



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 100 OF 2019

FAITH KANANU AKWALU

(Suing as guardian of SAMWEL AKWALU).....APPELLANT

VERSUS

DAVID MWENDA MAINGI.....RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.)

delivered on 27th June, 2019, in Tigania PMCC No. 62 of 2014)

JUDGMENT

1. The respondent to this appeal had brought a suit in the lower court alleging his parcel of land known as No. 2249 Uringu I adjudication section had been encroached upon by his neighbor the appellant who was the owner of Parcel No. 2248. He averred the appellant took advantage of his absence and trespassed into his land suit and started acts of planting crops. He prayed for an eviction order.
2. The appellant denied the claim and raised a preliminary objection that he was of unsound mind hence could not be sued.
3. By a reply to the defence the respondent denied the appellant lacked legal capacity as alleged or at all. Instead he averred the appellant was illegally assisted to trespass into his land by a land committee member and that the defence raised no triable issues, was frivolous, vexatious, scandalous and an abuse of the court process.
4. Through an application dated 8.10.2014 brought under **Order 32 Rule 15 of the Civil Procedure Rules**, the appellant sought for the dismissal of the suit on the basis he was of unsound mind hence lacked legal capacity to be sued.
5. The application was supported by an affidavit sworn by Mercy Kaume Advocate in which she attached inter alia a medical report from Mathari hospital, a medical record from Meru Level 5 Hospital dated 21.7.2014 and other prescription receipts all marked as annexures **SM1 – 5** respectively.
6. In sum, the deponent urged the court to find that the suit had been brought against the wrong person who was insane and who could not understand anything.
7. The respondent opposed the notice of motion through a replying affidavit sworn on 19.12.2014 by David Mwenda Maingi on the basis that mental illness was not the same as unsoundness of mind.
8. Further, the respondent averred if the appellant had been adjudged insane, he would not have been discharged from Mathari hospital and that if his last admission was in November 2012, he must have recovered since he took possession in 2011 and started planting trees which was inconsistent with somebody of unsound mind and that there were discrepancies in the medical record records produced before the court.
9. Parties were allowed to put in written submissions dated 5.11.2015 and 15.10.2018 respectively.
10. Meantime, the court on 25.10.2018 directed under **Section 18 (2) of Land Registration Act and Section 22 of the Survey Act** that the District land registrar and land surveyor to visit the locus in quo with the assistance of security from O.C.S Nchiru police station with a view of confirming the fixed boundaries and to file a report before 29.11.2018

11. The appellant filed an application dated 3.12.2018 seeking for stay of the orders made on 25.10.2014 until the application dated 18.10.2014 was heard and determined.
12. Following the scene visit, the surveyor filed its report on 31.1.2019 and confirmed that Land Parcel Uringu I/2249 fell under RIM sheet No. 108/3/15/12 and that beacons had been marked as per the scaled measurements for the registry index map.
13. Further and following consent as regard the application dated 3.12.2018, a comprehensive report by the surveyor was filed on 27.3.2019 dated 26.3.2019 which indicated: - the appellant was in use of Parcel No. 2249 where he had planted maize though the land was in the name of the respondent; boundaries were fixed as per RIM; there were no developments in terms of buildings and that both the map and the ground agreed in terms of position. The RIM was attached to the report.
14. The appellant filed an application dated 3.4.2019 seeking to be substituted with Faith Kananu Akwalu as the defendant on the basis of insanity. The application was supported by the affidavit of Faith Kananu Akwalu sworn on 3.4.2019. She attached copies of medical records marked as **FK 1 – 4** similar to the ones attached in the earlier application.
15. At the same time, the respondent brought an application dated 23.4.2019 seeking for entry of summary judgment against the appellant on the basis that the defence filed on 11.6.2014 raised no triable issues given the surveyor's report filed in court and dated 26.3.2019.
16. The appellant opposed the application through a replying affidavit sworn by Faith Kananu Akwalu on 8.5.2019. In sum she urged the court to give her a fair hearing since the defence had raised triable issues.
17. The appellant filed yet another application dated 11.6.2019 seeking for leave to amend the defence on the basis that the title deeds were now out, her land was now less two acres and there was need to bring in a counterclaim.
18. The court allowed the application for summary judgment leading to the respondent filing an application dated 15.7.2019 for provision of security during the execution of the decree.
19. Through a ruling delivered on 31.1.2019, the court dismissed the application dated 8.10.2014 while by orders issued on 14.3.2019, the application dated 3.12.2018 was found to have been overtaken by events given the surveyor's report.
20. Regarding the application for summary judgment, the court allowed it by a ruling delivered on 27.4.2019 triggering this appeal.
21. The appellant faults the ruling delivered on 27.6.2019 on the basis that: the prayers in the plaint for eviction needed parties to give viva voce evidence so as to determine the claim; the court failed to consider the appellant's replying affidavit to the application dated 23.4.2019; the court failed to find the application lacked merits since there was a pending defence; the trial court completely ignored the appellant's application seeking for the amendment of the defence; erred in law by stating since the respondent had confirmation document to land and a survey report, there was no need to hear evidence from both parties despite the appellant's similar documents; erred by refusing to consider the principles of law applicable in cases of summary judgment; erred by rushing to conclude a very sensitive issue of land without allowing parties to give evidence and lastly erred reaching a ruling which was against the weight of evidence.
22. Parties were directed to canvass the appeal through written submissions to be filed by 30.1.2022. The respondent filed his submissions dated 27.1.2022 opposing the appeal on the basis that the appellant lacked guardianship orders to represent the interests of the registered owner and thus could not be a party in this appeal as per the **Mental Health Act Cap 248 Laws of Kenya**. Reliance was placed on *John Patrick Macharia –vs- Patrick Kahiaru Muturi [2002] eKLR* on the proposition that there is a whole process under **Cap 248** to adjudge a person as of unsound mind.
23. Secondly, it is submitted the application for summary judgment under **Order 36 Civil Procedure Rules** was merited since it was a claim for the recovery of land with or without a claim for rent and mense profits, the respondent was able to prove through pleadings and documents that he was indeed legal, rightful and sole user of the suit parcel. That his claim could not be defeated by the sham defence based solely on unsoundness of mind. Reliance was placed on *Patel –vs- E.A Cargo Handling Services Ltd [1974] E.A 75* on the tests and principles to be applied in summary judgment; *Capital Construction Co. Ltd –vs- National Water Conservation and Pipeline Corporation [2013] eKLR* on the proposition that where litigation lacks bona fides and was brought with the sole aim of causing the opposite party anxiety, trouble and expense contrary to the overriding objective under **Section 1A and 1B of Civil Procedure Act**, the court should not hesitate to stop such ventures.
24. The respondent also found refuge in **Order 2 Rule 15, Order 13 Rule (1) (b), Section 1A and 1B of Civil procedure Act** and *Horkan Investment Limited –vs- Namayuk Self Help Group[2002] eKLR, Kobil Petroleum Ltd –vs- Kisii Petroleum Products Ltd [2006] eKLR, Postal Corporation of Kenya –vs- I.T. Inamder & 2 Others [20014] KLR 356* on the proposition that in order to eliminate delay in the administration of justice which would keep litigants out of the enjoyment of their property, the court is empowered in appropriate cases to enter summary judgment.
25. The respondent submits there was expert evidence in support of the respondent's case following a court ordered site visit and a letter of confirmation of ownership from the lands office supporting respondent's suit which the appellant did not counter by his own private and independent surveyor's report if at all he was in disagreement with the reports filed. Reliance is placed on *Kenya Airways Ltd –vs- Classical Travel & Tours Ltd [2003] LLR 2704 (CCK)* on the proposition that pleadings which are clearly unsustainable, lacking substance and unarguable were frivolous and by putting them forward for trial would be wasting the court's time.
26. Similarly, the respondent relied on *Delphis Bank Limited –vs- Caneland Limited [2014] eKLR* on the proposition that where a defence was a sham or could not be sustained, it was pointless to put parties through trial just to inflate costs and delay justice.

27. Fourth, it was submitted that the granting or striking out pleadings was discretionary and the trial court justly exercised the discretion and correctly found that the defence was a sham, frivolous, vexatious and an abuse of the court process especially in the instant case where it was a mere denial of liability without some reason given as held in Mugunga General Stores –vs- Pepco Distributors Ltd [1987] eKLR, Peeraj General Trading & Contracting Company Limited, Kenya & another –vs- Mumias Sugar Company Limited [2018] eKLR, Mercy Nduta Mwangi T/A Mwangi Keng'ara & Co. Advocates –vs- Invesco Assurance Company Limited [2019] eKLR.

28. In my view the issues for determination are:-

- 1) If the appeal herein was brought by a person with legal capacity.
- 2) If the trial court had jurisdiction in the first instance to entertain the suit.
- 3) If the trial court was right in entering summary judgment.
- 4) If the appeal has merits.

29. The appellant herein was granted leave to put in a supplementary record of appeal by 27.8.2021 and introduce the order appealed against. There was no compliance at all. On that score alone, the appeal before the court is incompetent for lack of the order and non-compliance with court orders.

30. Secondly, the appellant appeals against a ruling delivered on 27.6.2019. From the pleadings and the record of appeal, the court is unable to find such a ruling and or order.

31. Thirdly, the appellant describes herself as the guardian of one Samuel Mutegi Akwalu. In the application dated 3.4.2019, the appellant sought to be substituted as the defendant in place of Samuel Mutegi Akwalu alleged to be of unsound mind and registered owner of Parcel No. 2248. It is not clear from the record whether the notice of motion was allowed on 25.4.2019 or not. That notwithstanding, the procedure to appoint a guardian for the estate of a person adjudged to be lacking mental capacity is a legal process governed by the **Mental Health Act and Order 32 Rule 4 of the Civil Procedure Rules**. A party seeking such an order must file an originating summons and or a petition before the High Court. An inquiry must be made and the person alleged to be of unsound mind has to appear before the court for such an inquiry. See MMM –vs- AMK [2016] eKLR, JWA –vs- MWK [2020] eKLR.

32. In NM –vs- M'Marete Ibutu & 8 Others [2021] eKLR, this court held **Section 26 of the Mental Health Act** as read together with **Order 32 Rule 4 of the Rules** envisages the court being approached through a petition or an originating summons so as to make a judicial inquiry before granting a guardianship order.

33. The same position was taken by **Mary Kasango J. In re TKN (A person suffering from Mental Disorder) [2021] eKLR**.

34. The appellant has not attached any guardianship order from a Court of competent jurisdiction authorizing her to sue for or on behalf of the estate of Samuel Mutegi Akwalu. Similarly, the application allowing for her substitution did not attach such a guardianship order for the estate. It is not a doctor's report which grants and or declares one of unsound. It is the court which declares and appoints a guardian.

35. In MGG –vs- Gateway Insurance Co. Ltd & 2 Others [2020] eKLR the Court of Appeal held the appellant lacked capacity to file the suit on behalf of her husband without seeking to be appointed a guardian ad litem or manager under **Mental Health Act** before filing the suit. The court proceeded to dismiss the appeal. The same position obtains in this appeal and on that good, I find the appeal brought by an incompetent appellant.

36. Thirdly, the dispute at the lower court related to the fixing of a boundary. The trial court was right to refer the matter under **Section 18 (1) of the Land Registration Act** before the Land Registrar and the surveyor. The two proceeded to fix and mark the boundaries subsequent to which a report was filed on 31.1.2019 and 27.3.2019 respectively.

37. Once the boundary was fixed under **Section 18 of the Land Registration Act**, whoever was not satisfied with the decision was required to move to court and challenge it.

38. The appellant did not fault the surveyor's report by the surveyor and land registrar and or challenge the fixing of the boundary. As a consequence of the reports, the respondent filed an application for summary judgment since the two reports were not contested by the appellant. The land registrar and surveyor fixed the boundaries under **Section 19 (1) of Land Registration Act**. In essence, the two carried out their statutory mandate and reported to court about the progress.

39. The court initially made the reference to the land registrar and surveyor under **Section 18 of Land Registration Act** since it lacked jurisdiction to entertain the suit. The two carried out the statutory mandate.

40. Subsequently, the court also adopted the report which essentially disposed of the dispute. What was now left was the enforcement of the implementation of the surveyor's report by determining the issue of eviction.

41. Through the survey report and the application for summary judgment, the respondent was able to establish liability on the part of the appellant. The trial court cannot also be faulted for exercising its discretion especially where a report had been made. The dispute was settled by the land surveyor to the extent that the appellant had encroached on the respondent's land and was planting maize on it which did not belong to him.

42. Given the findings by the surveyor, the fixing of the boundary as per the RIM filed in court and the application for summary judgment, my finding and conclusion is that the trial court exercised its discretion properly, considered the applicable law and reached the correct decision.

43. There was also nothing wrong with the court referring the dispute under **Section 18 of Land Registration Act** so as to expedite the process.

44. In the premises, I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

IN PRESENCE OF:

MISS MURIMI FOR RESPONDENT

KAUME FOR APPELLANT - ABSENT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE