



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 69 OF 2019

M'MAILUTHA M'NKURARU.....APPELLANT

VERSUS

MBIRITHI JEREMIAH MWINGIRWA M'IKUNYUA.....RESPONDENT

(Appeal from the ruling of Hon Sogomo (PM) dated 2.5.2019 in Tigania Pm elc 70 of 2018)

JUDGMENT

1. The appellant M'Mailutha M'Nkuraru was the 1st defendant while the respondent, Mbirithi Jeremiah Mwingirwa was the plaintiff in the case Tigania PM ELC No. 70 of 2018. The respondent filed the suit on 17.4.2018 claiming that he is the registered owner of land parcel No. Kianjai/Kianjai/1842 while the appellant owned parcel No. Kianjai/Kianjai /5048 and the 2nd defendant owned parcel No. Kianjai/Kianjai/1744. The respondent further claimed that the two defendants had been using his land. The plaintiff had therefore sought for the following orders:

(i) "An order directing the district land surveyor Maua to demarcate and fix boundaries in respect of parcel Kianjai/Kianjai/1842 and the court to provide security in the said exercise.

(ii) A permanent order of injunction restraining the defendants, their agents, servants, employees, legal representatives, family members or anybody else claiming under their name from interfering with the boundaries, fence, cultivating, planting, harvesting any crops, damaging the land or in any way interfering with parcel No. Kianjai/Kianjai/1842".

2. The 1st defendant/appellant filed a memorandum of appearance as well as a notice of preliminary objection on 6.6.2018. The preliminary objection was based on the following grounds:

(a) "The court has no jurisdiction in this matter in view of section 18 (2) of the Land Registration Act 2012 that require boundary dispute be first settled by the Land Registrar.

(b) That the suit is misconceived, scandalous, frivolous, vexatious and a blatant abuse of the due process of the court".

3. On 20.8.2018, interlocutory judgment was entered against the defendants and the matter proceeded for formal proof on 8.11.2018 whereby judgment was entered as prayed in the plaint on the same date.

4. The appellant then filed an application dated 7.1.2019 where he sought orders of stay of execution of the judgment/decreed that that was partially executed and that the judgment be set aside averring that his preliminary objection was not heard and determined.

5. In a ruling delivered on 2.5.2019, the court found the application of 7.1.2019 not merited and the same was dismissed. Aggrieved by the said ruling, the appellant/1st defendant lodged this appeal raising several grounds, which can be summarized as follows: That the trial magistrate failed to consider that the preliminary objection had not been determined, and that the trial magistrate did not consider the principles of setting aside a default judgment. The appellant therefore prays that the appeal be allowed with costs in his favour, such that the ruling of 2.5.2019 is set aside and the application of 7.1.2019 be allowed.

6. The appellant also filed an application on 8.5.2019 for stay of execution of the trial court's judgment. However, this court caused the said application to be marked as spent on 14.11.2019 so as to facilitate the expeditious disposal of the main appeal.

7. Both parties have filed their respective submissions in respect of the hearing of the appeal. It was submitted for the appellant that he was

never served with the hearing notice nor the notice for entry of judgment. He also contends that in his preliminary objection dated 6.6.2018, he has raised the issue that under section 18(2) of the land registration Act 2012 boundary disputes ought to be settled by the land registrar in the first instance.

8. He contends that the trial court presumed that there existed boundaries simply because the defendants are the registered owners of the land parcels adjoining each other despite the fact that the appellant had raised the issue that the respondent had fraudulently acquired his title. The appellant further avers that this court has the discretion to allow the application of 7.1.2019.

9. In support of his claim, the appellant cited the following authorities. **Esther Wamaitha Njihia & 2 others vs Safaricom Ltd** referred to in **Nyeri High court civil suit no. 101 of 2011 Wachira Karani vs Bildad Wachira (2016) eKLR**, **Stephen Saramba Viraghi vs Hillary Savari & Another: Agnetta Mulama & Another (applicants) 2019 eKLR**, **Mukhisa Biscuit Manufacturing Co. Ltd vs West End distributors Ltd (1969) E.A 696**, **Owners of Motor vessel Lilian S vs Caltex Kenya Ltd (1989) KLR**, **CMC Holding Ltd vs James Mumo Nzioka Nyeri H.C Civil suit No. 101 of 2011**.

10. The respondent has averred that the case was formerly proved. It is further averred that the preliminary objection was not pleaded and hence cannot stand on its own and in the instance case, no defence was ever filed. The respondent contends that when the appellant filed his application to have the judgment set aside, he never sought orders to be allowed to file any defence hence the appeal should not be allowed.

Determination

11. The main issue for determination is whether this court should allow the application dated 7.1.2019 which was dismissed on 2.5.2019. The appellant basically wants the court's judgment to be set aside and the preliminary objection dated 6.6.2018 to be allowed.

12. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. But again in a scenario as in the instant matter **"The court has unfettered discretion in determining whether or not to set aside the default judgment"**. This was so held in the Court of Appeal case of **James Kanyita Nderi & another vs Marios Philotas Ghikas & another (2016) eKLR**.

13. In the instant case the appellant never filed a statement of defence ostensibly because he had filed the preliminary objection and even in his application dated 7.1.2019, he did not seek orders to be allowed to defend the suit. It follows that the judgment cannot be set aside on the basis of giving the appellant a chance to put forth his claim.

14. This is a case where the appellant appears to be complacent and casual in the manner he is prosecuting his claim. He filed the preliminary objection on 6.6.2018 and simply left it at that. There was no records to show that he made any attempts to have the said preliminary objection determined. He cannot now turn around and fault the magistrate for proceeding with the hearing of the suit when there was a pending preliminary objection.

15. As clearly indicated in the case of **Mukhisa Biscuit Manufacturing co. Ltd vs West End distributors Ltd (1969)** cited by appellant, a preliminary objection consists of points of law which have been pleaded or which arises by clear implication out of pleadings.

16. It is trite law in evidence that he who asserts must prove his case. **Section 107 of evidence Act** succinctly states:

"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". See Court of Appeal case of Charter house Bank Limited (Under Statutory management) v. Frank N. Kamau (2016) eKLR.

17. In **Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR** the court held as follows;

"that the issues for determination in a suit generally flowed from the pleadings, and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination".

18. In **Samson Emuru v. Suswa Farm Ltd (2006) eKLR**, the court made reference to the text book by *Bullen and Leake and Jacob's 12th Edition page 8* where the issue of pleadings was articulated as follows;

"As parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings.. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made".

19. In this case, the appellant had not filed his pleadings. He appears unsure of what he wants. Although he has dwelt in depth on the merits of the preliminary objection and that the dispute should be handled by a land registrar, he again contends that the respondent has a fraudulent title. If indeed that is his claim, then he ought to have filed a defence or a draft defence to that effect.

20. What is apparent is that the trial magistrate analyzed the merits of the preliminary objection as captured on page 72 of the record of appeal. I therefore find that there was nothing to divest the trial court's jurisdiction over the matter.

21. All in all, I find that this appeal is not merited. The same is hereby dismissed with costs to respondent. A copy of this judgment is to be placed in the lower court file. Thereafter, the said file is to be transmitted back to the trial court for execution of the judgment.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 2.7.2020. 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 Judgment 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