REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 1 of 2001

JOYCE CIERURI ……... APPELLANT

AND

BERNARD KAIRANYA …….. 1ST RESPONDENT

FREDRIC NTONGAI …….. 2ND RESPONDENT

DEMARCATION OFFICER (KANGETA) ……..…. 3RD RESPONDENT

(An appeal against the judgment and decree of the Learned Senior Resident Magistrate at Maua in Civil Case No. 61 of 1997 delivered on 16th December 2000)

JUDGMENT OF THE COURT

The appellant, Joyce Cieruri was the plaintiff while the three respondents were the defendants in Maua Principal Magistrate's civil case No. 61 of 1997. This appeal arises from that suit. By her plaint dated 26.5.1997 and filed in court on the same day, the plaintiff sought a declaration that she was the rightful owner of the whole of parcel number 2188 Kangeta Adjudication Section. She also prayed for an order of injunction against the 2nd respondent to restrain the said 2nd respondent from interfering with her actual and quiet possession of land parcel No. 2188. She also prayed for general damages, costs of the suit, interest on general damages and costs and any other relief that the court could grant her.

The plaintiff averred in her plaint that she had always been the registered owner of land parcel No. 2188 Kangeta Adjudication section and that in or about the year 1991, the 1st respondent was unlawfully allocated 2.5 acres inside the appellant's land in addition to being allocated the plaintiff's land parcel 2188. She further averred that the 1st respondent was allocated 2.5 acres instead of 2 acres allocated to him by the committee. The appellant further averred that she had objected to the award made to the 1st respondent and that at the conclusion of the objection, the appellant was ordered to transfer to the 1st defendant 1.50 acres out of parcel number 46 (1/2 acres) and 2621 (one acre). It does not come out clearly from the pleading at paragraph 7 of the plaint whether the total portion of land transferred to the 1st respondent was 1.50 acres or whether (as the pleading seems to imply) it was 2.00 acres. The 3rd respondent is accused of having transferred the whole of parcel No. 2188 to the 1st respondent instead of transferring only 1.50 acres. The appellant contended that parcel No. 2188 was the one on which her houses, coffee trees, miraa and other crops stood. Finally, the appellant averred that the 1st and 2nd respondents had unlawfully evicted her from her parcel of land and that they were now using her miraa and her coffee trees. She also averred that the 1st and 2nd respondents had destroyed her crops valued at Kshs. 19,525/=. It is worthy of note that though the appellant pleaded that the 1st and 2nd respondents had destroyed her crops valued at Kshs. 19,525/=, she did not include this claim among her prayers.

The 1st and 2nd respondents filed a joint statement of defence on 6.8.1997. They denied the appellant's averments as per paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint. At paragraph 4 of the said defence the 1st and 2nd respondents averred that the 1st respondent was the registered proprietor of parcel No. 2188 Kangeta Adjudication Section while at paragraph 5 thereof, it was averred that the 2nd respondent owned parcel No. 5390 of Kangeta Adjudication Section. It was also the 1st and 2nd respondents averments that the appellant's suit was vexatious and an abuse of the due process of the court and further that the appellant had not obtained the requisite consent under the Land Adjudication Act Cap 284 Laws of Kenya. Finally the respondents averred that the appellant had not exhausted the procedure as laid down under the said Cap 284 before filing of the suit and for those reasons the 1st and 2nd respondents urged the court to dismiss the appellant's suit with costs to the 1st and 2nd respondents.

It would appear from the record that the 3rd respondent did not file a defence.

In his judgment delivered on 18.12.2000 the learned senior resident magistrate, as he then was (Mr. M.N. Gicheru), found that the appellant had failed to prove her case against the respondents to the required standard. In his view, the appellant failed to discharge the onus upon her of proving that land parcel number 2188 Kangeta Adjudication section belonged to her. The learned senior resident magistrate also found that the tea and coffee on the said parcel belonged to Francis Kimaita and Geoffrey M'Mbui respectively. These two gentlemen were found to be neighbours of the appellant. The learned senior resident magistrate found that from the evidence parcel number 2188 belonged to the 1st respondent and further that the 1st respondent had proved that he was entitled to more land from the appellants husband than he actually got from him.

In her Memorandum of Appeal, the appellant set out nine (9) grounds of appeal. One of the grounds is that the learned resident magistrate failed to comply with the provisions of order 20 rule 3(1) of the Civil procedure Rules (hereinafter referred to as the rules) and further that the learned senior resident magistrate was wrong in dismissing the appellant's suit. The appellant also complained that the judgment made in favour of the respondents was against the weight of evidence.

As the first appellate court, I have carefully examined the pleadings, the evidence and submissions made by counsel on behalf of both the appellant and the respondents. In this regard, I shall first of all deal with the appellant's averment that the 1st and 2nd respondents destroyed her crops worth Kshs. 19,525/=. As stated earlier in this judgment, apart from the averment that the 1st and 2nd respondents had destroyed her crops worth that amount, she did not claim the same among the reliefs sought. In her evidence, the appellant only stated that the 1st respondent cut down her miraa, banana trees, tomatoes and avocadoes. The appellant did not say how many of each plant were cut down and what the value of these plants was. In effect therefore, I find that the appellant not only failed to specifically plead the value of these crops but she also failed in her evidence to strictly prove the same. It is the view of the court that the sum of Kshs. 19,525/= were special damages which not only needed to be specifically pleaded but had also to be strictly proved by the evidence. No such evidence was adduced. Though the learned senior resident magistrate did not address this issue in his judgment, it is the considered view of this court that even if he had considered it, there was no way he could have entered judgment for the appellant.

I have also carefully considered the appellant's evidence and that of her witnesses in the lower court. The appellant stated that she was the owner of land parcel number 2188 Kangeta Adjudication section which land she inherited from her husband, the late Simeon M'Mboroki. That the parcel measured 12 acres. That the 1st respondent objected to the lands committee against the appellant's husband owning the whole parcel of land and asked to be given 2.65 acres of the land. The appellant's husband also objected to the committee's findings and though the appellant's husband died before his objection was finalized, the committee gave half an acre of land to the 1st respondent and a further acre from another part of the parcel.

The learned trial magistrate found that the appellant's evidence did not prove her claims against the 1st and 2nd respondents. On a reconsideration and reevaluation of that evidence and the evidence put forward by the 1st and 2nd respondent's I am also persuaded that the appellant did not prove her claim on a balance of probabilities. The 1st respondent testified that he owns land parcel number 2188 which

measures 2 ½ acres. He produced evidence from the Land Adjudication Officer to prove the same. The 1st respondent also testified that he sold land to the 2nd respondent which was now registered as parcel No. 5390 Kangeta Adjudication section, and further that he had got his 2 ½ acres through objection case No. 821 of 1991. The 2nd respondent also confirmed that he bought his parcel of land number 5390 from the 1st respondent. He produced a title deed dated 15.4.1997 to confirm ownership of the land. On the evidence before me therefore, there is no reason for me to want to differ from the findings reached by the learned senior resident magistrate. The evidence clearly shows that the appellant did not know the number of her parcel of land. The evidence also shows that both the 1st and 2nd respondents clearly proved how they had come to be possessed of parcel numbers 2188 and 5390 respectively. The evidence adduced by the 1st respondent's witnesses, namely Julius Maeria M'Erumba DWI and Ibrahim M'Ikirima DW2 both testified that the appellant's late husband Simeon M'Mboroki who was brother to the 1st respondent's father had gathered some 5.43 acres of land belonging to the 1st respondents father. He also testified that the appellant's land borders the 1st respondent's parcel number 2188.

There is also the evidence of the 3rd respondent, George Mukira who worked as the then Demarcation Officer Kangeta Adjudication section until June 1999. He testified that the records at their offices showed clearly that the 1st respondent was the owner of land parcel number 2188 part of which he sold to the 2nd respondent through the laid down procedures. It was also his evidence that it was the elders who gave 2.50 acres to the 1st respondent and that despite the fact that the appellant filed objections through numbers 666 and 667; she had no right to the 1st respondent's land. I am persuaded by this evidence and I am satisfied that the learned senior resident magistrate was right in accepting that evidence as true. The 3rd respondent also testified that the appellant's late husband willingly surrendered 2.50 acres of the ancestral land to the 1st respondent and that the appellant had no right to that parcel of land belonging to the 1st respondent. The 3rd respondent's evidence further shows that the appellant had no objection when the 1st respondent transferred a portion of the 2.50 acres to the 2nd respondent nor did the 1st respondent object when the appellant sold her parcels of land to 14 different people. I find no reason to differ from the learned senior resident's magistrate's finding that the appellant indeed failed to prove her case against the respondent on a balance of probabilities.

The appellant has also complained that the learned trial magistrate did not comply with order 20 rule 3(1) of the Rules. The sub-rule complained of provides as follows:-

> **"3(1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it."**

I have scrutinized the learned trial magistrate's judgment. It is clear from the typed version that the judgment was signed although the date is not shown. It is indicated however that the learned trial magistrate recorded the quorum and the appearances on the 18.12.2000. The record also shows that all the parties were present on that day when the judgment was delivered.

For the reasons that I have given above, and in view of the conclusions that I have reached, I find that the appellant's appeal has no merit. The same is hereby dismissed. The respondents will have costs here and also the costs in the lower court.

It is so ordered.

Dated and delivered at Meru this 15th day of November 2005.

RUTH N. SITATI

JUDGE

15.11.2005