



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL APPEAL NO.11 OF 2018

EUNICE WANJIKU KIMANI.....APPELLANT

VERSUS

ZACHARY WARUIRU.....RESPONDENT

(Being Appeal from the judgment and Decree of the Chief Magistrates

Court at Thika(Mrs.C.A Otieno delivered on 23rd April 2018 in Thika Civil Case No. 179 of 2009)

BETWEEN

TERESIAH NYAMBURA KUNGU.....PLAINTIFF

VERSUS

EUNICE WANJIKU KIMANI.....1ST DEFENDANT

NYAKINYUA INVESTMENT LTD.....2ND DEFENDANT

ZACHARY WARUIRU.....THIRD PARTY

JUDGMENT

The Appellant **Eunice Wanjiku Kimani** was the 1st Defendant while the Respondent **Zachary Waruiru** was the Third Party in Thika **CMCC No. 179 of 2009**. The Plaintiff in the said suit was **Teresiah Nyambura Kungu (Deceased)**.

By a **Plaint** dated **13th March 2009**, the Plaintiff filed a suit against the Defendants (Appellant) seeking for orders that;

a) A Declaration by this Honourable Court that the Plaintiff is the registered owner of land parcel No. Ruiru / Ruiru East Block 2/4769

b) Cost of this suit

c) Any other order that this Honourable Court may deem fit and expedient to grant.

The Plaintiff had averred that she is the registered owner of the suit property having bought the same from the 2nd Defendant . That since the year **1998**, the 1st Defendant had been approaching the 2nd Defendant in a bid to fraudulently transfer the said suit property to her, despite the fact that the same is registered in the name of the Plaintiff and the collusion between the Defendants may deprive her off the suit property .

The Suit was contested and the 1st Defendant(Appellant) filed statement of Defence and Counter Claim dated **9th November 2010** and denied all the allegations made in the **Plaint**. She alleged that she was the legally and lawful owner of **L.R 2/4769** .That she is the rightful owner of the suit property in dispute and prayed that the title being a first registration, then any other title should be cancelled. In her Counter Claim, the 1st Defendant(Appellant) sought for orders that;

a) The Plaintiffs suit be dismissed with costs

b) The Court do declare that the 1st Defendant is the rightful owner of Parcel Number Ruiru/ Ruiru East Block 2/4769.

c) An order that the Thika Land Registrar do cancel the purported Plaintiff's alleged title

d) Cost of the suit together with interest thereon

e) Any other or such further relief as this Honourable Court may deem fit to grant in favour of the 1st Defendant against the Plaintiff.

While the suit was pending, the 1st Defendant (Appellant) learnt that a Third Party was the registered owner of the suit property and vide a Third Party Notice dated **9th February 2011**, the Third Party (Respondent) was enjoined in the suit.

The 3rd Party filed a statement of Defence dated 1st **December 2014**, and denied all the allegations made in the Defence and Counter Claim. He averred that he purchased the suit property from the Plaintiff for valuable consideration. Further, that prior to purchasing the suit property, he conducted due diligence over the suit land. That he is an innocent purchaser for value without notice and his title cannot be impeached.

From the proceedings at page 98 , it was noted that the Plaintiff's suit was dismissed on **5th November 2015**, and what was coming up for hearing was the 1st Defendant's (Appellant's) Counter Claim. The Counter claim proceeded by way of viva voce evidence wherein the 1st Defendant (Appellant) testified for herself and closed her case while the third party (Respondent) testified for himself and closed his case.

COUNTER CLAIM DEFENCE (APPELLANT'S) CASE

DW1 Eunice Wanjiku Kimani the 1st Defendant herein adopted her **witness statement dated 4th December 2014** . She alleged that **her husband William Donga Kimani bought L.R 2/4769**, from **Jane Kagundu**, vide a sale agreement in **15th February 1988** at **Kshs. 120,000/=** . That **Jane** was a shareholder at **Nyakinyua Investments Ltd** . She produced the sale agreement as Exhibit 1. That the said **Jane** gave them a share **certificate No. 04730**, which she produced as Exhibit 2, receipt dated **5th January 1988** as Exhibit 3 . That they went to the offices of the 2nd Defendant to get a title and they were issued with one in **1988** in her name dated **26th August 1988**, which she produced as Exhibit 4.

Further, that they put up building stones on the land and when they sought to sell the property in **2009**, they learnt that the suit property was registered in the name of someone else and also learnt that there was a case in Court and Judgment had been entered ex parte, but the same was set aside . That the third party claims ownership but she is the real owner of the suit property. She produced Green Card dated **9th December 2009**. That her title was issued in **1988**, while the 3rd Party's title was issued in **2009**. That she followed the right procedure and she sought to have the Third Party's Title cancelled. That she did not know who had put the restriction as indicated.

Further that they took possession in **1988**, and the land is undeveloped . That she did not know the Plaintiff prior to her death. That

she was never aware of the restriction and that after the signing of the agreement, they all went to the 2nd Defendant's offices, the transfer was done and they were called to get their titles.

3RD PARTY'S CASE

3rd Party Zachary Waruiru adopted his witness statement dated **5th December 2014**, and testified that he is in possession of the suit property. That the Plaintiff informed him about the case in **2011 /2012** and died on **28th April 2014** . That he did not visit the 2nd Defendant's offices, with the Plaintiff and he was informed by the Plaintiff's son in law about the land. That he conducted a search, and entered into a sale agreement with the Plaintiff upon confirming that the same was registered in the Plaintiff's name and he paid the purchase price. That there were no stones at the time. That about 5 year ago, he saw building stones dumped on the suit land. He produced a copy of the green card as Exhibit 1, Copy of the sale agreement Exhibit 2, Copy of title deed in the Plaintiff's name Exhibit 3 , Copy of clearance certificate Exhibit 4 and Application for consent dated **17th July 2009** as Exhibit 5 .

That the Title Deed was issued on **17th July 2009** and the Exhibit 5 indicates that the property searched is **Ruiru /Ruiru East / Block 2/4169** . That he took possession of the suit property in **2009** and he has not developed the property . That he ascertained the Plaintiff

was the owner of the suit property in **June/ July 2009**. That entry No. 5 in Exhibit 1 shows it was on **3rd July 2009** . That a restriction was removed and an agreement entered with the Plaintiff on **4th July 2009**, a day after the restriction was removed. That he was issue with P exhibit 1 on **9th February 2009**, and the case was between the Plaintiff and the 1st Defendant. That he was not aware of the restrictions on the land and the beacons were interfered with during the construction of the Thika Super Highway.

Thereafter, the parties filed written submissions and on **23rd April 2018**, the **Hon C.A Otieno** delivered her Judgment and dismissed the Appellants' Counter Claim and stated that ;

“ Given the above, it was the 1st Defendant to demonstrate to Court that the 3rd party had acquired registration of the land subject matter of the suit by way of fraud, misrepresentation, illegally , unprocedurally or through a corrupt system. I note that the 1st Defendant has made no allegation in the Plaintiff of fraud and or misrepresentation or unprocedural or illegal acquisition on the part of the 3rd party. Her evidence in Court did not also establish fraud or misrepresentation or engagement in a corrupt or illegal scheme by the 3rd party in registration of the land in his name.

In conclusion , I finds that the 1st Defendant Counter Claim has not been proved against the 3rd Party and the same fails . Given the nature of this case . I order that each party bear its own costs of the suit.

The Appellant was aggrieved by the above determination and filed a Memorandum of Appeal dated 4th May 2018, praying that the Appeal be allowed and the Court vary and or set aside the judgment dated 23rd April 2018 on the grounds that;

1. That the Learned Magistrate erred in Law and fact by finding that the Appellant’s Counter Claim was against the plaintiff and not against the Respondent herein

2. That the learned magistrate erred in Law and in fact in holding that the Appellant had not proved that she is the owner of the parcel of land despite the overwhelming evidence and uncontested documents tendered before her.

3. That the Learned Magistrate erred in Law and fact by holding that the Appellant Counter Claim fails and left the issue of ownership of the suit property undetermined, yet the Respondent’s chance of winning the case was based on the Plaintiffs winning the case in which case the Plaintiff’s case was dismissed for want of prosecution.

4. That the Learned ,magistrate erred in Law a and in fact by not taking into consideration that the Appellant Title to the suit property was a first registration issued in the year 1988, while the third party’s title was issued in 2009.

5. That the learned Magistrate erred in Law and in fact in failing to consider the principle first in time, in that the Appellant had purchased the property known as land reference number Ruiru/ Ruiru East Block 2/4769, in 1988 whereas the third party’s claim of the land is of the year 2009.

6. That the Learned Magistrate erred in Law and in fact by finding that the Respondent was an innocent purchaser without notice, yet there was overwhelming evidence showing that the Respondent was well aware of the land dispute involved herein.

a) Green card produced by the Respondent himself dated 9th December 2009, clearly shows that there has been a dispute on the ownership of the land since 1998.

b) Green card produced by the Respondent himself being a letter of consent from the Lands Control Board of the suit property shows that the land whose clearance was sought was land parcel No. Ruiru/Ruiru East Block 2/4169 and not land parcel No. Ruiru/Ruiru East Block 2/4769 the suit property herein.

7. That the Learned Magistrate erred in Law and in fact by holding that the Appellant needed to have proved fraud against the Respondent, yet there was overwhelming evidence that the Appellant was the first registered owner with a legal title

8. That the Learned Trial Magistrate exhibited actual bias against the Appellant

9. That the Learned Magistrate Orders have occasioned grave injustice.

10. In view of the circumstances set out herein above , the Learned magistrate totally misdirected herself in delivering Judgment in favour of the Respondent by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant.

The Appeal was canvassed by way of written submissions and the Appellant through the Law Firm of **Bwogo Manoti & Chepeno Associates** filed her Written Submissions on 16th November, 2020 and submitted that the Appellant rightly enjoined the Respondent as a third party since the suit property was illegally transferred to him when the suit was pending . That **Order 1 Rule 15** of the Civil Procedure Rules was clear that the Defendant can enjoin a third party where the matter

does affect the said person . That as per the Plaintiff, the Appellant claimed to be the legal owner and went ahead and sought a Declaration that she is the legal owner and the Respondent also claimed to be the owner .

That the Appellant produced before the trial Court documentation to show that she was the first registered owner of the suit property and the Respondent only got his title in **2009** . Further, that the documents on record shows that the Plaintiff title was granted on **23rd September 1992**, which was issued after the Appellant had already been issued with a title . That there was an illegality when the title to the suit property was transferred to the Respondent.

That the trial Court ought to have determined the issue of ownership of the suit property on merit and documentation produced in Court by all parties and not leave it undetermined as there were two titles over the same property . That the transaction between the Plaintiff (in the trial Court) and the Respondent is marred with illegalities. The Court was therefore urged to allow the Appeal.

The Respondent through the **Law Firm of Onesmus Githinji & Company Advocates** filed his written submissions dated **26th February 2021**, and submitted that the Appellant's Defence and Counter Claim did not feature any Specific paragraph raising a claim against the Respondent and as such, the Defence contained a mere

denial against the Deceased's claim and not a Counter Claim. That the Appellant could not raise a Counter Claim against the Respondent and that a Defendant Cannot Counter claim against a third party .

It was further submitted that the Appellant did not raise a triable issue against the Respondent and therefore no cause of action. That the refusal by the Appellant in enjoining the Land Registrar can only be that the green cards produced in evidence were forgeries . Further that the Appellant failed to prove how her husband acquired the suit property and transfer or completion certificate for registration for the 2nd Defendant . That the Appellant never produced a copy of the title that she obtained, but only obtained and or was issued with a questionable green card. It was the Respondent's submission that the Appellant has embroiled him in unnecessary litigation for **11 years** without any grounds of involvement.

This is a first appeal, and 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**. Refer to 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).

The Court will take 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. Refer to the case of **Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”.

Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the parties and the Ruling, the Court finds that the issues for determination are;

1. Whether the Appellant had a claim as against the Respondent

2. Who is the Bonafide owner of the suit property

3. Whether the Appeal is merited.

1. Whether the Appellant had a claim as against the Respondent

It is not in doubt that during the pendency of the suit, the Plaintiff's suit as against the Appellant was dismissed. It is further not in doubt that the Plaintiff further died during the Pendency of the suit and he was not substituted and any claim against her by the Appellant was therefore extinguished after the lapse of 1 year.

The Respondent has submitted that a Defendant cannot Counter Claim against a third party as a Counter Claim is intended to be against a party who previously made a claim against a Defendant and that the Appellant's pleadings did not warrant the Respondent's title to the suit property to be annulled. Further, having gone through the Judgment by the Trial Court, the Court notes that the trial Court held that the Counter Claim was against the Plaintiff and not the 3rd party noting that it was filed even before the 3rd Party Notices were taken out and as the Plaintiff is Deceased and no substitution has been done , the claim cannot stand.

The Court has perused the 3rd Party Notice that was filed pursuant to **Order 15 Rule 1** which provides that; **Order 15 Rule 1 (a) (b) and (c)** states as follows:

15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) –

a. That he is entitled to contribution or indemnity; or

b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them

Shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

From the above, it is not in doubt that the Appellant as per the provisions of law was required to issue a **Third Party Notice**, which **Notice** was issued and is dated **9th February 2011**, and the nature to The Appellant claimed against the Respondent was aptly communicated. That the Appellant was claiming against the Respondent who was the registered owner of the suit property .

In the case of **Cheruiyot Edwin Mutai ...Vs... Cyrus Ngaruiya [2020] eKLR**, the Court held that;

15. It is plain from the foregoing that third party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Subrules (b) and (c) of Order 1 rule 15 (1) of Civil Procedure Rules, 2010, envisage other scenarios. Subrule (c) thereof is particularly instructive. It foresees issues that may arise not only between the third party and the defendant but between all the three parties in the suit viz: the plaintiff, defendant and third party. Strange as it may seem, Subrule (c) envisages a situation where an issue may arise between the third party and the plaintiff, with the defendant not necessarily being centrally involved. This becomes clearly manifest when one considers the language used in Subrule (c), which, in the relevant part, is as follows:

“...determined not only as between the plaintiff and the defendant and the third party or between any or either of them.”

It is evident that third party notices cover issues that may arise between the Defendant and the third party, The third party filed his Defence in response to the Third Party Notice and it is the Court's considered view that there was a proper claim as against the Respondent herein that was an issue for determination between the Appellant and the Respondent. Just because the claim against the Plaintiff collapsed, did not mean that the claim against the Respondent collapsed too, as the Appellant was claiming against the Respondent and therefore had issued a **third party notice**.

2. Who is the Bonafide owner of the suit property

It is trite that when a party's title is challenged, it is incumbent upon that party to prove their root of title. See the case of **Munyu Maina ... Vs... Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, where the Court of Appeal held as follows; -

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Further in the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

The Appellant claimed to have been the registered owner of the suit property while the Respondent also laid a claim to the suit property by virtue of having bought the same from **Teresia Nyambura Kungu**. In determining who was is the bonafide owner of the suit property , the Court must then determine which of the party has proved the root of their title.

The Appellant averred that she is the registered owner of the suit property having acquired the same after her husband bought the suit property from one **Jane Njeri Kagindo** vide a sale agreement dated **15th February 1988**. The Appellant further produced in evidence a share Certificate dated **2nd May 1984**, in the name of the said **Jane Njeri** and a receipt for title deed dated **5th January 1988** . The Appellant further produced a copy of a green card that shows that the said green card was opened on **10th May 1988**, in which the Government of Kenya was the owner and on **26th August 1988**, the same was transferred to the Appellant . That on **21st August 1998** a restriction was registered and on **5th July 2009**, there was an indication that the said title would be cancelled.

The Respondent on the other hand produced in evidence a green card which shows that on **23rd September 1992**, the Government of Kenya was registered as the owner and the same was transferred to **Teresia Nyambura Kungu**, on the same date and a title deed issued . Further that on **21st August 1998** a restriction was registered and on **3rd July 2009**, the same was

removed and the suit property transferred to the Appellant on **17th July 2009**, and title deed was issued . Further the Respondent produced in evidence a sale agreement dated **4th July 2009**, a title deed dated **23rd September 1992**, issued in favour of **Teresia Nyambura Kungu**, a Company's Clearance letter dated **5th February 2002** from Nyakinyua Investments Limited indicating that after scrutinizing all documents and its registers relating to the suit property, it was confirmed that the suit property belonged to **Teresia Nyambura Kungu**. It is trite that whoever alleges must prove, and the parties herein having made various allegations had the onus of proving the said allegations.

Both parties had an obligation to prove the root of their title. None of the parties herein called any evidence a part from claiming that the documents held by the other party were not genuine. There was no substantive evidence to substantiate the said allegations. The Court has been presented with various documents and therefore it becomes incumbent upon the Court to scrutinize the said documents and come to a conclusion. Both parties presented a title deed and parallel **green cards** and none of the parties called any evidence to rebut the authenticity of the **green card** held by the other party.

What is not in doubt is that each party claims that the suit property originated from **Nyakinyua Investment Company Limited**. The Appellant claims that she bought the suit property from **Jane Kagodu**, who had bought the land from the said Company and the Respondent claimed to have bought it from **Teresiah Njeri**, who had also bought the same land from the said Company. The Respondent produced in evidence a letter dated **5th February 2002**, and the said Company did note that as per the documents in their Company together with its register relating to the suit property, the said **Teresia Nyambura Kungu** was confirmed as the owner of the suit property.

The Appellant has not produced any evidence to controvert the said evidence. While the Appellant produced in evidence documents that would suggest that she bought the suit property or the person who sold to her acquired the same before **Teresiah Nyambura**, the entity that she claims to have acquired the suit property from has indicated that as per their records, another person is indeed the legitimate owner. Therefore, it follows that the Respondent having bought the suit property from **Teresia Nyambura Kungu**, has been able to prove the root of his title and therefore he is the bonafide owner of the suit property.

3. Whether the Appeal is merited.

The Appellant had sought for orders that the Court do allow the Appeal and or set aside the Judgment dated **23rd April 2018**. Having carefully analyzed the pleadings together with the evidence adduced, this Court does not agree in principle with the analysis by the trial Court and how it came to its Conclusion. However, the Court is in agreement with the trial Court that the Appellant has failed to prove her claim to the required standard of balance of probabilities and she is thus not entitled to the orders sought in the Counter Claim for cancellation of the Respondent's title nor the Declaration that she is the owner of the suit property. Consequently, the Court finds and holds that the Appeal is **not merited** in so far as the Counter Claim was dismissed.

On Costs, it is evident that costs usually follow the event, and in this instant case, the Court is of the opinion that as per the evidence provided in Court, justice would best be served if each party is to bear its own costs.

The Upshot of the foregoing is that the Court finds that the instant **Appeal** is not merited and the same is dismissed entirely with an Order that each party to bear his/her own costs of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy