REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 1 OF 2019

ERASTUS NJOROGE GICHUHI - APPELLANT

VS

ESTHER WANJIRU GICHUHI - RESPONDENT

JUDGMENT

1. The Appellant herein being aggrieved with the judgment and order of the Hon. Resident Magistrate L. N Wachira sitting at Thika Chief Magistrate Court in Civil Case No. 1388 of 2005 delivered on 9/10/2007, preferred the present appeal vide a memorandum of appeal dated 8/11/2007 on the following grounds;

a. The learned Magistrate erred in law and in fact by not following the proper procedure thus resulting in a miscarriage of justice.

b. The learned Magistrate erred in law by failing to consider an error on the face of record that judgment and decree could not have been issued in matter which had not proceeded for trial.

c. The orders passed by the Court are contrary to the provisions of the law and the principles of natural justice.

d. The finding arrived at by the Court are not supported by the evidence on record.

e. No evidence was produced to decide/ conclude this matter as required by law.

f. The learned Magistrate erred in law by issuing interlocutory orders arising from an application as the final orders in the suit.

g. The learned Magistrate erred in law by issuing a decree of interlocutory orders.

2. The appeal was canvassed through Written Submissions.

3. The Appellant submits that his appeal lies against the order of the trial Court delivered on 09/10/2007 and goes on to state that a judgement was declared couched as an order which he claims determined all the issues in controversy in the suit. He also claims that no hearing was ever done in the matter. He faults the trial Court for proceeding to hear the Respondent's application dated 22/03/2006 in absence of the Advocate of the Appellant/ Defendant. He avers that he had filed a defence to the suit on the ground that his portion of land was less than the allocated acreage. He faults the trial Court for failing to order a resurvey of the land to be done. Also, that the trial Court issued final orders at an interlocutory stage which was not procedural. That the trial Court failed to consider submissions by the Applicant at the hearing of the application. He also takes issue with the dismissal of the Appellant's application dated 28/2/2007 which sought for review and or setting aside of the orders issued on 18/07/2006 in order to allow the matter to proceed to full hearing. The Appellant also believes that the learned Magistrate referral to the succession cause number 997 of 1996 was contrary to the law on natural justice .He then goes ahead to aver that after the delivery of the ruling a decree was issued and execution proceeded.

4. The Respondent in her submissions lays a history of the genesis of the subject matter in the instant appeal. He traces the Appellant's complaint against the acreage of his suit land to have emanated from the Thika Court award in Succession cause no. 51 of 1984. In that cause it was determined that the Appellant be allocated 4.5 acres out of land parcel number LOC.3/GICHAGIINI/323 with the Respondent being allocated 13 acres thereof. LOC.3/GICHAGIINI/323 measured 17.5 acres in total. She explains that the Respondent was the second wife of the deceased GICHUHI NJOROGE while the Appellant was his son of the 1st house. Further she discloses that the conflict around the mode of distribution was determined through arbitration. That the Appellant then appealed vide Succession cause number 997 of 1996 which was fully determined by Hon Lady Justice Rawal in the judgment delivered on 16/08/2002. She added that the Appellant herein had therefore exhausted all avenues of ventilating his grievances based on the provisions of section 50 of CAP 160. Thereafter the Respondent herein filed Civil Case no. 1388 of 2005 vide a plaint dated 21/03/2005 along with a chamber summons application dated on even date and filed on 19/09/2005 which she refers to as a declaratory suit and also to seek restraining orders against the Appellant /Defendant from encroaching on her land. The Appellant then filed an application seeking restraining orders against the Land Registrar from subdividing the original parcel of

land in execution of Lady Justice Rawal's orders, that application was heard by Martha Koome J which was dismissed on 22/09/2005 for being ambiguous and having been brought under the wrong provisions. After the dismissal, the Appellant herein then filed a defence in the CMCC 1388 of 2005 raising issues of less acreage of his land which was substantially in issue before the High Court Appeal that was dismissed. That after the determination of the cross applications made before the trial Court the Appellant was then evicted from the land belonging to the Respondent way back in 30/01/2007 and avers that the Appellant is now quietly confined in his parcel of land LOC.3/GICHAGIINI/1098 made of 4.5 acres and the Respondent is equally settled on hers, namely LOC.3/GICHAGIINI/1099.

5. The power of the appellate Court sitting on a first appeal is settled. In the case of **Selle v Associated Motor Boat Co. [1968] E A 123,** these have been set out thus:

> "….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 this respect".

6. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court 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-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."

7. The Appellant's appeal is anchored on the procedure that was followed by the trial Court before making the orders delivered on 09/10/2007. I have therefore evaluated the entire record of the trial Court. It is only the application dated 21/3/2005 which was heard on 23/05/2006 by the trial magistrate and a ruling delivered on 18/07/2006 and an order was later issued on 6/09/2006 by the same Court as shown by the Court record. I have not seen any application on record by the Respondent/Defendant dated 22/03/2006 which appears to be at the core of the Appellant's appeal: I however note from the Court record that the Honourable magistrate wrote that "the application dated 22/3/ 2006 is hereby granted with costs". Looking at the orders granted on 18/07/2006 I would assume this is the order that the Appellant herein seeks to challenge.

8. On 23/05/2006 when the application dated 21/03/2005 came up for hearing Counsel for the Applicant / Plaintiff was present and the Defendant was present in person. The Defendant did not make an application before the Court for an adjournment but instead allowed the hearing of the application to proceed and he did make his own submissions before the Court. Part of the Defendant's submissions was that he had been allocated a less portion of land than the 4.5 acres he ought to have received. The response by the Respondents Counsel was that it amounted to a boundary dispute which was not within the jurisdiction of the trial Court. The trial Court then proceeded to make its ruling which was duly delivered on 18/07/2006. In its ruling the trial Court allowed the Applicant's application in the following terms;

> a. "That Erastus Njoroge Gichuhi do confine his agricultural activities and his occupation to his land parcel number LOC.3/GICHAGIINI/1098 which is now registered in his own names and is hereby restrained from in anyway encroaching or remaining in occupation of the land parcel number LOC.3/GICHAGIINI/1099 now registered in the names of Esther Wanjru Gichuhi.
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> b. That costs of the application be provided for".

9. The Plaintiff later filed the application dated 10/11/2006 seeking executory orders of the Court orders issued on 18/07/2006 which application was allowed vide a ruling delivered on 28/11/2006 in the following terms;

> "that the structures building or any sheds of the Defendant which have continued to stand erected on the suit land belonging to the Defendant be demolished and brought down by the Court /bailiff at the cost of the Defendants in furtherance of the execution of the Court orders dated the 18/7/06.
>
> The officer commanding Githumu Police Station do provide security to ensure compliance of the Court orders emanating from this application and also the Court order dated the 18/7/2006".

10. Earlier the Defendant had filed a Notice of Motion dated the 24/7/06 seeking to interalia be allowed a period of one year to relocate his family and houses. This application was heard on merit and the Court dismissed it on the 9/10/06.

11. The Defendant thereafter filed the application dated 28/02/2007 seeking to set aside the Court orders delivered on 18/07/2006. This was after the execution Court orders issued on 28/11/2006 had already been executed and the Appellant had been evicted from the Respondent's land on 30/01/2007. That application was disallowed on 9/10/2007 for reasons that the Defendant had conceded that the matters in issue had already been litigated upon before by the same Court and he had failed to comply with the Court orders issued.

12. I have also not seen any decree on Court record as alleged by the Appellant. In fact, save for several rulings that were made by the trial Court on the cross applications filed therein there is no record to show that the main suit was ever set down for hearing by either of the parties.

13. The background of this appeal is worthwhile restating here. The suit land measuring 17.5 acres was family land. The family patriarch, Gichuhi Njoroge owned land parcel LOC3/GICHAGIINI/3213. The parties are related. Upon his demise a succession cause was filed in Thika to wit; No 51 of 1984 where the land was devolved in two portions; 13 acres went to the Plaintiff and 4.5 acres to the Defendant. Aggrieved with the decision of the succession Court, the Defendant /Applicant proffered an appeal to the High Court. Justice Rawal upheld the decision of the magistrate's Court and the confirmation of the grant to the Appellant in 4.5 acres and the Plaintiff, 13 acres. Another

ruling delivered by Lady Justice Martha Koome on 22/9/05 dismissed the application by the Appellant seeking to restrain the Land Registrar from issuing titles deeds in respect to subdivisions of LOC.3/GICHAGIINI/323.

14. On the 28/4/2004 the Succession Court in Cause No 51 of 1984 issued orders directing the OCS, Githuku Police Station to provide security in the partitioning of the parcel No LOC.3/GICHAGIINI/323 into two portions in accordance with the judgment of the Court. The partitioning was finally carried out and each party got titles pursuant to the Court orders. On the 21/3/05 the Respondent filed suit against the Appellant seeking interalia that the Respondent be restrained from encroaching in any way her portion of the land comprised in Loc 3/GACHAGIINI/1099 and that he should relocate his structures and houses to his parcel namely LOC.3/GICHAGIINI/1098.

15. In his defense the Appellant generally denied the Plaintiffs claim and stated that his land is smaller in size than what the Court decreed. The Respondent filed a Notice of motion on the 19/9/05 seeking similar prayers of restraining the Appellant on his suit land and from encroaching and remaining in occupation of the land parcel in the name of the Respondent. The application was heard on merit and the Court delivered its decision on the 18/7/06 in favour of the Respondent.

16. On the 24/7/06 the Appellant sought orders interalia that he be given 12 months to relocate his family and house. This application was heard and decision of the Court delivered on the 15/8/06. It was dismissed. Unrelenting, the respondent again filed another motion seeking demolition of the houses and structures of the Appellant which application was granted on the 28/11/06. It is on record that the Appellant was removed from the suit land on 30/1/2007. Aggrieved by the happenings so far, the Appellant sought orders to set aside and review the Courts decisions delivered on the 18/7/06 and 28/11/06. The application was dismissed on the 9/10/07. This triggered the filing of the current appeal.

17. The grounds of appeal have been reduced to two issues which I shall proceed to determine;

Did the trial Court breach the Civil Procedure Rules?

18. The Appellant takes issue with the fact that the trial magistrate proceeded to hear the application dated 21/03/2005 (as per the Court record) in the absence of the Appellant's Counsel. The same was heard in the presence of the Appellant who was present in Court in person on that day and was afforded an opportunity to make his own submissions before the Court. It is after hearing both parties that the trial magistrate made the ruling in which it is clearly stated that the ruling was made after hearing the parties in absence of the counsel for the Defendant and reading the affidavit evidence on record. The Applicant who was present in Court in person on that day did not make any application for adjournment. The previous time the matter was in Court it had been adjourned because the Appellant's Counsel was absent. There is no evidence on record that the particular Advocate ever appeared on behalf of the Defendant in subsequent proceedings until the new counsel came on record.

19. The Appellant has also faulted the orders which were issued by the trial Court for being a final determination of the issues in controversy which ought not have been issued at an interlocutory stage. The Respondent opposes that contention in that the application primarily sought restraining orders against the Defendant. It is on record that the suit was filed in furtherance of the judgement issued in the succession Court that decreed that the plaintiff would get 13 acres while the Defendant would get 4.5 acres. The prayers in the main suit were essentially the same prayers sought in the Notice of Motion dated the 22/3/05. The Court allowed that application.

20. It is evident that the main suit was never heard and determined. I say so because even if the same was to be heard and determined, it is unlikely that the outcome would have been any different from the decision of the Magistrates Court. The Appellant by his own motion had admitted that he indeed was on the Respondents land when he prayed to be allowed to remove his houses and structures within one year. Further the prayers in the suit were the same prayers in the application that was determined by the Court. By determining the application, the mainstay of the suit was also determined as well. There was nothing left in the suit to be determined.

21. I find no ground to fault the trial Court in that regard.

22. The Appellant's allegation that there was a judgment delivered in the matter without hearing the parties therein and a decree later extracted and executed is untrue as there is no evidence of such on record.

Did the orders of the trial Court violate the law on natural justice?

23. The Appellant avers that the trial Court violated the law on natural justice by making reference to the Succession cause number 997 of 1996 in which the High Court dismissed the Appellant/ Applicant's application in which the Appellant herein had raised the issue of the less acreage of his portion land by that submission by the Appellant. The Court is at a loss on whether the Appellant wants to tell this Court that the fact of the previously concluded matter in respect to the subject matter herein ought to have been withheld from the trial Court. The rules of natural justice are very clear and security for material non– disclosure is certainly not one of them. This issue is answered in the negative.

24. Further the Defendant participated in the prosecution of the three applications either through counsel on record and or on his own. I find no valid ground to suggest that the rules of natural justice were flouted and or that the Appellant was condemned unheard in any manner by the learned Magistrate.

25. Taking into consideration that the orders delivered on 18/07/2006 were already executed and the passage of time since then, the Appellant herein has failed to satisfy this Court that there are sufficient reasons to alter the finding of the lower Court.

26. In view of the preceding paras, this appeal is reduced to an academic exercise given that the Appellant did admit through his application dated the 24/7/06 that he is on the land of the Respondent and sought leave of the Court to relocate his family within a period of one year. The Court dismissed his plea. Granting this appeal will in no way further the interest of justice.

27. The appeal is bereft of merit. It is dismissed with costs to the Respondent.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF JULY 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Mr Gatumuta HB for Mr Kimwere for the Appellant

Respondent: Absent

Irene and Njeri, Court Assistants