



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 53 OF 2019

**RACHEAL NGUGI M' IKWARIA (suing as the legal Representative and administratrix
of the estate of GLADYS NCHORO AYUB (deceased)..... APPELLANT**

VERSUS

JUDITH NKIROTE.....RESPONDENT

(Being an appeal from the Judgement of Hon. Irura Principal Magistrate in Nkubu PMCC No. 43 of 2015 delivered on 27/3/2019)

JUDGMENT

1. **RACHEAL NGUGI M'KWARIA (suing as the legal Representative and administratrix of the estate of GLADYS NCHORO AYUB (deceased) (the appellant herein)** was the plaintiff in the trial court whereas **JUDITH NKIROTE (the Respondent herein)** was the Defendant. The two parties are sisters. The appellant instituted the trial Court proceedings through a plaint dated 24TH April 2015 and thereafter amended on 7th December 2015 seeking the following Orders;

- a) **An order requiring the Defendant, her agents, servants, employees or anyone acting under her names to stop constructing on the plaintiff's half share of Plot No. 44 "B" II Nkubu town thereby denying the plaintiff access to the rear part of the plot.**
- b) **General Damages for trespass to land.**
- c) **Cost and interest of the suit at court rates.**

2. It was the appellant's averment that her late mother, **Gladys Nchooro Ayub**, co-owned the suit premises with the Respondent but prior to her death she transferred her share to the appellant. That she is the owner of half a share of Plot No. 44 "B" II Nkubu Town with the Respondent, but without her consent the respondent was constructing on the plot thereby blocking the appellant from accessing the rear part of the plot, toilets and other facilities thereby occasioning her loss and damage.

3. The Respondent opposed the suit via her defence dated 3.6.2015 denying the appellants averments in *toto*. She averred that she co-owns the suit premises with her late mother and she had extensively built on the same and that the remainder of the premises ought to be co-owned by the beneficiaries of the estate which action can only be determined in a Succession cause.

4. During the hearing both parties called three witnesses each in support of their respective cases. The trial court however found that the title held by the Respondent as the co-owner of the suit property had not been challenged on the ground of fraud or misrepresentation for the appellant had not shown that her sister had acquired the title illegally, unprocedurally or through a corrupt scheme. On general damages the trial court found that there was no proof that the Respondent had encroached on the appellant's suit property as the land is still registered in the names of the Respondent and the deceased. The court therefore dismissed the appellant's suit with costs to the Respondent.

5. Aggrieved by the aforesaid decision the appellant filed her memorandum of appeal dated 5.4.2019 raising seven grounds set out as follows;

- a. **That the learned trial Magistrate erred in law and fact by finding that the appellant did not prove her claim of ownership over half of Plot No. 44 "B" II Nkubu town despite the evidence tendered by the appellant that she was occupying the half share of the said plot.**
- b. **The learned trial magistrate erred in law and in fact by finding that the appellant did not have a prima facie case against**

the Respondent despite the overwhelming evidence that the appellant was in occupation of half the share of the suit plot.

c. That the learned trial magistrate erred in law and in fact by failing to find that the appellant was suing as the legal representative and administratrix of the estate of the deceased mother and therefore she had a locus standi to seek the orders of injunction to stop the inter-meddling with the deceased part of the suit plot.

d. That the learned trial magistrate erred in law and in fact by finding that the appellant was seeking to restrain the respondent from entering the plot whereas the appellant's claim was limited to half share of the suit plot.

e. The learned magistrate erred in law and in fact by entering judgement for the Respondent against the appellant when there was no counterclaim by the Respondent against the appellant.

f. The learned trial magistrate erred in law and fact in that she failed to consider the appellant's evidence and submissions and thereby arrived at the wrong decision.

g. The decision of the learned trial magistrate is against the weight of evidence and the law.

6. On 19/11/2019 this court directed the parties to canvass the appeal through written submissions, of which both parties have duly complied. The appellant submitted that the deceased had made out a gift to her in contemplation of her death and was in occupation of the suit premises. That being the legal representative of the estate her mother, the trial Magistrate erred in failing to issue a permanent injunction against the Respondent to stop her from constructing on the Appellants share. She relied on the provisions of **Section 31 and 29 of the Law of Succession Act**.

7. The Respondent submitted that the trial court did not error in finding that the genesis of the suit plot emanated from Meru succession cause no. 189 of 1988 on sharing of the estate. That the proper legal procedure the appellant ought to have sought is through the succession cause of her deceased mother i.e. **Meru Hcc Succ 737 of 2015**.

Analysis and Determination

8. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

9. **Pw1 Racheal Ngugi M'Kwaria** testified that the suit premises is registered in the name of the deceased and the respondent. That prior to the demise of her mother Gladys Nchooro, deceased had granted her a share of the plot. That she is currently occupying one shop at the front building while the defendant is occupying the other whole portion. She told the court in cross-examination that their parents had seven children and their stepmother filed a succession cause No. 189/98. That the plot was initially registered in the names of their father but is currently registered in the names of Gladys Nchooro and Judith Nkirote. That her mother before her death swore an affidavit transferring the plot to her. She denied that the Respondent had constructed on the plot and/or utilised the same during the lifetime of their father. She also denied that there were tenants who had rented the premises from the Respondent. She presented the following documents in support of her case; **Pexh 1 Death certificate of Gladys Nchooro Ayub, Grant of letters of administration issued in Meru High Court Succession Cause No. 63 of 2015, demand letter dated 17/12/2014, Letter by the plaintiff to the administrator Nkuene Ward dated 10/2/2015, letter from the county government of Meru dated 26.2.2015, Application for change of title for plot no. 44 II B Nkubu town, and letter from the chief Kigane**. The production of documents nos 3, 6 and 8 in the list dated 24.4.2015 was objected on 25.4.2018 when appellant was testifying. The documents number 6 and 8 were later produced. The affidavit of Gladys Nchoro which is item no.3 was never produced as an exhibit.

10. **Pw2 David Kinoti Mugambi the Area Chief Kigane Location** presented a letter of introduction dated 2/3/2015 as Pexh 8. He however distinguished the letter of introduction he issued to the Appellant from those issued in Succession matters stating that the aforesaid letter only sought to introduce the Appellant as a daughter of the deceased. He also told the court that he is aware of the Succession cause of Ayub M'Kwaria, father to both the appellant and the Respondent but could not ascertain how the estate was distributed. He equally could not ascertain the current status of the suit properties.

11. **Pw3 Julius Bundi Magiri the Ward Administrator Nkuene** produced a letter from the County Government of Meru dated 26/2/2015 (document number 6). It was his testimony that the letter was in respect to the suit premises which was at the time registered in the names of **Gladys Nchooro and Judith Nkirote**. That the Appellant had equally placed a caution on the same. That at the time, the plot was under construction by Judith Nkirote but the same was stopped since the construction had not been approved by the County Government. He confirmed that Gladys Nchooro had requested to transfer his part of the suit premises to Racheal Ngugi through application No. 137112 dated 25/8/2011.

12. In cross-examination and when shown receipts of Kshs. 45,000/= paid by the Respondent, PW 3 confirmed that the same were payments for building approvals which was acknowledged by the county government. As regards the transfer from Gladys Nchooro to the appellant, he stated that the same was initiated and was awaiting approval.

13. **Dw1 Judith Nkirote** testified that after their father passed away, they filed a succession cause in Meru High Court Succession Cause No. 189/88 and the plot was allocated to herself and her mother Gladys Nchooro. That she knows her portion on the ground, where she had constructed seven (7) rooms. She has been paying for utility bills, rent and rates of the suit property. That on their mother's portion there is the front shop and one room at the back constructed by their father. That their mother never constructed anything after the demise of their father. That at the time of her testimony there was no construction going on as she was ordered to stop by a court order. That the appellant only started to claim interest of the suit premises after their mothers demise. That the appellant had been given one acre in **Kigane/ Mikumbune /79.**' She contends that Gladys Nchooro passed away in the year 2013 and a succession cause was filed, but she does not know to whom her mother's portion was granted to.

14. In support of her testimony DW1 produced the following documents in her list dated 3.6.2015 as her exhibits; which are **Dexh 1 Certificate of Confirmation of Grant of her fathers estate, Dexh 2 Letter dated 25th March 2013, Dexh 3 Letter dated 20th April 1997, Dexh 4 Bundle of Receipts, Dexh 5 Application form dated 24th May 2008** (I did not get this document in the Record of Appeal), **Dexh 6 Lease Agreement, Dexh 7 Application for development permission, Dexh 8 Letter dated 10/6/2014** (Not traced in the record), **Dexh 9 Police Abstract, Dexh 10 Minutes details form, Dexh 11 Demand Letter.**

15. **Dw2 Benard Gitonga** a neighbour to the parties herein testified that previously the plots were labelled as A,B,C. Plot A was given to Joseph Ngaine, Plot B was given to Ayub M'Kwaria while C was granted to his father Zaberio Anampiu. That the original owners were not related. That he was present when the Respondent was constructing houses in the suit premises and the said construction took place during the lifetime of both their parents.

16. **Dw3 Rael Nkirote Solomon** testified that she had rented a room in the suit property and the Respondent was her land lady. She is not however aware of the extent of the joint ownership between Gladys Nchooro and Judith Nkirote.

17. On the **first and second ground** of appeal, the appellant herein contends that the trial court erred by finding that the appellant did not prove her claim of ownership over half of Plot No. 44 "B" II Nkubu.

18. In its determination, the trial court held that the plaintiff had not proved her entitlement by way of transfer and was looking for a short cut to acquire half a share of the suit property belonging to the deceased instead of filing the correct succession cause.

19. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1) (2) of the Evidence Act** that provides thus:

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

20. Looking at the evidence on record, the appellant clearly admits that the property is still registered in the names of the Respondent and her mother (now deceased). She relied on the application for change of title and the affidavit sworn by the deceased (same was not produced) to assert her claim of transfer. Pw3 stated that the deed of transfer was still awaiting approval. However, the document produced by pw3 (plaintiff exhibit 6) indicates that the application was not approved. This letter is in tandem with the defence document produced as defence exhibit 2, where the Meru county government states that the application of 25.8.2011 was not approved as it emerged that there were some domestic issue relating to the plot. This means that the application for transfer was considered and a decision to reject the application made in year 2011. Gladys passed on in 2013. From year 2011 to when Gladys passed on, there is no evidence to demonstrate that Gladys and Appellant pursued the matter to ensure that the transfer was effected. Thus the intent by Gladys to transfer her share to the appellant did not mature during her lifetime.

21. It has also emerged that a succession cause has been filed in respect of the estate of Gladys, though both parties have been economical with details regarding this matter. The appellant ought to pursue her claim in that cause.

22. The appellant's contention that her right to ownership is based on her occupation was also not proved before the trial court.

23. The respondent's claim to the property was well explained. She presented the certificate of confirmation of grant which granted her a share of her father's estate, now half a share of the suit premises. She produced rent and rates receipts proving she paid for the same. Her evidence with regard to her right to ownership of half a share of the suit premises remained unshaken. The respondent stated that appellant sought ownership of the suit premises after the demise of their mother, a factor that was equally not challenged.

24. All factors considered I find that the trial court arrived at the correct determination with regard to ownership of the suit premises. The appeal hence fails in so far as ground 1 & 2 are concerned.

25. In the **third and fourth grounds** of appeal the appellant contends that the trial court erred in not considering that she had sued as the legal representative of the estate of the deceased hence she had locus to seek the orders of injunction to stop the intermeddling with the deceased part of the suit plot. It must be noted that the capacity of the appellant to sue was not challenged in the trial court rightly so because she had the limited grant. However, the grant issued to the appellant which she has availed as exhibit 2 was *“limited to the purpose only of filing the suit...”* and it gave her no powers to distribute the estate.

26. It was incumbent upon the appellant to prove that the Respondent had indeed trespassed on the premises belonging to the deceased estate. Trespass is an intrusion by a person into the land of another who is in possession and ownership as stipulated under **Section 3 (1) of the Trespass Act, Cap 294** as follows:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

27. In **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR** the Court explained the nature of a permanent injunction when it held as follows;

"A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...."

28. The Respondent clearly led evidence that she was aware of the perimeters between her property and that of the deceased and that she constructed on her side of the suit premises. The appellant did not demonstrate how the Respondent had invaded the parcel belonging to the estate of the deceased, in hindsight she only led a claim over the suit premises hence shifting from the burden of proving the ingredients of trespass. The appeal fails on these grounds.

29. The **fifth** ground of appeal was that the trial court erred in law and in fact, where the court entered judgement for the Respondent against the appellant yet there was no counterclaim by the Respondent. The court in its determination held as follows;

"In the end, I enter judgement for the defendant against the plaintiff and dismiss the plaintiff's suit in its entirety with costs to the defendant."

30. The only error I see in the determination is the citation "*I enter judgement for the defendant*". The Respondent only filed a statement of defence but did not raise a counterclaim against the Appellant. Despite the error in the determination the overall decision of the trial court remains the same. The error has no adverse effect in the courts finding and I therefore equally dismiss the same.

31. Ground 6 and 7 are an overall outlook of the decision of the trial court. The body of the judgment clearly shows that the trial magistrate analyzed all the evidence presented before her, supporting her decision with relevant authorities. The allegation that the magistrate failed to consider the evidence of the appellant is therefore unfounded.

Conclusion

32. The upshot of this determination is that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE