REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL CASE NO. 43 OF 2017

CYRUS KABIRA NJINE.....1ST APPELLANT

NDAMBIRI KUIRA.....2ND APPELLANT

VERSUS

ESTHER MUTHONI NDAMBIRI.....1ST RESPONDENT

PAUL MBOGO.....2ND RESPONDENT

DAVID NJIRU.....3RD RESPONDENT

FRANCIS MUGO.....4TH RESPONDENT

JOSEPH WACHIRA.....5TH RESPONDENT

DANIEL MURIUKI.....6TH RESPONDENT

JUDGMENT

1. The appellant Cyrus Kabira Njine **(to be referred to as the 1st appellant)** had filed a suit at Embu Chief Magistrate's Court Civil Case No. 52/2007 against Ndambiri Kuira, now the 2nd appellant, to recover a sum of Kshs 1,354,750/-. It was alleged that the money was paid to 2nd appellant as consideration for the purchase of his land parcel No. Kabare/Gachigi/568 measuring Three(3) acres and expenses which were incurred pursuant to the transaction and interests at 30% with effect from 8/9/06 till payment in full as agreed in the agreement dated 29/8/2015.

2. From the record of the Lower Court the defendant failed to enter appearance and also failed to file a defence. The court entered Judgment against the defendant, who is the 2nd appellant in this appeal in this appeal in the sum of Kshs 1,354,750/-. A decree was drawn together with the certificate of costs.

3. The 1st appellant took out a notice to show cause why the defendant could not be committed to Civil jail. Upon service the 2nd appellant who was the defendant appeared in court and recorded a consent with the 1st appellant to the effect that the decretal sum be settled by way of transfer to him of his title No. Kabare/Gachigi/568. It was also a term of the consent that the 2nd appellant would undertake to execute all the necessary documents to effect the transfer failure to which the Executive Officer of the Court would execute the documents. The consent was adopted as the order of this court.

4. The 1st respondent filed an application dated 9/4/08 with her co-respondents who are her sons seeking an order that they be joined in the suit as interested parties and for an order that the order of 8/4/08 be stayed. The court granted the orders in the application exparte pending interpartes hearing. The substantive prayer in the application was that land parcel No. Kabare/Gachigi/568 be subdivided as per the agreement dated 22/1/02 between the defendant and the interested party. The 1st respondent was the estranged wife of the 2nd appellant and her co-respondents are her children. They had sued the 2nd appellant in Kerugoya Senior Principal Magistrates Court at Kerugoya Civil Suit No. 34/2007 making the same claim of a portion of land out of Kabare/Gachigi/568.

5. The 2nd appellant filed a defence and counterclaim. The case was concluded and a decree issued to the effect that the application dated 8/2/07 was struck out with costs. The defendant's application dated 19/2/07 was allowed and the plaint was struck out. Judgment was

entered for the defendant on the counterclaim. The respondents filed **Embu High Court Civil Appeal No. 9/2008** against the decision in **S.P.M Kerugoya Civil Suit No. 34/2007**. The appeal has not heard and determined.

6. Back in the matter before the Senior Principal Magistrate Embu the application dated 9/4/2008 by the respondents was allowed to the effect that they were joined as interested parties. The judgment in favour of the 1st appellant and the consent order were set aside. The court ordered the suit to be heard afresh. The appellants were aggrieved by that ruling and filed which has raised the following grounds.

a) The Learned Senior Principal Magistrate erred in fact and in law in setting aside the regular judgment obtained by the 1st appellant without lawful cause.

b) The Learned Senior Principal Magistrate erred in law and fact in setting aside the consent orders entered into on 8.4.2008 between the appellants in satisfaction of a lawful decree in favour of the 1st appellant.

c) The Learned Senior Principal Magistrate erred in law and in fact in purporting to criticize and generally sit on appeal against the orders and decree of P.T. Nditika Senior Resident Magistrate in Kerugoya S.R.M.C.C. No. 34 of 2007 to the effect that the Respondents had no right in the 2nd appellant's Title No. KABARE/GACHIGI/568 when he had no jurisdiction to do so.

d) The Learned Senior Principal Magistrate erred in law and in fact in disregarding the law and opting to act on hearsay thereby making biased and prejudicial remarks in support of his unjustifiable decision to the effect that the appellants had colluded and/or conspired together to deprive the Respondents of alleged rights in the aforementioned title registered in the name of the 2nd appellant under the Registered Land Act, Cap 300.

e) The Learned Senior Principal Magistrate failed to appreciate that the 1st appellant was not party to an alleged agreement between the 2nd appellant and the Respondents upon which the latter based their claim on the suitland, a matter which was in any case res-judicata as the same had been adjudicated upon by the Kerugoya Court and was the subject-matter of Embu High Court Civil Appeal No. 9 of 2008.

f) The Learned Senior Principal's order allowing the Respondents to be joined as interested parties was unlawful and occasioned grave injustice to the appellants.

g) The Learned Senior Principal Magistrate's ruling and orders are contrary to law and justice.

7. The appellant prays that the appeal be allowed with costs and the ruling of the Senior Principal Magistrate be set aside.

8. The respondents opposed the appeal. The parties agreed to file written submissions. For the appellant, submissions were filed by I. W. Muchiri and Company Advocates. For the respondents, submissions were filed by M/s Anne Thungu Advocates.

9. I have considered the grounds of appeal, the record of appeal and the submissions. The 1st appellant submits that the 2nd appellant passed away on 5/10/2010 but she has opted to pursue the appeal as they had common grievances against the respondents as this is allowed under **Order 42 Rule 5 of the Civil Procedure Rules**. This is the position as rule allows any of the plaintiff or defendants to pursue the appeal and the High Court may reverse or vary the decree in favour of all the plaintiffs or the defendants.

10. Having considered the submissions, I find that there are two issues which arise for determination. These are:-

1) Joinder of parties.

2) Setting aside the consent order.

3) Res-judicata.

1. Joinder of Parties.

The appellant submits that he had sued the 2nd appellant on a contract to which the respondents were not privy. He submits that the trial Magistrate erred by entertaining the respondents' application to be enjoined in a suit purely based on a contract for refund of the purchase price paid in respect of land to which they were total strangers. He submits that at page 1237 of Black Law Dictionary 8th Edition the term privity of contract is defined as the relationship between the parties to a contract, allowing them to sue each other but preventing a 3rd party from doing so.

11. It is further submitted that the application under which the orders were issued was under **Order 1 Rule 10 (repealed Civil Procedure Act) and Section 3A Civil Procedure Act** which could not be invoked where there exists specific provisions catering for the relief sought. That **Section 3A** could not be invoked. That **Order 10 rule -1- Civil Procedure Rules** had no provision for joinder of interested parties which was a term unknown to it and the claim of the respondents ought not to have been entertained and more so because their claim over the 2nd appellants parcel of land had been adjudicated and found to be baseless. The Judgment which they sought to set aside had been regularly obtained.

12. For the respondent it is submitted that the ground has no merits. They rely on **Milimani High Court ELJ JR MISC Case No. 253/12 Republic –v- A. G & Others** which quoted with approval the case **Meme –v- Republic (2004) I KLR 637**, where it was held that at a very basic level the court is empowered to draw from the Civil Procedure Rules in exercise of powers under the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules by virtue of **Order 1 Rule 10(2)**, the court is empowered to direct joinder of parties in such a way as to enable the court to effectively and completely adjudicate upon and settle questions involved in the suit. They also rely on **Duncan M. Muchira & Others –v- Fidelity Commercial Bank Ltd HCCC 654/07, Ian Gwonda – v- James Nyangai Osoro & 2 Others Kisii HCCC/25/2008**. None of these authorities were supplied.

13. The respondent has also relied on **Departed Asian Property Custodian Board –v- Jaffer Brothers Ltd (1999) I.E.A 55** where it was stated that,

> ***"a clear distinction is called for between joining a party who ought to have been joined whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in that suit. A party maybe joined in a suit, not because there is a cause of action against it because that parties presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the cause or matter."***

The respondent submits that the court correctly enjoined the respondents as interested parties.

14. The application by the respondents to be joined in the suit was brought under **Order 1 rule 10 of the repealed Civil Procedure Act** it allowed the court to order substitution of a plaintiff where the suit had been instituted in the name of the wrong person. **Order 1 rule 10(2) of the Old Civil Procedure Rules** was the relevant provision under which the application could be brought. However, under **Order 50 rule 12**, an application which had not quoted the provision under which it was brought could not be defeated for that reason only but the court had discretion to hear and determine the issue. Failure to quote the correct provision was a technicality and since this judgment is being given in this age and time, I should not determine the appeal on a technicality as there are now various provisions urging the court to do substantial justice other than rely on procedural technicality, like **Section 1A & 1B of the Civil Procedure Act and Article 159 of the Constitution.**

Order 1 rule 10(2) of the Civil Procedure Rules provides:-

> ***"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."***

15. The Court is empowered to order the joinder of a party or parties in order to assist the court to effectively and conclusively to adjudicate upon and determine questions involved in the suit. A party maybe joined at any stage of the proceeding to enable the court determine all the issues in dispute. It therefore presupposes that a party is joined at the stage where his evidence will be adduced and considered before the hearing and determination of the case. A party will not be joined in a suit where such joinder will present practical problems of handling the existing cause of action together with the one of the party being joined or where it is unnecessary to join the party. The joinder of a party may also be declined where the relief sought is incompatible, does not exist or may not be granted. Thus, although the law allows the joinder of parties it must be shown that the relief arises out of the same transaction or in the alternative where separate suits are filed any common question of law would arise. A party will be added if such party is necessary for the determination of the real issue in dispute. What determines whether a party should be joined is where a common question of law or fact would arise between the parties already in the suit and the party intended to be joined.

16. Although the **Order 10 rule 2 Civil Procedure Rules** provides that a party maybe joined in at any stage of the proceedings, what is contemplated is that the suit is still pending and the party joined will be able to present his case and the court will be able to consider his case when making the final judgment in the case. This proposition was considered by the Court of Appeal in the case of **J.M.K –v-MWM & Another (2015) eKLR** where the court stated:-

> ***"We would however agree with the respondent that Order 1 rule 10 (2) contemplates an application for amendment or joinder of parties where proceeding are still pending before the court. Sarkars Code(supra) quoting as authorities decisions of Indian Courts on the provisions expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein the Court of Appeal of Tanzania while considering the equivalent of Order 1 rule 10 (2) in Tang Gas Distributors Ltd –v- Said & Others stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, that a party on can be joined even without applying that the joinder maybe done either before, or during the trial, that it can be done even after judgment where damages are yet to be assessed, that it is only when a suit or proceeding has been finally disposed off and there is nothing more to be done that the rule becomes in applicable, and that a party can even be added at the appellate stage."***

17. The impugned application was filed after the judgment had been entered and a consent entered on the execution of the judgment. It was an Omnibus application which was seeking to join the interested parties. An order for sub-division of the suit property and setting aside the consent order which had been entered by the parties in the suit.

18. The trial Magistrate erred by joining the interested parties without seeking leave to be joined and parties. Secondly, the trial Magistrate erred by joining interested parties after the judgment had been entered and a consent order entered on execution. There were no proceedings at that where a party could be joined as a defendant or a plaintiff as provided under **Order 1 rule 10(2).** The dispute involved a contract between the plaintiff and the defendant. There was no privity of contract between the Interested parties and the plaintiff and the defendant. Finally, the issue in dispute between the 2nd defendant and the respondents had been determined by a court with competent jurisdiction by the time the trial Magistrate joined in the Interested parties. There was no matter pending between them and the parties in the suit and they

were clearly abusing the court process.

The ground has merits.

2. Setting aside the consent Order:-

It is submitted that the trial Magistrate erred in law and fact by setting aside the consent order entered into by the appellants on 8/4/08 in satisfaction of a lawful decree.

19. The trial Magistrate stated that there was collusion and that what was entered was interlocutory judgment and the suit should have proceeded to formal. The appellant submits that was not a reason to set aside a consent order. Page 41 of the record shows that a final Judgment was entered and since the claim was liquidated, there was no requirement for formal proof. Secondly, the defendant against whom judgment was entered never complained about the Judgment in default. The consent was entered before the Chief Magistrate in open court. The trial Magistrate had no basis to set aside the consent reached by the parties. The Interested parties were not parties to that consent. A consent can only be set aside where a party to that consent alleges fraud, misrepresentation or mistake. A Third party has no basis of setting aside a consent which he was not a party.

20. The Court of Appeal in **Flora N. Wasike –v- Destimo Wamboko (1982-1988) 1 Appeal Reports** restated the law relating to consent orders and Judgment and held that a consent Judgment can only be set aside on the same grounds as would justify setting aside a contract.

21. It is also true that the legal effect of a consent Judgment or order is emphasized at **Section 67 (2) of the Civil Procedure Act** which provides mandatorily –

> ***"No appeal shall lie from a decree passed by the court with the consent of parties."***

In this section reference to the parties must be construed to refer to parties to the consent and none other.

22. The trial Magistrate had no jurisdiction to set aside the consent order as the parties to the consent had not raised any issue with the consent.

23. The Interested parties had no locus standi to challenge a consent order where they were not parties. They did not prove that the consent order was a product of fraud, mistake, misrepresentation or collusion. Where fraud or collusion is alleged it must be strictly proved, see **Ratila Gordhanbhai Patel –v- Lalfi Makanyi (1957) E.A 314, at 317.**

I find that the trial Magistrate erred by setting aside the consent order.

24. I have considered the submissions on the issue by the respondents. The authority cited is persuasive and the facts are distinguishable. By the time the ruling was delivered by the trial Magistrate the present case, a court with competent jurisdiction has dismissed the Interested parties claim over the suit against the 2nd Appellant. So at the time the consent was entered, there was nothing the appellants they were trying to defeat. There was no dispute that the 2nd appellant was the absolute proprietor of the Land parcel No. Kabare/Gachigi/568 and he could deal with it the way he wished. The court which heard the parties at Kerugoya court found that the 2nd appellant as the registered proprietor has an independent right over the land.

25. I find that the trial Magistrate had no basis for settling aside the consent order. The ground has merits.

3. Res Judicata.

This is a doctrine which ensure that there is an end to litigation and also serves to safe judicial time and resources. It is based on **Section -7- of the Civil Procedure Act** which provides:-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

26. The applicant submits that at the time the trial Magistrate gave a ruling that the respondents had valid claims over the 2nd appellant's land and refusing to hold that such claims were res-judicata in view of the decree in Kerugoya Court, the Magistrate appeared to sit on appeal on the Judgment of his fellow Magistrate. The respondents did not address this issue.

27. The respondents have no claim against the 1st appellant. If they had, nothing had stopped them from joining him in the case they filed at Kerugoya. It is therefore clear that there claim in this case was against the 2nd respondent. Ground -5- in support of the application stated that the 2nd defendant had given them land. This issue was directly in issue before Kerugoya Magistrate's Court, No. 34/07 which had been determined. The trial Magistrate in the case at Embu which gave rise to this appeal had no jurisdiction to determine the issue between the 2nd appellant and the respondents.

28. In the application the respondents had said there was an appeal. It was not proper for the Magistrate who had coordinated jurisdiction to

sit on appeal see to **Karumba –v- National Bank of Kenya Ltd (2003) 2 E.A 475.** It is the High Court which could hear the appeal from the Magistrate's Court. As I have already stated at the time the respondents came to the suit it had already been finalized.

29. I find that as far as the Magistrate's court was concerned, the issue was res judicata having been determined by the Magistrate at Kerugoya. The ground of res judicata had merits.

30. The trial Magistrate erred by holding that the appellants had colluded. There was no basis for this finding as the appellants had colluded. The 2nd appellant had stated that he was forced out of his land by the interested parties. There was therefore no basis for the trial Magistrate to hold that there was collusion by the appellants. In any case there is no law that says that a father must give land to his adult sons. Being the registered proprietor he was free to deal with land as he wished.

31. I find that the appeal has merits. I allow it. I order that:-

1) The ruling of the trial Magistrate dated 14/5/2008 is set aside.

2) The respondent's application dated 9/4/08 is dismissed with costs.

32. Costs of the appeal to the appellants.

Dated at Kerugoya this 18th day of May 2020.

L. W. GITARI

JUDGE