



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C.A CASE NO. 13 OF 2019

JOYCE MICHERE GITHINJI.....APPELLANT

VERSUS

PATRICK NGARARIGA WANG'OMBE.....RESPONDENT

(Being an Appeal from the Ruling of Hon. P.M. Mugure – Senior Resident Magistrate at Wang’uru in PMCC No. 34 of 2018 on 6th December 2018 and 22nd May 2019)

JUDGMENT

Introduction

The Appellant who is acting in person is an elderly Kikuyu lady and is unable to read or write. She had been sued by the Respondent in Wang’uru Magistrate’s Court in PMCC No. 34 of 2018 for a claim in the sum of Ksh. 70,000/= allegedly being the total of the agreed price plus Ksh. 35,000/= damages for breach of contract pursuant to an alleged sale agreement dated 5th August 2015. From the proceedings before the trial Court, the plaintiff/respondent filed a request for judgment in default of Appearance and defence in a letter dated 5th April 2018 and on 26th April 2018, the Court allowed the request and entered interlocutory judgment as prayed in the plaint dated 23rd February 2018. A decree was then drawn and the process of execution commenced. By a Notice of Motion dated 6th December 2018 and filed in Court on 8th December 2018, the respondent sought an order to allow him execute the decree by way of cultivation of rice holding T/No. 3325 A Unit W3 Wamumu Section comprising one acre for ten (10) crop seasons to offset the decretal amount assessed at Ksh. 141,350/=. At paragraph 3 of the supporting affidavit, the respondent stated that the appellant was committed to civil jail for failure to pay the decretal sum but failed to comply. When the said application came up for hearing, the trial magistrate allowed the same Ex-parte and ordered as follows:-

“That the plaintiff be and is hereby allowed to execute his decree by cultivating rice holding T/No. 3325 A Unit W3 Wamumu Section comprising 1 acre for ten (10) crop season to offset the decretal amount herein”.

Aggrieved by the said order, the appellant filed a Notice of Motion dated 22nd May 2019 under certificate of urgency seeking a stay of execution of the said order issued on 28th January 2019 pending the hearing of the said application. The application came up for directions on 23rd May 2019 and the trial magistrate directed the same to be served for inter-partes hearing on 27th July 2019. When the application came up for inter-partes hearing on 27th July 2019, the respondent sought leave to file a replying affidavit out of time as he was served late. The appellant did not oppose and the application was rescheduled to 3rd June 2019. On 3rd June 2019, the respondent was absent. There was no response by the respondent. The application was unopposed. However, the application was dismissed with each party to bear her own costs. The appellant was aggrieved by the two decisions and approached this Honourable Court with a Notice of Motion dated 24th June 2019 seeking stay of execution of the decree issued on 28th January 2019 in PMCC No. 34 of 2018 (Wanguru) pending the hearing of this Appeal. In the Memorandum of Appeal filed in Court on 19th June 2019, the appellant set out the following grounds of Appeal:-

1. The entire proceedings were annulity.
2. That the learned trial magistrate erred in law and in fact in granting the orders as prayed in the plaint without considering that the appellant was not served with any document and this affidavit of service was false and the respondent had cultivated the appellant’s one acre in the year 2016 hence the appellant was condemned unheard.
3. That the learned trial magistrate erred in law by failing to observe the plaintiff/respondent adduced false witnesses.

4. That the learned trial magistrate erred in law and in fact in committing the appellant to civil jail on 23rd July 2018 and ignored formal application to set aside the proceedings and without considering that the respondent herein vide Criminal Case No. 35 of 2017 at Wanguru had remanded the appellant for six months over the same matter was dismissed.
5. That the learned trial magistrate erred in law and in fact in granting the orders as prayed by the respondent on 6th December 2018 without considering the false evidence on record and dismissed appellant's unopposed application dated 22nd May 2019 on 23rd June 2019.
6. That the learned magistrate erred in law and in fact in failing to consider the history of the land and the appellant has all along lived on for livelihood.
7. That the judgment was against the weight of the evidence on record.

Appellant's Submissions

The appellant submitted that she is the registered licensee of rice holding No. 3325 A Wamumu Section. She further stated that the respondent herein cultivated her rice holding for one year in 2016 crop season to offset the consideration arising from a lease agreement with him and that instead of leaving the rice holding in her possession, he secretly acquired an order to continue cultivating forcefully the rice holding for ten years leaving her destitute and helpless. The appellant further stated that in January 2017, the respondent in bad faith caused her to be arrested and committed to civil jail in Criminal Case No. 36 of 2017 where she was remanded for six (6) months, prosecuted before she was subsequently acquitted under *Section*

215 of the Criminal Procedure Code. She also stated that the respondent arranged for her committal to civil jail for one month. She argued that the respondent is forcefully cultivating her rice holding leaving her destitute and helpless with her family members despite the fact that he has fully offset his amount in accordance with their lease agreement plus interest.

Respondent's Submissions

The respondent submitted that the trial magistrate Hon. P.M. Mugure delivered a judgment on 28th January 2019 and 3rd June 2019 and that the appellant has failed to indicate which of the two decisions she was appealing against. The respondent also submitted that this appeal is null and void as no order appealed from has been extracted and annexed in the record of proceedings. He stated that the appeal was filed without a certified copy of the order appealed from contrary to *Order 42 Rule 2 Civil Procedure Rules*. The respondent also submitted that instead of preferring an appeal, the appellant should have sought clarification from the Court by way of an application under the slip rule under *Section 99 of the Civil Procedure Code*, or by way of review under *Order 45 of the Civil Procedure Rules*. He submitted that the grounds in the Memorandum of Appeal are clearly vexatious and frivolous and that the appeal is wholly unmeritorious and should be dismissed with costs.

Analysis and Decision

I have considered the appellant's seven grounds of Appeal and her submissions. I have equally considered the rival submissions by the respondent. It is not in dispute that the respondent had sued the appellant in the lower Court for a liquidated claim of Ksh. 70,000/= being the refund of a purported lease of one (1) acre of rice holding No. 3325 A Wamumu Section plus interest at 50% per annum. It is not also in dispute that upon being satisfied that summons to Enter Appearance was properly served and that the appellant had failed to Enter Appearance or file defence within the stipulated period and upon request by the respondent, the trial Court entered final interlocutory judgment against the appellant as prayed in the plaint. The respondent obtained the decree and applied for execution by committing the appellant to civil jail for 30 days. The appellant did not pay the decretal sum and the respondent filed application seeking the following orders:-

- “1. That this Honourable Court do allow the plaintiff/applicant to execute his decree by way of cultivation of rice holding T/No. 3325 A Unit W3 Wamumu Section comprising 1 acre for ten (10) crop seasons to offset the decretal amount herein.**
- 2. That costs of this application be provided for”.**

The said application was allowed ex-parte after the trial Court was satisfied that the applicant was properly served. On the first ground of appeal, I find that the appellant has not proved how the entire proceedings were a nullity. The respondent's dispute like all civil claims underwent a civil process from the issuance of summons until execution stage. The appellant should have challenged any of these processes where she felt was not conducted in accordance with the law. She cannot lament that the entire process was a nullity when she did not challenge the same in accordance with the laid down procedure. As regards the second ground, the appellant appears to challenge the manner in which the final interlocutory judgment was entered. However, she did not seek to set aside the same or have the process server recalled for cross-examination. This Honourable Court appreciates that the appellant is acting in person and has no benefit of a legal counsel to assist her to challenge any Court process where she thinks was not done in accordance with the law.

Ground number 3 of the appeals also falls by the wayside as the only way to determine the veracity of evidence adduced by a witness is by way of cross-examination in Court or subjecting the same to examination by a document examiner. There was no report by a document examiner indicating whether any of the documents annexed to the affidavit evidence were false and no replying affidavits were filed in opposition thereto. The process server who served the Court summons and other Court processes was not challenged and deponent of such affidavits of service recalled for re-examination. There was also no viva voce evidence adduced during the hearing of this case as the suit was determined through final interlocutory judgment.

As regards ground number 4, the appellant is lamenting how she was committed to civil jail for six (6) months. Committal to civil jail is a lawful process of execution of a decree. The appellant did not challenge the judgment and the decree which is the subject of this appeal from the lower Court. That ground in my view is moot.

On ground number five (5), I find that the trial magistrate allowed the application dated 6th December 2018 the consequence of which the respondent was allowed to execute the decree and judgment to be executed by way of cultivation of rice holding T/No. 3325 A Unit W3 Wamumu Section comprising 1 acre for ten (10) crop seasons. The trial magistrate did not demonstrate mathematically how the sum was going to be equivalent to the ten years the respondent was going to utilize the appellant's lease hold interest in the suit property. In any event, the lease

hold interest in the rice holding T/No. 3325 A Unit W3 is a property of the National Irrigation Board which is managed under Mwea Irrigation Settlement Scheme. The appellant is merely a licensee and a licensee has no proprietary interest in the subject matter capable of being executed in law. I therefore find and hold that the trial magistrate misdirected herself in allowing the execution of a property belonging to the National Irrigation Board who is not a party to this suit.

On ground number 6 of the Appeal, the appellant averred that the trial magistrate erred in law and in fact in failing to consider the history of the land. I find the appellant failed to give the causal link between the execution of the decree and the historical perspective of the rice holding. I therefore find that ground not proved to the satisfaction of the Court.

On ground number 7, I find that no viva voce evidence was given in which the trial magistrate could have weighed in her final judgment. The decree was a result of a final interlocutory judgment. I also find that ground has not been proved to the required standard.

The upshot of my finding is that this appeal only succeeds on ground number five and the same is hereby allowed in the following terms:-

1. The orders of the learned magistrate Hon. P.M. Mugure allowing the Notice of Motion dated 6th December 2018 on 28th January 2019 are hereby set aside and substituted with an order dismissing the said application with no order as to costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 16th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Joyce Michere Githinji – present
2. Patrick Ngarariga Wangombe – present
3. Mbogo – Court clerk.