



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELCA CASE NO. 37 OF 2019**

**ZKO.....APPELLANT**

**VERSUS**

**FJO.....RESPONDENT**

***(Being an appeal from the Judgment and decree of the Hon. Mr. Kipngeno Sang, Senior Resident Magistrate in Maseno PMCC.***

***115 of 2014 delivered on the 2<sup>nd</sup> April 2019)***

**JUDGEMENT**

ZKO (*hereinafter referred to as the Appellant*) filed a suit in the Principal Magistrate's Court at Maseno against FJO (*hereinafter referred to the Respondent*) claiming to be the registered proprietor of a parcel of land title no. West Bunyore/Ebusakami/xxxx together with the buildings and improvements thereon. The appellant claimed that he had rented his house to one VDGBPM an expatriate from the Netherlands who married the respondent and then started cohabiting in the said house.

In or about 2002 the respondent's marriage broke down and her said husband left her and went to live elsewhere. The respondent has since that time been living in the said appellant's house without the appellant's consent and without paying any rent whose current rate is Kshs. 10,000/= per month.

The appellant claimed that he has on many occasions asked the respondent to vacate but she has refused to do so thereby causing the appellant to suffer loss and damage and the appellant prayed in the lower court for an order of eviction of the respondent from the suit premises. The appellant prayed for an order of eviction of the respondent from the suit parcel of land. He also prayed for mesne profits and costs.

The Respondent filed a defence admitting that the appellant was the registered owner of the land but denied that he owned buildings and improvements. The respondent denied that the appellant ever rented any house to VDGBPM or that VDGBPM is an expatriate. The respondent denied that her marriage broke down or on about 2002 or that VDGBPM left her on or about 2002 and went to live elsewhere.

She averred that she had openly without let stayed on the premises for a period in excess of 14 years without the permission of the appellant and not as a tenant wherefore she had acquired prescriptive rights over the property and denied that she is a trespasser. The respondent averred that the appellants suit was time barred.

When the matter came up for hearing before the lower court, the appellant testified that the respondent was his niece and that the suit property was his property. He produced the title deed as evidence that the land was registered in his name. He demonstrated that he had taken a loan with the Agricultural Finance Corporation using the land as security. There is a house on the land that he built in 1982 to 1987. His niece stays in the house as a tenant and should pay rent of Kshs 10,000/=. Her husband moved out in 2002. He sought eviction orders.

On cross-examination, he states that the original title is with Agricultural Finance Corporation because of the loan and the balance was Kshs. 80,000/=. He built a house in 1982. He did not have evidence that he built the house. After completing the house, VDGBPM and the wife and children stayed in the house as tenants but he had no written agreement but had agreed that he educates children of his late sister.

PW2, Javan Malendu aged 86 years testified that Dr. Osago sold the land to the appellant in 1982 who built the house on the land. A Whiteman occupied the house as a tenant and used to pay rent for the house but left the house and re-married.

On cross-examination he states that he can't recall the year he saw DW2 (Mzungu). He heard about the rent issue from the appellant.

The respondent who was DW1, on her part testified that the Appellant was his uncle and VDGBPM was her husband. She was not a tenant as there was no agreement. Her husband constructed the house and they moved in to stay. Her husband bought the house and that they never

paid rent. She had lived in the house since 2002 when her husband left.

On cross examination she states that she was married in 1987 and the husband left in 2002 and moved to Kisumu. She did not know for whom her husband paid fees. She stayed in the house since 1987.

DW2, VDGBPM originally from Netherlands a retired Engineer now hailing from Vihiga County stated that the respondent was his ex-wife. She became a friend in 1980 because she used to sell them vegetables. The appellant agreed to sell him land in 1982 and he built the house in the land in 1982. The property was not registered in his name because he was a foreigner as he could not own the land. He stayed in the land upto 2000 but the appellant became hostile hence he left. DW2 further testified that he used to stay on the land with his European wife T before he married the respondent.

In his judgment, the Learned magistrate correctly found the issues right for determinations being :-

**1) Who owns the suit land?**

**2) Whether the plaintiff is entitled to the prayers sought.**

On the 1<sup>st</sup> issue, the court found that the appellant produced the title deed as evidence of ownership further that he received a loan from AFC on 29/1/2013 whilst the title had been issued on 11/2/1992. The title deed was a re-issue and that he did not explain the whereabouts of the title issued in 1983 and the reasons for re-issue. The Learned Magistrate found this as evidence of Trust. The court found that the appellant did not prove that the DW2 was educating the appellant's sisters children.

In regard to who constructed the house, the learned magistrate found that there was no evidence of Architectural plans or pictures submitted. No tenancy agreement. All these pointed to existence of a trust. The court found that the plaintiff/applicant was not entitled to orders sought and the suit was dismissed. The appellant was dissatisfied with the judgment and lodged this appeal on grounds that:

**1. The Learned trial magistrate erred in both law and fact by dismissing the Appellant's suit, yet sufficient evidence was led to demonstrate that the Appellant was entitled to the prayers sought in his plaint.**

**2. The Learned trial magistrate erred in both law and fact in failing to appreciate that the Appellant being the registered proprietor of the suit property, the provisions of section 24 of the Land Registration Act preserved his rights to the exclusive use of his property.**

**3. The Learned trial magistrate erred in both law and fact in framing and determining an issue of trust that was never pleaded nor any evidence of the same led by either party during the trial.**

**4. The learned trial magistrate erred in both law and fact in failing to find that there existed a tenancy relationship between the Appellant and the Respondent and that the suit property belonged to the Appellant who was being denied entitlement to reap from its fruits.**

**5. The learned trial magistrate erred in both law and fact in failing to consider the Appellant's submissions before arriving at his decision.**

**6. The Judgment was against the weight of evidence.**

**7. The learned trial magistrate erred in law in failing to notify parties of the delivery.**

The Appellant prays for orders that:

**a) This Appeal to be allowed with costs.**

**b) The Judgment of the Honourable Mr. Kipngeno Sang, Senior Resident Magistrate in Maseno PMCC No. 115 of 2014 delivered on 2<sup>nd</sup> April 2019 be set aside in its entirety and substituted with an order allowing the Appellant's suit by ordering the eviction of the Respondent from the Appellant's suit property WEST BUNYORE/EBUSAKAMI/xxxx plus payment of mesne profits to the Appellant.**

The appellant argues that the Learned Magistrate failed to appreciate that the appellant was the registered owner of the suit property and that there was a letter from one Dr. Osago Odek who transferred the property to the appellant. The appellant argues that there is no evidence of fraud or misrepresentation which the appellant was a party.

On this issue, the court finds that the Appellant did not avail the green card for the suit property to demonstrate the historical background before he was registered as the proprietor of the land. He did not produce the instrument of transfer He did not produce the agreement of sale.

Section 3 (3) of the Law of Contract Act provides that no suit shall be brought upon a contract for the disposition of an interest in land unless — (a) the contract upon which the suit is founded—

(i) is in writing;

(ii) (ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

There is no evidence that there was any agreement between the appellant and Dr. Osago Odek and that the latter was ever the proprietor of the land and that he sold the land to the appellant. The said Dr. Osago Odek was not called as a witness for the appellant. It was the duty of the appellant to demonstrate that the property was acquired and registered procedurally.

However, I do agree with the appellant that the issue of Trust was not pleaded and therefore the honourable court erred in finding that there existed a trust as the same was not pleaded. The court should not have considered what was not pleaded.

The fundamental Rules of Civil Procedure are that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to float the settled fundamental rules of civil procedure. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. The pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

This court has considered the facts of the case and finds that the appellant was registered as the proprietor on the 30/3/1983 and title deed issued on 11/2/1992. It is evident from the appellant's testimony that the respondent took possession in 1982 before the appellant was registered as the proprietor. There is no evidence of any tenancy agreement or any permission by the appellant to the respondent to enter the land. The suit in the lower court was filed on 25/6/2014 more than 12 years after the respondent took possession.

Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides that:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

Though the appellant was the registered proprietor of the suit property, he had abandoned his rights by failing to claim the property within 12 years, this issue was not considered by the learned Magistrate. I do find that it was a live issue that ought to have been considered by the court. The appellant slept on his rights and failed to file the suit at appropriate time. I do find that the Appellant's suit in the lower court was statute barred and ought to have been struck out. Ultimately the appeal is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**