Mitati v Mitati & 2 others (Environment and Land Appeal 68 of 2019) [2023] KEELC 18811 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18811 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 68 OF 2019

BM EBOSO, J

JULY 3, 2023

BETWEEN

JECINTA NJERI MITATI ..... APPELLANT

AND

ELIZABETH MUGECHI MITATI ..... 1ST RESPONDENT

FRANCIS NJUGUNA MITATI ..... 2ND RESPONDENT

TERESIA NJOKI KAMAU ..... 3RD RESPONDENT

(Being an Appeal against the Judgment of Hon A. Maina, Senior Principal Magistrate, delivered on 26/11/2019 in Thika Chief Magistrate Court MCE & L Case No. 47 of 2014)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon. A. M Maina, Senior Principal Magistrate, on 26/11/2019 in Thika Chief Magistrate Court Environment and Land Case No 47 of 2014. Elizabeth Mugechi Mitati [the 1st respondent in this appeal] was the plaintiff while Jecinta Njeri Mitati [the appellant in this appeal] was the defendant in the primary suit and the claimant in the counterclaim. Although the appellant did not clearly designate defendants in the counterclaim, it does emerge from the totality of the counterclaim that the defendants in the counterclaim were Elizabeth Mugechi Mitati and Teresia Njoki Kamau. Indeed, the reliefs sought in the counterclaim targeted properties which the duo claimed to be theirs.

2. Strangely, despite making Teresia Njoki Kamau a party to the counterclaim, the appellant moved the trial court for leave to serve third party notices upon her, alongside Francis Njuguna Mitati. The trial court granted the plea. Subsequently, a joint defence dated 29/5/2019 was filed on behalf of Francis Njuguna Mitati and Teresia Njoki Kamau.

3. It does emerge from the pleadings and from the evidence in the trial court that the appellant and the 1st respondent were at one point wives of Francis Njuguna Mitati. It does also emerge that the four properties which were the subject of the suit in the trial court were the subject of litigation in a divorce cause between Francis Mitati Njuguna and Jecinta Njeri Mitati. I will briefly outline the parties' respective cases and evidence in the trial court and the findings of the trial court. Before I dispose the key issues that fall for determination in the appeal.

4. Through a plaint dated 15/9/2014, Elizabeth sought a declaration that land parcel number Samuru/ Mwitigiri/1784 and Samuru/ Mwitigiri 1785 belonged to her and that Jecinta be ordered to vacate the parcels or be evicted by a court bailiff. Her case was that she was the registered owner of the two parcels, having purchased them from M/s Kariua Mwiriukia Farmers Co-operative Society Ltd. She contended that in the year 2010, she allowed Jecinta to settle on the two parcels. It was her case that when she subsequently notified Jecinta to vacate the land, the latter refused to vacate. She contended that Jecinta was a trespasser on the two parcels.

5. Jecinta filed a statement of defence and counterclaim dated 10/10/2014. Her case was that the two parcels belonged to their mutual husband, Francis Mitati Njuguna. She contended that upon getting married to Francis, she settled on the two parcels together with parcel numbers 1786 and 1787 in 1994 and she had lived on the parcels with her four children since 1994. It was her case that their husband gave her the parcels, hence she was the rightful owner of the parcels. She further contended that Elizabeth's claim was statute-barred.

6. Through the counterclaim, she contended that she was embroiled in a divorce dispute with Francis and that Francis, Elizabeth and Teresia Njoki Kamau had colluded to fraudulently deprive her parcel numbers Samuru/ Mwitigiri Block 1/ 1784; Samuru/ Mwitigiri Block 1/ 1785; Samuru/ Mwitigiri Block 1/ 1786; and Samuru/ Mwitigiri Block 1/ 1787. She prayed for an order declaring her as the rightful owner of the four parcels. She also sought an order directing rectification of the parcel registers relating to the four parcels.

7. In their joint statement of defence dated 29/5/2019, Francis and Teresia averred that they had no interest in parcels number Samuru/ Mwitigiri Block 1/1784 and Samuru/ Mwitigiri Block 1/ 1785. At the hearing, Francis testified that he married Jecinta in 1994. He added that he purchased parcel number 1784 and parcel number Samuru/ Mwitigiri Block 1/ 1785 on behalf of the 1st respondent. He added that parcel numbers Samuru/ Mwitigiri Block 1/ 1786 and Samuru/ Mwitigiri Block 1/ 1787 belonged to his daughter-in-law, Teresia Njoki Kamau. He added that upon marrying the appellant in 1994, the 1st respondent gave the appellant "a room to settle in" but the appellant subsequently erected a permanent house on the land. It was his evidence that having divorced the appellant, the appellant together with the children of the union should vacate the land and go back to her "maternal home".

8. The 1st respondent's evidence was that she purchased parcel numbers 1784 and 1785 from Kariua Mwiriukia Farmers Co-operative Society Ltd in 1977 and 2000 respectively and erected a semi-permanent house on the parcels. She added that in the year 2010, she allowed the appellant to temporarily settle on the land. It was her evidence that her husband married the appellant in the year 2010.

9. Upon conclusion of trial, the trial court rendered the impugned Judgment in which it dismissed both the 1st respondent's primary suit and the appellant's counterclaim on the ground that they had failed to prove their respective claims. The trial court rendered itself thus:

> "In summary, the plaintiff has been unable to prove that she is the legal owner of the plot number 1784 and 1785. I dismiss the claim against the defendant. The defendant on the

other hand has been unable to prove that land parcels number 1784, 1785, 1786 and 1787 belong to her, and as such her counterclaim fails and is dismissed."

Appeal

10. Aggrieved with the Judgment of the trial court, the appellant brought this appeal, advancing the following six verbatim grounds of appeal:

    1. That the learned trial magistrate erred in law and failed in entering judgment against the appellant against adduced evidence and dismissing the appellant's evidence as tailor-made.

    2. That the learned trial magistrate erred in fact when she failed to harmonize her proceedings with the judgment and misconstrued the appellant's evidence.

    3. That the learned trial magistrate erred in fact and in law when she disregarded the appellant's evidence and delivered a judgment which never addressed the real issues presented before her and left the parties in suspense.

    4. That the learned trial magistrate erred in law and fact when she disregarded the evidence of the appellant but proceeded to find against the appellant based on her own opinion and presumptions. Further turning a blind eye to the appellant's submissions.

    5. That the learned trial magistrate erred in law and in fact giving mild orders in total disregard of the appellant's enshrined rights to the suit properties.

    6. That the learned magistrate made a ridiculous verdict which essentially pontified the respondent by assuming that the appellant who has been on the suit land has no right over the same.

11. The appellant urged this court to allow the appeal, set aside the Judgment of the trial court and grant "any further relief as the court deems fit to grant in the interest of justice."

Submissions

12. The appeal was canvassed through written submissions dated 26/7/2022, filed by M/s Ishmael & Co Advocates. Counsel for the appellant faulted the trial court for what he termed as failure to address itself to: (i) the fact that what was before her was purely a matrimonial property dispute; (ii) the fact that the 2nd respondent [Francis Mitati] as husband of the appellant had abused a trust bestowed on him by casually dispossessing the appellant of matrimonial property by transferring them to the 1st and 3rd respondents; (iii) the fact that the primary documents relating to acquisition of the suit properties were never produced, hence the purported transfers were a fraudulent scheme aimed at dispossessing the appellant of the suit properties; (iv) the fact that the trial court having found that it could not evict the appellant, it ought to have granted her ownership of the suit property; and (v) the question of ownership of parcels number 1786 and 1787. Counsel further faulted the trial court for misquoting the evidence of the appellant by stating that the appellant testified that she did not jointly own the suit properties with the 2nd respondent.

13. Counsel further faulted the trial court for failing to consider the fact that the four parcels had been in the exclusive possession of the appellant hence the appellant was entitled to it by virtue of Section 9 of the *Matrimonial Property Act*. Counsel argued that the trial court erred in failing to appreciate

the broad interpretation of "matrimonial home" under Section 2 of the *Matrimonial Property Act*. Counsel submitted that a title obtained through fraud is a nullity and ought to be nullified.

14. The record does not bear written submissions by the respondents.

Analysis and Determination

15. I have read and considered the original record of the trial court and the record filed in this appeal; the parties' respective submissions; the relevant legal frameworks; and the applicable jurisprudence. This appeal does not challenge the trial court's findings and disposal orders on the primary suit which was brought by the 1st respondent. It only challenges the findings and disposal order of the trial court on the counterclaim which was brought by the appellant.

16. Taking into account the grounds of appeal and the submissions tendered in this appeal, the following are the three issues that fall for determination in the appeal: (i) Whether the appellant proved her counterclaim to the required standard; (ii) Whether the appellant was entitled to the reliefs that were sought in the counterclaim; and (iii) What order should be made in relation to costs in the trial court and in this appeal. Before I dispose the above issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

17. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:-

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

18. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

19. Did the appellant prove her counterclaim? The case of the appellant was contained in her defence and counterclaim dated 10/10/2014; her evidence; and her submissions. Her case was that parcel numbers 1784; 1785; 1786 and 1787, together totalling about a half of an acre, belonged to her husband, Francis Mitati Njuguna [the 2nd respondent] and were the land where she had constructed her matrimonial home and where she had resided since she got married to the 2nd respondent in 1994. She contended that she was the rightful owner of the suit properties by virtue of them being the matrimonial home "given to her by her husband." In the alternative she contended that she had acquired ownership rights over the parcels by dint of her possession of the land from 1994.

20. By way of counterclaim, the appellant contended that the respondents had embarked on a scheme to fraudulently dispossess her of the suit land despite the fact that she was "the owner" and had been in actual possession since 1994." She itemized particulars of fraud.

21. It does emerge from the evidence on record that the 1st respondent lied to the trial court that she allowed the appellant to temporarily settle on two of the suit properties in 2010. Her evidence was

contradicted by the 2nd respondent who corroborated the appellant's assertion that she had been in occupation of the land since 1994 when she got married to the appellant. It did also emerge that registrations relating to parcel numbers 1786 and 1787 had been changed in 2013 from the 2nd respondent to the 3rd respondent. At that time, the marriage between the appellant and the 2nd respondent had turned sour. It does emerge from the evidence on record that the said registrations were effected despite the duo knowing that the two parcels formed part of the appellant's home where she resided with the children of the marriage and where she had resided since 1994.

22. It does also emerge from the evidence on record that acquisition and registration documents relating to parcel numbers 1784 and 1785 were, for reasons only known to the 1st and 2nd respondents, withheld from the court. What were presented were letters authored in September 2014 purporting to confirm the 1st respondent as the owner of parcel numbers 1784 and 1785. It is clear that the letters were authored after the respondents had decided to dispossess the appellant of the parcels of land.

23. From the totality of the evidence that was placed before the trial court, it is clear that the appellant had been in uninterrupted occupation and possession of the four parcels since 1994. She has her matrimonial home on the land. It is clear from the evidence that, purely for the purpose of defeating the appellant's interest in the land, the 2nd respondent elected to renounce his interest in the land.

24. Can the 2nd respondent's renouncement of his interest in the four parcels defeat the appellant's interest in them? I do not think so. The appellant has been in possession of the four parcels to the exclusion of both the 1st and 3rd respondents. The 2nd respondent having elected to renounce his interest in the land, the logical conclusion which the trial court ought to have arrived at was that the appellant's title to the four parcels were to be deemed to have crystalized under Section 17 of the *Limitation of Actions Act* upon expiry of 12 years from 1994. This is informed by the fact that the appellant pleaded limitation in her defence and counterclaim. Secondly, there was evidence that she had been in possession of the suit land from 1994. To this extent, the appellant clearly proved her counterclaim and demonstrated that she was entitled to the two principal prayers that were sought in the counterclaim.

25. For the above reasons, I find that the appellant proved her counterclaim to the required standard and that the trial court erred in dismissing her counterclaim. I further find that the appellant is entitled to prayers (a) and (b) of the counterclaim.

26. The above error was committed by the trial court. Consequently, parties will bear their respective costs in this appeal and in the trial court.

Disposal Orders

27. In the end, this appeal succeeds and is disposed in the following terms:

    a. The finding and disposal order of the trial court on Jecinta Njeri Mitati's counterclaim in Thika CMC E & L Case No 47 of 2014 are set aside and are substituted with an order allowing the counterclaim in terms of prayers (a) and (b) of the counterclaim.

    b. The finding and disposal order of the trial court on the primary suit by Elizabeth Mugechi Mitati in Thika CMC E & L Case No 47 of 2014 are undisturbed by this court.

    c. Parties will bear their respective costs of the suit in the trial court and costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF JULY 2023

B M EBOSO

JUDGE

In the Presence of: -

Ms Wairimu for the Appellant

Ms Njoroge for the Respondents

Court Assistant: Hinga