



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CIVIL APPEAL NO. 16 OF 2018

FATUMA AHMED MOHAMMED.....1ST APPELLANT

MARIAM AHMED MOHAMMED.....2ND APPELLANT

VERSUS

CHARLES MWANGI GITUNDU.....RESPONDENT

JUDGEMENT

(Being an Appeal from the Ruling and Order of Hon. M Kasera delivered on 30th August, 2018

at the Chief Magistrate Court at Kajiado CMCC No. 154 of 2014)

Introduction

By a Memorandum of Appeal dated the 26th September, 2018 the Appellants appeal against the whole of the Ruling delivered by Hon. M. Kasera Chief Magistrate's Court at Kajiado on the 30th August, 2018. The genesis of this appeal is the Ruling of the Principal Magistrate Hon. M. Kasera in the Kajiado CMCC No. 154 of 2014 where she ruled in favour of the Respondent by striking out the Appellants' Defence and entered judgement for the Respondent. In the said suit the Respondent had sought for the following orders as against the Appellants:

a) Order of eviction to evict the Defendants from KJD/ Ole Kasasi/1181, KJD/ Ole Kasasi/ 1182, KJD/ Ole Kasasi/ 1183, KJD/ Ole Kasasi/ 1184, KJD/ Ole Kasasi/ 1185, KJD/Ole Kasasi/ 1187, KJD/ Ole Kasasi/ 1188, KJD/ Ole Kasasi/ 1189, KJD/ Ole Kasasi/ 1190, KJD/ Ole Kasasi/ 1191, KJD/ Ole Kasasi/ 1192 and KJD/ Ole Kasasi/ 1193.

b) Permanent injunction to prevent the Defendants by themselves or any other claiming through or under them from occupying or continuing to occupy or howsoever trespass upon the suit properties, that is to say, KJD/ Ole Kasasi/1181, KJD/ Ole Kasasi/ 1182, KJD/ Ole Kasasi/ 1183, KJD/ Ole Kasasi/ 1184, KJD/ Ole Kasasi/ 1185, KJD/Ole Kasasi/ 1187, KJD/ Ole Kasasi/ 1188, KJD/ Ole Kasasi/ 1189, KJD/ Ole Kasasi/ 1190, KJD/ Ole Kasasi/ 1191, KJD/ Ole Kasasi/ 1192 and KJD/ Ole Kasasi/ 1193.

c) Costs of the suit.

The Appellants being dissatisfied by the whole Ruling filed an appeal at the Environment and Land Court in Kajiado on 26th September, 2018.

The Memorandum of Appeal contained the following grounds;

1. THAT the learned Magistrate erred in law and in fact by failing to consider the issues raised in the Appellants statement of Defence and striking it out without considering and making a determination on the issue of the Court's jurisdiction to hear and determine the matter.

2. The Learned Hon. Magistrate erred in law by entertaining a suit in which she had no pecuniary jurisdiction to hear and determine and thus could not grant the orders sought as granted.

3. The Learned Hon. Magistrate erred in law by totally ignoring the issues raised by Appellants thereby denying them their right to a fair hearing by striking out their Defence which raised triable issues for determination.

4. The Learned Hon. Magistrate erred in law and facts by issuing eviction orders without the proof by the Plaintiff as to how he acquired the ownership of the suit property known as KAJIADO/ OLE KASASI/ 549.

The Appellants pray;

- a. That this Appeal be allowed.
- b. That the Ruling delivered on 30th August, 2018 be set aside.
- c. That this Honourable Court grants leave to the Appellants to institute a suit at the Environment and Land Court at Kajiado against the Estate of ASHMAEL OLE PASHA and the Respondent herein.
- d. That the Appellants herein be compensated for the unlawful eviction.
- e. That the Appellants herein be reinstated back to be occupants of KAJIADO/ OLE KASASI/ 549.

The Appellants and Respondent filed their respective submissions to canvass the instant Appeal.

Submissions

The Appellants in their submissions contended that their claim for adverse possession as raised in their Defence dated the 29th January, 2015, ousted the jurisdiction of the Chief Magistrate's Court to determine the Respondent's case. The Appellants further submitted that they had developed the suit property and had been in possession thereon for over two decades before the Respondent surfaced and claimed the said suit property. They relied on the decisions of **Owners of the Motor Vessel ' Lillian S' V Caltex Oil (Kenya) Ltd (1989); Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR; Macfoy V United Africa Co. Ltd (1961) 3 ALL ER 1169** to buttress their averments on the issue of jurisdiction. They insisted that since they had been in continuous, open, exclusive, undisturbed and uninterrupted occupation, use and enjoyment of the suit property known as LR No. KAJIADO/ OLE KASASI/ 549 since 1988 when they took possession and by operation of the land, then the Respondent's title if any was extinguished in the year 2000. Further, their occupation for a period of more than 20 years was not subject to any conditional agreement and or permission from any person whatsoever. They reiterated that the Respondent did not deny the fact that they had been on the suit property from 1988 and no one took any step to evict them. They claimed the Respondent's allegations that he bought the suit property from Ole Pasha buttresses their claim. They relied on the following decisions: **Karuntimi Raiji Vs M'makinya (2013) eKLR; Samuel Nyakenogo V Samuel Orucho Onyaru (2010) eKLR and Jacob Mwanto Wangora V Mary Waruga Wokabi & 3 others (2018) eKLR** to support their arguments.

The Appellants further averred that the Respondent had failed to demonstrate his acquisition of the suit property and even if it is true such acquisition cannot defeat their uninterrupted occupation. Further, the Respondent failed to demonstrate they were not in occupation and instead his suit supports their preposition of actual possession of the suit property.

The Respondent in his submissions contended that since HCCC No. 88 of 2009 had been dismissed on 22nd March, 2017 the issue of subjudice did not arise and the said line of defense was misplaced and should be rejected. Further, the issue of pecuniary jurisdiction was not raised in the Statement of Defence. To support this averment, he relied on the case of **Suleiman Sheikh Shabal Vs IEBC (2014) eKLR**. He reiterated that the issue of adverse possession never arose and neither did the Appellants claim to be owners of the suit property. He insisted the line of Defense is untenable. Further, the Court was correct to strike out the Defense and enter judgement in his favour. He further submitted that they had proved ownership over the suit property. He reiterated that under section 78 of the Civil Procedure Act the Court has no power to grant leave to the Appellants to file a suit before the Environment and Land Court. Further, that the Court does not have power to order compensation where no such prayers were sought in the lower court.

The Appellants reiterated that they had a defense in the lower court and parties had gone through pre-trial. Further, that the Court should have set the suit down for hearing. They further claimed that they were not given a notice of delivery of Ruling and eviction orders were issued ex parte. Further, Court should have scrutinized the process of purchase.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Magistrate erred in law and in fact by striking out the Appellant's Defense and entering judgement for the Respondent.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal?

As to whether the Learned Magistrate erred in law and in fact by striking out the Appellant's Defense and entering judgement for the Respondent.

The genesis of the Appeal arose from the Learned Magistrate's Ruling which struck off the Appellants' Defense and entered judgement for the Respondent. Before I delve into the fact as to whether the Learned magistrate was correct in striking out defence, I will proceed to define

the term triable. **The Black's Law Dictionary 10th Edition defines the term "triable" as, subject or liable to judicial examination and trial".**

In the current scenario, the Learned Magistrate had proceeded to strike out the Appellants Defense and in her Ruling she placed heavy relied on the Kajiado ELC 27 of 2018 (formerly Machakos HCCC No. 88 of 2009) which had been dismissed for want of prosecution. While doing so, she proceeded to state that the Defendants had no legal right over land parcel number Kajiado/ Ole Kasasi/ 549 which had been subdivided into 12 plots as the same had been overtaken by events. I note in the Defence which had been struck out, the Defendants (Appellants), had not only pleaded the existence of the aforementioned suit which related to the lower court matter but denied that they had trespassed on the suit property. They further denied being tenants thereon. They contended that they had been residing on the suit land for two decades and no eviction orders had been issued against them. Further, that the lower court suit was subjudice and the court did not have jurisdiction to hear it. I note the Respondent never challenged the Appellants existence on the land which formed the fulcrum of the lower court suit. [To my mind, these were triable issues which ought to have been considered before the matter was determined].

In the case of **Job Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR**, the court stated as follows: **"Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner." What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.'**

Further, in the case of **RAMJI MEGJI GUDKA LTD -Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** held as follows:

"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said: -

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

While in the case of **Moi University V Vishva Builders Limited - Civil Appeal No. 296 of 2004 (unreported)** the Court of Appeal held that: -

"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.

Further, **Article 50 (1) of the Constitution provides that: ' (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'**

Based on the facts before me and from the record of the lower court while associating myself with the decisions cited above, I find that the learned Magistrate indeed erred in law and fact in striking out the Appellant's Defense and yet it raised bona fide triable issues which should have been subject to further interrogation at a trial. Further, by striking out the Defense, she actually denied the Appellants the right to a fair trial as enshrined in the Constitution.

On the other prayers sought by the Appellants for compensation for the unlawful eviction as well as reinstatement back as occupants of KAJIADO/ OLE KASASI/ 549, I find that these are issues which should be dealt with substantively once the suit is set down for hearing on its merit. Further on the issue of leave to institute a suit at the Environment and Land Court at Kajiado against the Estate of ASHMAEL OLE PASHA, I opine that the same is misplaced and cannot be granted in this Appeal. The Appellant is advised to file a separate application to that effect.

I note the Appellants heavily relied on the issue of adverse possession but I hold that this is an issue which was not expressly raised in their Defence and will decline to make any order to that effect.

It is against the foregoing that I find the Appeal partially succeeds and will proceed to allow it in the following terms.

- i. That the Ruling delivered on 30th August, 2018 be and is hereby set aside.
- ii. That the Appellants' Defense in the Kajiado CMCC NO. 154 of 2014 be and is hereby reinstated and the parties directed to have the matter heard and determined on its merits.
- iii. The Costs of this Appeal are awarded to the Appellants.

Dated Signed and Delivered at Kajiado this 25th Day of November, 2020

CHRISTINE OCHIENG

JUDGE