



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT MERU
Civil Appeal 57 of 2011**

THE REGISTERED TRUSTEES OF

THE PRESBYTERIAN FOUNDATION.....1ST APPELLANT

THE PRESBYTERIAN CHUCH OF

EAST AFRICA IRIGA PARISH.....2ND APPELLANT

IRIGA HEALTH CENTRE.....3RD APPELLANT

VERSUS

COUNTY COUNCIL OF MERU SOUTH.....1ST RESPONDENT

WILSON NYAGA.....2ND RESPONDENT

JUDGEMENT

The Plaintiffs in the lower court have filed this appeal challenging the entire decision of the learned trial magistrate in which their suit was dismissed on the 10th August, 2010. They have set out five grounds of appeal:

1. The learned trial magistrate erred in law and in fact in holding that the Appellants had not been allotted land parcel number Muthambi/Iriga/601 when the documentary evidence exhibited in court proved that they are the lawful allottees.

2. The learned trial magistrate erred in law and in fact in holding that the 3rd Appellant is not entitled to the suit property when the suit property had been allotted to it and registered in its name.

3. The learned trial magistrate erred in law and in fact in dismissing the entire suit on the grounds that the Appellants were not properly before the court when he had denied them an opportunity to amend their pleadings.

4. The learned trial magistrate erred in law and in fact by allocating parcel Number Muthambi/Iriga/601 to unknown parties for purposes of constructing a school when such parties had not been allotted the said property.

5. The learned trial magistrate erred in law and in fact in failing to appreciate the entire oral and documentary evidence tendered by the Appellants and therefore arriving at the wrong conclusion that they are not entitled to their prayers in the suit.

In determining the appeal this court will be guided by principle set out in the case of **Barnabas Bwambou & another vs. Vitaris Odiwour Rugic & Ano.** [2006] eKLR where the court held:-

“In an appeal of this nature, it is trite that the appellate court will not usually interfere with the award unless it is established that the learned trial magistrate misdirected himself or that he based his findings on the wrong principles of law.

In their filed written submissions the Appellants have set out the grounds upon which the decision of the lower court is challenged.

The Respondents have also filed their written submissions as agreed between the parties. The Appellants filed a reply to the Respondents submissions.

When the matter came before the court for highlighting of the submissions, Mr. Otieno for the Appellants urged the issue raised by the Respondents on the time factor, that is, whether the appeal was lodged within time as stipulated by the law. I will begin by dealing with that issue. Mr. Otieno for the Appellants urged, and that is not in dispute that the judgment in the lower court was delivered on the 11th August, 2010. Counsel urged that the Appellants lodged their appeal on the 13th September, 2010, and that too is not in dispute. He urged that since 11th September, 2010 was on a weekend there was automatically an extension of time as provided by Order 50 rule 3 of the CPR.

Mr. Gitonga for the Respondents urged that the appeal was filed out of time and without the leave of the court and was therefore incompetent. Counsel urged that 30 days right of appeal expired on Friday 10th September, 2010. Counsel urged that since 10th September was not on a weekend the appeal should have been filed by that day and that filing it on the 13th September, 2010 without leave rendered the appeal incompetent.

The Appellants had 30 days to file their appeal from 11th August, 2010. Order 50 Rule 8 provides for computation of days states:

“In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

Simple computation of the days brings the 30 days to 10th September, 2010 which is a Saturday. The Appellants' advocate is right that the last day of filing the appeal fell on the weekend and therefore filing the matter on the Monday next following as he did, did not render the appeal incompetent. I find no merit on this point and dismiss it accordingly.

Counsel for the Appellants who filed the written submission chose to deal with ground number 3 of the memorandum of appeal before any other. That ground is worded as follows:

3. The learned trial magistrate erred in law and in fact in dismissing the entire suit on the grounds that the Appellants were not properly before the court when he had denied them an opportunity to amend their pleadings.

Mr. Osiemo in the written submissions urged that since the Respondents admitted that the 1st Appellant is a legal entity capable of suing and being sued in the record of appeal at page 55, that in view of that admission the Appellants were not under duty to prove the legal capacity of the 1st Appellant as the court found. Mr. Osiemo urged that PW1 in his evidence in court justified signing the verifying affidavit when he testified that he was the Chairman of the 3rd Plaintiff/3rd Appellant, and that therefore he did not need any other authority to sign, as the court held. In any event, Mr. Osiemo urged, the court dismissed the application dated 9th June, 2010 in which the amendment sought by the Plaintiffs was to introduce PW1, as the 4th Plaintiff in the suit. Mr. Osiemo relied on Order 1 Rule 9 of the Civil Procedure Rules which provides:

“No suit shall be defeated by reason of a misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Mr. Gitonga for the Respondent’ in response to ground 3 of the appeal urged the court to consider the provisions of Order 1 Rule 12 of the Civil Procedure Rules. Mr. Gitonga supported the finding of the learned trial magistrate that the person who signed the verifying affidavit was not a party to the suit, neither was he a registered Trustee of the 1st Plaintiff and was not authorized to sign the verifying affidavit; and that in the circumstances he could not have sworn the verifying affidavit to verify averments in the plaint.

Mr. Gitonga must have meant Order 1 Rule 13 (1) and (2) of the rules, which is on point to the issue at hand. It provides:

“13. (1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

I have considered the rival arguments by counsels to both parties. The learned trial magistrate was dealing with the issue of *locus standi* of Amos Muga Kaburu, who was the Plaintiff’s witness number one, to sign the verifying affidavit to the plaint. The learned trial magistrate observed at Page 72 of the record of appeal as follows:

“In fact during cross-examination Amos Muga Kaburu (PW1) admitted that he was not one of the registered trustees of the Presbyterian Foundation. When questioned by counsel for the defence he stated as follows, “there are 3 Plaintiffs in this suit. I recall on 13.11.2008 I swore an affidavit confirming the facts on the plaint. No one else swore a verifying official. I am not one of the registered trustees of the Presbyterian Foundation.”

What comes to my mind is that Amos Muga Kaburu (PW1) is a total stranger to this suit and has no *locus standi* to purport to represent the Plaintiffs. The fact that he claimed to have been an assistant chief for the area and a church elder at the Presbyterian Church Iriga Parish does not naturally give him any legal standing before this court.”

The learned trial magistrate came to the correct conclusion that Amos Muga Kaburu had no *locus standi*

to sign the verifying affidavit to the plaint as he was neither a party to the suit, nor a Trustee of any of the Plaintiffs, nor did he have written authority from the Plaintiffs to sign the verifying affidavit on their behalf.

It was argued by Mr. Osiemo in his written submissions that the court was *estopped* from challenging the capacity of Amos Kaburu to sign the replying affidavit because the court declined an application by the Plaintiffs to amend their pleadings in order to join him as a party to the suit.

Mr. Gitonga in response supported the learned trial magistrate's action and stated that the amendment was brought after the close of the Plaintiffs and Defendants' cases.

In regard to the issue of amendment it was within the learned trial magistrate discretion to allow or decline the application for amendment, and there was nothing wrong with his exercise of that discretion. In the case of **Central Bank Ltd vs Trust Bank Ltd. and Others CA NO. 222 of 1998**, the Court of Appeal observed:

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. At page 2245, of the Air Commentaries on the Indian Civil Procedure Code by Chittaley and Rao in which the learned authors state:

‘that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.’ ”

The amendment sort was substantive as it was introducing a new party to the suit. That would have changed the nature of the Plaintiffs claim and would have also taken the Defendants by surprise, and was likely to adversely affect the Defendants. The Appellants were inordinately late in making the application for amendment of their pleadings. The Plaintiffs should not impose the doctrine of estoppel against the court as it does not lie. The court was rright to decline the application in all the circumstances of the case.

Mr. Gitonga in his written submissions urged the court to find that the application to amend pleadings by the Plaintiffs amounted to an admission that the 3rd appellant was not a juristic person and secondly that the evidence of Amos Kaburu was worthless to the Appellants case. Both positions are not correct. I do not agree with counsel in regard to Amos Kaburu being a useless witness. The truth is a Plaintiff can call any person as a witness to support their case, and that person need not be a party to the suit.

I find that the verifying affidavit to the plaint was incompetent as it did not comply with Order 4 rule 1 (1) to (4) of the CPR which stipulates as follows:

“Order 4 Rule

1. (1) The plaint shall contain the following particulars—

- (a) the name of the court in which the suit is brought;**
- (b) the name, description and place of residence of the plaintiff, and an address for service;**
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;**
- (d) the place where the cause of action arose;**
- (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and**
- (f) an averment that there is no other suit pending, and that there have been no previous**

proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule

1(1)(f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of of the company duly authorized under the seal of the company to do so.”

The witness Amos Kaburu swore the verifying affidavit yet he was not one of the Plaintiffs and neither did he have a written authority to sign the same on behalf of the Plaintiffs. In the premises I do find that the entire suit was incompetent for lack of a verifying affidavit that complied with the rules.

Mr. Osiemo dealt with ground No. 1 in the Appellants petition of appeal which states as follows:

1. The learned trial magistrate erred in law and in fact in holding that the Appellants had not been allotted land parcel number Muthambi/Iriga/601 when the documentary evidence exhibited in court proved that they are the lawful allottees.

In respect of ground 1 Mr. Osiemo urged that the Appellants exhibited titles to the suit land in the name of the 3rd Plaintiff/Appellant showing that Land Parcel No. Muthambi/Iriga/601 was reserved for the 3rd Plaintiff. He referred to page 79 to 83 and 90 of the record of appeal. Mr. Osiemo urged the court to find that the learned trial magistrate erred to find that the Appellants were land grabbers and that they had not been allotted the suit property by the 1st Defendant/Respondent.

Mr. Gitonga in response to ground 1 of the appeal urged that the Plaintiffs were relying on the Council Minutes of the 1st Respondent's predecessor Min. NO. F.S. & G.P.C. 21 of 1977. He says that an extract of the copy of those minutes are contained at pages 14 to 15 of the Appellants Record of Appeal. Mr. Gitonga submitted that the said minutes do not anywhere show that any of the Plaintiffs were indeed allocated the suit land. Counsel urged that Minute 21 of 77 is clearly titled “**EXCHANGE OF PUBLIC LANDS**” He urged that Iriga Development Committee had applied for exchange of six acres of land for purposes of building a Health Center, Cattle Deep, Coffee Factory, Milk Diary Store ,Y.P. Club and Iriga Women's Group. Mr. Gitonga urged that neither the 1st Plaintiff nor the 2nd or 3rd Plaintiffs ever applied for any land from the then County Council of Meru. Mr. Gitonga urged that it was the public through their Sub Location Development Committee which applied for and was granted a parcel of land measuring 2 acres to construct a health center for the benefit of the general public and that it was that land which the Plaintiffs were trying to take over for themselves.

I have looked at the Exhibits tendered by the parties to this suit relevant to this issue of ownership of the suit land. The Plaintiffs Exhibit 1 was Minute No. 21/77 where the predecessor of the 1st Defendant considered applications for exchange of lands under Minute 21/77 item no. 3. The County Council allowed the recommendation by Iriga Development Committee for the exchange of their six acres of land LR. Muthambi/Iriga/350, for the purposes of building, *inter alia*, Iriga Health Centre. Plaintiffs Exhibit 3 and Defence Exhibit 2 is the same Certificate of Official Search which shows that pursuant to Minute No. F.S.& GPC of 21/77 of 22nd February 1977, Muthambi/Iriga/601 is owned by Meru County Council and reserved for Iriga Health Centre. The Green Card, Plaintiff Exhibit 4 also confirmed the same position.

