



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E018 OF 2020

JOSHUA KABURU KIMATHI.....1ST APPELLANT

SIMON GITONGA M'IKIOME.....2ND APPELLANT

VERSUS

EVANGELINE KAGWENI.....RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.)

delivered on 4th May, 2020, in Githongo PM E & L No. 9 OF 2017)

JUDGMENT

1. By an appeal dated **16.12.2020** the lower court judgment is sought to be set aside on the grounds that:- it is considered irrelevant and remote factors; was based on diversionary and biased approach hence occasioning injustice to the appellant; was against the appellants proprietary rights; was contradictory and self-defeating judgment and lastly was against the weight of the evidence tendered.
2. This being a first appeal, the court is expected by law to review, reassess and rehearse the pleadings, evidence and law and come up with its own findings and conclusions while aware the lower court had the benefit of seeing and hearing the witnesses. ***See Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123.***
3. The appellants had sued the respondent for illegally and without justification placing cautions over **Parcel L.R. No's Abothuguchi/Kariene/3709 and 3707**. They sought the cautions to be lifted and or set aside.
4. The respondent filed a defence and counterclaim based on spousal, family and customary trust and sought that the alleged sale and or transfer be invalidated on account of lack of a spousal consent, fraud and illegality.
5. She further averred there was a pending suit namely **Meru CMCC No. 322 of 2013**. She counterclaimed for a permanent injunction stopping any eviction or interference with her possession and occupation of the suit land, cancellation of the purported sale/transfer and the land be registered under her name.

EVIDENCE

6. PW1 adopted his witness statement dated 16.2.2018 and produced documents as per his list dated 26.7.2013 namely a sale agreement, copy of a search, 1st and 2nd agreements, a search, copy of the proceedings and judgment as **P exh 1 – 6** respectively.
7. In cross examination PW1 stated the land was vacant at the time he bought it and denied it was not occupied though it had some bushes, confirmed the 2nd plaintiff was husband to the defendant; admitted he was unaware of any succession proceedings over the suit land and stated he was not aware of the original owner of the land. He was clear s he did not involve the defendant and her six children in the sale transaction.
8. PW1 testified he was not aware there had been a case at the chief's office but admitted the cautions were placed after the transfer over the two parcels. He told the court that Parcel No. 3703 was being utilized by the 2nd appellant and his family though none of the family members were consulted during the transactions. He stated a special land control board handled the transfer at Meru town and could not tell how the 2nd appellant spent the money though he denied he was a drunkard. He testified he was not aware there was a counterclaim and could not tell why the respondent was seeking that the land reverts back to her.

9. As regards the criminal case PW1 said he did not know of any appeal pending before the High Court and denied he secretly bought the land without involving the respondent or her children. He confirmed he had taken up possession of Parcel **No. 3709**.
10. In re-examination PW1 alleged the respondent was on a different parcel of land, denied he was an official of the land control board and could not confirm if an appeal was pending.
11. PW2 adopted his witness statement dated 26.7.2013 confirmed the two agreements were written and monies paid to him. He stated he had no problem transferring the land to the 1st appellant hence requested the cautions be lifted.
12. In cross examination PW2 admitted he lived with the respondent with their six children though he did not seek their consent or have a witness during the sale agreements with the 1st appellant. He admitted he had inherited the land from his late father and that initially the land belonged to his late brother after which a succession cause was filed and the land transferred to them. He claimed his other brothers got their shares out of his father's estate.
13. Further PW2 admitted the respondent cautioned the suit land for she did not approve of the sale or transfer or transfer. PW1 denied receiving the full purchase price, could not recall the balance and hence did not demand for it since the land had a caution, but was optimistic the 1st appellant would eventually clear the balance. He denied he was threatened to sue his wife but insisted she owned no land at all.
14. Further PW2 admitted he was paid the purchase price in installments as of little as 500/=, 2,000/= or 5,000/=. PW2 admitted he took beer, gave some money to the respondent and her children though they did not value him at all.
15. As regards the land control board meeting, PW2 admitted he was directed on where to go and what to do by PW1. He claimed the respondent and other family members had abandoned him. He however admitted he had differences with his wife for she did not take care of him.
16. In re-examination PW2 claimed the respondent was not living on the suit land for she had other parcels of land elsewhere, that he had given his children a share and that his other brothers got shares elsewhere. Further PW2 insisted he used the purchase price with his family and that there was nothing irregular with the transactions.
17. Further PW2 insisted the respondent mistreated him and that though he was a drunkard, at the time the sale agreements were made he was in sober mind.
18. DW1 adopted her witness statement dated 30.6.2014, stated PW2 was her husband and that the subject parcels of land were family land registered out of a succession cause of her late brother in law, one John Mutwiri M'Kiume. She denied her spousal consent to sell the parcels was ever sought or obtained, for **Parcel No. 3707** where she occupies and lives while in **Parcel No. 3709** she had coffee and banana trees. She denied she accompanied PW2 to the land control board meeting.
19. DW1 produced two letters from the area chief, an application for caution, copy of a plaint in **ELC No. 209 of 2013** as **D exh 1 – 5** respectively. She urged the suit be dismissed and her counterclaim be allowed.
20. In cross examination, DW1 acknowledged being charged in a criminal case initiated by PW1 when the subject land was still under PW2's name but stated she had appealed against the conviction and sentence. DW1 admitted they had children still in school but stated she lived in Nyweri though she utilizes the suit land. She admitted her husband was a drunkard and may have signed the sale agreements while drunk.
21. DW1 stated the land initially belonged to her late brother in law but had left the suit land in trust for her family. She testified she went to the area chief who gave her letters to go and place a caution over the suit land for they were sold without her consent or approval.
22. In re-examination DW1 insisted their late brother in law had inherited the suit land from her father-in-law and that before the alleged sale, she was utilizing the suit land especially Parcel No. 3709 and that PW2 did not disclose to her and the children about the purported sale to which she made a report at the chief's office in presence of the 2nd appellant who denied any such sale was taking place.
23. Further DW1 confirmed she did not know how the money was utilized for the 2nd appellant had fled her home after the money was paid to him. She insisted he was a drunkard.
24. DW2 as the area chief Kariene, confirmed he authored **D exh 1 & 2** addressed to PW2 with regard to a land dispute. In cross examination he confirmed PW2 failed to honour the summons.
25. This is the evidence the trial court used to dismiss the suit and enter judgment in favour of the respondent as per the counterclaim.
26. With leave of court and consent parties opted to canvass the appeal through written submissions dated 18.10.2021 and 3.11.2021 respectively.
27. The appellants submit there was no material for the lower court to make a finding at page 38 of the records that the suit lands were ancestral and being occupied by the respondent together with her children, yet the same was not pleaded nor proved by either evidence or by seeking for a scene visit so as to show the court the status.
28. Further the appellants submit the court was biased since it only took the version of the respondent and not the appellants.

29. The appellants submit the court gave prayers at page 38 of the record of appeal which were not sought in the counterclaim in total disregard of the appellants claim, voiding the transaction for lack of spousal consent without any basis which was not only remote but based on imagination and not evidence.

30. Again the appellants submits the 1st appellant was unjustly denied his proprietary rights by the court failing to evaluate the evidence of the 2nd appellant who had sold the parcels to him without considering the prejudice and financial loss he would suffer out of the judgment, notwithstanding the judgment was against the available evidence.

31. On the other hand the respondent submits there was no dispute that:

a) The 2nd appellant and the respondent were husband and wife,

b) Both were occupying the suit land

c) There was admission of non-involvement of the respondent or her children in the transaction.

32. Consequently the respondent submits she had rights which were protectable under **Section 71 (1) Land Registration Act 2012** to justify the registration of the cautions on account of overriding interests.

33. Further it is submitted the trial court was impartial and rational basing its judgment on evidence over the manner in which the suit land was acquired by the 2nd appellant on account of succession case, secrecy and the speed in which the land was transferred and registered in favour of 1st appellant.

34. The respondent insists the court had powers to frame issues on a point not covered by the pleadings and on which a decision is necessary as held in **G.K Macharia & Another –vs- Lucy N. Mungai [1995] eKLR.**

35. Forth it is submitted the judgment was fair, objective and cannot be faulted given the evidence tendered on succession cause, issue of occupation by the respondent and her overriding interests,hence the judgment had no ambiguity at all.

36. Having gone through the foregoing ,the issues for determination are:-

a) Whether the trial court was justified in declining to lift the cautions placed over the suit land by the respondent.

b) Whether the trial court erred in law and in fact in finding the respondent to have proved her counterclaim on a balance of probability.

37. The appellants claim was that the respondent had no justification in law and in fact in lodging the cautions and hence sought the court to lift, set aside and or remove them.

38. **Sections 71, 72, 73, 74 and 75 of the Land Registration Act Rev. 2020** covers the law on lodging and removal of a caution. The power to remove a caution is donated to both the land registrar and the court. In the instant case no evidence was tendered by the appellants to show if they ever invoked **Section 73 (2) of Land Registration Act as the first port of call.**

39. **Section 75 thereof** provides for instances of wrongful caution lodged without reasonable cause and grants an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.

40. The appellants approached the court by way of a plaint and not a miscellaneous application or an originating summons. Once the respondent was served with the plaint, she opted to file a defence and a counterclaim dated 10.11.2014. At paragraph 3 she denied the 1st appellant was the owner of **Parcel No's 3709 and 3707** and put him to strict proof. In paragraph 4 she pleaded illegality, fraud and lack of a good title since the property was held in trust for her and her family. At paragraph 6 she pleaded she placed the cautions to protect the property for the benefit of her family and hence denied the contents of paragraph 6, 7, 8 and 9 of the plaint and put the appellants to strict proof. At paragraph 9 she pleaded there was a conspiracy between the appellants to deprive her family of the land, claimed her husband was a drunkard, had neglected and wanted to render the family landless and or destitute.

41. Further she denied service upon her of any demand letter, claimed the appellants were not entitled to the orders sought on account of fraud and illegality and stated the cautions were merited.

42. At paragraph 14 of the counterclaim she pleaded the suit parcels were family trust land,and that she was entitled to a share as her family had all along been utilizing the same for a long period of time. Further at paragraph 15 she pleaded the 2nd appellant was fraudulently seeking to sell the same to the 1st appellant without her consent and gave particulars of fraud on account of each of the appellants. In paragraph 16 and 17 of the counterclaim she gave details of the prayers sought and claimed there was a pending **Meru CMCC Case No. 322 of 2013** over the subject matter.

43. The respondent made three specific prayers at the end of her counterclaim namely dismissal of the appellants suit and judgment in her favour for a permanent injunction, an order that the suit parcels are family land,and lastly the transfers be cancelled and the land be registered under her names.

44. The respondent verified the counterclaim through an affidavit and pleaded an existing case **Meru CMCC No. 322 of 2013** and **Nkubu Criminal Case No. 1911 of 2013**.
45. The appellants filed a reply to the defence and defence to counterclaim dated 1.12.2014, which did specifically deny the contents of paragraph 6 of the defence and counterclaim in which the respondent had averred she cautioned the properties to protect her interests and the benefits of the family.
46. Similarly the reply to defence did not deny the contents of paragraph 10 and 11 of the defence in which the respondent had stated the reliefs sought in the plaint should not be given since her cautions had merits.
47. Further and as can be seen from the reply to defence and defence to the counterclaim the appellants gave a joint denial to the contents of paragraph 15 of the counterclaim yet the respondents had particularized accounts of the 1st appellant and the 2nd appellant separately.
48. In ***Joseph Kowen Chemjor -vs- William C. Kiseru [2013] eKLR***, **Munya, J**, held a party seeking to have a caution removed had on a balance of probabilities to show why the defendant had no right to place the caution on his title and why the caution needed to be removed.
49. The 1st appellant chose to file the suit together with the 2nd appellant who is the husband to the respondent. The concept of spousal consent was introduced by the **Land Act** and **Land Registration Act 2012**. On the other hand **Section 12** of the **Matrimonial Property Act** governs land when there are marital relations.
50. The respondent pleaded beneficial interest and went on to lead evidence to show her husband was estopped from selling the suit land without her knowledge or approval. She pleaded the issues as demonstrated above and produced documentary evidence on how she had been resisting the claim by the 1st appellant to an extent of being charged and convicted in a court of law at Nkubu Law Courts. Further she traced the root of the title from her late father in law through the brother in law and eventually to the 2nd appellant.
51. **Section 71** of the **Land Registration Act** grants the respondent as a spouse to the 2nd appellant rights to lodge a caution based on her status as a spouse with known rights or interests over land in line with Article 45 of the Constitution.
52. **Section 93** of the **Land Registration Acts** provides for co-ownership between spouses on interests in land obtained during subsistence of a marriage. It declares such property to be deemed as matrimonial property.
53. PW1 did not deny the respondent is his spouse. PW1 and PW2 admitted they did not seek the consent of the respondent during the sale and eventual transfer. Similarly the respondent pleaded non-involvement and hence her objection to the transaction. Her evidence was consistent that she did not approve of the sale hence the reason she lodged the cautions.
54. In ***Maria Ngangi Gwako -vs- Charles Mwenzi Ngangi [2014] eKLR*** the court held the onus is upon the cautioner to justify the lodging of the caution and the need for it to remain in place.
55. **Article 45** of the **Constitution** recognizes the place of the respondent in the society and life of the 2nd appellant. The respondent pleaded the acts of the appellants are aimed at rendering her and her children destitute and landless. She also claimed a share of the land in line with **Section 93** of the **Land Registration Act**.
56. The 2nd appellant was not very clear on whether he had made an alternative provision for the respondent and the children. Further it was also not very clear from him if he had been cleared of the purchase price other than insisting he was hopeful the 1st appellant would pay him the balance with time.
57. **Section 25** of the **Land Registration Act** provides the rights of a proprietor to land are subject to overriding rights as per **Section 28** which need not be noted in the register.
58. In ***Joseph Githinji Gathiba v Charles Kingori Gathiba (2001) 2 E.A 342*** the court held **Sections 38 and 126 (1)** of the **Registered Land Act** recognized trust where a person is holding land in a fiduciary capacity.
59. Given that the respondent is a recognized spouse of the 2nd appellant and who has admitted they live together, my view is the claim by the respondent was not so remote such that it could not be recognized by the law through lodging of a caution.
60. In ***Salesio M'itonga -vs- M'Thira & 3 Others [2015] eKLR*** the Court of Appeal stated that a trust is a question of fact to be proved by evidence. In this case the respondent gave evidence which was admitted by the appellants that the suit land was out of a succession cause and hence both ancestral and trust land. The land devolved to the 2nd appellant upon the death of his brother hence falling under the concept of intergenerational equity. See ***Mbui Mukangu -vs- Gerald Mutwiri Mbui [2004] eKLR***.
61. It has been submitted by the appellants that there was no evidence that the respondent was in possession of the suit land to found a claim of trust. In ***George Mbiti Kiebia & Another -vs- Isaya Theuri M'Lintari & another [2014] eKLR*** the Court held one did not need to be in possession or occupation to prove a customary trust.
62. The 2nd appellant has acknowledged the respondent is his spouse, they live together and have children some in schooling age. The 2nd appellant also admitted they have had occasional differences with the respondent. Further the respondent alleged the 2nd appellant was not providing for them and that upon disposal of the land he disappeared and they never got the alleged purchase price.

63. In *Douglas Macharia Waithaa –vs- Samuel Mugo Njoki [2018] eKLR*, the court faced with a similar situation as in the instant case allowed a counterclaim.

64. In the premises my considered view is that the lower court reached a correct decision based on the pleadings, evidence and the law. The same is confirmed.

The appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Ndubi for appellants

Miss Mukanguru for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE