IN THE COURT OF APPEAL AT NAIROBI

(Coram: Gachuhi, Akiwumi & Lakha JJ A)

CIVI APPEAL NO 85 OF 1990

Between

G.K. MACHARIA .....APPELLANT

LUCY MACHARIA.....APPELLANT

AND

LUCY N. MUNGAI.....RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Justice Shields) dated 29th November 1989

in

HCCC Suit No 1514 of 1985)

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JUDGMENT

The respondent who claimed that she was the owner of Plot No 133R Ongata Rongai through purchase of that property from one Joseph Orumoy the previous owner, and that this transaction as required by law, had received not only the approval of the Olkejiado County Council, in which the reversionary interest of the land and other lands in Ongata Rongai was vested, but also that she had been registered in the records of the County Council as the new proprietor of the land, sued the appellants, husband and wife, who occupied Plot No 330 Ongata Rongai which was adjacent to hers, for various reliefs on the grounds that the appellants had trespassed onto the respondent's land and were erecting a house thereon. The reliefs were for an injunction to restrain the appellants and curiously, also the County Council and their agents, from occupying the land; for damages; and for compensation for the loss of use by the respondent of her land. The appellants and not the County Council, entered appearance and filed their defence. It was averred in this defence that the appellants had not unlawfully committed acts of trespass on Plot No 133R Ongata Rongai or deprived the respondent of the enjoyment of that land. On the other hand, it was further averred that the appellants had been in lawful occupation and built a house on Plot No 337 Ongata Rongai which had been renamed Plot No 133B and which, to use the words employed in the defence, "had nothing to do with the plaintiff's plot". There was, however, no denial of the averment contained in the plaint that the appellants were the owners of Plot No 330.

It appeared from the pleadings then that whilst the appellants were the owners of the plot adjacent to that claimed by the respondent as hers, they were in effect denying that the plot was the respondent's Plot No 133R Ongata Rongai and asserting at the same time, that it was theirs and that its description was not Plot

No 133R Ongata Rongai, but Plot No 133B Ongata Rongai. The matter in issue would then seem to be, as advocate for the appellants set out as the first in the draft issues prepared by him: "Who is the owner of Plot No 133B Ongata Rongai?"

To this can be added another most relevant issue namely:

> "Is Plot No 133R Ongata Rongai the same piece of land as Plot No 133B Ongata Rongai?"

These are also the issues which are apparent from the bundle of documents which were admitted in evidence by consent during the trial of the suit. It is clear from these documents that the respondent bought from Orumoy in 1978 what was then known as Plot No 133R Ongata Rongai and that the same was transferred by the County Council into the name of the respondent on 25th June, 1979. It appears from the letters contained in the bundle of documents, and written in the first quarter of 1981, by the advocate of the respondent complaining about the appellants' trespass on her land, that the land in dispute was then described as Plot No 133B and not 133R Ongata Rongai as contained in the respondent's plaint. It is not quite clear when this change in the description occurred, but in the first quarter of 1981, and in reply to the letters of complaint written by the advocate of the respondent, the County Council itself, by its letters of 10th April, and 28th April, 1981, and contained in the bundle of documents, agreed that the land that the respondent owned and which could only be that which she had bought from Orumoy, was Plot No 133B Ongata Rongai. On 15th August, 1984, and on 3rd May, 1985, the Ministry of Local Government after carrying out its own investigations, and County Council, respectively, wrote letters also contained in the bundle of documents, confirming that the respondent was the registered owner of Plot No 133B Ongata Rongai. The County Council also in May, 1995, issued to the respondent which they have not done to the appellants, a rates clearance certificate and contained in the bundle of documents, to the effect that the respondent in whose name Plot No 133B was registered, had paid to the County Council all sums due to it in respect of Plot No 133B. A similar certificate contained in the bundle of documents, had been issued by the County Council in the name of Orumoy in respect if Plot No 133R Ongata Rongai. According to the bundle of documents, the second appellant on the other hand, was offered by the County Council in its letter of 14th April, 1978, Plot No 337 – residential if she wished to have it. The Health Officer of the County Council was to show her that plot. On 7th January, 1981, the Health Officer wrote to the Clerk of the County Council, and it could only be in respect of Plot No 337 – Residential which had been offered to the second appellant, that that plot according to the map of the plots of the County Council included in the bundle of documents, which was adjacent to Plot No 330, should be described as Plot No 337 and not Plot No 133B as shown on the map of plots of the County Council. This is what must have fortified the second appellant into thinking that the plot that had been offered her was in reality Plot No 133B which, as luck would have it was conveniently adjacent to Plot No 330 which belonged to her husband.

