Mwangangi v Mwangangi (Civil Appeal 146 of 2019) [2023] KEHC 21249 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 21249 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 146 OF 2019

G MUTAI, J

APRIL 24, 2023

BETWEEN

MBINYA MWANGANGI .... APPELLANT

AND

SAMUEL MUTUKU MWANGANGI .... RESPONDENT

JUDGMENT

1. The Chief Magistrate, EM Keago (then an SPM) delivered Judgment on October 17, 2019 in Machakos CMCC 767 of 2015. He awarded Kes 108,000/- as general damages and Kes 1,965/- as special damages, and costs.

2. On November 15, 2019 the appellant filed a Memorandum of Appeal which had 6 grounds. The main issue was that the parties were customarily related, the land where the crops in question were planted was registered in the name of the deceased and there was no administrator and the appellant's claim was disregarded.

Duty of the appellate court

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

4. This was aptly stated in the case of *Peters vs Sunday Post Limited [1985] EA 424* where, the Court of Appeal therein rendered itself as follows:-

> ' It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

> to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion.'

5. In *Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123*, this principle was enunciated thus:

> ' This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.'

Pleadings

6. In a plaint was commenced in the most unusual manner. The plaintiff claimed potatoes that the defendant hand planted in the deceased father's land in 2003.

7. The claim having arisen in 2003 was filed on October 1, 2015, twelve years later. There is also a claim allegedly of assault which was dealt with in CMCC 1413 of 1999.

8. There's a claim again for sweet potatoes in 2014. From the pleadings it is clear the dispute is over land parcel number Title Number Masii/Mithini/385. There was a comprehensive written statement. There appears also to be a long-standing dispute running from the plaintiff's late fathers land and some other sales that took place.

9. There's also a statement from Masii ward Agricultural officer which is not complete. There was a certificate from the Ministry of Health over the value of potatoes. On unknown dates presumably December 19, 2015 the applicant made an application for an injunction over the named suit land.

10. There are several documents of title and decisions of the land control board. The totality of the evidence is that I have to determine ownership of the land before determining the ownership of the crops.

11. However, there's a second aspect, the dispute relates to the estate of the late father to the plaintiff. Having brought a claim relating to the estate of the late father, the respondent had no locus standi to file the claim. In the case of *Julian Adoyo Ongunga versus Francis Kiberenge Abano Migori Civil Appeal No 119 of 2015*, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a grant:-

> ' Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.'

12. In the case of [*Daniel Njuguna Mbugua versus Peter Kiarie Njuguna & 2 others [2021] eKLR*](), Kemei, J stated as follows : -

> ' It is now settled that striking out is a drastic remedy and it has been held that striking out procedure can be invoked only in plain and obvious cases and such discretion should be exercised with extreme caution. In the case of DT Dobie K Limited versus Muchina [1982]eKLR Justice Madan stated that if such a suit shows a semblance of a cause of action provided it can be injected with life through amendments, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.

13. Exercising extreme caution as guided by the wisdom of the Justice Madan (as he then was) in D T Dobie case, I find that this matter cannot be saved. It is plain that the Plaintiff has no locus and has not exhibited any cause of action. He has no mandate to bring the suit in the absence of letters of grant of administration. Justice will be served to this case if the parties are let to pursue the succession of the estate and as any intermediate preservatory orders can still be obtained from the said probate Court.'

14. There should be restraint in striking out suits unless they are hopeless. In the case of DT Dobie & Company Ltd vs Muchina (supra) it was stated thus:-

> ' The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.'

15. In [*Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another [2021] eKLR*]() stated : -

> ' The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In Postal Corporation of Kenya versus IT Inamdar & 2 Others [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend'.

16. In the *Co-Operative Merchant Bank Ltd versus George Fredrick Wekesa (Civil Appeal No 54 of 1999*) the Court of Appeal stated that Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain is a matter of fact. Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

17. In [*Yaya Towers Limited versus Trade Bank Limited (In Liquidation) (Civil Appeal No 35 of 2000*]()) the same court expressed itself thus. 'A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial. It cannot

be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.'

18. Further matters relating to the year 2003 are stale. Though not pleaded, fully, it is clear from the evidence the respondent disguised a claim that had been dealt with in 2014. In *Dennis Nyandu versus Francis Aburi Oyaro [2021] eKLR* the Court stated as follows: -

> ' The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest'

19. Furthermore, in *Iga versus Makerere University [1972] EA* it was held that: -

> ' A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.'

20. It is not plausible in the nature of things how sweet potatoes planted in 2004 could be harvested in 2014.

21. The court takes judicial notice that sweet potatoes only stay on land for half year or thereabouts. It is important to note that even on merit, the Respondent's claim was untenable. The crops are not indicated to have been destroyed on a specific parcel of land since the report detailing assessment does not say on which land the crops were planted.

22. The other question that the court will ask itself is whether this is truly a land matter or a commercial dispute. My view, is that there is no ownership dispute within the parties but a dispute relating to the destruction of property belonging to a deceased person.

23. The procedure of claim for such was not followed as letters of administration to both deceaseds herein have not been produced. The parties are duelling over property that is not theirs the Appeal is thus meritorious and I proceed to allow it.

Determination

24. The appeal is allowed in the following terms: -

    a. Judgment entered for the respondent against the appeal in the subordinate court on October 17, 2019 in Machakos CMCC 767 of 2015 is set aside in toto;

    b. The plaintiff suit in the lower court is hereby struck out with costs of Kes 30,000/- to the appellant in the court below and Kes 35,000/= in this court;

    c. The costs be payable within 30 days. Failure

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mutinda Kimeu for the Appellant

No appearance for the Respondent

Ms. Winnie Migot – Court Assistant