REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 128 of 2008

MANENE NDUE……..……..……1ST APPELLANT

SALUSIO MAJAU……..……..……2ND APPELLANT

EDWIN MURITHI……....……..……..3RD APPELLANT

RIUNGU CHABARI…….....……..……..4TH APPELANT

ERASTUS MWIRICHIA ……....……5TH APPELLANT

VERSUS

MBAREINE KATHUNGU…….....…….……RESPONDENT

(Being an appeal from the judgment/decree of Mr. W. K. Korir, (Principal Magistrate) delivered on 18/11/2008 at Meru in CMCC No.20 of 1994).

J U D G M E N T

The appellants were the plaintiffs at the lower court. The plaintiffs had sued the defendant seeking removal of the defendant's permanent structures constituting a nuisance onto the access road adjoining the sublets numbers Mwimbi/Chogoria 290B and C or in the alternative an order authorizing the plaintiffs to remove the said nuisance; a permanent injunction restraining the defendant from creating a nuisance on the aforesaid access road, general damages with costs and interests.

The respondent filed defence and counterclaim. The respondent denied the plaintiffs claim and in the counterclaim, sought specific performance of contract entered into between himself and the 1st appellant. He also claimed general damages for breach of contract, costs with interest.

The appellants gave evidence and called four witnesses whereas the respondent gave evidence and called one witness. The facts of the case are simple and not in dispute. The 1st appellant sold various portions to various purchasers who included his co-appellants and the respondent from his parcel of land MWIMBI/CHOGORIA/290. The 1st appellant caused subdivision of his parcel of land creating several tittles thereto. The mutation for subdivision was presented to land Registrar Meru South and Tharaka District on 30/7/1996. The resultant numbers were No.2120,2121,2122,2123,2124,2125,2126,2127 and 2128.

The subdivided parcels were registered in the names of various individuals as given by the 1st appellant. The respondent was not registered as the 1st appellant contended that the respondent had occupied a portion that he had not purchased. The respondent was supposed to occupy a portion indicated in the subdivision as C. The appellants contended that the respondent put up a structure on the road of access blocking the appellants from accessing their respective portions.

The trial court after hearing the case dismissed the appellants suit and granted the respondent's counter claim. The appellants being aggrieved with the trial Magistrate's judgment preferred this appeal setting out 14 grounds of appeal.

Prior to the hearing of the appeal, counsel for the parties to the appeal agreed by consent to file written submissions in support of their respective client's opposing positions. The written submissions with lists of authorities were filed. This court further heard oral submissions made by Mr. K'opere advocate for the appellants and Mr. Basilio Gitonga Advocate for the respondent. The court has also read the pleadings, proceedings and judgment of the trial court.

The appellants combined ground No.1 and 2 of the appeal. The appellants argued that the abatement of the suit by the 2nd and 5th appellants did not affect the claims by the 1st, 3rd and 5th appellants and in the same measure since the respondent's counter-claim was general and not specified to be against which plaintiff the said abatement affected his counterclaim in equal measure. The appellants contended allowing counterclaim with full costs against all the appellants on the order of specific performance was legally erroneous. The respondent's counter-claim was not against all the appellants but 1st appellant. The respondent having therefore succeeded on counterclaim against 1st appellant ought to have been awarded costs against the 1st appellant but not against the other appellants.

The trial court correctly found that the 2nd and 5th plaintiffs claim had abated as no substitution had been effected within the prescribed period and further the trial Magistrate was correct to find that the remaining plaintiffs succeeding in their claim, the estates of the 2nd and 5th plaintiffs would automatically benefit in the prayers they were seeking as the prayers were all the same with those being sought by the remaining plaintiffs.

The 4th appellant as a purchaser held a legally enforceable right as a purchaser of portion of suit property at the date of the filing of the suit on 17th November, 1994. The purchaser's rights are recognized in law and the assignment to his wife at the time of the transfer and registration between the years 1996-2000 could not defeat the 4th appellant's rightful claim.

The respondent referred me to the case of **PATRICK KARIUKI –V-MWAURA MUCHINA THIRIKWA C.A. NO.681 OF 2000(Nairobi) and ELIZA OLOO ARUM –V-HILL SCHOOL C.A. 51/1994**(Eldoret) dealing with abatement of case. I am in agreement with the above mentioned cases that where a deceased person is not substituted within a year by a personal representative the suit relating to deceased person abates after the lapse of 12 months from the date of death.

In this appeal the claim by 2nd and 5th plaintiffs at the lower court abated when 12 months lapsed without the substitution and the trial court correctly held so.

In view of the trial court's finding that 4th appellant had no legally enforceable right as a purchaser and because he had transferred the suit property to his wife, the trial court misdirected itself and arrived at the wrong decision.

The appellant combined grounds Nos 3, 4 and 5 of the Memorandum of Appeal and argued them together. The appellants faulted the trial Magistrate for failing to appreciate evidence of the Land Registrar(PW2) that mutation for subdivision of L.R. No.Mwimbi/Chogoria/290 was registered on 30/7/1996 and new numbers assigned with clear demarcation of sizes and road reserve as confirmed by PW3 the surveyor who produced the registry index map and that of constructions, approvals or

development which were undertaken prior to that date constituted illegalities and were null and void. The evidence by PW2 the land Registrar and PW3 is clear that mutation for subdivision was presented on 30/7/1996. DW1, the respondent in his evidence stated that he gave plan for approval but that he does not know who approved the plan. That he obtained occupation permit and stated the same does not have a rubber stamp and that the receipts do not have rubber stamp either. The respondent stated that he started construction in 1988. DW2 testified that the respondent's plan measured 40'x80'. That respondent carried out construction between 1988 and 1993. He stated he could not identify the plot on the map and that the respondent's plot is on where the road access had been put as per exhibit P.10. That two people had already bought plots when respondent bought his. DW2 testified the respondent's plot is not shown on the map. He admitted that it is on the access road.

PW2 on being cross-examined, stated that when mutation was presented to them he did not know what was on the ground and normally they do not visit the ground. He confirmed none of the officers visited the ground. PW3 confirmed that subdivision was not carried by their officers. The site visit as per sketch drawing by Muiri C.M, Meru Law Courts clearly show that part of the respondent's building fell on a portion reserved for the road to the front and rear access to all the other land owners. The skeleton by Mr. Muiruri, CM Meru Law Courts on visit to the site indicate that the respondent's building exceeded 40'x80'by 8-10 feet extending to the access road. The respondent's building was put between 1988 and 1993 without proper approvals and compliance with physical planning Act and titles of the suit property having not been issued by the time the respondent constructed. This was therefore before presentation of mutation and subdivisions plans which were registered in 1996. On the other hand PW1, PW2, PW3, pw4, Pw5 and DW2 confirmed that the respondent had constructed on the road access blocked other proprietors from access of their plots by extending this plot beyond 40'x80' being the portion sold to him by the 1st appellant.

I therefore find that the respondent did not have valid approval to put up the building before demarcation of roads of access and on the portion which the 1st appellant had not pointed out to him and effected transfer or had or given consent to carry out construction.

The respondent did put up a building on a road of access at his own risk. In view of the foregoing I find grounds no's 3,4,5, and 6 of the Appeal to be merited and allow the same.

The appellants combined grounds no's 7, 8, 9 and 12 and argued them together. The appellant counsel submitted that the trial court relied on extraneous matters which were not part of the proceedings and failed to enquire about the access road as per subdivision plan register and as drawn by a surveyor one Laban. The parties all relied on subdivision plan which had been drawn by a qualified surveyor named as Mr. Laban and which plan was duly submitted for approval and was approved by District Surveyor on 30/7/1996. The sub-division plan clearly showed where the road of access is and it is the same sub-division plan that Chogoria Town Council relied upon as per its letter of 11/03/2004(see page 67 of the record of appeal) when it sought to demolish the respondent's structures developed between parcel No.Mwimbi/Chogoria/2121 and 2122 as the structures were on a road reserve contrary to Physical Planning Act. On occupation certificate/permit issued by Meru County Council to the respondent dated 18th February, 1992 and not in 1988 as court found, it is the occupation and putting up of the shop and toilet on the part of plot which blocked the access road which made the appellants file this suit in 1994. The respondent stated in his evidence that he could not point out on the sub-division plan, by Mr.Laban where his plot was located. Interestingly the 1st appellant is yet to transfer the plot due to the respondent.

The respondent relied on the subdivision plan drawn by the said Mr. Laban. There cannot therefore be confusion as to which is correct subdivision plan followed by the District land Registrar and Chogoria Town council. On the other hand minutes relied upon County council of Meru produced as exhibit No.5 by the respondent under item No.18 do not state the plot number but refer to retail shop, the same is unsigned and the trial court was in error in relying on the same when the authenticity was challenged and further when the same was uncertified as true copies of the records.

The trial court in its judgment raised the issue of conspiracy by the appellants against the respondent. I

find in the proceedings the respondent did not raise the issue nor the appellants. The court was wrong in raising an issue on its own motion using it as a basis of his judgment having not been raised by any of the parties to the proceedings.

In the circumstances I find that the trial Magistrate considered extraneous matters which influenced it's judgment to the detriment of the appellants and as such the grounds of appeal mentioned herein above succeeds.

The appellants combined grounds No.10 and 11 and argued them together. The appellants fault the trial Magistrate in sanctifying an illegality by his judgment and decree. The trial court found there was no access road when the suit was filed in 1994, while at the same time relying on the sketch marked in letters when the respondent was buying a portion of plot from 1st appellant in 1979.

The sketch later made provisions for plots and access road which was later reduced into a clear mutation and registered. The respondent was wrong in proceeding to develop the purchased plot before sub-division plan had been concluded and registered. The trial court has not justified in its findings that there was no road of access when the suit was filed in 1994.

The court was further wrong in its finding that a contractual, private and personal interest of the respondent overrides legal and public policy rights governing by land/Town planning and tenure including statutory rights of easement to land owners.

Lastly the appellant argued ground Number 14 of Memorandum of Appeal on costs. The appellant counsel argued the trial Magistrate granted full costs on a counter-claim and the suit when the respondent had succeeded on part of his counter-claim and when prayer for transfer was untenable. Costs is always at the discretion of the court and normally costs follow the event.

Section 27 of Civil Procedure provides:-

"27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.'

In view of the foregoing the trial court was right in awarding costs to the respondent having found for him in suit and counter-claim. I find no merits in the ground and the same is dismissed.

Under Section 28(c) and (j) of the Land Registration Act, 2012(No.3 of 2012)it provides:-

"28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
(j) any other rights provided under any written law."

In the case of **KAMAU –V-GATHURU & ANOTHER KLR (E&L) 655** Civil Case No.316 of 1998 Hon. Justice Musinga held:-

"2. The plaintiff had on a balance of probabilities established her case and the first defendant had no right to block the frontage of the plaintiff's property which opened up to a cul de sac.

Besides the above in the case of **KAMAU –V-KAMAU KLR(E&L) 1 page 105 Civil Appeal No.45 of 1987** Court of Appeal held:-

"A right of way and a right to take water are affirmative easements for they authorize the commission of acts which are injurious to another and can be subject of an action if their enjoyment is obstructed.

4. At equity, if there is an agreement to grant an easement for valuable consideration, whether it is under seal or not, equity considers it as granted as between the parties and persons taking with notice and will either decree a legal grant or restrain a disturbance by injunction.

5. If the footpath and the bridge over the respondent's land to that of the appellant's husband was a way of necessity and an easement by operation of law, it would continue to exist for as long as the necessity exist notwithstanding that it was not referred to in the certificate of title to the respondent's land(the servant tenement)."

The upshot of this appeal is that the appeal is allowed and I proceed to make the following orders:-

(a). The judgment and decree given on 18th November, 2008, be and is hereby set aside and substituted with the following:-

i. Judgment be and is hereby entered for the appellants No.1, 3 and 4 in this appeal against the respondent in terms of prayer (a) and (b) of the plaint.

ii. The 1st appellant do specifically transfer plot measuring 40'x80' plot marked (c) to be excised out MWIMBI/CHOGORIA/290 which portion should not include any part of the road of access.

(b). The appellants are awarded costs of the appeal and costs of the suit below,however the 1st appellant should pay the respondent costs of the counter-claim in the court below.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF OCTOBER, 2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

N/A for the appellant

N/A for the respondent

J. A. MAKAU

JUDGE