



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 92 OF 2011

KIRIMI KIRERA.....1ST APPELLANT

FREDRICK KIRERA.....2ND APPELLANT

VERSUS

FLORENCE THIRINDI.....RESPONDENT

J U D G M E N T

The suit was filed in Court in the year 2001. The Plaintiff sought a declaration that the Plaintiff owned half of plot No.8 situated at Kiengu Market within Meru North District. She also sought an order directing the 3rd Defendant to register the Plaintiff as the owner of half of the suit plot. She also sought costs and interest thereon at the Court rate.

The Plaintiff pleaded that the 2nd and 3rd Defendants had fraudulently transferred the suit plot to the 1st Defendant.

The 1st and 2nd Defendants filed a joint defence denying the Plaintiff's claims generally. Specifically the particulars of fraud as set out in paragraph 10 of the plaint were denied. At paragraph 5 of their defence they took issue with the jurisdiction of the Court saying that all the Defendants resided at Maua and the subject matter was also in Maua. They also in paragraph 6 of the defence indicated that they would be asking to have the suit struck out as, according to them, the Plaintiff had not obtained letters of Administration in respect of the Estate of Asuman M'Munoru, the deceased husband of the Plaintiff.

The 3rd Defendant, Nyambene County Council denied the claims contained in the Plaintiff's plaint. They specifically denied the particulars of fraud contained in paragraph 10 of the plaint. They also specifically denied that the deceased husband of the Plaintiff was the original owner of Plot No. 8, Kiengu Market. They denied knowledge of any arbitration by Njuri Ncheke elders and also claimed that the Plaintiff lacked capacity to file the suit on behalf of the estate of Asumani Munoru, her deceased husband.

It is apparent that the County Council of Meru vide Minute Number 7/69 9A) 43 of the Trades and Market Committee Meeting held on 17 th April, 1969 transferred the suit plot to Kirimi Frederick. The application to have the plot transferred to Kirimi Frederick was made by M'Munoru Kiunga. This transfer took place 32 years before this suit was filed by the Plaintiff.

The appeal is against the Judgment of the Hon. S. N. K. Anderson, Principal Magistrate in Meru C.M.C.C. No. 114 of 2001 delivered on 14th July, 2011. The grounds listed in the amended Memorandum of Appeal are:

1. **THAT the Learned Magistrate erred in Law and fact by failing in her Judgment to analyze or isolate all the salient issues for determination as contained in the pleadings of all the parties in the case before the Trial Court.**
2. **THAT Learned Magistrate misdirected herself and erred in failing to find that one of the crucial issues was the existence of an alleged agreement between the deceased and 2nd Appellant for development and sharing of the plot which the respondent had woefully failed to prove.**
3. **THAT the Learned Trial Magistrate erred and misdirected herself in law and fact in failing to consider fairly all the evidence tendered both before herself and her predecessor.**
4. **THAT the Learned Trial Magistrate erred both in law and fact by transferring the burden of proof from the respondent (Plaintiff in the Trial Court) to the Appellants (Defendants in Trial Court)**
5. **That the Learned Trial Magistrate erred both in law and fact by finding that the burden of proof had shifted to the Appellants whereas in law only the evidential burden to rebut the Plaintiff's case shifts and never the burden of proof which always lies on the Plaintiff.**
6. **THAT the Learned Trial Magistrate erred both in law and fact by failing to find that the respondent having absolved the Nyambene County Council and its predecessor from any blame in the transfer of plot No.8 Kiengu Market from the deceased to the 1st Appellant then the respondent's case for fraud against the 1st and 2nd Appellants could not stand and the entire suit in the Trial Court ought to have been dismissed against all the Defendants not just the 3rd Defendant.**
7. **THAT the Learned Trial Magistrate erred in law and fact by placing so much reliance on technicalities of filling the transfer form (D.EXH.3) which was a Standard Form Document and which was duly filled by the transferor and which was supposed to be filled in parts C, D & E by the Clerk to the Meru County Council (Predecessor or Nyambene County Council) and which was also backed by minutes of a full County Council of Meru (E.EXH. 4)**
8. **THAT the Learned Trial Magistrate was clearly biased against the Appellant when she questioned the alleged brazen conduct of the 2nd Appellant just because he transferred the suit property to the 1st Appellant who was his son and who was 3 years old in 1969 when in fact there was a logical explanation that in 1969, the 2nd Appellant would not be allowed to own property in the same County Council where he was employed as a Cashier /Civil Servant.**
9. **THAT the Learned Trial Magistrate's findings that the Appellants had not demonstrated they were entitled to the entire suit plot is a clear misdirection in law and fact and shows the Learned Magistrate had a preconceived mind against the Appellants and she did not fairly and impartially analyze all the evidence.**
10. **THAT the entire Judgment and findings of the Learned Trial Magistrate were against the law and weight of evidence on record.**
11. **THAT the Learned Trial Magistrate erred in law and facts by failing to find that:**

(i) The respondent was claiming a half of the suit plot on behalf of the estate of her deceased husband since the suit plot initially belonged to the respondent's (long deceased) husband, yet the respondent had not obtained any form of letters of administration of her afore-said late husband's estate, to clothe her with capacity to file the primary suit

(ii) She had no territorial jurisdiction, to entertain the primary suit since the suit plot is situate in, and the parties reside and work for gain in Kiengu within Maua area, which is within the geographical jurisdiction of Maua Law Courts.

The parties made detailed submissions in support of their respective positions. The Appellant proffered 4 authorities. The Respondent offered one authority. As ground II of the Memorandum of Appeal questions the jurisdiction of the Trial Magistrate, I will address this issue first.

Before doing so, however, I wish to refer to two issues raised by Mr. Calpeters Mbaabu, advocate for the Appellant. Raising the first issue, he said, “Your Lordship, it is quite strange for the respondent's counsel to attack the Appellants' Counsel under his limb by calling them **“LEARNING FRIEND!”** May your lordship be pleased to expunge from the record all the sentences which have haplessly been personalized.”

Raising the second issue, he said: “At the last page of her submissions, the Respondent wishes the Honourable Court determine this appeal on humanitarian grounds. That is extremely weird and unheard of! Cases are determined based on the law and facts and not on humanitarian grounds. Amazingly, the respondent's Counsel invokes the holy name of God in an unfortunate bid to intimidate the Court with some perceived consequences. This is absolutely unpalatable, uncalled for, unethical, unprofessional and most unfortunate. We urge the Honourable Court to expunge the said part of the Respondent's submissions from the record in determining this Appeal.”

The statement in question made, by Mr. Elijah K. Ogoti, advocate for the respondent, exactly in his own words, reads as follows: “It is just for the Lower Court Judgment to stand till after all the Appellants have ½ of the plot furthermore on humanitarian grounds this plot originally belonged to the respondent family and if the Hon. Court gives it to the Appellants even God may not be happy and we know the consequences though to the coming generations (sic). My lord I rest my submissions.”

I find the two statements unnecessary and uncalled for. Calling a colleague a **“LEARNING FRIEND”** instead of a **“LEARNED FRIEND”** in submissions amounts to behaviour which is opprobrious and deserving condemnation. Regarding the part asking the Court to be influenced by humanitarian grounds and also saying that God would not be happy if this case ends up being decided in favour of the Appellant, I can only say that this is a Court of law which conducts its business in accordance with established Judicial tenets.

Regarding jurisdiction, it is clear that the Appellants' statement of defence at paragraph 5 raised the issue of Jurisdiction. In the case of Owners of the Motor Vessel “Lillian S” V. Caltex Oil Kenya, (1989) KLR1, the Hon. Justice Nyarangi JA, Said:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no Jurisdiction, there would be no basis of a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Hon. Justice Nyarangi JA, as he then was quoted “Words and Phrases Legally Defined” - Volume 3: 1-N page 113 as follows:”

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter, or Commission under which the Court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the Jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the Jurisdiction shall extend or it may partake of both these characteristics. ... Where

a Court takes it upon itself to exercise a Jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given”

Justice Nyarangi then said: “It is for this reason that a question of Jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court. A party who fails to question Jurisdiction of Court may not be heard to raise the issue after the matter is heard and determined.”

In this suit the question of jurisdiction was raised in the Joint statement of the 1st and 2nd Defendants at paragraph 5.

Section 15 of the Civil Procedure Act says: “

“15. Subject to the Limitations aforesaid, every suit shall be instituted in a Court within the Local limits of whose jurisdiction: -

(a) the Defendant or each of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the Court is given or the Defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action wholly or in part arises.”

The cause of action in these proceedings wholly arose within the geographical Jurisdiction of Maua law Courts and not Meru Law Courts. All the Defendants reside within the Jurisdiction of Maua Law Courts. This actuality was not denied or contested by the respondent.

It was submitted, for the Respondent that Article 159 (2) (d) of the Constitution of Kenya cured the question of Jurisdiction as procedural technicalities should be eschewed. It was also submitted that the question of Jurisdiction should have been raised as a preliminary objection in the Lower Court.

As the Hon. Justice Nyarangi said in the case of The MV “Lilian S”, Jurisdiction is everything. In this case the question of Jurisdiction had been pleaded in the 1st and 2nd Defendants' Statement of Defence. The Court should have on its own motion decided this question forthwith. It did not do so.

I find that the question of Jurisdiction is not a procedural technicality. It is a substantive legal issue.

I also find that the cause of action arose within the jurisdiction of Maua Law Courts. The Meru Chief Magistrate's Court did not have Jurisdiction to hear and determine this suit.

As the Hon. Justice Nyarangi, JA, as he then was, eloquently stated: “Where a Court takes it upon itself to exercise a Jurisdiction which it does not possess, its decision amounts to nothing.”

Although the question of Jurisdiction disposes of this Appeal, I find it necessary to consider other issues raised herein.

I now wish to address the issue of lack of capacity to institute the suit by the Respondent as according to the Petitioner, she had not obtained letters of administration of the husband's estate. I note that the Lower Court had found as a fact that Limited Grant of Letters of Administration had been obtained in Maua Succession Cause 23 of 2000 and that the same had been produced as an exhibit. I need

not say anything else regarding this issue.

The submission by the Appellant that the primary suit, Meru C.M.C.C. No.114 of 2001 was statutorily time barred since it was predicated upon fraud, which is a tort actionable within 3 years, will now be considered. It is not in dispute that the Meru County Council registered Plot No.8 Kiengu Market in the name of the 1st Appellant in 1969, a period of 32 years before Meru C.M.C.C No. 114 of 2001 was filed on 27.2.2001.

The Respondent's husband died in 1990, 21 years after the suit was transferred to the 1st Plaintiff. I find that it is inconceivable for the Respondent's husband not to have discovered that the subject plot was registered in the name of the 1st Appellant. I find that if there was fraud, time would run against the Plaintiff's/Respondent's husband from 17.4.1969 when the Meru County Council transferred the plot to the 1st Appellant. The husband of the respondent would have been time barred sometime in 1972 after 3 years.

The Respondent claims that she discovered the fraud in the year 2001 and filed this application in the year 2001, hence within the allowed time. She offered as her authority a ruling in the case of Lawrence Mwangi V. Agricultural Finance Corporation and another [H.C. C. NO.2150 of 2000- Nairobi] where the Court said:

“By Order VI rule 4(1) Civil Procedure Rules if AFC wishes to rely on the defence of limitation the statute of limitation must specifically be pleaded. By S 26, where the action is based on fraud of the Defendant, the period of limitation does not begin to run until the Plaintiff has discovered the fraud.”

The circumstances of that case and those of this case are different. In this case it is not in dispute that the deceased husband of the Plaintiff, before his death in 1990, had slept on his rights for 21 years. The limitation period for fraud was 3 years. He was, therefore, before his death, statutorily barred from proceeding to Court on a matter based on fraud. Could his death then alter the landscape and cure incapacity? The Plaintiff claims that she is suing on behalf of the estate of her deceased husband who before his death was already statutorily barred by the Limitation period. My view is that if the Plaintiff's husband was incapacitated before his death, that incapacity must bind the person suing on behalf of the estate. I find that recognition of this reality is a point of law that can be raised by a party as envisaged by the defunct O.VI.r.7. This provision is now contained in Order 2, rule 9.

Irrespective of when she discovered the fraud she is alleging took place, whether it is in 1990 or 2000 as variously claimed, I hold that she was bound by her deceased husband's incapacity. It is inconceivable that the 1st and 2nd Defendants would be having possession of the suit plot for 21 years before the death of the Plaintiff's husband, without him having discovered that there was something amiss, let alone fraud.

If I had not indicated that the appeal would be allowed for lack of jurisdiction by the Trial Court, I would allow the appeal on the basis that the Plaintiff was statutorily barred from instituting the suit. I reiterate that I find time-bar to be a legal point.

Having gone through the typed proceedings in the Lower Court, I find that grounds 1 to 10 in the Appellants Amended Memorandum of Appeal are supported by the entire record. For example, the Plaintiff at paragraphs 7 and 8 of her plaint stated that her deceased husband, by an agreement, allowed the 2nd Defendant to develop the whole of the suit plot on a mutual understanding that it would be shared equally on a 50-50 basis between her late husband and the 2nd Appellant. She states that the 2nd Appellant took possession of the said plot and constructed a permanent building. However, her single witness contradicted her statement by saying that the Plaintiff's deceased husband and the second Appellant had jointly put up a building on the suit plot. The witness also contradicted the Plaintiff in other areas.

Whereas the alleged fraud was supposed to have been perpetrated by the 1st Defendant and the 2nd

Defendant with collusion of the 3rd Defendant, Nyambene County Council, the Learned Trial Magistrate stated in her Judgment that the suit against the 3rd Defendant had not been sufficiently proven and dismissed the suit against it with costs.

I find that upon a proper evaluation and analysis of the evidence placed before it, the Trial Court would not have entered Judgment for the Respondent. In the circumstances this Appeal is allowed and the entire Judgment of the Learned Trial Magistrate is set aside and is substituted with an order that the suit against the 1st and 2nd Appellants who were 1st and 2nd Defendants in the Lower Court is dismissed with costs. Costs in the Lower Court are also awarded to the Appellants.

Dated and Delivered in Open Court at Meru this 7th day of October, 2013, in the presence of :

Cc. Mwonjaru/Daniel

Miss Nyagah h/b Carl Peters Mbaabu for Appellant

Elijah Ogoti for Respondent - absent

P. M. NJOROGI