



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO 32 OF 2018

GRACE NJERI NDIRANGU.....APPELLANT

VERSUS

EDWARD KAMAU MUHINDI (substitute for RUTH WANGUI MUHINDI

Deceased).....RESPONDENT

JUDGMENT

**Introduction & Background**

1. On 8/4/2019 this Appeal was consolidated with **ELCA 19 of 2017** as they impugned the Judgment and Ruling respectively delivered in **Kiambu PMCC No. 128 of 2013**.

2. The instant Appeal challenging the trial Court judgment delivered on 12<sup>th</sup> April 2017 was commenced by a Memorandum of Appeal dated 10/5/2017. In detailed 7 grounds of Appeal, the Appellant faults the trial Court decision allowing the Respondent's suit and dismissing the Appellant's Counterclaim. The gist of the Appeal *inter alia* is that the Learned Magistrate delivered an irreparable judgment that sprung from flawed proceedings; failing to consider an Application to set aside proceedings before it; taking into account inadmissible evidence; shifting the burden of proof to the Appellant for failing to call witness when her Application for adjournment was denied and lastly lacked jurisdiction to entertain the dispute.

3. **ELCA 19 of 2017** was initiated vide by a comprehensive Memorandum of Appeal dated 1<sup>st</sup> November 2017. It enlists 11 grounds of Appeal against the trial Court Ruling rendered on 5/10/2017 *inter alia* that the trial Court erred in finding that it was *functus officio*; holding that the Appellant opted not to participate in the proceedings; allowing inadmissible evidence in Court and disregarding a pending Application for setting aside proceedings. Most of the enumerated grounds of Appeal are a replica of those mentioned in para. 2 above.

4. **Ruth Wangui Muhindi** instituted her suit vide a Plaint dated 24<sup>th</sup> June 2013 against her daughter, **Grace Njeri Ndirangu** the Appellant herein. The substance of her case was that her late husband transferred land parcel known as **L.R Karai/Gikambura/T23** (*hereinafter referred to as the suit property*) to the Defendant with a view of charging the property for its development. That thereafter the Defendant would transfer the suit property to the Plaintiff. That this arrangement was formalized through an agreement dated 18/5/1986. However, the Plaintiff contended that efforts to have the Defendant transfer the suit property to her were futile and accused her of fraudulently dealing with land hence the suit. The Plaintiff thus beseeched the Court to enter judgment for; vacant possession of the suit property together with the title documents and transfer in her favor; general damages and costs of the suit.

5. The suit was opposed. The Appellant filed a '**Memorandum of appearance in protest**' dated 8/7/2013 through the firm of **G.E.O Oluoch & Co. Advocates**. She also filed a statement of defence and counter claim dated 24/7/2013. She contended that the suit was incompetent for want of a competent Verifying Affidavit; that without prejudice the cause of action was time-barred; she did not enter into any purported agreement to transfer the suit property as alleged and that she is the sole registered owner of the suit property. She denied allegations of fraud and misrepresentation.

6. She contended that the suit land was transferred to her by her father as a gift *intervivos* and without any conditions. That in 1986 there were attempts by some of her family members to wrestle the property from her and this led to the agreement of 1986 which on inquiry her father asked her to agree to as it was inconsequential given that the suit land was already in her name. That her father wanted the agreement as a mere show to avoid village ridicule from his agemates who would chide him for selling the land to his daughter.

7. In her counter claim, she sought an injunction against the Plaintiff from interfering with the suit property. She urged the Court to dismiss the Plaintiff's case and allow her counter claim with costs.

8. Simultaneous to filing the Plaintiff, the Plaintiff also applied for temporary injunctive orders against the Defendant vide her Application dated 22/10/2013. The Court granted interim relief on the same day.

9. Opposing the Application, the Appellant filed a '**Notice of Preliminary Objection**' dated 31/10/2013. She faulted the Application as defective for relying on an agreement that was time barred; fraudulent; the suit land was rightfully transferred to her and that the Application for Caution on the suit land was no registered. The Court considered the PO, found it unmerited and dismissed it on 11/3/2014.

10. As fate would have it, the matter never proceeded for trial on the onset. For instance, the Court record shows that on 15/7/2014, 14/10/2014 and 20/1/2015 there was no appearance by the Appellant. On 13/4/2015 there was no appearance for both parties. On 12/10/2015 the matter was adjourned at the Appellant's instance same for 7/12/2015. In fact on that day, Counsel Gichohi holding brief for Oluoch informed the Court that the Appellant would not be participating in those proceedings having filed **ELC 1000/2015** on the same subject matter. Hearing was further adjourned to 28/12/2015 for a Kikuyu translator to be availed for the Plaintiff to testify.

11. On 28/12/2015, Counsel Gichohi was still holding brief for Oluoch again applied for adjournment which the Plaintiff's Counsel, Kinyanjui strongly objected to. Indeed Counsel Kinyanjui pointed out that the Defendant's Counsel had excused himself from the proceedings. It took the Appellant's personal plea before Court to move the Court for adjournment citing Mr. Oluoch's illness. The Court granted a final adjournment and hearing set for 8/2/2016.

12. Unfortunately, the Plaintiff passed on **6/1/2016** before her case was heard. Her Counsel applied for substitution and her son, **Edward James Muhindi Kamau** and her personal representative took over the suit. **Edward James Muhindi Kamau** was appointed administrator of her mother's estate vide Kikuyu Succession cause no. 56 of 2016 on 29/6/2016. **Edward James Muhindi Kamau** is the Respondent in this Appeal hence the description of Ruth Wangui as Plaintiff in **para. 5** above and as would be demonstrated below, pleadings were not amended to reflect Edward Kamau as the substituted Plaintiff.

13. Fast forward to **16/1/2017** and the Appellant was again not ready to proceed. Mr. Oluoch was said to be attending a matter in Nyeri. The Plaintiff's case proceeded for hearing with **Edward James Muhindi Kamau** testifying as **the sole witness**. He stated that his late father distributed his properties to his wives and allocated the suit property to his late mother, Ruth. That his father gave the Appellant the suit property to obtain a financial facility. That his mother's efforts to recover the land were fruitless. He implored the Court to order transfer of the suit land to the estate of his late mother. He denied knowledge of an agreement dated 23/6/1982 and maintained that he was not a witness to. PW1 added that the document dated 18/5/1986 was witnessed by four people. He did not name them. He concluded by producing unspecified list of documents as evidence.

14. The Plaintiff's Counsel sought time to file written submissions ahead of

Judgment that was initially scheduled for **23/3/2017**. Judgment was delivered on 12/4/2017. The subject of the instant Appeal.

15. In the intervening period, the Appellant's Application dated 7/4/2017 seeking to set aside proceedings of 16/1/2017 was filed on 11/4/2017 according to the Court stamp thereto. The Application was considered on 20/4/2017 when Counsel Oluoch explained that he was unable to place the Application before Court since the file was already pending judgment (on 12/4/2017). Objecting to that Application, filed preliminary objection dated 5/5/2017 that; the Application was misconceived; it was defective for want of legal compliance; the Court was *functus officio* and lastly that the suit was *res judicata*.

16. Parties canvassed the Preliminary Objection and indeed the Application by way of written submissions. The Court upheld the Preliminary Objection by finding that it was *functus officio* that the subject of Appeal in ELCA 19 of 2017.

17. It is worth pointing out that in the Application for substitution, the only annexures thereto were copies of **Ruth's death certificate** and **Grant of Letters of administration** issued to Edward. My perusal of the Court file does not reveal any amended Plaintiff to reflect the Plaintiff's substitution; fresh witness statement or list of documents. Even going by the Plaintiff's documents, in the Application for substitution dated 21/7/2016, Edward Kamau was described as 'Applicant/Substituted Plaintiff' as contrasted with the final submissions dated 3/2/2017 whereby 'Ruth Wangui Muhindi' was indicated as the Plaintiff.

18. Interestingly, in the Appellant's Application dated 7/4/2017 for setting aside proceedings, Edward Kamau suing as the personal representative of Ruth is described as the 'Defendant' while Grace Njeri is the 'Plaintiff'. The same description was repeated in the Preliminary objection dated 5/5/2017.

#### **The written submissions**

19. The Appeal was admitted for hearing on 25/6/2019. Directions to prosecute it by way of written submissions were taken on 28/10/2019.

20. The Appellant through the firm of **G.E.O Oluoch & Co. Advocates** filed her submissions dated 8/11/2021 and further rejoinder dated 27/9/2021. The summary of her submissions was on impropriety of the trial Court proceedings touching fixing of hearing dates, Application for adjournment, conduct and hearing of the suit, Court's Ruling on the PO and issues on Appeal.

21. Regarding the trial Court's jurisdiction, the Appellant submitted that only the ELC Court was vested with jurisdiction to entertain this dispute in line with Article 162 of CoK and the ELC Court Act. Additionally, that the suit was time barred under the Limitation of Actions Act. That under Order 8 Rule 6 CPR the Respondent having failed to amend his Plaintiff after substitution, the entire suit was null and void. That the Court entered *ex parte* judgment yet the Respondent did not discharge the burden of proof on him.

22. In the submissions rejoinder, it is argued that both Memorandum of Appeal were filed well within time of the impugned decisions. That

the record of Appeal was not filed out of time as alleged and that the Appeal is not overtaken by events. This is because the Appellant still holds title to the suit land.

23. On the other hand, the firm of **Mbuthia Kinyanjui & Co. Advocates** filed submissions dated 2/7/2021 on behalf of the Respondent. The Court notes that the submissions revolved on the technical aspects of the Appeal as opposed to the substantive issues contained in the Memorandum of Appeal. According to her, the record of Appeal was filed out of time; Appeal ought to be dismissed for want of filing submissions and that the Appeal has been overtaken by events because the disputed judgment has already been executed. He urged the Court to dismiss the Appeals.

#### **Analysis and determination**

24. Having considered the record of Appeal, the written submissions together with the lower Court record and all the material placed before me, the issues that commend themselves for determination are;

- a. Whether the trial Court had jurisdiction to determine the matter
- b. Whether the suit was time barred
- c. Whether the trial Court was functus officio.
- d. Whether the record of Appeal was filed out of time
- e. Whether the Respondent proved his case in the lower Court.
- f. Whether the Counterclaim should be dismissed.
- g. What orders should the Court make?
- h. Costs of the Appeal

25. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first Appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

“I accept Counsel for the Respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).”

26. It is not in dispute that the parties are siblings being the son and daughter of James Muhindi Kamau and Ruth Wangui Muhindi, both deceased. the suit was commenced by Ruth Wangui Muhindi and after her demise on the 6/1/2016 Edward James Muhindi Kamau was substituted in her place.

27. According to the green card on record the suit land measuring 0.050 ha was registered in the name of Muhindi Kamau on the 9/9/1959 while Grace Njeri Ndirangu became registered as owner on the 5/3/1986. It was charged to Equity Bank Limited to secure Kshs 500,000/- in favour of Grace Njeri Ndirangu.

#### **Whether the trial Court had jurisdiction to determine the matter**

28. At the time of filing suit, 2013, the repealed Magistrates Court Act Cap 10 was applicable. According to the Magistrates Court Act, 2012, the jurisdiction of the Court was expressed as follows;

‘The Magistrates' Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed— (a) (b) (c) (d) (e) seven million shillings for a Chief Magistrate; five million shillings for a Senior Principal Magistrate; four million shillings for a Principal Magistrate; three million shillings for a Senior Resident Magistrate; and two million shillings for a Resident Magistrate.’

29. Noting that the trial Court suit was heard in 2017, The Magistrates Court Act, 2015 Sections 7 & 9 (a) introduced inter alia the following amendments;

7. Civil jurisdiction of a Magistrate's Court

(1) A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- (a) twenty million shillings, where the Court is presided over by a chief Magistrate;
- (b) fifteen million shillings, where the Court is presided over by a senior principal Magistrate;
- (c) ten million shillings, where the Court is presided over by a principal Magistrate;
- (d) seven million shillings, where the Court is presided over by a senior resident Magistrate; or
- (e) five million shillings, where the Court is presided over by a resident Magistrate.

9. Claims in employment, labour relations claims; land and environment cases A Magistrate's Court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (ii) compulsory acquisition of land;
- (iii) land administration and management;
- (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (v) environment and land generally.

30. The dispute before the Court was of a civil nature being a land case. The only limit to his jurisdiction was his pecuniary jurisdiction. Nothing has been placed before this Court to oust the jurisdiction of the said Hon. Magistrate. It is therefore the conclusion of this Court that the Hon. Learned Magistrate was clothed with jurisdiction to hear and determine the matter. The issue is answered in the positive.

#### **Whether the suit was time barred**

31. Vide a notice of Preliminary objection dated the 31/10/2013 the Appellant raised an objection on the grounds that the suit was incurably defective on account that; the cause of action arose in 1986 thus it was statutorily time barred seeing the suit was filed in 2013, some 27 years later; the cause of action being premised on fraud and misrepresentation. Any suit based on fraud must be filed within 3 years otherwise it becomes statute barred; this suit is seeking to recover land after almost 3 decades against the statutory limitation of 12 years as provided under section 7 of the Limitations of Actions Act.

32. The Respondent in answer to the Preliminary Objection stated that in the agreement dated 18/5/1986 the Appellant argued that the agreement was enforceable in the future and therefore time did not start running.

33. The trial Court considered the Preliminary Objection and delivered its Ruling on the 11/4/2014 and held that the Court was not convinced that the claim is time barred as the dispute did not arise in 1986 as claimed by the Applicant.

34. Section 68 Evidence Act provides that where any party aggrieved by a preliminary decree does not Appeal from that decree, he shall be precluded from disputing its correctness in any Appeal which may be preferred from the final decree. In this case the Appellant is precluded from raising an Appeal on the issue.

#### **Whether the trial Court was functus officio**

35. In the case of **Patrick Ngumbao Mweni v Richard Kipkemei Limo & 4 others [2021] eKLR** the Court of Appeal in dismissing an Application by a party who sought joinder and review of the trial Court Judgement stated;

“It is a general principle of law that a Court after passing judgment becomes functus officio and cannot reconsider that judgment one more time on merits.”

36. In this case the Appellant's Counsel sought by way of Application orders to set aside exparte proceedings and the Judgement of the 12/1/2017 for the reasons that; he was not invited to take the hearing date; he was served with the hearing notice one day before the hearing; he was attending hearing at a superior Court at Nyeri which had already been scheduled; his client was not available for the hearing. In response the Respondent raised a Preliminary Objection on the grounds that the Court was functus officio and therefore could not entertain the Application to reopen the case for hearing. The Learned Hon. Magistrate agreed with him and upheld the Preliminary Objection.

37. Order 12 rule 7 of the Civil Procedure Rules provides that where under this order judgment has been entered or the suit has been

dismissed, the Court, on Application, may set aside or vary the judgment or order upon such terms as may be just.

38. In the case of **James Kanyiita Nderitu & Another [2016] eKLR**, the Court stated as thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the Defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a Defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the Court to set aside the default Judgement and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the Defendant to file his Memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See **Mbogo & Another –vs- Shah (1968) EA 98**, **Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75**, **Chemwolo & Another –vs- Kubende (1986) KLR 492** and **CMC Holdings –vs- Nzioka [2004] I KLR**

In an irregular default judgment, on the other hand; judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

39. The import of the above precedent is that the Court has discretion to determine an Application to set aside judgment in line with the parameters set out above. It is the view of the Court that the Learned Hon Magistrate erred in law by holding that he was functus officio. The Court was not called upon to consider the merits of the case but to reopen the case to allow for interpartes hearing.

#### **Whether the Record of Appeal was filed out of time**

40. To answer this issue the Court has to peruse the record and the proceedings to determine whether or the Appeal was filed out of time. Section 79G of the Civil Procedure Act provides as follows;

‘Every Appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.’

41. In this case the Ruling and the Judgement were delivered on the 5/10/17 and the 16/1/2017 while the Memorandum of Appeal was filed on the 3/11/2017 and 10/5/2017. In both instances the Appeals were filed within time. Nothing therefore turns on this one.

#### **Whether the Respondent proved her case in the lower Court.**

42. The right to property is protected under Article 40 of the Constitution. This right is not absolute and the exception is compulsory acquisition which must be undertaken for public purpose and with prompt payment in full and of just compensation. Under Article 40 (6) however the rights do not extend to any property that has been found to have been unlawfully acquired.

43. Section 24 and 25 of the Land Registration Act (LRA) vests the registered owner with absolute ownership together with all the rights appurtenant thereto. the said rights are not liable to be defeated except as provided for under the Act and shall be held by the said proprietor subject to any limitations permitted in law.

44. Section 26 of the LRA sets out the grounds in which a title can be impugned that is to say on the ground of fraud, misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

45. It was the case of the Respondent that the Appellant has by way of fraud and misrepresentation caused the suit land to be registered in her name thus enriching herself, refused to transfer the land to her mother despite her own undertaking to do so and defrauding the mother of her property.

46. In the case of **R.G. Patel vs Lalji Makanji (1957) EA 314** stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of **Koinange & 13 others v Koinange [1968] KLR 23**.

47. Fraud being a serious allegation must procedurally be pleaded and proved to a standard above a balance of probabilities but not beyond

reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence. See **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**.

48. The Respondent testified at the trial having been substituted on behalf of his mother, the previous Plaintiff. He stated that the suit land was allocated to his mother among other wives. However, a close scrutiny of the confirmed certificate of grant of the estate of the late Muhindi does not include the suit land.

49. The witness relied on a letter dated the 19/5/1986 that the Respondent had undertaken to transfer the suit land to his mother. I have looked at the said letter and the said witness was not a witness or a party. It was clear from the green card that the suit land was transferred to the Appellant during the lifetime of the father. No evidence was demonstrated by the Respondent to prove fraud and or misrepresentation.

50. All in all, the Respondent did not prove fraud and or misrepresentation on the part of the Appellant and it is the conclusion of the Court that the onus of proof remained undischarged.

51. In the upshot the Appeal succeeds and I make the following orders;

**a. The Plaintiff's suit be and is hereby dismissed.**

**b. The costs in the trial Court and this Appeal shall be borne by the parties in equal share. The Court has considered the relationship of the parties who are siblings in that regard.**

52. Orders accordingly.

**DELIVERED, SIGNED & DATED AT THIKA VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF APRIL 2022**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Appellant: Absent

Kinyanjui for Respondent

Court Assistant: Phyllis