REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 114 OF 2012

HEMED KASSIM HEMED …………………..…………..…………. APPELLANT

-V E R S U S-

FATUMA SHEIKH ABDALLA ………………………..……………. RESPONDENT

(Being an Appeal from the judgment of the Principal Magistrate Hon. S. K. Gacheru delivered on 28th June, 2012 in Mombasa CMCC No. 3173 of 2010)

JUDGMENT

1. This is an appeal against the decision of the Principal Magistrate S. K. Gacheru of 28th June 2012. Hon. S. K. Gacheru did not receive the evidence of this case because the case was wholly heard by Senior Resident Magistrate Hon. M. K. Mwangi who before he wrote the judgment was transferred from Mombasa Law Court. Hon. S. K. Gacheru therefore, just like me did not have the benefit of seeing or hearing the witnesses when they testified.
2. I am under a duty as the first appellate Court to re-evaluate the evidence tendered before the lower Court and to draw my own conclusions: see the case **KENYA PORT AUTHORITY –Vs- KUSTON (KENYA) LIMITED [2009]2 EA 212.**

3. Before embarking on that duty I wish to deal with Ground of Appeal No. 3 presented by the Appellant. On that ground Appellant faulted the Learned Magistrate for failing to make a finding that **Plot Mombasa/Block XXXIV/60** (the suit property) the property in question, in this dispute, was family land. I have gone through the pleadings in this matter and I could not find any allegation that the said suit property is family land. To therefore fault the Magistrate for not considering that which was not in issue at the trial Court is in error on the part of the Appellant.

4. The Court of Appeal in the case **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER –Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR**, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

   "… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-

   'As the parties are adversaries, it is left to each one 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. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

The Appellants also cited the Ugandan case of LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986]UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55 THAT-

'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'"

Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-

"ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

'…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

5. From the above discussion Appellant's ground No. 3 is rejected for seeking to advance an issue not in the pleadings.

BACKGROUND

6. The Appellant is the mother of the Respondent. At the time she testified in March 2011 she stated she was about 80 years.

7. She and the Respondent are registered proprietors in common of the undivided shares of the suit property.

8. Appellant's evidence as supported by PW2 was that the suit property was purchased from the proceeds of money sent by her son Mohamed Kassim Hemed Saleh, now Deceased, when he was based in Holland. It was not clear form Appellant's evidence, why the suit property was registered in both her name and Respondent's. Some guidance can be found from the Appellant's

written statement where she said-

> **"Sometime in July 1988, together with my husband Mr. Kassim Hemed (now Deceased) we discussed the matter with the members of my family and it was agreed that the TITLE DEED of my said property (MOMBASA/BLOCK/XXXXIV/60) should remain in both my names and the names of our elder son (HEMED KASSIM HEMED) so long as the plot remain the family property as other members of my family also contributed money for the reconstruction of the said house."**

It is important to state that although Appellant as seen above alluded that the suit property was intended to be family property, it was not pleaded in her Plaint. To therefore entertain that issue would be tantamount to denying Respondent a hearing on the same: see **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** (supra).

9. On the suit property is a building which initially had a ground floor occupied by Appellant and 1st floor occupied by Respondent.

10. Appellant in evidence as per her statement stated that in February 2010 she signed an agreement, Defence Exhibit No. 1 whereby she agreed to Respondent constructing another flat on the second floor of that building. That to enable that construction to take place without endangering her life Appellant moved out of the ground floor of that building and went to live with her granddaughter. It was on her return to the building in November 2010, she said, she was surprised to find Respondent had constructed more than she had consented to, that is he had constructed the flat No. 4 on the 3rd floor. That discovery was the genesis of this dispute.

11. As per the Plaint Appellant sought two prayers. Firstly she sought an order of eviction of Respondent from the 3rd floor where flat No. 4 was constructed. The second prayer was for a permanent injunction to restrain Respondent from entering the said flat No. 4.

12. Respondent denied Appellant's claim and pleaded in his Defence that the construction of flat No. 4 was ratified by an agreement signed by Appellant being Defence Exhibit No. 2.

13. Respondent in evidence stated that he contributed to the purchase of the suit property when he was working in Saudi Arabia. His contribution was half of the purchase price while his later brother Mohammed Kassim Hemed Saleh contributed the other half. That the share of his later brother was held by Appellant, their mother.

14. He stated, further, that before embarking on 2nd floor constructing on the suit property he sought Appellant's consent which was given and they signed an agreement Defence Exhibit No. 1 dated 19th February 2010. That later on 2nd November 2010 Appellant again agreed and signed Defence Exhibit No. 2 to the effect that Respondent could build 3rd floor, that is flat No. 4. This is what he stated in respect to Defence Exhibit No. 2-

    > **"Later, on 2.11.10, we agreed that I do on 3rd floor 1 apartment. Abdul Falah was present as a witness at all times when we signed Dexh 2. It was signed before an advocate. The document was read to plaintiff in Swahili by secretary of Advocate. Plaintiff was happy even in the case of construction."**

15. Respondent called one witness who was involved in the construction and who stated that he was at the Advocate's office when the Defence Exhibit No. 2 was read out to Appellant by the Advocate's Secretary. It is however to be noted that this witness confirmed that he was illiterate.

16. In the judgment of the trial Court the Court found Appellant had failed to prove her case and proceeded to dismiss it. In that judgment the trial Court found that Appellant had consented to the construction of flat No. 4 by virtue of signing Defence Exh. No. 2.

COURT'S DETERMINATION

17. There are really only two issues raised by the present appeal. Those issues are:

- **Whether Appellant consented to the construction of flat No. 4?**

- **If the answer to No. 1 is positive, what orders can this Court grant?**

DID APPELLANT CONSENT TO CONSTRUCTION?

18. From my close reading of the evidence tendered before Court I find that Appellant denied signing or more correctly, thumb printing Defence Exhibit No. 2. This is clear from her evidence when she stated-

> **"On 19.2.2010 we never agreed that he (Respondent) continues building the house. My consent was never sought. I can't read or write …."**

This statement was made while Appellant was being cross examined. The other document which Appellant referred to in the latter part of that cross examination was entirely different document and not Defence Exhibit No. 2. In my reading I find that the document Appellant referred to in the latter part of that cross examination was the document which was dated 20th February 1985, signed before the Kadhi where Appellant seemed to have surrendered her share of the suit property to Respondent. That is the only explanation one gets from Appellant's evidence, at that point of cross examination when she said-

> **"He cheated and when the documents we agreed (sic) was read to me, I was surprised that he wanted to take over the house."**

19. It is because of the above finding I reject the submissions made by Learned Counsel for the Respondent when he stated that Appellant had failed to prove the doctrine of *non est factum*, that is, it is not my deed. The doctrine was discussed in the case: **MARVCO COLOUR RESEARCH LTD –Vs- HARRIS [1982]2 SCR 774** thus-

> **"[w] here a document was executed as a result of a misrepresentation as to its nature and character and not merely its content the Defendant was entitled to raise the plea of non est factum on the basis that his mind at the time of the execution of the document did not follow his hand."**

20. As I stated before I do not understand that to be the defence raised by Appellant in respects of the Defence Exh. No. 2. What I understand from Appellant's evidence to be Appellant's case is that she did not sign Defence Exhibit No. 2.

21. Having raised that defence, that she did not sign that agreement the evidential burden of proof as set out in Sections 107 to 112 of the Evidence Act Cap 80 fell upon Respondent. The Respondent was required to prove on a balance of probability that Appellant signed Defence Exhibit No. 2.

22. Did the Respondent meet that burden of proof? Respondent gave evidence in respect to that exhibit and stated it was prepared by an Advocate and was read by the Advocate's Secretary, to the Appellant, in Swahili.

23. To support that evidence he called a person who was involved in the construction, but who did not sign as a witness to Exhibit No. 2, who also said the agreement was signed in the Advocate's office and was read out by the Advocate's Secretary in Swahili.

24. The question that begs the answer is, why were the Advocate and the Secretary not called to testify to the fact? No explanation was given. Even more worrying is that there was another

person who allegedly signed as a witness by the name of Abdulfatah Abdalla Ali who was not called to testify to the fact that Appellant signed the agreement and that it was read to her by the Advocate's Secretary. It is also important to note that if infact the Secretary read out the agreement such reading out is not evidenced in that agreement. Respondent did not meet the required burden of proof.

25. In view of the finding that Respondent did not meet that burden it follows Appellant did not give her consent for the construction of Flat No. 4. She only gave consent to the construction of flat No. 3 as evidenced by Defence Exhibit No. 1.

WHAT IS THE EFFECT OF APPELLANT'S LACK OF CONSENT?

26. The trial court's judgment was delivered on 28th June 2012. By that date The Land Registration Act, 2012 had commenced. Section 91(1) of that Act provides that co-tenant means-

> **"… the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common."**

Sub-Section (5) of that Section further provides-

> **"If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole …"**

Sub-Section (6) provides-

> **"(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld."**

27. Respondent as seen from Sub Section (6) could not construct flat No. 4 without the authority of Appellant his co-owner of the suit property. Much more Respondent could not rent out that flat without consent of Appellant. This is what was stated by the Court of Appeal in the case **SATIMA PEAK FARMERS LIMITED –Vs- ONESMUS WERU (DECEASED) & 4 OTHERS [2013]eKLR** as follows-

> **"…. We pose the question, is a co-owner of real property an agent of the other? Can his/her action bind the other owners? What are the rights of a co-owner inter se and as against third parties who have notice of co-ownership? In RE HILTON (1090)2 Chan 548 it was stated that where the legal estate is vested in all co-owners, they must act unanimously. One or two co-owners cannot act to sell the land to the exclusion of the other and none of the co-owners has the power to sell unless such power is exercised unanimously by all registered co-owners. The only thing that one co-owner has against the other is unity of possession of the suit property and nothing more."**

28. The above holding although referring to a sale by one co-owner without consent of the other equally applied in this present appeal. Respondent built flat No. 4 without the consent of Appellant.

29. What then can be the effect of such construction. The effect is that flat No. 4 is equally owned by the two, Appellant and Respondent as co-owners.

30. I noted from Appellant's evidence that Respondent is benefiting from the rental income of flat No. 4. That being so, the interest of justice and because the law supports equal ownership to be represented by equal benefit, the parties shall equally enjoy the rental income. In my view the law cannot support the prayer of Appellant that Respondent be evicted and be restrained from entry of flat No. 4.

CONCLUSION

31. It is clear from the evidence before the trial Court that the Respondent has since 2010 enjoyed the rental income of flat No. 4. It is now time for Appellant to have the benefit of enjoying that same rental income. In my view and because this is a family matter, not wishing to cause any more antagonism, I will not issue an injunction as sought. I grant the following orders-

a. **The dismissal of the Appellant's suit before the lower Court is set aside and is substituted by an order that-**

i. **The Appellant and Respondent shall from this date hereof share equally the rental income of flat No. 4 on property Mombasa/Block XXXIV/60.**

ii. **The parties shall bear their own costs in respect to this appeal and to the lower Court case.**

DATED an DELIVERED at MOMBASA this 4TH day of DECEMBER, 2014.

MARY KASANGO

JUDGE