



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO. 17 OF 2019

MARY WAMBUI MUNYORI.....APPELLANT

VERSUS

MARIA WAMBUI KANYUA.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This is an appeal against the judgment and decree of **Hon. H.O Barasa (Senior Principal Magistrate) in Engineer SPM ECL No. 1 of 2017 – Mary Wambui Munyori v Maria Wambui Kanyua** dated 22nd October, 2019. By the said judgment, the trial court dismissed the Appellant’s suit and allowed the Respondent’s counter claim with costs.
2. The material on record indicates that by a plaint dated 11th December, 2017, the Appellant sued the Respondent seeking an eviction order against her, her agents and family members from **Title No. Nyandarua/Wanjohi/564 (Parcel 564)**. She also sought a permanent injunction to restrain her, her servants, agents and family members from entering, cultivating, or interfering with her quiet enjoyment of Parcel 564 (*original number 1792*). The Appellant also sought costs of the suit and interest.
3. The basis of the Appellant’s claim was that she was the registered proprietor of Parcel 564 which her late husband, Kahindu Munyori (*Munyori*) had acquired from the Settlement Fund Trustees (SFT) in 1963 or thereabouts. The Appellant further pleaded that the Respondent’s late husband, Francis Kanyua Njuguna (*Njuguna*), was allocated Plot No. 1820 at Wanjohi Settlement Scheme in 1963 but Njuguna and his family had refused to move to their Plot No. 1820 but had chosen to invade and settle on Parcel 564.
4. The Appellant pleaded that despite demand, the Respondent had refused to vacate Parcel 564. It was further pleaded that the Appellant had reported the matter to the Location Chief and the Officer Commanding Station of Miharati Police Station without being assisted hence the suit.
5. The record shows that the Respondent filed a defence and counter claim dated 5th February, 2018. By her defence, she conceded that Njuguna had been allocated Plot No. 1820 by SFT in 1963 and that upon being shown the plot he and his family took possession and settled thereon peacefully without any interruption from any quarters. It was further pleaded that the Appellant also settled on her portion of land adjacent to the Respondent’s and that each family had fenced and developed its own portion of land over the years.
6. It was further pleaded that sometime in 1986, Njuguna discovered that Plot No. 1820 was missing from the area list and map and he sought for correction of the error and anomaly by a letter dated 23rd July, 1987. It was pleaded that the concerned authorities had initiated the process of separating the two plots. It was pleaded that on 13th January, 2020 the Director of Land Adjudication and Settlement (*the Director*) requested the District Land Adjudication and Settlement Officer (LAO) to finalize the process of separation by registration of a mutation to enable the two concerned families to obtain separate titles.
7. The Respondent further pleaded that whilst the process of correction of the anomaly was on-going the Appellant secretly and fraudulently processed a discharge of charge from SFT and caused the entire land in occupation of the 2 families to be registered in her name as Parcel 564. Accordingly, the Respondent denied the Appellant’s claim of invasion and trespass upon Parcel 564.
8. By her counter claim, the Respondent reiterated the contents of the defence and pleaded that she was entitled to 7.68 ha belonging to Njuguna and that the Appellant had fraudulently registered the entire property in her name. She, therefore, prayed for a declaration that she was entitled to 7.68 ha of out Parcel 564; an order for cancellation of the Appellant’s registration as absolute proprietor of parcel 564; an order for excision of 7.68 ha out of Parcel 564 and her registration as proprietor thereof; and costs of the counter claim.
9. The Appellant filed a reply to defence and defence to counter claim dated 23rd July 2018. The Appellant joined issue with the Respondent upon her defence. She denied that Plot No. 1820 was missing and asserted that it was still in the area list and map. The

Appellant maintained that she was the sole owner of Parcel 564 (*original 1792*) and that it was the Respondent who was out to grab it from her.

10. The Appellant further pleaded that the Respondent's counter claim was an attempt at unjust enrichment in that the Respondent wanted to acquire and keep part of Parcel 564 whereas she had her own Plot No 1820. The Appellant denied the fraud and particulars of fraud alleged against her and asserted that she was lawfully registered as proprietor of Parcel 564. She consequently asked the court to dismiss the counter claim.

11. The material on record shows that upon a full hearing of the suit, the trial court found for the Respondent and as a consequence dismissed the Appellant's suit and allowed the Respondent's counter claim. The trial court found and held that the families of Munyori and Njuguna had resided side by side since 1963 on portions of land shown to them by SFT; that both parties had paid their dues to SFT; that Plot No. 1820 was indeed missing from the area list and map; that the Appellant had acted fraudulently in processing title for the entire Parcel 564 whereas she was aware of the efforts by the Director to correct the anomaly in the allocation process. As a consequence, the trial court held that the Respondent was entitled to a portion of 7.68 ha out of Parcel 564 which her family had always occupied since 1963.

B. THE GROUNDS OF APPEAL

12. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 19th November, 2019 raising the following 8 grounds of appeal:

(a) *The Learned Magistrate erred in law and fact by failing to find that L.R Nyandarua/ Wanjohi/564 (originally L.R. Nyandarua/Wanjohi/1792) and L.R Nyandarua/Wanjohi/1820 were two distinct parcels of land both on the records and on the ground.*

(b) *The Learned Magistrate erred in law and fact by failing to find that at the time of allotment, the Settlement Funds Trustees recognized L.R. Nyandarua/Wanjohi/564 (originally L.R. Nyandarua/Wanjohi/1792 and L.R Nyandarua/Wanjohi/1820 as two distinct parcels of land, and at no given time did the two merge to become one parcel of land.*

(c) *The Learned Magistrate erred in law and fact by failing to find that the Settlement Fund Trustees lawfully and legally allotted all its interest in L.R Nyandarua/Wanjohi 564 (originally L.R Nyandarua/Wanjohi/1792) to Kahindu Munyori Zaree.*

(d) *The Learned Magistrate erred in law and fact by failing to find that the aforesaid allotment stated above, has never been rescinded or revoked and neither was it subject to any conditions that would warrant its subdivision in order to create L.R Nyandarua/Wanjohi/1820.*

(e) *The Learned Magistrate erred in law and fact by finding that L.R Nyandarua/Wanjohi/1820 should be created out of L.R Nyandarua/Wanjohi/564 (originally L.R Nyandarua/Wanjohi/1792).*

(f) *The Learned Magistrate erred in law and fact by finding that the Appellant fraudulently acquired the title documents for L.R. Nyandarua/Wanjohi/564*

(g) *The Learned Magistrate erred in law and fact by finding that the Respondent was entitled to a portion of 7.68 hectares out of L.R Nyandarua/Wanjohi/564.*

(h) *The Learned Magistrate erred in law and fact in dismissing the Appellant's claim, and instead allowed the Respondent's counterclaim with costs.*

13. The Appellant consequently sought the following reliefs:

(a) *That the appeal be allowed.*

(b) *That the judgment of the trial court dated and delivered on 22nd October, 2020 be set aside.*

(c) *That judgment be entered for the Appellant as prayed in her plaint.*

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

14. When the appeal was listed for directions on 18th January, 2021, it was directed that it shall be canvassed through written submissions. The parties were granted 21 days each to file and serve their respective submissions. The record shows that the Appellant's submissions were filed on 24th February, 2021 whereas the Respondent's submissions were filed on 11th May, 2021.

D. THE APPLICABLE PRINCIPLES

15. 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.”

16. 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...”

17. 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

18. Although the Appellant raised 8 issues in her memorandum of appeal, the court is of the opinion that those issues may be condensed into the following 3 issues:

- (a) *Whether the trial court erred in law and fact in dismissing the Appellant’s suit.*
- (b) *Whether the trial court erred in law and fact in allowing the Respondent’s counter claim.*
- (c) *Who shall bear costs of the appeal.*

F. ANALYSIS AND DETERMINATION

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

19. The court has considered the material and submissions on record on this issue. Whereas the Appellant had pleaded in her plaint and her memorandum of appeal that parcel No. 564 and Plot No. 1820 were separate and distinct plots on the ground the Appellant changed tact in her submissions and contended that the said Plot No 1820 was non-existent hence the SFT could not purport to allocate it to Njuguna. It was submitted that the purported allocation was null and void hence the only option SFT had to refund the payments made by Njuguna.

20. It was submitted that the trial court erred in holding that the Respondent was entitled to a portion of 7.68 ha out of Parcel 564 since the entire land belonged to her. The Appellant further submitted that having been issued with a title deed the same was unimpeachable except an account of fraud and that there was no evidence before the trial court to demonstrate that she was privy to any fraud in the acquisition of Parcel 564.

21. There is no doubt from the material on record that both Munyori and Njuguna were allocated some land in Wanjohi Settlement Scheme by SFT in 1963. The material on record reveals that both allottees were shown their portions of land and that they settled thereon with their families and that there was a fence separating their respective portions. It would appear that Munyori’s family believed they were fully in occupation of Parcel 564 whereas Njuguna’s family believed they were in occupation of Plot No. 1820 and they lived side by side as neighbours for about 50 years without any dispute.

22. However, in 1986 or thereabouts it was discovered that Plot No 1820 was not captured in the area list and Registry Index Map. It would appear that Njuguna raised the matter with the allocating authorities which made several attempts to resolve the anomaly. It appeared to the Director that the parties plots were like “conjoined twins” hence a “surgical operation” was required to separate them. The Director consequently requested the LAO to facilitate an excision so that each of the families could get separate titles.

23. It was whilst the dispute was pending resolution that the Appellant surreptitiously obtained a title deed to the entire land in dispute measuring 13.6 ha whereas she was in occupation of about 5.2 ha and the Respondent was in occupation of 7.68 ha. The material on record indicates that the Appellant obtained a discharge from SFT and obtained a title deed without reference to the Respondent whilst the dispute was pending resolution before the Director. The ground report dated 15th February, 2016 by the Land Adjudication and Settlement Officer Nyandarua North Sub – County indicates that a site visit was undertaken on 27th February 2015 during which the Appellant and the Respondent were present. So, the Appellant was fully aware that the dispute was pending resolution at the time she processed her title documents.

24. The court is satisfied from its evaluation of the material on record that the trial court did not err in law when it held that the Respondent was not a trespasser on the suit land which was registered as Parcel 564. The material on record, and which was believed by the trial court, shows that both Njuguna and Munyori were settled on different portions of the suit land in 1963; that they had resided there peacefully for about 50 years; that each family had fenced off its own portion of land with cedar posts and barbed wire; that each family had developed its own portion of land and constructed houses and other structures thereon. Accordingly, there was no way the Respondent could be termed as a trespasser notwithstanding the anomalies in documentation at the Ministry of Lands and SFT.

25. The court is further of the opinion that it was the duty of the concerned authorities to correct any anomalies and errors in the allocation of the suit land to the two families. There is evidence on record to demonstrate that the Director had initiated steps to resolve the dispute. The Appellant must have irregularly and fraudulently obtained a discharge from SFT and processed a title deed without full disclosure of the facts on the ground as contained in the report dated 15th February, 2016 by the LAO. The court is thus of the opinion that the Appellant was not entitled to the reliefs sought in the plaint in the circumstances. The court does not consider the dispute to be the typical case of double allocation hence the authorities cited by the Appellant are not directly on point. The material on record points more to a case of lack of diligence in records management than outright double allocation.

(b) Whether the trial court erred in law and fact in allowing the Respondent's counter claim

26. The court has considered the material and submissions on record on this issue. This issue is closely intertwined with the first issue since it is based on the same factual circumstances. The court has already found and held that the trial court was entitled to hold that the Respondent was not a trespasser on the portion of land she was occupying. The court has further agreed with the finding of the trial court that the Respondent was occupying the portion as pointed out by SFT.

27. There is sufficient evidence on record to demonstrate that the families of Munyori and Njuguna had resided side by side for about 50 years and that each family had fenced and developed their respective portions of land without any dispute. There was absolutely no evidence of an *invasion* as alleged by the Appellant in her pleadings and evidence. The court is of the opinion that the allocating authorities were entitled to correct the anomalies in documentation and issue titles to the two families for the respective portions they were occupying. That was the only practicable and sensible way of resolving the dispute. Accordingly, the court is of the opinion that the trial court did not err in allowing the Respondent's counter claim in the circumstances.

28. The Appellant submitted that there was no *fraud* proved in her acquisition of title to Parcel 564. Fraud is defined in **Black's Law Dictionary (12th Edition)** is the following four ways:

1. *A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.*
2. *A reckless misrepresentation made without justified belief in its truth to induce another person to act.*
3. *A tort arising from a knowing or reckless misrepresentation or concealment of material fact to make another to act to his or her detriment.*
4. *Unconscionable dealing.*

29. **Black's Law Dictionary** also refers to the definition of fraud in **John Willard, A Treatise On Equity Jurisprudence (Platt Porter Ed., 1897)** where fraud is defined as follows:-

“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and any other unfair way that is used to cheat any one, is considered as fraud.”

30. The court has noted that in Paragraph 13 of the defence and counter claim, the Respondent pleaded the following particulars of fraud against the Appellant:

- (a) *The Plaintiff knew but failed to disclose about the defendant's proprietary interest in the suit land.*
- (b) *The Plaintiff knew but failed to disclose about the ongoing arbitration process to the **Settlement Fund Trustees**.*
- (c) *The Plaintiff failed to involve the Defendant in the process of acquisition of title to the suit though aware that she was by right in occupation of a substantial portion thereof since 1963.*
- (d) *The Plaintiff engaged in a secretive scheme to defraud the Defendant of her interest in the suit land through acquisition of the whole title thereof.*

(e) The plaintiff engaged in a corrupt scheme with the assistance of unknown officers in the Settlement Fund Trustees to unlawfully get registered as proprietor of the whole suit land when there was active on-going dispute on the ownership thereof.

31. The court is satisfied that on the basis of the evidence on record the Respondent proved at least the first 4 particulars of fraud pleaded in the defence. It was not necessary for the Respondent to prove *all* the particulars of fraud enumerated in the defence. Proving any one of the several particulars of fraud would be sufficient. Accordingly, the court is satisfied that the Appellant was guilty of fraud as defined in law in her acquisition of title to the whole of parcel 564. The court is further satisfied that the Appellant's title was impeachable under **Section 26 (1) of the Land Registration Act** and that the trial court did not err in law in allowing the Respondent's counter claim.

(c) Who shall bear costs of the appeal

32. 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 is of the opinion that the dispute between the parties was occasioned mainly by poor record management on the part of the allocating authorities. Accordingly, the court is of the opinion that the appropriate order to make is that each party shall bear her own costs of the appeal.

G. CONCLUSION AND DISPOSAL

33. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the court makes the following orders for disposal thereof:

- (a) The Appellant's appeal be and is hereby dismissed in its entirety.**
- (b) The judgment and decree of the trial court dated 22nd October, 2019 is hereby affirmed.**
- (c) Each party shall bear her own costs of the appeal.**

34. It is so decided.

Judgment Dated and Signed in Chambers at Nyahururu this 24th day of June 2021 and delivered via Microsoft Teams platform.

In the presence of:

Mr. Simiyu holding brief for Mr. Nderitu Komu for the appellant

Mr. Gakuhi Chege for the Respondent

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Y. M. ANGIMA

JUDGE