It was on the basis of the evidence which we have herein before summarized that the learned judge held that the second appellant had unfortunately, been led to believe that she had been allocated Plot No 133B which the county Council had already allocated to Orumoy and who, in turn, had transferred it to the respondent. And being satisfied that the respondent had not stood idly by and let the appellants develop the land in dispute, the learned judge had granted possession of the land to the respondent and restrained the appellants from remaining on the land. He further ordered that the respondent should retain the building put up by the appellants, but that the second appellant would have mesne profit for six years assessed at 100/= a month.

The appellant appealed against this judgment on two grounds:

> 1. The learned trial judge erred in law in finding that the respondent had proved the respondent's case although the respondent failed to call one Joseph Orumoi the person who allegedly sold the suit plot to the respondent to prove that the suit plot was the one which was allocated to him considering that plot number on letter of allotment exhibit I was altered and the respondent did not give any explanation for the alteration.
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> 2. That the learned trial judge erred and misdirected himself in rejecting the appellant's contention

that the original documents should be produced although a list of documents had been filed in Court on the ground that the alteration in exhibit I was crucial to the determination of the suit."

The learned judge had before him in addition to the oral evidence that was adduced, documentary evidence which he accepted and which clearly showed more than on a balance of probabilities, that not only was plot No 133R Ongata Rongai the same as plot No 133B Ongata Rongai, but also that plot No 133B was subsequently registered only in the name of the respondent, in the records of the County council. There was in our view, no need for the learned judge to hear the evidence of Orumoy particularly on a matter which was not controverted. What is more, the documentary evidence introduced in evidence had been by consent of all the parties.

Counsel or the appellants, however, urged strenuously that since in the plaint, the land in dispute had been described as plot No 133 R Ongata Rongai and not as plot No 133B Ongata Rongai, and that since the plaint had not been amended to show that the latter description had replaced the former one, the respondent was bound by the averments in her plaint. The decision by the learned judge that plot No 133 B Ongata Rongai belonged to the respondent was therefore, not consistent with the claim of the respondent as set out in her plaint and so, erroneous. In other words the respondent had failed to establish her case.

Furthermore, counsel for the appellants argued, the question whether plot No 133R Ongata Rongai was the same as plot No 133B Ongata Rongai was not made an issue for trial and the learned judge could not therefore, determine this issue. It is worth noting that these arguments cannot be said to arise directly from the grounds of appeal contained in the appellants' memorandum of appeal. But we have a discretion to allow an appellant to take a new point on appeal if full justice can be done to the parties. (See'*Tanganyika Farmers v Unyamwezi* [1960] EA 620). We exercised this discretion in favour of the appellants.

It is true that the parties having failed to settle issues for trial, none were settled by the learned judge as required by o 14 r 5 of the Civil Procedure Code. If this had been done, one of the issues as we have already pointed out, would have been whether plot No 133 R Ongata Rongai was the same as Plot No 133 B Ongata Rongai. Although not settled as an issue for trial, this issue, however, could not be side stepped during the trial and became a matter which though it was unpleaded, had been left to the learned judge for decision. In the cross examination of the respondent, it was suggested to her that she owned plot No 133R Ongata Rongai and not plot No 133B Ongata Rongai. In the course of cross examination of the second appellant, she said that she did not know where plot No 133 B and or 133 R was nor who occupied them, thus conceding that plot No 133 B could belong to the respondent and could also, as shown on the map of the plots of the County Council, be adjacent to plot 330. Then of course, there were the uncontroverted documental evidence which we have already referred to, wherein, the County Council confirmed that the respondent and not the appellants, was the registered owner of plot No 133 B Ongata Rongai which had at first, when the respondent had purchased it from Orumoy, been described as plot No 133 R Ongata Rongai. In such a situation, was the learned judge wrong in basing his decisions on an unpleaded issue which had been left to him for decision because the evidence before him and which counsel for the appellants relied upon at the trial, raised the issue? We would say, no. The same point arose for consideration in the case of *Odd Jobs vs Mubia* [1970] EA 476. Law, JA at 478 observed as follows:

"In the case now before us, I am impressed by Mr Malik- Noor's argument that although Mr Sharma objected to evidence being led relating to the unpleaded issue, he cross-examined the other side's witnesses and led his own witness on this very issue; and although in his final address he objected to the new issue being considered unless made the subject of an amendment to the plaint, he nevertheless made submissions on the unpleaded issue. In these circumstances, although with some hesitation, I consider that the unpleaded issue was left to the judge for decision. I have no doubt the appellant was taken by surprise by the introduction of the unpleaded cause of action at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action, both by leading evidence and addressing the Court with reference to it, and I am not satisfied that the procedural irregularities in the court below have infact led to a failure of justice neccessiting intervention by this Court. In other words, it has not been

shown to my satisfaction that in the event the decision in the court below was wrong.

This appeal might never have been brought if the true cause of the action had been pleaded. Its omission from the plaint s reprehensible enough, but when it became clear early in the course of the trial that the claim was in fact based on a contract, which was the opposite of what had been pleaded, then it became the respondent's duty to have this new cause of action embodied in an amendment to the plaint. I would express my disapproval of the conduct of the respondent's case in the court below by depriving him of the costs of this appeal, and order that the appeal be dismissed but without costs.

Much of the confusion which arose at the trial would have been avoided if the provisions of o 14 r 5 requiring the framing and recording of issues had been complied with. Had issues been framed at the hearing, the necessity for amendment of the pleadings would immediately have become apparent, and much trouble and expense avoided. The prime responsibility to ensure that issues are framed lies on the Court, but in my view the advocates also have a duty to see that this requirement is complied with by the Court."

Duffus P having referred to the role of court under o 14 in settling issues for trial, then went on at 479, to express his views which were similar to those expressed by Law JA as follows:

"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions the Court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties.

In this case the real issue for determination and the issue on which the judgment is based was whether the contract was dependant on a condition precedent being carried out by the defendant/appellant.

There can be no doubt that this issue was raised at the trial, that it was objected to by the appellant's advocate but allowed by the judge and that both parties then called evidence on this issue which was finally determined by the Court in the respondent's favour.

There has been an irregularity in the pleadings but this Court will not usually interfere with a judgment if it is satisfied that there has been no failure of justice or lack of jurisdiction. I am satisfied that the issue was before the Court and that the parties were heard on the issue and the main question here is whether or not the appellant suffered any prejudice or injustice by the course that the proceedings took."

We need say no more than that the learned judge appears to have had all the relevant facts before him and to have come to a correct decision on those facts in a case where the circumstances appear to be the same if not more deserving that those in the *Odd Jobs* case supra . No prejudice or injustice has been suffered by the appellants in the present appeal by the procedural irregularity in the pleadings that occurred. In the result, we hereby dismiss the appeal, but since the advocates for the parties also had a duty to see that issues are framed and recorded, there will be no order as to costs.

Dated and delivered at Nairobi this 18th day of October, 1995

J.M GACHUHI

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JUDGE OF APPEAL

A.M AKIWUMI

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR