 1st issue for my determination is who is the owner of rice holding No. 579 A and 1 acre out of Jua Kali rice holding? It is not in dispute that the 1st defendant was the succession (sic) of rice holding No. 579 pursuant to Wanguru Succession No. 14/1983. It is also not in dispute that on 26th April 2006, the Advisory Committee sat and made a ruling in favour of the plaintiff for the rice holding number 579 to be sub-divided equally between the plaintiff and the 5th defendant. As a result, the 1st defendant filed a Judicial Review Vide Misc Case No. 67/2006 at Embu High Court which affirmed the decision of the Advisory Committee. This paved the way for the Sub-division of rice holding number 579 into two equal portions and plaintiff was issued with a tenant identification card for rice holding No. 579 A that being the case and noting that the defendants did not challenge the decision of the High Court this Court cannot therefore vary the decision made in High Court Misc No. 67/2006 but is bound by it”

I do not think that the magistrate’s findings with respect to the rice holding No. 579 can be faulted under the circumstances.

That settles grounds 1, 3 and 4 of the appellants’ appeal.

In ground 5 and 6, the appellants claim that their counter-claim was dismissed without giving them an opportunity of being heard and that the trial magistrate failed to affirm that the respondent is the owner of rice holding No. 762 measuring 3 ½ acres, Tebere Section. From what I can see in the record, the parties were all heard during the trial and called witnesses in support of their respective cases. They also cross-examined their opponent’s witnesses. It cannot therefore be true that the appellants were condemned unheard. From the pleadings, rice holding No. 762 measuring 3 ½ acres Tebere was not a subject in the suit before the trial magistrate and therefore, there would have been no basis of making any finding on the same.

Accordingly, grounds 5 and 6 of the appeal also fail.

In ground 2, although the pleading is not clear, it appears to me that the appellants are challenging the trial magistrate’s award of Ksh. 250,000/= made to the respondent herein as mesne profits. In her pleading in the subordinate Court, the respondent had also sought the following order in paragraph 12 (b)

“Total crop harvest from rice holding No. 579 A and 1 Acre of Jua kali holding belonging to the plaintiff for 2011/2011 crop season”

In her short testimony during the trial in the subordinate Court, the respondent who was the plaintiff made no mention of the fact that she was entitled to Ksh. 250,000/= or indeed any sum as mesne profit for the crop of 2011 season. Her evidence was brief and I shall reproduce it for clarity. She said:-

“My name is Teresia Njeri Karuru. I come from Kiriko village. I am a farmer and cultivates rice in Kiriko village. I can’t remember my land reference number but they are five acres. I know the defendants. They are my step children and co-wife. I have brought them to Court because they have cultivated my land and they have taken my land saying it’s theirs. This year I have planted. I have my own place. The villagers assisted us to plant this year. I want them to pay me costs of the case. The defendants have been chasing me and abusing me. I also want my parcel of land back. The land in Ndalani is not mine”.

The only witness who came near to mentioning that plaintiff was entitled to any proceeds of the rice harvested from the rice holding was James Ngige Karuro the plaintiff’s (respondent’s) son who said that in every acre, 25 bags of rice are harvested and therefore for 2.5 acres, the plaintiff would have harvested 186 bags and each bag would fetch Ksh. 5,000/=. The witness did not produce any evidence to support those figures. As it were, the witness was simply throwing figures at the Court. The claim for the proceeds of the harvest for the 2011 season was a special damage which the law requires to be specifically pleaded and proved. That was not done in this case and the magistrate was plainly wrong in making a finding that the respondent was entitled to a sum of Ksh. 250,000/=. The appeal on that ground

succeeds and that award is set aside.

On the issue of costs, this being a family dispute, the most appropriate order would be for each party to meet their own costs.

Ultimately therefore, this Court after considering this appeal makes the following orders:-

1. *The trial magistrate order injuncting the appellants, their servants and/or agents from interfering with the respondent's quiet possession, occupation cultivating and enjoyment of rice holding No. 579 A is up-held. Appeal dismissed on that ground.*
2. *The trial magistrate's order directing the appellants to pay the respondent Ksh. 250,000/= is set aside. Appeal allowed on that ground.*
3. *The parties shall meet their own costs both in this Court and in the lower Court.*

It is so ordered.

B.N. OLAO

JUDGE

18TH DECEMBER, 2014

18/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Appellants -present

Respondent – present

COURT: judgment delivered in open Court this 18th day of December, 2014.

Appellants present

Respondent present.

B.N. OLAO

JUDGE

18TH DECEMBER, 2014