



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 123 OF 2019

DESMOND MUTUMA MWITI.....1ST APPELLANT

ASHFORD MWITI.....2ND APPELLANT

-VERSUS-

DUNCAN MUTHOMI..... RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment and decree of Hon. J. Irura (PM) dated 3rd April, 2019 in *Nkubu PMCC No. 32 of 2018*. *Desmond Mutuma Mwiti and Another v Duncan Muthomi*. By the said judgment, the trial court dismissed the Appellants' suit for an eviction order against the Respondent with costs.

2. The material on record indicates that by a plaint dated 15th February, 2018 the Appellants sued the Respondent seeking his eviction from **Title No. Abogeta/L. Chure/1099** (the suit property).

The 2nd Appellant pleaded that he was the registered proprietor of the suit property and that he had entered into a sale agreement for its sale to the 1st Appellant. It was further pleaded that despite the Respondent who was a licensee bring given 3 months notice to vacate the suit property, he had failed to vacate without any lawful justification or excuse hence the suit.

3. The Respondent filed a written statement of defence dated 16th March, 2018 denying the Appellants' claim in its entirety. He denied being a licensee on the suit property and also denied the existence of any sale agreement between the 1st and 2nd Appellants. The Respondent further stated that the alleged sale agreement between the Appellants was merely a collusive move intended to defeat his proprietary rights over the suit property. He, therefore, urged the court to dismiss the suit with costs.

4. The record further indicates that upon a full hearing of the suit the trial court dismissed the Appellant's suit on essentially two grounds. First, the court held that the Respondent had not been given 3 months' notice of determination of the licence. Second, the court held that the sale agreement between the 1st and 2nd Appellants was null and void for want of consent of the Land Control Board under the **Land Control Act (Cap 302)**.

B. THE GROUNDS OF APPEAL

5. Being aggrieved by the judgment and decree of the trial court, the Appellants filed a memorandum of appeal dated 30th January, 2019 raising the following 5 grounds of appeal:

(a) That the learned Magistrate erred in fact and in law in his finding that the 2nd Appellant wrongfully filed the suit against the Respondent whereas there was overwhelming evidence that the Respondent is illegally in occupation of the 2nd Appellant's land parcel No. **Abogeta/L-Chure/1099** measuring 0.19 Hectares.

(b) That the learned Magistrate erred in law and in fact by failing to admit the evidence by the Appellants that the Respondent had refused to give vacant possession of the said parcel of land upon the lapse of three months as was required in the land purchase agreement dated 22nd June, 2017 even though the Respondent acknowledged receipt of written demand notices dated 22nd December, 2017.

(c) That the learned Magistrate erred in law and in fact by inferring that the Respondents' possession was adverse even though the evidence on record is that he was a licensee.

(d) That the trial Magistrate misinterpreted the law in respect of voidability of written agreements due to lack of Land Control Board Consent letter.

(e) That the trial court erred in law by failing to uphold the indefeasibility of title to land and the absolute right of registered owner to enjoy his property.

6. The Appellants consequently sought the following reliefs in the appeal:

(a) That the appeal be allowed.

(b) That the judgment of the trial court be set aside and substituted with an order of eviction against the Respondent from the suit property.

(c) That costs of the appeal and of the suit before the trial court be awarded to the Appellants.

C. DIRECTIONS ON SUBMISSIONS

7. When the appeal was mentioned for directions on 31st August, 2020 the parties agreed to canvass the appeal through written submissions. The material on record indicates that the Appellants filed their submissions on 31st August, 2020 whereas the Respondent filed his on 24th September, 2020.

D. THE APPLICABLE PRINCIPLES

8. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

“...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 witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

9. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424 Sir Kenneth O'Connor, P.** rendered the applicable principles as follows:

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

10. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt v Thomas [1947] A.C 424** at page 429-430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

E. THE ISSUES FOR DETERMINATION

11. Although the Appellants raised 5 grounds of appeal, the court is of the opinion that the appeal may effectively be determined on the basis

of the following two issues:

(a) *Whether the trial court erred in fact and in law in dismissing the Appellant's suit.*

(b) *Who shall bear costs of the appeal and the suit before the trial court.*

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in fact and in law in dismissing the Appellants' suit

12. The court has considered the material and submissions on record on this issue. Whereas the Appellants contended that the trial court was wrong in dismissing their suit, the Respondent fully supported the judgment of the trial court. The material on record indicates that the trial court dismissed the Appellants' suit on essentially two main grounds. First, the court was of the opinion that the Respondent's licensee to occupy the suit property had not been terminated. In this respect, the court held that the Appellants had failed to produce a 3 months notice of termination of the licence. Second, the trial court was of the opinion that there was no evidence of a sale agreement between the 1st and 2nd Appellants and that, in any event, such agreement was null and void for lack of consent of the Land Control Board under **Section 6 of the Land Control Act (Cap. 302)**.

13. The court has considered the pleadings of the parties and the evidence tendered before the trial court. The gist of the 2nd Appellant's case was that he was the registered proprietor of the suit property hence entitled to enjoyment of all the rights of a registered proprietor under the law. It was his contention that the Respondent was his former employee who was merely occupying the sit property with his permission and that he had refused to vacate even after being served with a notice to vacate.

14. The Respondent, on the other hand, denied being a licensee of the 2nd Appellant by virtue of being his employee. Although he did not plead with particularity the basis of his right of occupation, he vaguely stated that the 1st and 2nd Appellants had colluded to disturb enjoyment of his "*proprietary rights*" over the suit property.

15. The court is of the opinion that under **Order 2 rule 4 of the Civil Procedure Rules**, the Respondent was obligated to plead his defence with particularity. **Order 2 rule 4** stipulates as follows:-

"4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this rule "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

16. The court has noted that at the trial of the suit the Respondent's evidence was totally at variance with his pleadings. His evidence was that the 2nd Appellant was his former employer and that he had retained some of his salary (Kshs.320,000) for the purpose of purchasing a parcel of land for him. He contended that the suit property is what was ultimately given to him. The record also shows that he conceded having received the demand letter dated 22nd December, 2017 on 8th January, 2018.

17. The material on record reveals that the 2nd Appellant is the registered owner of the suit property. The trial court found that the Respondent was a licensee on the suit property. The issue which arises is whether or not such licence was terminated. The trial court took the view that a notice of 3 months was required as per the terms of the sale agreement dated 29th June, 2017 between the 1st and 2nd Appellants. However, it must be noted that the Respondent was not privy to the said agreement hence he was not entitled to the benefit of any clause therein.

18. The court takes the view that a licensee is entitled to a reasonable notice of termination of licence but that does not necessarily mean that it has to be a period of 3 months. It could be less or more, depending on the circumstances of the individual case. Although the Respondent denied receiving a 3 months notice of termination, he did concede receiving a demand letter on 8th January, 2018. In fact, he responded to the demand letter through a letter dated 26th January, 2018 written by the Chief of Igoki Location in Nkubu. It was not contended in the reply that the Respondent required more time to vacate the suit property. What the Respondent disputed was the existence of a sale agreement between the 1st and 2nd Appellants.

19. The court is further of the opinion that whether or not a 3 months notice was given to the Respondent would not be of much help to the Respondent. The Respondent's defence was that he was the rightful owner of the suit property. He claimed to have paid Kshs.320,000/- and that the 2nd Respondent had voluntarily ceded the suit property to him. It would thus follow that notice of

termination of a licence would be of no consequence to a person who claims ownership of the suit property.

20. On the basis of the material on record, the court finds and holds that the Respondent did not adduce sufficient evidence to demonstrate his ownership of the suit property or the existence of any other “proprietary rights” over the suit property as pleaded in his defence. There is nothing on record to demonstrate that the rights of the 2nd Appellant as the registered proprietor of the suit property had been defeated by the Respondent in any manner provided for under **Section 24 or Section 28 of the Land Registration Act, 2012**. There was no allegation in the defence that the 2nd Appellant was holding the suit property in trust for the Respondent. There was no allegation that the Respondent had acquired the suit property by virtue of adverse possession. The only evidence on record is that the 2nd Appellant may have owed the Respondent a sum of Kshs.320,000/- or so.

21. The court has considered the trial court’s holding on the issue of the consent of the Land Control Board. The court is unable to agree with the trial court that this was a legitimate issue for consideration and determination. The Respondent never pleaded in his defence that the sale agreement between the 1st and 2nd Appellants was null and void for lack of consent from the Land Control Board. What the Respondent disputed was the very existence of the agreement and its genuineness.

22. Under **Order 15 rule 1 of the Civil Procedure Rules**, an issue arises when a proposition of law or fact is made by one party and denied by the adverse party. Under **Order 15 rule 2** a court may frame issues from:

(a) *The allegations contained in the pleadings of the parties.*

(b) *The statements made on oath by or on behalf of the parties.*

(c) *The contents of documents produced by the parties.*

23. The court has noted that the Respondent did not raise the issue of consent of the Land Control Board either in his defence or existence at the trial. The issue was also canvassed by any of the parties in their respective submissions. In the premises, the trial court erred in law in determining on issue was not properly before it. This legal position has been considered and affirmed in various decided cases such as **Odd Jobs v Mubia [1970] EA 476**, **Uyas Industries Ltd v Diocese of Meru [1982] KLR 114** and **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] 2 EA 385**.

24. In the case of **Galaxy Paints Co. Ltd v Falcon Guards Ltd (supra)** it was held by the Court of Appeal, *inter alia*, that:

“It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court’s determination.”

In Gandy v Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record...”

25. The court is satisfied upon reconsideration and re-evaluation of the evidence tendered at the trial that the trial court erred in fact and in law in holding that the Appellants had not proved their case against the Respondent on a balance of probabilities. The court is thus of the opinion that the trial court erred in law in dismissing the Appellants’ suit for reasons given in the judgment dated 3rd April, 2018. The court is consequently inclined to allow the appeal.

(b) Who shall bear costs of the appeal and of the suit before the trial court

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of appeal and of the suit before the trial court. Accordingly, costs shall be awarded to the Appellants.

G. CONCLUSION AND DISPOSAL

27. The upshot of the foregoing is that the court finds merit in the Appellants’ appeal. Accordingly, the court makes the following orders for disposal of the appeal:

(a) *That the appeal be and is hereby allowed.*

(b) *That the judgment of the trial court be and is hereby set aside and substituted with an order of eviction against the Respondent from the suit property.*

(c) *That costs of the appeal and of the suit before the trial court be awarded to the Appellants.*

It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF MAY 2021.

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Y. M. ANGIMA

ELC JUDGE

JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE