



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 48 OF 2019

REBECCA KARUTA M' NGERA.....APPELLANT

VERSUS

STEPHEN MATI ALIAS MATI NTHANGI.....1ST RESPONDENT

PHINEAS MURERWA NDATHO.....2ND RESPONDENT

(Being an appeal from the Judgment of the principal magistrate's court at Nkubu, Hon J. Irura (PM) Dated 27/ 2/ 2019 in Nkubu PM ELC No. 8 of 2014)

JUDGMENT

1. **Stephen Mati alias Mati Nthangi** (*the 1st respondent herein*) instituted the suit in the trial court against the appellant and the 2nd respondent seeking a declaration that he is the sole proprietor of parcel **Abothuguchi/Kiija/265**. He also sought an order of eviction and permanent injunction restraining the appellant and 2nd respondent from interfering with the suit premises and an award of general damages for the acts of trespass.

2. **Rebecca Karuta M' Ngera** (*the appellant*) and **Phineas Murerwa Ndatho** (*2nd respondent*) filed a defence and counterclaim denying the 1st Respondents claim in *toto*. In the counterclaim they sought a declaration that parcel **L.R. ABOTHUGUCHI/ KIIJA/265** is the property of the appellant and a declaration that the 1st respondent held the same in trust for both the appellant and the 2nd respondent. They prayed for an order that the suit land Abothuguchi/Kiija/265 be registered in the name of the appellant.

3. The trial court decided the case in favour of the 1st respondent, declaring that the 1st respondent is the sole proprietor of the suit premises. The court also ordered the appellant and 2nd respondent to vacate and deliver vacant possession of the suit premises and equally awarded Kshs. 300,000/= to the 1st respondent as general damages for trespass.

4. Aggrieved by the aforesaid determination, the appellant filed her memorandum of appeal raising nineteen (19) grounds of appeal which may be summarized as follows;

a) That the Learned magistrate erred in law and fact in failing to hold that the Plaintiff/1st Respondent was an imposter trying to impersonate the registered owner of the suit land to deprive the 1st Defendant/Appellant of her ancestral land.

b) That the learned trial magistrate erred in law and fact in failing to hold that the suit land was ancestral family land originally registered in the name of Mati Nthangi (deceased) held in trust for himself and the 1st Defendant/Appellant who is his niece and a daughter to his brother Tirimana Gakumo.

c) The learned trial magistrate erred in holding that the appellant and 2nd respondent should be evicted from the suit land.

5. The appeal was canvassed through written submissions by the appellant and 1st respondent. The court was informed that the 2nd respondent is not participating in the trial. The appellant submitted that the 1st respondent's suit was not proved on a balance of probabilities as there was no indication that the suit premises had been transferred to the 1st respondent from his father.

6. On the other hand, the 1st respondent submitted that the appellant did not adduce any evidence to support the averment that the 1st respondent had caused the suit land to be fraudulently registered in his name. As such, the 1st respondent's claim that he is known as Mati Nthangi, the owner of the suit land was not controverted by any evidence emanating from the appellant. It was also submitted that the trial court had correctly determined that the 1st respondent did not hold the land in trust for the appellant and the 2nd respondent. Further, it was

submitted that the trial court had rightly found that the claim of trespass had been established in favour of the 1st respondent hence the order of eviction was merited. He cited the following cases; **Kibiro Wagoro Makumi vs. Francis Nduati Macharia & Another (2018) eKLR, Kisii High Court ELC Case No. 45 of 2013 Zacharia Onsongo Momanyi versus Evans Omurwa Onchagwa, Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR.**

Analysis and Determination

7. This is a first appeal. It is the duty of a first appellate court to re-evaluate the evidence and draw its own conclusions – **See Selle-Vs-Associated Motor Boat Co. Limited 1968 E.A. 123.**

8. **Pw1 Mati M' Ithangi alias Stephen Mati** testified that he is an uncle to the appellant. That Tirimani was the appellant's grandfather. PW1's father, M'Thangi Mati was a brother to Tirimani. That both Tirimani and his father were granted land by their father. That after his father's death in the 1950s, Tirimani Gakumo gathered his father's land and the same was registered in his (Pw1's) name as the suit premises measuring 0.7 Ha. Tirimani's land was given to the appellant.

9. Pw1 leased the suit land to one Jane Gaiti (pw2) in 1996, but she was chased away by the appellant and 2nd respondent.

10. In cross-examination, pw1 testified that his father had two wives. He is a son of the 2nd wife. That he took the name Stephen when he was issued with his identity card in 15/5/1996. He further stated that those who were left with his land are the ones who indicated his name as Mati M'Ithangi. He had apparently been summoned by the mother of appellant who then showed him the suit land averring that he (pw1) had been given the said land by his father.

11. He also stated that Maingi was the son of his (pw1's) father from the first wife but he never met him. That he has not filed the succession cause in relation to his father.

12. He also told the court that his mother stayed on the land belonging to Tirimani. That he had leased the land to Jane Gaiti for 17 years who left in the year 2013 after the appellant and 2nd respondent chased her away from the land.

13. In re-examination he told the court that the land had not been transferred to his father prior to his death as the father was not alive during the demarcation period. He left the land to his brother and asked him to register him as the owner. That Gatura, Rebecca's mother is the one who did the survey and subdivision and gave him the land intended to be given to him. This was occasioned by the fact that Tirimani had also died before demarcation. The land was however registered in the names Mati M'Ithangi.

14. **Pw2 Jane Gaiti** testified that she leased the suit land from pw1 in 1996 and cultivated on the land for 17 years. She was taking care of the trees on that land. She left the land in the year 2013 after being chased away by the appellant.

15. In cross examination, she stated that she used to pay sh. 1000 per acre in the lease. By then, there were no people living on the land. However, in 2013, the appellant came from her husband's place chased pw2 away and also put up a temporary structure. The appellant and 2nd respondent informed her that the aforesaid Mati had died. The assistant chief would later send her to inquire about Mati. Pw2 had told the chief that Mati was alive and so pw1 turned up, and the appellant was surprised as she believed Mati was deceased.

16. In re-examination she stated that the appellants have now occupied the land, installed water pipes planted bananas and constructed a house thereon.

17. **Pw3, Francis Chabari** testified that he is familiar to the 1st respondent's father. That Stephen Mati's mother was a sister to his father. That Pw1's father had a wife named Nchurugo and another who passed away. That the 1st respondent was the son of the 2nd wife and he had been bequeathed the suit property by his father. That he was present when Stephen Mati was shown the land by Gatura (appellant's mother). Also present was one M' Mworira. That on the advice of the area chief, Mati leased out the suit premises to Pw2. He contends that the 1st respondent is also known as Mati M'Thangi.

18. **Pw4 M'Mworira Kanampiu** testified that he was born in the year 1939 and he is blind. He knew 1st respondent since childhood, and that pw1 used to live at a place called Mukuuni. He was also familiar to the father and mother of the 1st respondent. That he took goats as dowry for the 1st respondent's mother and they were together during the emergency period.

19. He further stated that the suit property belonged to Gakumo, father to Tirimani and M'Thangi. Gakumo would later divide the land to his sons. Tirimani proceeded to give his share to Ndatho, hence the appellants claim lies with Ndatho. That before demarcation, pw4 was occupying the suit land but it was given to Tirimani and he was moved to another parcel of land. During registration, PW4 participated in the registration of the suit land in the name of Mati Nthangi, who later leased the land to Jane Gaiti.

20. **Dw1 Rebecca Karuta** testified that she is the daughter of Gatura who was a daughter of Tirimani. Tirimani had a brother known as Mati Nthangi who had a son known as Maingi who died. The wife of Mati Nthangi as well as the one of Tirimani also died. The suit land was therefore left in the hands of Gatura mother of appellant. That the portion where M' Thangi lived was left to them (appellant) as there was no one else who could have taken the share.

21. That while she was living on the suit land, she saw land brokers who came to the land and informed them that they had bought the land. That she later on placed a caution on the land. That they had previously tried to resolve the matter with the clan and the District officer but they did not reach an agreement. That it is only after she reported the matter to the District officer that the 1st respondent brought the suit to court.

22. She further stated that by the time title deeds were issued M'Thangi was not alive. The title were being issued as per gathered land. That her mother, Gatura had been left in charge of M'Thangi's land.

23. **Dw2 M'Murungi Ngaruro** testified that she was a neighbour of Mati M' Thangi who was a son of Gakumo. That M'Thangi had one wife and one son. That the suit premises herein was part of ancestral land which belonged to Gakumo and was sub divided amongst Tirimani and M'Nthangi. M'Thangi had built on his portion, while Tirimani had also built on his own portion too. Tirimani is the one who gave directions on how the sub-division ought to be done. M'Thangi would later on relocate to another land. When he came back he was elderly but still had only one wife Kianda. His son had passed on.

24. Dw2 also stated that the appellant occupies the portion which Gatura had been given by Tirimani. Upon being cross examined by the court, Dw2 stated that the land was subdivided whereby Ndatho occupies one portion while appellant occupies the other portion.

25. **Dw3 M'Kwaria M'Inui** testified that when M'Thangi died he left the land to Tirimani who in turn left the land to Gatura. At the time Tirimani died, demarcation had been done. That Rebecca lives alone on the land left by M'Thangi,

26. **Dw4 Phineas Murerwa Ndatho** asserted that he was claiming the land belonging to his father i.e. Ndatho a brother to Rebecca. He restated that it is only Rebecca who resides on the suit land. He does not know Stephen Mati as a member of their family. He contends that he can only claim land belonging to his father. He has no claim over the suit land.

27. The root of the suit land is not in dispute. The land belonged to one Gatumo who had two sons, Mati Nthangi and Tirimani. Tirimani is the father of Gatura who in turn is the mother of 1st appellant. The 2nd respondent is a son of Ndatho, a brother of appellant from different fathers. It is also not disputed that the 2nd respondent occupies part of the ancestral land which Tirimani had given to Ndatho.

28. The point of departure is the claim of the 1st respondent that he is a son of Mati Nthangi, the brother of Tirimani. The appellant's case in summary is that her mother's (Gatura) uncle Nthangi died and so did his wife and son Maingi hence there was no one else to take up the land of Nthangi except her. The appellant claims that the 1st respondent did not prove he was the owner and that he fraudulently transferred her (appellant's) land to himself.

29. On the other hand the 1st respondent's case is that the suit land is his entitlement of the ancestral land, the same having been the share of his father's land. He contends that his Christian name is Stephen while his Kimeru name is Mati and that the suit land was registered in his name.

30. It is evident that the suit land was registered for the very first time on 12.6.1972 in the name of Mati Nthangi (see green card on page 10 of the record of appeal). The certificate of official search dated 12.8.2013 indicates that the land is still registered in the name of Mati Nthangi.

31. The issues therefore for determination is whether the trial magistrate erred in believing the version of the claim as given by the 1st respondent and his witnesses. In the circumstances, the court will analyse the issue of fraud and trust which in the final analysis will determine if the orders of eviction and award of damages are merited.

Fraud

32. The appellant has alleged that their counterclaim was not determined by the trial magistrate. Fraud is one of the two main issues (fraud and trust) raised in the counter claim of the appellant. However, a perusal of the trial magistrate's decision reveals that the trial court gave an in-depth analysis on matters fraud where she cited relevant case law to arrive at her decision. The trial magistrate set out the particulars of fraud raised by the 1st appellant as clearly captured on page 102 of the record of appeal.

33. **Section 107 of the Evidence Act** provides that:

“(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”.

34. While section 109 of the same act provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

35. It was therefore incumbent upon the appellant to adduce evidence in support of the pleadings which she failed to do. It is the appellant who was contending that Nthangi had died with his wife and son leaving no other family save her grandfather Tirimani, her mother Gatura and herself. It was not enough for the appellant to allege that 1st respondent was not a son of Mati M'Nthangi, brother of Tirimani. It was incumbent upon her to prove such that allegation.

36. Looking at the totality of the evidence adduced herein, it emerges that both M'Nthangi and his brother Tirimani died years ago before land demarcation though the former passed on before Tirimani. The ancestral land was therefore left in the hands of the appellant's mother (Gatura). Thus when the suit land was being registered in 1972, both M'Nthangi and Tirimani were no more.

37. The 1st respondent has stated that those who were left with his father's land are the ones who registered it in his name Mati Nthangi. He specifically stated that the land had not been given to him by Rebecca. What happened is that appellant's mother (Gatura) is the one who was in charge of the surveying of the land and caused it to be registered in 1st respondent's name. This evidence is buttressed by PW 3 Francis Chabari who stated that 1st respondent's mother was a sister to his father and that 1st respondent was the only child of his mother, the second wife of M'Nthangi. He stated that one Mworira came looking for Stephen Mati so that the latter could share his father's land. Mworira testified as Pw4 and stated that he knew 1st respondents mother who was staying at a place called Nkui and was even buried there.

38. DW 2, M'Murungi Ngaruro further stated that M'Nthangi used to live on the suit land but relocated to another area where he stayed for a long time and only came back as an elderly man. The appellant and his witnesses are not an authority on how Nthangi was living his life when he left the suit land. They cannot determine if he sired other children whom they did not come to know. What is crucial to note is that appellant has admitted that;

“Gatura was left in charge of the land of her paternal uncle” (see page 83 of the record of appeal).

39. If that be the case why then did Gatura cause the land to be registered in the name of a long dead uncle? I have no doubts that Gatura was actually causing the land to be registered in the name of her uncle's son who happens to be the 1st respondent. The only hitch was that this son was not around and people like PW 3 and 4 had to go and look for him.

40. It follows that 1st respondent was not the one who occasioned the registration of the land in his name. It was the appellant's mother.

41. There is no way the suit land could have been registered in the name of the initial M'Nthangi in 1972 since this person was long dead. What is apparent is that whoever caused the land to be registered in 1972 must have meant the same to belong to 1st respondent as the only surviving son of M'Nthangi.

42. There is not the slightest evidence to indicate that any fraud was at play in the registration of the suit land in the name of Mati Nthangi. After all, if Gatura was not aware of the existence of 1st respondent, and yet she knew that her uncle was dead certainly she would have caused the land to be registered in the name of her other family members.

43. The fact that 1st respondent is known as Stephen Mati does not in any way imply that he is not the same person as Mati Nthangi. What is clear is that 1st respondent and his mother don't appear to have been brought on the suit land by M'Nthangi.

44. As clearly stated in the case of **Dr. Joseph Arap Ngoki vs Justice Moiwo Ole Keiwa & 5 others Nairobi civil appeal No. 60 of 1997**, the title of a registered owner can only be challenged on grounds of fraud or misrepresentation. In the case of **Denis Noel Mukhulo Ochwada and Ano. Vs. Elizabeth Murangari Njoroge and Another**, the court made reference to the case of **R. G. Patel v. Lalji Makanji** in determining the standard of proof in fraud cases, where the former Court of Appeal for Eastern Africa had held as follows;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

45. In **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the court had this to say on matters fraud;

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

.....

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (emphasize added) (Davy V Garrett (1878) 7 ch.D. 473 at 489). General allegations, however strong may be the words in which they are stated, are insufficient amount of an averment of fraud of which any court ought to take notice”.

46. In the instant case, the appellant did not in any way indicate how the 1st respondent committed fraud. What appellant had done is to attempt to shift the burden of proof upon the 1st respondent. In light of the foregoing, I find that appellant claim based on fraud fails.

Trust

47. Appellant's claim on basis of trust is captured in paragraph 18 of her counterclaim. She alleges that this claim was not considered. However, the trial magistrate gave a detailed analysis of this claim as captured from page 103 – 105 of the record of appeal. The only fault I find in the decision of the trial court is that the trial magistrate failed to determine the root of entitlement of each claimant (appellant and 1st respondent). I will hence proceed to determine this issue.

48. For the 1st respondent, he is basing his claim on his father's entitlement to the ancestral land. The appellant on the other hand is not basing her claim on her grandfather's entitlement. She has recognized that M'Nthangi had his own distinct portion of the land when she says

that:

“Each of them (Nthangi and Tirimani) was buried near where they had built their houses. Tirimani and Gatura were buried where they were living and M’Thangi was buried where he had built their house as each of them had their respective family”.

She went on to state as follows:

“The land was subdivided and Ndatho was given a portion. The portion where M’Thangi was living was left to us as there was no one else who could have taken his share..... I have planted banana trees and I have constructed a house on the portion which was for M’Thangi”

49. It follows that appellant is claiming the share of her grandfather’s brother’s entitlement on the basis that the latter (Mati Nthangi) had no family. This court and the lower court has established otherwise. It follows that appellant has no basis of claiming the ancestral land in the lineage of her grandfather’s brothers household.

50. The trial magistrate had indeed tried to establish the truth during the trial when she questioned DW 2 on the root of the land. Dw 2 had stated as follows;

“Rebecca had siblings by the name Ndatho and Kimathi. Ndatho lives on the suit land. The land has been subdivided so Ndatho lives on one portion and Rebecca has another portion. The land belonged to the two sons of Gatumo being Tirimani and M’Thangi. Rebecca and Ndatho are in the lineage of Tririmani...”.

51. What resonates from this evidence is that appellant’s claim over the suit land on the basis of trust can only be derived from her grandfather’s lineage which is Tirimani’s entitlement. That entitlement is in the hands of her brother Ndatho.

52. In the case of **Philicery Nduku Mumo vs Nzuki Makau (2002) eKLR**, the court of appeal held that it is trite that trust is a question of fact and has to be proved by evidence. The evidence tendered by the appellant before the trial court did not support the claim of land based on trust, hence her claim was not proved and is not justified. The appeal fails on this ground.

Eviction and award of damages

53. It has emerged that appellant moved into the suit land in 2013, where by she chased away the person who had leased the land (PW 2) and she then embarked on developing the same. It follows that the trial magistrate arrived at a correct finding in holding that the appellant should be evicted. The award of Shs.300,000 is also reasonable in the circumstances considering that the appellant has not even attempted to mitigate the situation by moving out of the land.

Final orders:

54. This appeal is hereby dismissed with costs to the 1st respondent. I grant a stay of 30 days.

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 29.6.2020. 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