



IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 37 OF 2013

ALEXANDER KANG'ETHE MWANJE..... APPELLANT

VERSUS

MARGARET WAMBOGORESPONDENT

An Appeal from the Judgment of HON. J. KIARIE – SRM sitting at EMBU in SPMCC CASE NO. 142 OF 2000 delivered on 18/6/2003).

J U D G M E N T

1. This appeal herein arises out of a ruling dated 18/6/2003 in Embu RMCC 142 of 2000. The grounds of appeal are as follows;
 - i. That the Magistrate erred in reviewing and setting aside judgment entered on 20/9/2000 when there was no sufficient ground to warrant setting aside the Judgment.
 - ii. That the Magistrate erred in reviewing and setting aside the said judgment on grounds of jurisdiction when the said issue had not been raised by the Defendant.
 - iii. That the Magistrate erred in setting aside the judgment entered on 20/9/2000 yet the Defendant had no defence in respect of LR KAGAARI/KIANJOKOMA/T.26
 - iv. That the Magistrate erred in making a finding that the Plaintiff ought to have made an application to execute against the estate of the deceased Defendant when such an application was not necessary as the prayers sought in the plaint and as decreed covered the deceased's family, agents, servants and those claiming under him.
 - v. The Magistrate erred in allowing the application dated 29/4/03 when he knew there was inordinate delay in bringing the same and that a similar application was still pending.
 - vi. The Magistrate erred in deciding the application against the weight of evidence and submissions in favour of the Plaintiff.
2. The Appellant was the Plaintiff while the Respondent was the Defendant in the lower Court. The facts in the said Court were that the Plaintiff filed a plaint dated 6/7/2000 in his capacity as the registered owner of KAGAARI/KIANJOKOMA/T.26. The Plaintiff who alleged that the Defendant had trespassed into the said land prayed that the Defendant, his family agents and or servants or those claiming under him be evicted from the said land.
3. The Defendant filed a statement of defence dated 12/7/2000 wherein he admitted that the Plaintiff was the registered owner of the said land but claimed that the Plaintiff did not offer an explanation of how he acquired that land. He denied trespassing on the said land and claimed that he rightfully owned the said land as the same had been granted to him by the County Council of Embu as public utility under a corresponding minute.
4. Thereafter, the Plaintiff filed a notice of motion seeking that summary Judgment be entered in his favour as prayed in the plaint. The application was based on the grounds that the Plaintiff was the

registered owner of the said land and that the Defendant had unlawfully occupied it since 1997 and that the Defendant had admitted that the Plaintiff was the registered owner of the said land in his statement of defence.

In his replying affidavit, the Defendant claimed that the Plaintiff acquired the said land fraudulently and through corruption. The lower Court allowed the application and struck out the defence. A decree was subsequently issued on 5th September 2001.

5. On 29/4/03 the legal representative of the estate of the Defendant filed an application under certificate of urgency seeking orders;
 - a. For a stay of execution of the decree dated 5/9/01.
 - b. To be made a party to the proceedings as the legal representative of the Defendant who had since died.
 - c. That the orders made on 20/9/2000 striking out the defence and entering judgment in favour of the Plaintiff be set aside.
6. The application was grounded on the following grounds;
 - a. That the Plaintiff had attempted to execute the decree by evicting the Applicant from plot number 32 at Kianjokoma market.
 - b. That no application had been made to execute the decree against the legal representative as required by law.
 - c. That the Plaintiff's claim for eviction of the Defendant was for allegedly trespassing on Kagaari/Kianjokoma/T.26 which land is registered under his name under the Registered Land Act.
 - d. That the Court did not have jurisdiction to entertain the claim for eviction as the same fell under the jurisdiction of the High Court and/or the Land Disputes Tribunal.
 - e. That the land from which the Plaintiff attempted to evict the Applicant from was plot number 32 at Kianjokoma and not Kangaari/Kianjokoma/T.26.
7. In its Ruling dated 18th June 2003 the Court allowed the application on grounds that;
 - a. The Defendant died in the year 2000 therefore the Plaintiff ought to have applied to Court to levy execution against the Defendant's legal representatives according to section 37 of the Civil Procedure Act. The execution was obtained without an application under section 37 and was therefore a nullity.
 - b. The provisions of the Land Disputes /act were not brought out in the defence otherwise the Court would have held there were triable issues.
 - c. There was an issue of jurisdiction which the Court was not aware of
 - d. The Court invoked section 3A to prevent abuse of the Court process and to ensure justice was done.

It is this Ruling dated 18th June 2003 that is the subject of this appeal.

8. Both Counsels agreed to dispose of the appeal by written submissions. Mr. Kinyua Muriithi submitted that there were no sufficient grounds to warrant the setting aside of the Judgment. Counsel faults the learned trial Magistrate for finding that section 3 of the repealed Land Disputes Act does not talk of agricultural land. And that there was no requirement for section 37 Civil Procedure Rules to apply when eviction was requested for because the decree was clear that ***“Eviction of the Defendant, his family, agents and/or servants or those claiming under him from LR NO.KAGAARI/KIANJOKOMA/T.26”***.

He further submitted that he was not aware that the Respondent was the legal representative of the deceased Defendant. He also submitted that there had been inordinate delay in filing the application for Review, and the learned trial Magistrate failed to address this issue and/or failed to give reasons for not agreeing with the Plaintiff on this.

9. Mr. Okwaro for the Respondent opposes the appeal saying the defence had raised triable issues and it ought not to have been struck out. It was his submission that in attempting to evict the Respondent the Appellant failed to comply with the Provisions of Section 34 and 37 Civil Procedure Act.
10. As a first appeal Court I have a duty to reconsider the evidence, assess it and reach my own conclusions while remembering that I neither saw or heard the witnesses, and hence make an allowance for that. See **(i) WILLIAMSON DIAMONDS LTD & ANOTHER –V- BROWN [1970]E.A. 1 (ii) SELLE & ANOTHER –VS- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968]EA 123 (iii) KAMAU –VS- MUNGAI & ANOTHER [2006]1 KLR 150.**

I have evaluated the record and the submissions by both Counsels.

11. I have found the issues for determination to be four. These are

- i. Whether the Court had jurisdiction to deal with the matter.
- ii. Whether the learned trial Magistrate erred in finding that section 34 and 37 Civil Procedure Act had to be applied in this matter.
- iii. Whether there was inordinate delay in filing the application dated 29/4/2003.
- iv. Whether there were sufficient grounds for setting aside the decree.

12. Issue No. (i)

The application dated 29/4/2003 was for review under Order 45 rule 1((i) (b) Civil Procedure Rules which provides;

“Any person considering himself aggrieved by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay”.

13. The plaint shows that Appellant was the registered owner of land parcel number KAGAARI/KIANJOKOMA/T.26 at Kianjokoma market and the Respondent had trespassed onto this land. A reading of the pleadings plus the notice of motion dated 4th August 2000 and the Replying Affidavit confirms that the land in question is a plot at the Kianjokoma market; and not agricultural land which could have been the subject of the High Court and/or Land Disputes Tribunal Act.

And this being the position, I do find that the learned trial Magistrate had jurisdiction to deal with this matter and there had been no error on the face of the record.

14. **Issue No. (ii)**

There is no dispute that the Defendant in the lower Court died. It is also true that the decree involved the Defendant/his family members and/or agents. However his name remained therein and his interest had to be protected. Such interest could only be protected by the application of section 34 and 37 Civil Procedure Act. The Appellant did not comply with the two provisions. I therefore find that the learned trial Magistrate did not error on this finding.

15. **Issue No. (iii)**

Summary Judgment was entered on 6th September 2000 and the Defendant died on 17th December 2000. A decree was issued on 5th September 2001. What prompted the Respondent to file the

