



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA 5 OF 2020

JOSEPH NJUGUNA MUCHAI.....APPELLANT

VERSUS

HANNAH NJOKI MUCHAI.....RESPONDENT

(Being an Appeal from the Judgement of the Hon M Kurumbu SRM

in CMELC 36 of 2019 delivered on the 13/2/2020)

JUDGEMENT

1. The background of this Appeal is that the Appellant filed suit against the Respondent on the 19/9/2019 seeking interalia orders compelling the Respondent to transfer 3051 tea bushes on parcel LOC6/KIMANDI/WANYAGA/207 to the Appellant and a permanent injunction be issued against the Respondent from interfering with the Appellants quiet occupation and use of the portion of the suit land upon which the Appellant has settled and where the tea bushes are planted.
2. The matter proceeded exparte in the lower Court where the Appellant singly testified.
3. The Hon Court delivered its judgement on the 13/2/2020 and dismissed the suit. The Hon Court held that the land is owned by the deceased's father and husband of the parties and that since the tea bushes cannot be separated with the land the parties ought first to have petitioned for letters of grant of administration for interalia determination of the beneficiaries of the estate and its distribution. It was the view of the Court that if the Appellants claim is granted the Respondent may not be able to comply because she is not the legal administrator of the estate and secondly it would amount to a back door distribution of the estate of Elijah Muchai Muniu, deceased. Further the Court found no evidence in form of title deed or a certificate of search to proof ownership of the suit land.
4. Aggrieved by the above decision of the Hon Court the Appellant has preferred this Appeal on the following grounds;
 - a. That Learned Magistrate erred in both fact and law in failing to appreciate that the subject of the Plaintiff's suit was not part of the estate of the deceased Elijah Muniu Muchai but was tea bushes registered in the Respondent's name under grower's licence No. NGO340161.
 - b. The Honourable Magistrate erred in both fact and law in failing to find that the Appellant's claim before the lower Court related to a right of claim to work on land.
 - c. The Honourable Magistrate erred in law and in fact in making a finding that the Respondent was not able to deal with the deceased's estate thereby failing to appreciate that the 3051 tea bushes she had been sued to transfer to the Appellant were in her name and not the name of the deceased Elijah Muniu Muchai.
 - d. The Honourable Magistrate erred in both fact and law in making a finding that the Appellant had not proven the owner of the land thereby misapprehending that the Appellant's suit at the lower Court was not for any share of land but tea bushes planted thereon and over which a growers licence could issue to the Appellant as was indeed held by the Respondent in her name.
 - e. The Learned Magistrate erred in fact and in law in making a finding that no section of the law prevented the parties from agreeing on the dispute on issuance of tea growers licence to the Appellant while on the other hand denying the Appellant's right to approach a Court of law for adjudication of such dispute the latter also permitted by the law.
 - f. The Learned Magistrate erred in fact and in law in failing to give due consideration to the pleadings, testimony and submissions

adduced by the Appellant in support of his case and thereby arriving at a wrong finding.

5. The Appellant has sought the following orders on Appeal;

- a. Set aside, vacate and or vary the judgement of the lower Court delivered on the 13/2/2020 in its entirety and grant the prayers in the plaint dated he 18/9/2019.
- b. Award costs of the Appeal as well as those in the lower Court to the Appellant
- c. Grant any other and further orders as the Court may deem just and fit to grant.

6. In his submissions the Appellant reiterated the background of the suit as captured in the pleadings and further that the suit centered on the registration of the tea bushes registered in the name of the Respondent and not the deceased father and husband of the parties. Being the registered owner of the tea bushes, she has the capacity to so transfer to the Appellant as per the agreement reached with the family dated the 14/9/2014.

7. That the nature of the claim is based on the right to work on the land which claim falls within the jurisdiction of the Environment and Land Court (ELC). He faulted the Court in making a finding that the parties should have petitioned for succession and or discuss the matter through alternative dispute resolution mechanisms.

8. The issue for determination in this Appeal is who owns the tea bushes in question; whether the Court erred in the decision that it reached in the judgement; whether the Court considered the pleadings of the Appellant.

9. This Court has power to review the facts and evidence and draw its own conclusions. In the case of **Abok James Odera & Associates – Vs- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated as follows regarding the duty of first appellate Court: -

“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-analyze 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,”

10. It is not in dispute that the suit in the lower Court was heard *ex parte*. It is trite that even when a suit proceeds *ex parte* the litigant must proof his claim to the required standard in law. The burden of proof does not shift to the Respondent because the matter was not controverted. Section 107 of the evidence Act provides as follows;

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

11. In this case the Appellant avers that the Respondent is the holder of a grower license No NGO340161 issued by Ngere Tea Factory in which 10800 tea bushes are growing. That the tea was planted by his father Elijah Muchai Muniu in 1974 on the suit land. That the land is ancestral land having been owned by his deceased father who settled his sons on the land before his death. That in a family meeting held in 2014 it was agreed that tea grower no 25 should be split into two in favour of the Appellant and the Respondent. That instead the Respondent proceeded to transferred the entire tea bushes to her name leaving the Appellant without a tea grower number and forced to deliver tea through the brother’s number a situation that does not allow him to maximize his earnings including securing a loan facility.

12. It is his case that despite preparing the relevant documentation the Respondent has adamantly refused to execute the same.

13. The jurisdiction of the ELC Court is set out in law. Art 162(2) of the Constitution read together with section 13 of the ELC Act and section 150 of the Land Act gives this Court exclusive jurisdiction and power to interalia hear and determine disputes actions and proceedings concerning land. If I understand the cause of action in this suit correctly is that it revolves around the transfer of the tea bushes growing on the suit land. In other words, it premised on the use of the suit land.

14. That said I have anxiously perused the record of Appeal and find no record of a growers licence in the name of the Respondent. What obtains on record are tea census card dated the 23/1/19, TESA Recommendation of tea transfer/lease document which proposes to transfer 3051 bushes to the Appellant, showing growers verification certificates showing the split of tea bushes into 3051 and 7749. The Plaintiff failed to present any document in form of a growers licence or such other evidence in the name of the Respondent. Curiously the late fathers’ growers licence was neither produced. There is no way that the Court would tell that the tea bushes are registered in the name of the Respondent to enable her comply with an order of this Court. It is trite that Court orders are not issued in vain.

15. Parties are bound by their pleadings. Where a party does not proof his case as set out in his plea he cannot get a remedy from the blues. In this case the Appellant has averred that the tea bushes were licensed to his late father’s name who owned the land and planted the teas in 1974. If that were the case, Section 65 of the law of succession provides as follows;

“When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be

admitted to prove the will, and letters of administration may be granted to him or them accordingly.”

16. The Hon Court made the correct observation when it stated that the parties are yet to administrator the estate of the late Elijah Muachai Muniu. That is the correct position in law with respect to the estate of a deceased person. Any other action involving it is termed as intermeddling.

17. In the end I find that the Appellant did not proof his case to the balance of probabilities.

18. I have perused the record and find that the Hon Court considered the pleadings and the submissions of the Appellant and find not ground to fault the trial Court on the same.

19. Similarly, I find that the Court considered the case of the parties and reached the correct decision in its judgement.

20. In the end I find the Appeal unmerited and dismiss it with costs in favour of the Respondent.

21. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA THIS 26TH DAY OF MAY 2020.

J G KEMEI

JUDGE

Delivered in the presence of;

Ndegwa HB for Nyambura Njuguna for the Appellant

Respondent: Absent

Court Assistants: Kuiyaki/Alex