



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. APPEAL CASE NO. 25 OF 2014

LUCY NJERI.....APPELLANT

=VERSUS=

ISAAC WANGOYA MWANGI1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

(Being appeal from Judgment and Decree of the Honourable D. Ole Keiwua (Mr) - Principal Magistrate delivered on 8/10/2012 in Milimani CMCC. NO. 10840 of 2006)

JUDGMENT

1. This appeal arises from the judgment of the lower court in Milimani CMCC No. 10840 of 2006 in which the lower court dismissed the appellant's suit. The appellant as the plaintiff had sued the respondents in relation to an unsurveyed and untitled piece of land designated as Plot No. C39 Kariobangi South/KCC Village Scheme, Nairobi (the **suit property**). In her plaint dated 15th September 2006, the appellant alleged that the 1st defendant had trespassed on the suit property which was allotted to her by the City Council of Nairobi on 7th January 2002. The appellant sought a permanent injunction and general damages for trespass.

2. The 1st respondent filed a defence and counterclaim dated 24th February 2010. He disputed the appellant's claim of ownership of the suit property and further denied trespassing onto the suit property. He contended that his entry, occupation and development of the suit property was regular and was pursuant to his allotment of the property by the City Council of Nairobi on 7th January 2001. He further contended that he had made payments to the Council pursuant to the allotment. In the counterclaim, the 1st defendant sought a declaration that the suit property belonged to him. He also sought a permanent injunction restraining the appellant from interfering with his quiet and peaceful occupation of the suit property.

3. The appellant testified but did not call witnesses. The 1st defendant closed his case without leading any evidence. In a judgment delivered on 8th October 2012, the trial court found that the appellant had failed to prove her case on a balance of probabilities and proceeded to dismiss the suit. The counterclaim was also dismissed for want of proof.

4. Aggrieved by the finding of the lower court, the appellant brought this appeal seeking to have the judgment of the lower court set aside and substituted with a judgment in terms of the prayers set out in the Plaint. In her Memorandum of Appeal dated 5th November 2012, the appellant raised the following seven (7) grounds of appeal:

1. That the learned magistrate erred in law by striking off the suit.

2. That the learned magistrate erred in law and in fact in failing to consider and give probative value to the evidence adduced by the plaintiff in support of her claim to ownership and possession of Plot No. 39 Kariobangi South/KCC Village Scheme.

3. That the learned trial Magistrate erred in law and fact in failing to take into consideration that the 1st defendant did not adduce any evidence during the hearing of the suit to support his claim to ownership and possession of Plot No. 39 Kariobangi South/KCC Village Scheme.

4. That the learned trial magistrate erred in law in failing to appreciate that the standard of proof required from the parties to the suit and from the plaintiff in particular was on a balance of probability.

5. That the learned trial magistrate erred in law in and in fact in failing to take into consideration and to appreciate that the evidence adduced by the plaintiff was not rebutted or controverted by the defendant.

6. That the learned trial magistrate erred in law and in fact by failing to consider the averments in an affidavits from an officer of the 2nd defendant as the allocating authority confirming that the plaintiff was the allocated and the lawful owner of Plot No. 39 Kariobangi South.

7. The learned trial magistrate erred in law in failing to grant the prayers sought by the plaintiff in the suit.

5. In my view, the above seven grounds of appeal can be condensed in two (2) key grounds, namely:

a) That the trial court erred in law and fact in failing to consider the probative value of the plaintiff's evidence which was not controverted by the defendant.

b) That the trial court erred in law in failing to appreciate that the standard of proof required from the plaintiff was on a balance of probabilities.

6. The appeal was argued by way of written submissions. The appellant in her submissions dated 13th July 2017 argued that having dismissed the 1st respondent's defence and counterclaim for lack of proof, there was no other evidence to the contrary and the trial court could thus not disentitle her of ownership of the suit property. Counsel submitted that the court ought to have allowed the appellant's claim since her evidence was unchallenged. Counsel referred to the case of Linus Ngang'a Kiongo v Town Council of Kikuyu(2012) eKLR.

7. The appellant further submitted that the trial court's finding that she was seeking the court's intervention in order to transfer the interest in the suit property to herself was misguided since she already had the interest and was only seeking the court's intervention to ensure non-interference with her interest. It was also submitted by the appellant that the lower court had considered non-issues which had not been pleaded by either of the parties in delving into the superficial distinction between the Nairobi City Council and the City Council of Nairobi. Counsel submitted that the distinction was factually wrong since all the documents adduced by the appellant bore the name Nairobi City Council.

8. The appellant further submitted that the court's decision to strike out her suit was draconian and misguided and contrary to the principles espoused in the cases of DT Dobie & Compnay Ltd v Muchina & another (1982) KLR 1 and Saudi Arabia Airlines Corporation v premium Petroleum Company Ltd cited in Kenya Commercial Bank v Suntra Investment Ltd, HCCC No. 381 of 2012. Lastly, the appellant urged the court to award her general damages of Kshs 500,000/- guided by the decisions in Paul Audi Ochuodho v. Joshia Ombura Orwa (2014)eKLR, Gitathiru Kariobangi Company Ltd v James Gacheru Muriu and 9 Others (2014) and M'Mukaya v. M'Mbinjiwe(1984)KLR 761.

9. The 1st respondent filed submissions dated 9th September 2017 where he relied on the case of DT Dobie & Compnay Ltd v Muchina & another (1982) KLR 1 to argue that the trial court denied him the opportunity to be heard. The 1st respondent averred that the 2nd respondent's allotment of the suit property to the plaintiff constituted an illegality since the property had been previously allotted to someone else thereby rendering the appellant's allotment void and unenforceable. The court was referred to the cases of Mohamed v Attorney General (1990)KLR 146 and Nyeri County Council v Monica M. Mwangi as cited in Root Capital Incorporated v Tekangu Farmers Cooperative Society & another (2016)eKLR for the submission that no court ought to enforce an illegal contract.

10. The 1st respondent submitted that because the appellant took law into her hands by pulling down his perimeter wall on the suit property he had approached the court with unclean hands and was undeserving of the reliefs sought. The 1st respondent relied on the case of Patrick Waweru Mwangi & another v Housing Co. of Kenya Ltd(2013) eKLR and contended that a party who fails to do equity is undeserving of equity.

11. While relying on the case of Nairobi Permanent Secretary v Salim Enterprises & others(1995-1998)1EA 232, the 1st defendant submitted that the appellant only made payments to the court rates after she noticed that he had erected a wall on the suit property. The equity maxim that equity aids the vigilant and not the indolent was relied upon. Lastly, the 1st respondent cited the case of Rukaya Ali Mohamed v David Gikonyo Nambacha & another, Kisumu HCCA No. 9 of 2004 and averred that he was the absolute owner of the suit property, having been allotted the suit property in 2001 prior to the appellant's allotment dated 7th January 2002.

Issues and Determination

12. The court has considered the pleadings, evidence and judgment in the lower court. The court has also considered the grounds of appeal and the parties rival submissions. This being a first appeal, the role of this court as stated in Selle & another v Associated Motor Boat Co. Ltd & Another (EA) 123 is to re-evaluate the evidence tendered before the trial court and make its own findings and conclusions. The single issue which arise out of the grounds of appeal set out in the preceding paragraphs is whether the appellant proved her case on a balance of probabilities.

13. The appellant submitted at length that since the 1st defendant did not call any evidence, her evidence remained unchallenged and that the trial court ought therefore to have allowed her claim as sought in the plaint. This proposition is incorrect because it is trite law that even where no evidence is called in rebuttal, the plaintiff's burden to prove her case on a balance of probabilities by adducing credible evidence remains. This was the finding of the Court of Appeal in Charterhouse Bank Limited (Under Statutory Management) vs. Frank N. Kamau, Nairobi CA No. 87 of 2014 (2016) eKLR where the court stated as follows:-

“In Karuqi & Another v. Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the

plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

14. Consequently, failure by the 1st respondent to lead evidence did not in itself automatically constitute proof on a balance of probabilities as a matter of course. It was incumbent upon the appellant to present credible evidence in support of her claim. The appellant presented before the court an offer letter dated 7th January 2002 issued to her by the City Council of Nairobi as evidence of her ownership of the suit property. She also testified and produced receipts showing that pursuant to the offer for allocation, she made payments to the City Council of Nairobi on 13th September 2006. The offer letter dated 7th January 2002 required the plaintiff to tender a written acceptance and pay stand premium within 30 days of the offer. There is no evidence that the appellant met the conditions of the offer since no evidence of the written acceptance was tendered before the trial court and payments were made after a period of more than 4 years from the date of offer.

15. More important, the suit in the lower court was filed on 15/9/2006. In paragraph 4 of her plaint dated 15/9/2006, the appellant contended that on or about 25/8/2006, the respondent commenced construction or developments on the suit property. The payments receipts in support of compliance with the conditions in the letter of allotment were dated 13/9/2006 meaning that the appellant only purported to comply with the conditions after the respondent had commenced developments on the suit property. It can therefore be inferred that the belated payment was made for the purpose of the suit. Indeed, the suit was filed two days after obtaining the receipts. Put differently, it is the defendant's commencement of development which prompted the plaintiff to purport to accept the offer made to her on 7/1/2002. In my view, having failed to comply with the terms of offer, the offer lapsed. The trial court rightly found that the appellant had not proved her claim on a balance of probabilities. The trial court properly found that the appellant had not presented sufficient evidence to warrant issuance of a permanent injunction and award of damages against the defendant as sought in the plaint.

16. The appellant and the 1st respondent alleged that the trial court struck out their claims in disregard to the principles espoused in **DT Dobie & Compnay Ltd vs. Muchina & another (1982) KLR 1**. The distinction between the terms 'dismissal and striking out' was considered by the court in **Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission & 3 others (2017)eKLR** as follows:-

The two terms, 'dismissal and striking out' must therefore be differentiated for their true meaning and import and cannot be used interchangeably nor confused with each other. I hold the view that striking out is a summary procedure that investigates no merit of the dispute but looks at the propriety of the matter as presented and how it sits with the law. Therefore a suit would be struck out on account of facts including; lack of jurisdiction, failure to meet the thresholds of statutory requirement like not revealing a genuine and justiciable cause or for being an abuse of the court process like where it is *res judicata* or merely calculated to achieve a vexation of the defendant. To the contrary dismissal of a cause would follow scrutiny of the merits of the dispute as articulated and after consideration of the facts and evidence grounding the cause.

17. The appellant's claim in the lower court was declined after a hearing of the main suit on merits. The suit was therefore dismissed and not struck out and nothing turns on the use of the words "struck out" as opposed to "dismissed" by the trial court in its disposal order.

18. It is therefore my finding that the appeal herein is without merit. The same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Kirui holding brief for Mr Chege for the Respondent

Ms Halima Abdi – Court Clerk