Having considered these documents I find that Iriga Development Committee exchanged their six acres of land LR No. Muthambi/Iriga/350 for purposes of various developments for public use, and that out of that land came six parcels of land with different titles. The one which concerns this appeal is the

Muthambi/Iriga/601, which was reserved for Iriga Health Centre. The evidence before the court was that the land belonged to the predecessor of the 1st Defendant reserved for public benefit. It was never the property of the Plaintiffs. And they did not place before the court any evidence that the land was allotted to them. More important Defence Exhibit 4 shows that the 1st Defendant eventually changed user of the said suit land from a Health Centre to D.E.B. School, also meant for the community benefit. The Plaintiffs did not adduce any evidence to show that land was allotted to them and they ought to have some documentary proof if there was such allotment in their favour.

I had a distinct conviction that there is confusion in terms which the Plaintiffs. The name Iriga Health Centre which was the one in which land was reserved by the predecessor of the 1st Defendant for construction of a Health Centre, is not necessarily the 3rd Plaintiff in this suit. Iriga is the name of a place within Meru South District. The Plaintiffs needed to show that the Iriga Health Centre stated in the minutes of the predecessor of the 1st Defendant County Council, is the same as the 3rd Plaintiff in this suit. It was the duty of the Plaintiffs to establish a nexus between the 3rd Plaintiff and Iriga Health Centre mentioned in the 1st Respondent's Minutes and in the Certificate of Official Search and the Green Card. It could have been easy for the Plaintiffs to establish this if they had documentary Allotment Letter to the suit land. Alternatively, it could also have been easy if in the Minutes the County Council specifically stated or recorded that the said land was reserved in order for the 1st or 2nd Plaintiff to construct a Health Centre.

If the records indicated that the land was reserved for the Presbyterian Church of East Africa, the Plaintiffs claim could have been quite clear. Unfortunately all the safeguards to the name which I have mentioned were nonexistent, and it was not obvious that the Iriga Health Centre in the Certificates of Search and the Minutes of 1st Defendant referred to the same party as the 3rd Plaintiff. The Plaintiffs did not therefor prove their claim.

Mr. Osiemo next urged ground 4 of the appeal which is:

4. The learned trial magistrate erred in law and in fact by allocating parcel Number Muthambi/Iriga/601 to unknown parties for purposes of constructing a school when such parties had not been allotted the said property.

In regard to ground 4 Mr. Osiemo submitted that the Respondents admitted in evidence and particularly Defendants witness No. 2 that there was a construction going on in the suit property. Counsel urged that the construction was going on in the land reserved for Iriga Health Centre, which is owned by the 3rd Plaintiff in the suit and that by dismissing the Plaintiffs suit the learned trial magistrate had rubber stamped the illegal transfer and change of user of the suit property effectively handing it over to a third party.

Mr. Gitonga in response to this ground urged that the learned counsel for the Appellants was misled as the fourth ground of the appeal was far-fetched and totally unfounded. Mr. Gitonga urged that nowhere in the entire judgment of the learned magistrate did he allocate the suit land. Mr Gitonga urged that court was guided by exhibits produced by the Appellants and in particular Plaintiffs exhibit 3 which was an Official Search on the suit property showing that the land was owned by the Meru County Council, the predecessor of 1st Respondent.

I have considered the entire judgment of the learned trial magistrate. Nowhere did he allocate the suit property to any party. The court dismissed the Plaintiffs case with costs and made no further orders.

Mr. Osiemo next argued ground no 5. which is as follows:

- 0. The learned trial magistrate erred in law and in fact in failing to appreciate the entire oral and documentary evidence tendered by the Appellants and therefore arriving at the wrong conclusion that they are not entitled to their prayers in the suit.**

