Nathan v Njue (Environment and Land Appeal 24 of 2019)
[2022] KEELC 3519 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3519 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL 24 OF 2019

A KANIARU, J

JUNE 21, 2022

BETWEEN

ROSE WANDIRI NATHAN ..... APPELLANT

AND

JANE MUTHONI NJUE ..... RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgement of the lower court (M.N. Gicheru, Chief Magistrate) in CMCC No. 119 of 2017. Rose Wandiri, the appellant, was the plaintiff in the lower court while Jane Muthoni Njue, the respondent, was the defendant. In the lower court, the parties were disputing over ownership of a portion measuring 0.05 ha of Land parcel No. Ngandori/kirigi/8930. It is a portion that the appellant alleged to have been selling to the respondent at an agreed price of Kshs. 350,000. The agreement was said to be both oral and written and the respondent was supposed to have paid the full purchase price on or before the end of December 2016. The parties were also supposed to share equally the costs of survey.

2. The respondent was said to have breached the agreement in various ways, particularly by refusing or failing to share costs of survey, trespassing, occupying, and using the land, refusing to pay some balance of purchase price, and finally, causing wastage and destruction. Further, the respondent was said to have caused placement of restriction on the land registrar.

3. The appellant want to refund the purchase money – said to be Kshs. 78,060 – paid by the respondent. He wants too an eviction order, an order removing restriction placed on the land register, a restraining order to protect the land from interference by the respondent by herself or by others at her behest, and also costs of the suit.

4. The respondent largely denied the appellant's claim, and pleaded, interalia, that there was indeed a sale agreement and that she had paid the full purchase price. She averred that the appellant herself had put

her into possession of the land; that she had developed it after going into possession; and that she had placed a restriction on it after realizing that the appellant was not willing to transfer it to her. Further, a criminal case was said to exist between the respondent and the appellant's children arising from damage or destruction of crops on the disputed portion by the appellant's children. This suit itself is said to be meant to bring pressure to bear on the respondent in order to drop the criminal case.

5. The respondent also lodged a counter claim in which she reiterated her compliance with the terms of the sale agreement and alleged breach of the same agreement by the appellant. She asked the court to compel the appellant to transfer the land to her or in the alternative, refund the purchase money paid amounting to Kshs. 525,000/-. She also asked for costs of the counter claim.

6. The lower court heard the matter and delivered its judgement on 26/8/2019. The judgement resulted in dismissal of both the appellant's suit and the respondent's counter claim. The appellant then lodged the appeal now before this court. She listed seven (7) grounds of appeal as follows:

    1. The learned chief magistrate erred in law and fact when he failed to give the necessary weight to the plaintiff's evidence.

    2. The learned chief magistrate erred in law and fact when he failed to appreciate that the sale agreement between the appellant and the respondent was not capable of being enforced.

    3. The learned chief magistrate erred in law and fact when he failed to consider the provisions of Sections 6, 7 and 80 of the *Land Control Act* (Cap 302, Laws of Kenya).

    4. The learned chief magistrate erred in law and fact when he failed to appreciate that the respondent was a trespasser on the appellant's parcel of land.

    5. The learned chief magistrate erred in law and fact when he failed to determine the issues raised by the appellant in her pleadings.

    6. The learned chief magistrate misdirected himself when he held that the appellant had not filed his written submissions.

    7. The judgement was against the weight of submissions.

7. This court started hearing the appeal on 17/5/2022. During hearing, it became clear that the appellant wanted the lower court judgement set aside so that the matter can be heard afresh. It became clear too that the respondent was not opposed to the idea of the matter being heard afresh.

8. It is clear therefore that the idea of the matter going for a re-trial is mutually agreeable to both sides. It is an idea that commends itself to this court as desirable in the interests of justice, given that the judgement that was delivered did not produce a winner. Both parties were loosers and the problem between them remained un-resolved. One possibly un-intended result of the judgement of the lower court is that the solution to the problem that the parties had was left to their own designs. The judicial process they had invoked in order to get a solution ultimately turned out to be unhelpful to them.

9. Ordinarily, this is a matter where I am supposed to place reliance on Section 78 of *Civil Procedure Act* (Cap 21) which gives the appellate court various options while handling an appeal, including but not limited to, determining the case with finality, remanding the case, framing issues for determination during a new trial, and/or taking additional evidence or ordering such evidence to be taken. Wittingly or unwittingly, the parties mutually opted for a fresh or new trial, which is also provided for under the same provision of the *Civil Procedure Act* (supra).

10. The turn of events during hearing also made me not feel obligated to follow the dictates contained in the observations spelt out *Selle Vs Associated Motor Boat Co* [1968] EA 123 where the court rendered itself thus:

> " An appeal to this court from a trial by the high court is by way of a 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 witness and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judges finding 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif Vs Ali Mohamed Shollan*: [1955] 22 E.A.C.A. 270)"

One would find this position expressed in several other cases including *Peter M. Kariuki Vs Attorney General* [2014] eKLR where the court expressed itself as follows:

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with evidence."

11. The above dictates of both statutory and decided case law are not a compelling imperative given that the parties are mutually agreed on the way forward. This court has already stated that it is in agreement with them.

12. Accordingly, the disposal or final determination of this appeal is as follows: That the matter goes back to the lower court for trial and determination. Both parties shall be at liberty during trial to use the same evidence and/or materials they had used earlier and/or to call for additional or new evidence and/or materials. I make no order as to costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU THIS 21ST DAY OF JUNE, 2022.

In the presence of Mwenda for Rose Njeru for appellant and the Respondent present in person.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

21.06.2022