



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 8 OF 2020

SERAH WANJIKU KUNGU.....APPELLANT

VERSUS

PETER MUNYUA KIMANI.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable Magistrate Mr. Musyoka delivered on 20th December 2018 at the Senior Principal Magistrates Court in Kikuyu Civil Suit No. 230 of 2010)

JUDGMENT

By a Plaint dated 23rd July 2010, Serah Wanjiku Kungu, the Plaintiff (Appellant) herein filed Civil Suit No. 230 of 2010, at the Senior Principal Magistrates Court in Kikuyu, against the Defendant (Respondent) and sought for orders that;

- a) An order of permanent injunction restraining the Defendant, his employees, servants and or agents from howsoever or any way from trespassing on the Plaintiff's parcel of land known as L.R No. Muguga/Kanyariri /1245, whether by gaining entry thereto, continuing to occupy the same or otherwise or at all.***
- b) Eviction from the suit property.***
- c) Costs of the suit and interest***

In her statement of Claim, the Plaintiff (Appellant) averred that she is the registered owner of the suit property having bought it in a public auction on 4th June 2008, and registered as the owner on 27th October 2008. That the Defendant (Respondent) has been forcefully occupying the suit property without consent or permission or any lawful cause. That the Defendant's actions are unwarranted and illegal and the same amount to trespass. The Plaintiff particularized trespass as; gaining physical entry into the suit property without her authority or permission and physically preventing the Plaintiff from accessing the suit property and threatening her.

The suit was contested and the Defendant(Respondent) filed a statement of Defence dated 20th August 2010, and denied all the allegations made in the Plaint. It was his contention that on 4th June 2008, Equity Bank Ltd fraudulently conspired with the Plaintiff to defraud him of his parcel of land by purporting to sell to the Plaintiff (Appellant) his parcel of land in recovery of a nonexistent loan. That he has been in occupation of the suit property as the owner and the allegations of trespass are unfounded.

On 13th November 2018, the parties consented to dispose off the matter by way of written submissions. Mrs Muiruri for the Plaintiff (Appellant) produced in evidence the Plaintiff's witness statement filed on 8th July 2018, and list of documents dated 11th July 2018, to be adopted as Plaintiff's Exhibits. The Defendant's Advocate Mr. Nyaga relied on their statement of Defence. Only the Plaintiff filed her written submissions dated 3rd December 2018, through the Law Firm of M.Murimi & Company Advocates and submitted that the Plaintiff (Appellant) has adduced evidence to show that she attended a public auction and emerged as the highest bidders of the suit property and was issued with a Certificate of sale and settled the full purchase price by making several installments. That in her witness statement and bundle of documents, the Plaintiff provided evidence to show that she is the registered owner of the suit property, the same having been sold to her at a public auction. That the Defendant (Respondent) did not provide any proof to support his allegation that the Plaintiff and Equity Bank conspired to defraud him of his property.

The Plaintiff (Appellant) further submitted that the Defendant (Respondent) has failed to vacate the suit property despite several demands, hence he is a trespasser. That the Plaintiff is a bonafide owner of the suit property and she is the one entitled to occupy the suit property and the Defendant should therefore be evicted.

On 20th December 2018, the trial Court entered Judgment and struck out the Plaintiff's (Appellant's) case with no orders as to costs. In its Judgment the trial Court stated;

“ I do not want to go to the merit or demerits of this suit. There is a dispute as to how the Plaintiff acquired the property and this is central to the determination of the ownership of the property and cannot be decided without Equity Bank being enjoined as a party to this suit.

I will therefore not proceed with the matter because substantive justice demands that all parties be heard. Land being a dear resource to many people it need to be carefully handled. The Defendant has all along been in occupation of the land and needs to know how his land was sold and finally transferred and for that reason I will neither dismiss the suit nor allow the case but will proceed to strike put the suit but with no order as to costs. The parties can seek further legal advise one that to be done next.

The Plaintiff (Appellant) was aggrieved by the above determination of the Court and Decree thereon and she has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **16th January 2019**. The Appellant sought for the setting aside of the said Judgment .The grounds upon which the Appellant sought for the Appeal to be allowed are;

1. That the Learned trial Magistrate erred in Law and in fact by reaching a decision of striking out the Plaintiff’s suit based on misconception, misapprehension and misapplication of law and Facts.

2. That the Learned Trial Magistrate erred in Law and in fact in failing to consider that the Plaintiff herein had a valid and indefeasible Certificate of Title to the suit property and that the issue at hand was one of an injunction and eviction from the suit property and not ownership. As such the Learned Trial Magistrate misdirected himself in creating new issues alien to the parties and adjudicating upon the same.

3. That the Learned Trial Magistrate erred in Law and in fact in holding that Equity Bank was not enjoined in the proceedings, yet the Plaintiff did not seek to enforce any right nor seek any relief as against Equity Bank.

4. That the Learned Trial Magistrate erred in fact and in law in coming up with a determination that both parties had delayed the hearing and determination of the suit, yet the suit had been subject of Preliminary Objection raised by the Counsel of the Defendant whose ruling , the Defendant’s Advocate proffered an Appeals to the High Court of Kenya to wit High Court of Kenya at Nairobi, Milimani Law Courts , Civil Appeal No. 567 of 2011 which Appeals was dismissed under the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules by the Honourable Mr. Justice A. Mrima on 7th June 2016 and the said order issued on 5th January 2018.

5. That the Learned trial Magistrate erred in Law and in fact in failing to consider the Plaintiff’s evidence and the Plaintiff’s written submissions

6. That the Learned Trial Magistrate did not exercise his discretion judiciously.

The Appeal was canvassed with by way of written submissions and the Appellant through the **Law Firm of M. Murimi & Company Advocates**, filed her written submissions on **23rd April 2021**, and submitted that the power to strike out a suit is espoused under **Order 2 Rule 15 of the Civil Procedure Rules** and that the trial magistrate did not apply any of the principles for consideration. That the Defence did not allege that the suit disclosed no cause of action and therefore the Appellant’s evidence remained unchallenged.

It was further submitted that the trial Magistrate created new issues alien to the parties. That the Appellant had already acquired title to the suit properties and it has never been challenged by the Respondent. That it was upon the Respondent to outline the particulars of the alleged fraud and adduce evidence. It was the Appellant’s further submissions that she had adduced evidence of the payments, she made and the title deed validly issued to her and she had no claim against Equity Bank and she had been vigilant in prosecuting the suit. The Appellant further filed Supplementary Submissions dated **13th November 2020**, which the Court has read and considered. The Appellant relied on various provisions of law and decided cases and urged the Court to allow the Appeal.

The Respondent filed his written submissions dated **27th April 2021** through the **Law Firm of M.K Chebii & Company Advocates** and submitted that he cannot be a trespasser on his own property. That the Appellant did not file any documents in support of buying the suit property in the said public auction and failed to enjoy **Equity Bank** which was a necessary party. That the Counsels for the two parties consented to disposing off the suit by way of written submissions and therefore oral evidence could not be tendered. The Respondent relied on various decided cases and urged the Court to dismiss the Appeal.

The Court has carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows;-

As this is a first appeal, it is the Court’s duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78 of the Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo vs Shah (1968) EA at Page 93 where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

The Court has carefully read and considered the Memorandum of Appeal, the written submissions, the pleadings in the lower Court and the Judgment by the trial Court. The Court finds the issues for determination are;

1. Whether Equity Bank was a necessary party and Whether its misjoinder was fatal

2. Whether the Appeal is merited.

1. Whether Equity Bank was a necessary party and Whether its misjoinder was fatal

This Court has considered the Judgment of the trial Court and it is not in doubt that the trial Court struck out the Appellant's case and noted that the Appellant ought to have enjoined Equity Bank in the suit and as the Bank was not enjoined, then in the interest of justice, the suit was for striking out. In the case of William Kiprono Towett & 1597 Others Vs Farmland Aviation Ltd & 2 Others (2016) eKLR the Court held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

From the above decided case, it is not in doubt that the non-joinder of party is not fatal to a suit and a Court ought to determine the disputes between the parties before it and therefore the non-joinder of Equity Bank was not fatal to the suit.

Was Equity Bank therefore a necessary party to the proceedings? It is not in doubt that the Appellant claims to have bought the suit property from Equity Bank through a public auction. In her Complaint, the Appellant sought for a permanent Injunction and an order of eviction against the Respondent. The Respondent filed his Defence and denied the said allegations and sought for the dismissal of the suit. It is thus clear that no party was seeking any redress against Equity Bank. If the Respondent was alleging fraud therefore it was incumbent upon the Appellant to prove that she did not acquire the said suit property by fraud. The Court does not find any reason as to why Equity Bank would have been required to be enjoined as it did not have any interest over the suit property having sold it to the Appellant and further there were no recourse sought against it and there is no reason as to why any orders sought could not have either been granted and or denied in its absence.

The Court therefore finds and holds that Equity Bank was not a necessary party in the suit and failure to sue it was not fatal to the suit.

2. Whether the Appeal is merited.

Having held that Equity Bank was not necessary party, it is therefore not in doubt that the striking out of the suit based on the said contention was not merited and the Court erred in arriving at the said decision. This Court therefore has no option but to set aside the trial Court's Judgment.

Upon setting aside the said Judgment, the Court must further determine whether it is to return the file back to the lower Court or make a determination on the issues raised in the trial court.

The Appellant having appealed against the decision of the lower Court, it means a determination was made, and an Appeal Court must therefore find whether the said determination was proper and if not proper proceed to make its own determination. This Court having made a finding that the lower court's findings were in error, it must therefore make its own determination.

The Appellant had sought for the eviction and a permanent Injunction against the Respondent. It is the Appellant's contention that she bought the suit property at an auction when the same was sold by Equity Bank. It is not in doubt that during the trial, the parties agreed to canvass the suit by way of written submissions. That while the Plaintiff produced in evidence her witness statement and list of documents, the Respondent only produced his Defence and did not produce either its witness statement nor any list of documents and the trial Court was asked to determine the matter based on material placed before it. Since no evidence was adduced in support of the Defence case, the Defence on record remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schultzer, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the Defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of **John Wainaina Kagwe..Vs..Hussein Dairy Ltd[2013]eKLR**, the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

It is therefore clear that without producing any witness statement or documents, the allegations made by the (Defendant) Respondent remained mere allegations and the averment by the (Plaintiff)Appellant were uncontroverted though she still had an obligation to prove her claim.

The Appellant produced list of documents. In the said list, there is a title deed dated **27th October 2008**, in her favour confirming that she is the registered owner of the suit property. Further, there is a Certificate of sale dated **4th June 2008**, from Watts Enterprise confirming that the Appellant was the successful bidder in the public auction and a Memorandum even dated. There is also a transfer by Chargee in exercise of its Power of Sale and a letter by Equity Bank dated **21st August 2008**, being release transfer by charge and an Advertisement for Public auction.

All the above documentations show the Appellant’s root of her title and have not been controverted by the Defendant (Respondent). Though the Respondent claims that there was fraud, no evidence was adduced to that effect nor did the Respondent produce any evidence to prove that he has challenged the sale. Therefore, the Court finds and holds that in the absence of any evidence to prove the said fraud, the Appellant was able to prove the root of her title and her title therefore remains absolute and indefeasible in terms of **Section 26 of the Land Registration Act**.

Being the indefeasible owner, the Plaintiff(Appellant) is therefore entitled to all the rights and privileges that appertain to the suit property, including the right to quiet use and possession of the property and the same can only be achieved if the Respondent is evicted from the suit property and further a permanent injunction should issue.

Having found that the Appellant properly acquired the title to the suit property, and that she is the **absolute** and **indefeasible** owner and that Equity Bank was not a necessary party to the suit for purposes of determining the issues in dispute, then this Court finds that the certificate of title held by the Appellant is proper and she is entitled to all the rights and interests as per **Sections 24 and 25 of the Land Registration Act**. The trial court did err in striking out the suit.

Having carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at an improper determination and did not exercise its discretion properly and this Court has no option but to set aside the said determination.

The upshot of the foregoing is that the Appellant’s Appeal is found **merited** and consequently the said Appeal is allowed entirely and the Judgment and Decree of the trial court is set aside and the Court allows the orders ought in the Plaint dated **23rd July 2010**.

On the issue of costs, the Court finds the same is granted at the discretion of the Court, though Costs usually follow the events. The Respondent will therefore bear the costs of the suit in the lower Court and this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Karanja for the Appellant

Mr. Cheruiyot holding brief for Mr. Chebii for the Respondent

L. GACHERU

JUDGE

29/7/2021