



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. E26 OF 2021**

**(Consolidated with ELCA E027 OF 2021 vide court order of 5.7.2021)**

**CATHOLIC DIOCESE OF MERU.....1<sup>ST</sup> APPELLANT**

**MARGARET KANINI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GEORGE KALERIA MUCHENA.....RESPONDENT**

***(Being an appeal from the Judgment of Hon. P.M. Wechuli (P.M.)***

***delivered on 7<sup>th</sup> January , 2021, in Tigania PM E&L No. 62 of 2020)***

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants seeks reversal of the lower court judgment on the grounds that:- the 1<sup>st</sup> appellant was wrongly sued, the suit disclosed no cause of action against him; the court had no jurisdiction to hear and determine the suit; orders issued were against a material evidence as produced; the court failed to give the 2<sup>nd</sup> appellant an opportunity to procure and produce crucial evidence; denied the 2<sup>nd</sup> appellant opportunity to be heard; failed to grant the 2<sup>nd</sup> appellant to have legal representation; failed to recuse himself upon request; failed to appreciate the 2<sup>nd</sup> appellant was wrongly enjoined as her parcel was in the name of her deceased husband; based the judgment on a inconclusive expert evidence; further there was encroachment on the part of the 2<sup>nd</sup> appellant without any basis in law and lastly condemned the 2<sup>nd</sup> appellant to pay costs when there was no demand letter prior to filing suit.

**A. PLEADINGS**

2. The respondent had filed a suit by way of a plaint dated **9.9.2020** suing **Agapius Njeru** through **Catholic Diocese of Meru the 1<sup>st</sup> appellant and Margaret Kanini (2<sup>nd</sup> appellant)** claiming to be an active user and possessor of unnamed property which on 5.6.2020, the 2<sup>nd</sup> appellant under instructions of the 1<sup>st</sup> appellant trespassed into and maliciously caused damage assessed at **Kshs. 91, 800/=**. He alleged the trespass was unlawful and inequitable entry which was still continuing and amounted to an affront to his right to enter, own and use his property.

3. The respondent prayed for a permanent injunction barring and restraining the appellants, their agents, servants or any one acting under their names from entering or dealing in any way or interfering with **Land Parcel No. Meru North Athinga/Athanja/5565**.

4. By a defence dated 6<sup>th</sup> September 2020, the 1<sup>st</sup> appellant denied the claim stating their land was **Parcel No. Meru North/Athinga/Athanja/6019** which was distinct and hence it was the respondent encroaching on it without any justification.

5. At paragraph 9, the 1<sup>st</sup> appellant pleaded he was improperly enjoined since he was a Meru Parish Priest under the Catholic Diocese of Meru and not the legal entity for the Diocese of Meru. He urged the court to find no cause of action had been disclosed and strike out the suit with costs since Catholic Diocese of Meru registered trustees had not been sued.

6. On the other hand the 2<sup>nd</sup> appellant by a defence dated 29.9.2020 denied the respondent's suit. In particular she denied acting under the 1<sup>st</sup> appellant's instructions to trespass into the alleged land.

7. As a first appellate court, **Section 78** of the **Civil Procedure Act** mandates the court to examine matters of both law and facts and subject

the whole of the evidence to a fresh and exhaustive scrutiny before drawing conclusions and findings bearing in mind the court did not have an opportunity to see and hear the witnesses first hand.

8. Further in *Peter M. Kariuki –vs-Attorney General* the Court of Appeal held:

*“that by reconsidering the evidence adduced, the court ought to draw its conclusion and findings so as to satisfy itself the consistency of the conclusion by the trial court with the evidence tendered.”*

#### **B. TESTIMONY**

9. **PW1** testified that his land was ancestral land and that Antuanu Catholic Church had encroached into it. He produced P Exh 1-4 to back his claim and prayed for restraining orders against the appellants.

10. In cross-examination the respondent testified that though the land was not registered in the name of DW1, he was the man in-charge since 2017, the land was registered in the name of Antuanu Catholic Church, admitted boundary disputes are handled by a District Land Registrar though he had not filed any documents to establish such a dispute had been heard and determined before moving to court. He admitted the 1<sup>st</sup> appellant was not occupying his land but had allegedly influenced his church followers to build a footpath on his land. He admitted he had not pleaded such particulars in his plaint.

11. In further cross-examination the respondent told the court there had been a previous case between the church and the 2<sup>nd</sup> appellant which had been withdrawn. Additionally the respondent stated he had sued the 2<sup>nd</sup> appellant for cutting down his trees and trespassing on his land.

12. **DW1** testified to be the priest in-charge of Tigania Parish, Catholic Diocese of Meru. He adopted his statement made on 3.11.2020 and produced D Exh 1-5 to demonstrate he was wrongly sued and that their land was distinct from the plaintiff's land.

13. In **cross-examination** the 1<sup>st</sup> appellant maintained that parcel No. 6019 belonged to the Catholic Diocese of Meru, denied being on the plaintiff's land and stated the case ought to be withdrawn as against him.

14. DW2 testified the respondent was her relative, claimed the land was registered under her deceased husband one Ringera, stated though she had ownership documents, she had not collected them from Nuru Land Office. She stated she had been on the suit land for over 5 years with no complaint on her occupation from anyone. She vehemently denied receiving any demand letter before the suit was filed.

15. After the close of defence case a request was made for a surveyor to visit the scene on **10.12.2020**, and file a report by 14.12.2020. The said report was duly filed.

16. The 1<sup>st</sup> appellant urges the court to find there was no cause of action against him, was improperly joined to the proceedings and the final orders were made against a party who was wrongly enjoined to the suit.

17. In considering this aspect the trial court confirmed in the judgement, **Parcel No. 6019** was registered in the name of **Antuanu Church Catholic Diocese** and that the church ought to have been sued. He held indeed there was misjoinder of parties but went on to hold the same was not fatal.

18. Looking at the 1<sup>st</sup> appellant's defence and list of witnesses and documents dated 3.1.2020, he makes it clear he was not one of the Catholic Diocese of Meru Registered Trustee(s), and that the land alleged to have encroached into the respondent's land was not registered in his name but Antuanu Church Catholic Diocese. He produced **D Exh 1-5** which was clear that he was wrongly enjoined into the proceedings.

19. While the trial court seems to rely on, **Order 1 rule 9, Order 1 rule (2)** states a court has powers to order a name be struck out and order a joinder of a necessary party so as to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

20. The 1<sup>st</sup> appellant was not sued as an agent of Antuanu Catholic Church. He produced **D Exh 1** showing his appointing authority and the place he was in-charge – Tigania Parish. **D Exh 1** is clear there was no Antuanu Catholic Diocese of Meru. **D Exh 2** does not include the name of the 1<sup>st</sup> appellant. There was therefore no nexus between D Exh 2 and the 1<sup>st</sup> appellant.

21. In *Registered Trustees of the Catholic Diocese of Muranga & Another –vs- James Mwangi & 2 Others [2014] eKLR* in a noting the court in *Jane Nyambua Joshua –vs- Apostolic Faith Church*, the court held:

*“A church would only be sued through its registered trustees as per Trustees (Perpetual Succession Act Cap 164 Laws of Kenya.”*

22. **Section 26(1)** of the **Land Registration Act 2012** provides all courts shall take **D Exh 1** as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The first appellant made it clear since filing of the suit he was not the registered owner of the suit land and neither was he a Catholic Diocese of Meru Registered Trustee as per **Cap 164**. The trial court therefore misdirected itself by finding misjoinder was not fatal and going ahead to determine the issues between the parties.

23. If a party is not properly before the court and the one who is registered owner is absent it was an act in futility for the court to proceed with the hearing and condemn a third party through the 1<sup>st</sup> appellant who had pleaded and testified he was not the right person to plead to the

case and be answerable for misdeeds of a registered proprietor who had no connection with him.

24. The 2<sup>nd</sup> appellant raised the issue that her land was registered in the name of her deceased husband and that she was not his legal representative. The trial court in my view ought to have determined that issue and not wish it away for again a decree could not issue against a deceased person without bringing on board a legal representative.

25. In *Munywoki Musuva Ngao –vs- Mutua Mbinda & Another [2019] eKLR* the court struck out a suit where like in the instant suit the property was registered in the name of a deceased person.

26. The 2<sup>nd</sup> major ground of appeal is that the subject matter was a boundary dispute hence the court had no jurisdiction to hear and determine it. The plaintiff alleges encroachment and trespass. The respondent testified he had not supplied any documents to show the land registrar had determined the issue to finality before filing the suit. In cross-examination he admitted he was aware it was the Land Registrar's mandate to hear the dispute.

27. During defence testimony it came out clearly the matter was over boundary between **Parcels No's 6019, 5565 and 5569** and 5652. This is the reason the court made an order on 31.11.2020 for the surveyor to visit the disputed parcels and file a report. The surveyor's report dated 14.12.2020 and which the trial court relied upon was based on Provisional Registry Index Map, which is not conclusive under the **Surveyors Act**.

28. The report made a recommendation that the District Land Adjudication & Settlement Officer Tigania East do provide another report portraying the position of Parcel No. 5652 on the Registry Index Map. The surveyor's report is clear the issue is over boundary dispute. Instead of seeking for a conclusive expert report from the District Land Registrar and the Adjudication & Settlement officer the trial court went ahead to make conclusive determination on parties' legal rights.

29. The mandate to settle boundary disputes exclusively belongs to a Land Registrar under **Section 18 (1)** of the **Land Registration Act 2012**. **Section 18(2)** of the **Land Registration Act** provides a court shall not entertain any actions or other proceedings relating to a dispute as to the boundaries of a registered land unless the boundaries have been determined in accordance with this section. Under **Section 19** thereof the power to fix boundaries of a registered land is vested with the Land Registrar who can avail accurate plans.

30. The Court of Appeal in *Azzuri Ltd –vs- Pink Properties Ltd [2018] eKLR* held:

*“Boundary disputes pertaining to land must be referred to a Land Registrar for resolution hence courts lack jurisdiction to entertain such disputes in the first instance.”*

31. Further in *George Kamau Macharia –vs- Dexka Ltd. [2019] eKLR*, the court held:

*“It was the Land Registrar who has technical experts and resources to determine and ascertain the boundaries hence the court ought to defer such a matter before it is escalated to court.”*

32. Further in *Estate Sonrisa Ltd. & Another –vs- Samuel Kamau Macharia & 2 Others [2020] eKLR* the Court of Appeal affirmed the position that parties can only move to court after the Land Registrar has made a decision in order to challenge it under **Sections 79 (3) (G) 80, 86 and 91 (G)** of the **Land Registration Act**.

33. In view of the foregoing decisions, it is my finding the lower court lacked jurisdiction to entertain the suit in the first instance.

34. On the issue of giving the 2<sup>nd</sup> appellant an opportunity to procure and produce crucial evidence, the record shows parties were ordered to comply with pretrial directions and file the necessary documents before the matter was set down for hearing. The 2<sup>nd</sup> appellant could not therefore fault the trial court for her own mistakes.

35. Lastly on the issue of recusal, there is no evidence that application based on tangible evidence was filed and grounds laid for the court to recuse itself. In absence of such material, the court finds such a ground lacking merit.

36. In view of the foregoing I find the appeal with merits on grounds above stated. The appeal is allowed with costs. The lower court suit is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

Mukangara for 1<sup>st</sup> appellant

Mbaabu Inoti for 2<sup>nd</sup> appellant – absent

Kaberia for respondent

**HON. C.K. NZILI**

