



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 177 of 2002

PETER W. MIGWI KANGETHE.....APPELLANT

VERSUS

JOHN L. KARANJA MWANGI.....RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate’s Court at Murang’a (J.B.A. Olukoye – R.M) in R.M.CC. No.107 of 1998)

J U D G M E N T

By a plaint dated 22nd April, 1998 and filed in court through **Messrs Gacheru J. & Co. advocates** the following day, **John L. Karanja Mwangi**, the respondent herein initiated a claim against **Peter W. Migwi Kangethe**, now the appellant for:

- “(a) **The defendant to sign all relevant documents to effect the sub-division and transfer of part A, C and F to be awarded to the defendant and portion B, D and E to the plaintiff.**
- (b) Alternatively the Executive Officer of the court to be authorized to sign all the relevant documents to effect the sub-division and transfer.**
- (c) Costs of the suit.**
- (d) Any other or further relief the honourable court may deem fit to grant.”**

That claim was based on these facts:

“1.....

2.....

3. **Plot No.Loc.11/Maragi/1193/69 is registered in the names of the plaintiff and the father of defendant Peter W. Migwi Kangethe the administrator of the estate of Ismael Kangethe.**

4.

5. **On divers dates the plaintiff and defendant constructed some permanent rooms in the said plot as follows:**

(a) A & C developed by the defendant.

(b) B & D developed by the plaintiff as indicated in Murang'a Municipal Plan.

6. On about 17th September, 1996 the plaintiff and defendant differed as to how the plot would be sub-divided and the District Officer Kiharu and Murang'a Municipal Engineer sub-divided the plot into six portions.

7. The plaintiff was awarded all the portions B and D which he had developed and portion E which was not developed making the size of 0.07 Ha. The defendant was awarded all the portions A and C which portion he had already developed and F which was undeveloped amounting to 0.07 Ha.

8.

9. On or about the year 1996 the plaintiff requested the defendant to consent for the above sub-division and sign the relevant documents to effect the same and the defendant has refused/neglected to do so.”

On being served, the appellant reacted by filing through Messrs Waiganjo Gichuki & Co. Advocates a memorandum of appearance and subsequently, a defence and counterclaim. In his defence and counterclaim, the appellant averred that:

“1.....

2.....

3. The defendant states that plot No.Loc.11/

Maragi/1193/69 is registered in the names of the plaintiff as to half share and the defendant and 3 other persons as to the other half share in equal shares but all the registered proprietors are lessees.

4. The defendant states that his father developed part of the plot alone and part of the plot jointly with the plaintiff and the defendant himself developed another part of the plot without any assistance from the plaintiff but as the plot is not subdivided the naming of the parts as A, B C or D is not comprehensible to the defendant and is denied. The defendant puts the plaintiff to strict proof of paragraph 5 of the plaint.

5. The defendant admits that there are differences between the parties regarding the mode of partition of the plot but states that the differences are caused by the unreasonable conduct of the plaintiff in pressing for an unworkable and unreasonable mode of partition instead of the normal and acceptable partition into two equal portions.

6. The defendant is a stranger to paragraph 6 of the plaint and further states that any such action as alleged on the part of the District Officer and the alleged Municipal Engineer would be incompetent, illegal null and void. Paragraphs 6, 7 and 8 are therefore denied and the defendant puts the plaintiff to strict proof in respect thereof.

7. The defendant states that he was entitled to refuse his consent to the proposed mode of partition as it was unworkable and unreasonable and illegal.

8.....

9.....

10.....

11. The defendant further states that on diverse dates between 1990 and 1998 he requested the plaintiff to facilitate partition of plot No.Loc.11/Maragi/1193/

69 and the issuance of separate leases for the co-proprietors (i.e. the plaintiff and the defendant and three others) in accordance with their shares.

12. The plaintiff at first consented to the mode of partition into two equal portions and contributed half of the costs of drafting the necessary sketches.

13. The plaintiff later changed his mind after he had unlawfully sold portions of the said plot to three or so other persons who were not co-proprietors and then started insisting that the plot must be partitioned into 6 portions which is unreasonable, unworkable and illegal.

14. The defendant states that the plaintiff's actions are illegal and unreasonable and the only realistic mode of portion is into two equal portions and further that the plaintiff should not have purported to sell portions of the plot to third parties without first offering the shares or portions to the other co-proprietors."

In conclusion he prayed that:

“(a) An order that plot No.Loc.11/Maragi/

1193/69 be partitioned into two equal portions to be registered in the names of the respective proprietors.

(b) An order that the mode of partition be such as was first agreed by the parties in December 1993 and as represented in the draft sketch paid for by the parties.

(c)A declaration that the purported sale by the plaintiff of portions of the suit plot is illegal null and void.

(d) Costs of this suit.”

Once the pleadings were closed, the hearing of the suit commenced before **J.B.A. Olukoye**, the then Resident Magistrate in the Principal Magistrate's Court at Murang'a. The respondent's evidence was that; he was proprietor of the suit premises situated at Makuyu having acquired the same way back in 1964 when it was allocated to him by the Murang'a County Council. In 1967 he apportioned **one Bernard Gatibu** 40 feet of the said plot who gave the same to his daughter who later got married and asked him to have the land registered in **Ismael Kangethe's** names. They got so registered as partners. He testified further that when he applied to be registered as partners he forgot to indicate in the application the portions each one of them was entitled to. However they managed to obtain a lease which was in their names. In 1969 he built a butchery, bar and garage but the rest of the plot remained undeveloped. It was his evidence that he undertook the construction alone and that **Ismael** constructed behind the butchery and completed construction in 1969. He then sought to have the joint lease dissolved and for each of the partners to get their own separate leases. However they have been unable to agree on who should take which portion of the plot. The matter was consequently arbitrated upon by the District Officer, Kihara and it was resolved each of them retains the portions that they had developed. He produced a document to prove that he was entitled to portions V, D and E whereas **Ismael** was entitled to portions A, C and F. He went onto state that when the defendant complained after his father died it was resolved each one of them gets what they had developed and the undeveloped part to be measured and shared equally. In conclusion he stated that the suit premises should be shared as indicated in the letter produced and for each of them to get separate leases. He also sought for costs of the suit.

The respondent's first witness was the then D.O. Kiharu Division. He testified that the dispute was referred to him in the year 1969 by the county council and in company of the parties and municipal engineer they went to the site and upon hearing both parties they resolved that each party gets the respective portions developed by each. The appellant was awarded portions A, C and F whereas the respondent was awarded V, D and E. He stated that both parties were present and were involved in the subdivision and one of them opposed the sub-division.

The respondent's next witness was the secretary to Mukuyu plot committee which comprises 14 members whose duty entails dealing with petty plot cases, rental problems and the suit premises fell within his jurisdiction though it was registered in the names of both the appellant and the respondent. He testified that on 20th August, 1995 there was a meeting convened after the appellant had complained against the respondent as to the partitioning of the suit premises. They deliberated on the matter and took minutes of the deliberations which he tendered as evidence. It had been resolved that each one of the two retain their structures as erected but the plot be shared equally. The two agreed and respectively signed the agreement. They also resolved that measurements be undertaken and whoever had less to be compensated with the undeveloped portion and that the respondent compensates the appellant by building him a foundation.

The plaintiff's 3rd witness testified that he was the planning officer with Municipal Council of Murang'a and had been head engineer for 8 years and that he did subdivide the suit premises into 6 portions in the presence of both parties who had showed him their respective developed structures. The respondent got portions B, D and E whereas the appellant got A, C and F and their said portions were equal. It was his evidence that the subdivision plan was to be signed by physical planner but it was not signed though he gave the plaintiff a copy having applied for the same. Reason for failure to sign was because the parties subsequently disagreed. That marked the close of the respondent's case in the court below.

The defence case through the appellant was that the suit premises were owned in equal shares as between the respondent and himself. Initially the suit premises had been owned by the respondent and the appellant late father. However the appellant had since replaced his demised father. He testified that both the respondent and his father carried out construction work on the suit premises. Later on they were stopped by council from further construction. It was his evidence that the area so constructed was front of Mwhoko Bar and Butchery, the toilets at the tip of the narrow end of the triangle as per plaintiff exhibit 3 and that his father had started foundation and when stopped it had reached the slab level. Thereafter he moved to construct the workshop and garage and according to the map his father constructed part C which has been let out by his mother on his behalf. Area marked D was constructed by both his father and the respondent whereas area A was solely constructed by the witness and area E was constructed by his father upto the foundation level and though same was fully developed the respondent did so without consent of his father. The issue had been subject of deliberations between his father and respondent in 1969 and he was a witness. He contended that he was in occupation of area A and B whereas the respondent was responsible for area C. The respondent though had sold part of the said plot to one **Njuguna Ruiru, Peter Njiri Mugo and Jadiel Githinji Maina** and in the process he had sold more than half of the suit premises without consent from him. Further he never shared out the proceeds of the sale aforesaid. In abid to resolve the ownership of the suit premises they agreed on subdividing the plot into 2 equal portions and a sketch to that effect was drawn and same was produced as evidence save that the respondent subsequently declined to sign the same despite several demands orally and in writing. He further stated that areas marked B and D were jointly owned and he sought half of rents received from the respondent to no avail. As far as he was concerned he had never refused to have the suit premises partitioned into 2 portions but he was opposed to having the same subdivided into 6 portions as the respondent had given himself portions jointly owned by both parties and further that if suit premises were subdivided into 4 portions he would get the garage and plots already sold by the respondent and that would bring conflicts between himself and these purchasers. To him the subdivision should be into 2 equal portions and he also gets Mwhoko bar that was jointly put up by his father as he had also contributed 253 fts of stones to complete the same. Finally he testified that he had also paid the respondent half the amount incurred when there was a civil case about Mwhoko bar, restaurant and butchery and there was an acknowledgement signed by both parties. He contended that he had more costly developments than the respondent. Further it was his opinion that PW4 was not a qualified surveyor and he never consented to the visit to the suit premises and had infact protested vide letter to the D.O. He maintained though that the respondent's suit was premature and unreasonable and same should be dismissed with costs and judgment entered in his favour on the counterclaim.

The appellant's 1st witness was **Wilson Mwaniki**. He testified that the appellant's father constructed the foundation of Mwhoko bar as he was a tenant on the suit premises. He used to pay rent to appellant's father and that he together with the respondent put up the building on the foundation laid by the

appellant's father as aforesaid. On completion rent paid was used to offset amount used in the construction and after their money was repaid he vacated the suit premises. It was his evidence that the appellant's father paid for the construction of the foundation.

The 2nd defence witness testified that he was the one who constructed foundation. The work was given to him by the appellant's father. He constructed it upto the slab level. That was the foundation of what later came to be known as Mwihoko Bar.

The 3rd defence witness was the District Physical Planner. He testified that if the suit premises are subdivided into 2 costs of building are involved but if subdivided into 6 portions same will be very expensive to undertake as it will be 3 times the half one and so the two parties must consider costs of the two.

The learned Magistrate having carefully considered and evaluated the evidence tendered by the respective parties found favour with the respondent's case holding:

“Considering the adduced evidence this court found that there was a consent (sic) as between the parties as (sic) the joint ownership of the plot in dispute and issue for determination is in what proportion would the same be shared out. There was also no dispute that the plot was partially developed and the developments thereon comprised of a bar, butchery and garage. There was further no denial that the defendant's father was the original partner and the defendant stepped into his shoes upon his death. The court found that the parties should get the portions each one of them had developed and share the undeveloped portion equally and for that I find the plaintiff's mode of distribution appropriate.....In a nut shell this court found that the plaintiff has proved his case on a balance of probabilities whereas the defendant has failed to prove his counterclaim to the required standard. Accordingly judgment is entered for the plaintiff as against the defendant in terms of the plaint plus costs whereas the defendant's counterclaim is dismissed with costs to the plaintiff....”

That determination provoked this appeal by the appellant. In a twelve point memorandum of appeal, the appellant complained that:

“1. The learned trial Magistrate erred in totally ignoring *section 103 (2) of the Registered Land Act* and thereby allowed an illegality in that the respondent had admitted selling portions of the suit land LOC.11/MARAGI/1193/69 to third parties without the consent of the appellant; it is admitted by the respondent that, that directly affected the decision of the respondent to subdivide the plot into ridiculously small and economically unviable portions.

2. The learned trial Magistrate erred in holding that the appellant had failed to prove that the respondent had sold portions of the suit land by calling witnesses or tendering any documents in support of the sales while it is obvious from the record that the respondent had admitted that he had sold portions of the suit land to third parties without the consent of the appellant.

3. The learned trial Magistrate erred in ignoring the provisions of *sections 104 of the Registered Land Act Cap 300 Laws of Kenya* in not requiring that the first application for determination of the manner of partition of the suit land be made to the Land Registrar.

4. The learned trial Magistrate erred in finding that the appellant had not proved which portions of the suit land were sold by the respondent while the record shows that the court visited the suit land and the appellant physically pointed out the portions sold by the respondent and development carried out by each of the parties involved.

5. The learned trial Magistrate erred in deciding the case in favour of the respondent without requiring that all the other three co-proprietors and one Esther Wahu who has a life interest be made parties or be served with notice of the suit; this is against the rules of natural justice and common sense since the said persons were already registered as such before the filing of the suit.

6. The learned trial Magistrate erred in ignoring the evidence of PW3 which showed that the relevant plot committee had directed that the suit land be partitioned into two equal portions and also in not finding that the actions of PW2 (i.e. the District Officer) and PW4 (i.e. the so called head Engineer and Planning Officer) of partitioning the suit land into six portions was unlawful as none of them is empowered by the Registered Land Act to decide on or effect subdivision or partition of land registered under the Registered Land Act like the suit land.

7. The trial Magistrate erred in awarding the so called portion B to the respondent even after finding the development on the said portion was carried out jointly by the respondent and the appellant's father and failing to order the amount of compensation payable to the appellant in respect of the share of the developments carried out by the appellant's predecessor in title.

8. The learned trial Magistrate erred in awarding the so called portion D to the respondent while there was evidence on record showing that the portion was developed jointly by the appellant's father and the respondent and failing to award or consider the award of any compensation to the appellant.

9. The trial court erred in finding that the appellant had not proved that his developments on the portion of the suit land he was claiming were more substantial than those of the respondent when in fact the court visited the site and was shown the constructions by the appellant which were inhabited buildings on which construction of other stores had began and was going on at the time of the court visit.

10. The trial Magistrate totally ignored or misunderstood the appellant's case and thereby arrived at a decision which was unjust in all the circumstances of the case.

11. The trial Magistrate ought to have found that partition of the suit premises into two equal portions as proposed by the appellant with consequential orders about compensation for development was more sensible and more equitable than that proposed by the respondent and accepted by the court.

12. The judgment of the lower court is against the weight of the evidence and is unjust to all the parties concerned.”

On 6th March, 2003 the respondent passed on. A year thereafter, the appeal as against him abated. However by a chamber summon application dated 16th May, 2005 brought by the appellant, he sought that **Joyce Mwhaki Karanja** the wife of the deceased be substituted in the appeal in place of the deceased respondent **John Karanja Mwangi** and that the appeal be revived. By a ruling dated and delivered by **Kasango J.** on 6th July, 2007 the application was allowed in its entirety.

Thereafter directions were on 24th February, 2009 given that the appeal be heard by way of written submissions. Such submissions were to be filed on or before 24th April, 2009. Come that day and all the parties had filed their respective submissions. However **Kasango J.** declined to deal with the appeal any further as she was proceeding on transfer to the High Court of Kenya at Meru. The matter was then placed before me for further directions. On 29th May, 2009, respective parties agreed that I could proceed to craft the judgment on the basis of the pleadings and written submissions on record.

I have since carefully read and considered the written submissions on record and the authorities cited herein. This being a first appeal it is my duty to re-evaluate the evidence, assess it and make my own conclusion, remembering however that I have neither seen nor heard the witnesses and making due allowance for this – See **Selle V Associated Motor Bat Company Limited (1968) E.A. 123 and Williamson Diamonds Ltd V Brown (1970) EA.1.**

Bearing the principles stated in the foregoing authorities, I have gone over the evidence tendered in the trial court which I have set out elsewhere in this judgment as well as the pleadings. I am of the view that

this appeal may very well be determined on the questions of cause of action, partnership and *section 104* of the Registered Land Act.

In the plaint, the respondent had merely asked for:

“...the defendant to sign all relevant documents to effect the subdivision and transfer of part A, C and F to be awarded to the defendant and portion B, D and E to the plaintiff.....alternatively he prayed that..... “the Executive Officer of the court to be authorized to sign all the relevant documents to effect the subdivision and transfer.....”

What cause of action known in law is revealed and or disclosed by these prayers as read with the pleadings? I cannot think of any. The respondent had not prayed for any declarations, breach of agreement e.t.c what he prayed for amounts to a mandatory injunction. Can a suit be solely founded on mandatory injunction and without more! I have my own doubts. A litigant cannot be compelled to do something without a basis being laid first in the nature of a recognized cause of action known in law. This is what happened in the circumstances of this case. I note though that the parties were all represented by advocates of many years standing. However I am surprised that the lawyer for the appellant did not take up the issue of cause of action as a preliminary point. His counterclaim though fared no better. Despite the foregoing misgivings, the learned magistrate proceeded to enter judgment as prayed in the plaint. It is instructive that the plaint had a main prayer as well as an alternative prayer. In entering judgment as prayed in the plaint, which prayer in the plaint was the learned magistrate granting the respondent. Is such judgment capable of enforcement? I have my own doubts again.

To my mind this was a dispute among partners. The evidence of the respondent as well as the appellant supports this contention. The same goes for the pleadings. They owned plot **No.Loc.11/Maragi/1193/93** as partners. A disagreement arose as to the sharing of the same. The dispute was who should get which portion of the partnership property in accordance with his share contributions, monetarily and by way of developments effected by the respective partners. This being a partnership dispute it could not have been dealt with and resolved in the manner that it was. The Partnership Act as well as *order XXXVI rule 4* of the Civil Procedure Rules have elaborate provisions as to how partnership disputes are resolved.

The suit premises too were registered under the Registered Land Act. The dispute between the appellant and respondent was in relation to the partition of the same amongst themselves. According to *section 104 (1)* of the Registered Land Act,

“an application in the prescribed form to the Registrar for partition of the land owned in common may be made by:-

(a) any one or more of the proprietors; or

(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree and, subject to the provisions of this Act and of any written law by or under which minimum areas of frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement of the proprietors in common or, in the absence of agreement, in such manner as the Registrar may determine” (emphasis supplied)

It would appear from the foregoing that the respondent ought to have filed first an application for partition of the suit premises with the Land Registrar. The situation obtaining herein was perhaps one envisaged when the above provision of the law was promulgated. In the light of the foregoing, I think that the respondent commenced the instant proceedings in the wrong forum. Instead of following the laid down procedure as aforesaid, the respondent resorted to the D.O and a Planning Officer from Municipal Council of Murang’a for solution and to effect the alleged partition whereupon he filed the instant suit. The learned Magistrate in the light of the express provisions of *section 104* of the Registered Land Act aforesaid had no jurisdiction to entertain the suit. After all a subordinate court is not a court of inherent and unlimited jurisdiction.

It is for all the foregoing reasons that I find this appeal to have considerable merit. Accordingly it is allowed with costs to the appellant. The decree and order of the lower court is set aside. In substitution thereof, the respondent's suit in the subordinate court is ordered dismissed with costs to the appellant as well. In the light of what I have said with regard to the provisions of *section 104 (1)* of the Registered Land Act, the appellant's counter claim too stands dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of June, 2009.

M.S.A MAKHANDIA

JUDGE