



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI
ELC APPEAL NO. 35 OF 2019

MERCY MINNIE WANJIKU.....APPELLANT

VERSUS

CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

PETER KAMAU NYUTU.....2ND RESPONDENT

HARUN OBIRI MASESE.....3RD RESPONDENT

MARTIN MAGOMA MOSE.....4TH RESPONDENT

(Being an Appeal from the ruling the Chief Magistrate's Court at Nairobi, by Hon. Orange, Resident Magistrate dated 13/9/2017 in Chief Magistrate's Court Civil Suit No. 5098 of 2008)

BETWEEN

MERCY MINNIE WANJIKU.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.1ST DEFENDANT

PETER KAMAU NYUTU.....2ND DEFENDANT

HARUN OBIRI MASESE.....3RD DEFENDANT

MARTIN MAGOMA MOSE.....4TH DEFENDANT

JUDGEMENT

1. This appeal challenges the decision of the Honourable Mr. Orange, Resident Magistrate made on 13/9/2017 vide which he allowed the application by the proposed 4th Defendant (the 4th Respondent in this appeal) and set aside the judgement which had been entered on 28/4/2016 by Mrs. M. Chesang, Resident Magistrate in favour of the Appellant, who was the Plaintiff in the suit. Honourable Mrs. Chesang observed that interlocutory judgement had been entered against the 1st and 3rd Defendants on 8/9/2010 and the 1st Defendant's defence was struck out. She entered judgement for the Plaintiff against the Defendants as prayed in the plaint on the basis that the allegations contained in the Amended Plaint were uncontroverted and were therefore taken as proved.

2. When the Appellant went to execute that judgement, the 4th Respondent filed the application dated 21/3/2017 as the Proposed 4th Defendant seeking stay of execution of the decree dated 28/4/2016 and of the orders of his eviction from land reference number Nairobi Block 63/538 Jamhuri Estate ("the Suit Property"). The 4th Respondent also sought to be joined in the suit as a proposed Defendant and to be heard on the suit. He sought to have all the proceedings, judgement and subsequent orders made in the suit set aside in their entirety.

3. The application was made on the grounds that the 4th Respondent acquired the Suit Property on 20/9/2000 from Njuguna Kamau and he obtained a letter of allotment from the Nairobi City Council on 11/10/2000. He averred that he had developed the Suit Property and resided on it with his family for close to 17 years. He urged that he should have been joined to the suit or served with summons or given notice of the

existence of that suit. He averred that he would suffer grave harm if the eviction were allowed to proceed yet he had been denied an opportunity to oppose the suit. He relied on various correspondence including receipts for payments made to the Nairobi City Council. He also annexed a copy of the sale agreement dated 20/9/2000 and a copy of a letter of the allotment dated 11/10/2000.

4. The Learned Magistrate heard the application and in his ruling he observed that there was no proof that the 4th Respondent who was in occupation of the Suit Property had been served by the Plaintiff before the matter was fixed for hearing. The Honourable Mr. Orange observed that there was deliberate concealment of some facts by the Plaintiff and the proposed 4th Defendant had an interest in the case hence he ought to be accorded a chance to be heard on merit.

5. In the Memorandum of Appeal filed in court on 2/10/2017 the Appellant contended that the Learned Magistrate erred in allowing the 4th Respondent's application and in unlawfully reviewing a judgement that had been passed by her colleague. She faulted the Learned Magistrate for failing to find that the Plaintiff was entitled to evict the proposed 4th Defendant from the Suit Property. Further that she erred in failing to find that the Plaintiff had already established her title to the Suit Property and there was no basis to disturb that. She also faulted the Learned Magistrate for failing to take into account the documents she submitted in evidence. The Appellant urged the court to set aside the ruling made on 13/9/2017. She urged this court to make its own finding on the law and the facts. In the alternative, she sought to have the case referred for hearing before a different magistrate. She sought the costs of the appeal and of the lower court case and any other relief deemed appropriate in the circumstances.

6. Parties filed submissions which the court has considered. The Appellant contended that she filed suit in 2008 and at the time judgment was entered in her favour the case had taken almost 9 years in court. She submitted that during that period the 4th Respondent was alleged to be in possession of the Suit Property living on it. She contended that based on the title and the plaint she filed it was the 3rd Respondent and not the 4th Respondent who was illegally in possession of the Suit Property. She maintained that the 4th Respondent claimed in the supplementary affidavit dated 19/6/2017 that he was aware of a scheme to evict him since 2003 and that despite this knowledge, he did not join these proceedings at the right time. The Appellant relied on the doctrine of laches and asked the court to question where the 4th Respondent was during the 9 years when the case was in court.

7. The Appellant contended that it was irregular for the Learned Magistrate to review the judgment. She relied on the decision in **Benjoh Amalgamated Limited and another v Kenya Commercial Bank Limited [2014] eKLR** in which the court stated that to justify a new trial, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, or the evidence which must be credible, would probably have an important influence on the result of the case. The Appellant contended that the grounds the 4th Respondent relied on were insufficient to warrant the reopening of the case. She maintained that the documents she produced were sufficient to show that she was the rightful owner of the Suit Property and there was no basis for her to be deprived of her property. She added that she was denied a right to her property without the claim by the 4th Respondent being heard and his testimony being tested through cross examination. She urged that the court was *functus officio* when it reviewed the judgement.

8. The 4th Respondent submitted that he took possession of the Suit Property and constructed a house on it in 2003. He averred that he had lived in the house with his family from 2003 without any interruption until March 2007 when Keysian Auctioneers went to evict him on instructions from the Appellant. He claimed that he had never been served with summons to enter appearance or pleadings despite the Appellant knowing that he had been in possession of the Suit Property since 2000. He faulted the Appellant for failing to join him as a party to the initial suit.

9. He submitted that the trial court had powers to review the judgement and join a necessary party to the suit pursuant to Order I Rule 10 (2) of the Civil Procedure Rules. He maintained that he had a legitimate interest in the subject matter of the suit and needed to be given an opportunity for a fair hearing. He faulted the Appellant for not conducting proper due diligence and visiting the Suit Property. The 4th Respondent explained that he had no right of appeal against the decision of the trial court because he was not a party to the suit. He submitted that the ruling of the Learned Magistrate did not cause any absurdity in the law. He urged this court to dismiss the appeal and allow the trial court to hear the parties including him afresh with a view to completely adjudicating and settling all questions touching on the Suit Property.

10. The issue for determination is whether this court should grant the orders sought in the appeal. The Appellant has not demonstrated that the 4th Respondent was made aware of the existence of the suit nor was he given an opportunity to defend the Appellant's claim to the Suit Property. If indeed he has been living on the Suit Property with his family since 2003 then the Appellant ought to have made him a party to the proceedings when she filed suit in 2008. He was a necessary party to the suit who should have been made aware of the suit relating to the Suit Property so that he could participate in the proceedings for the court to conclusively determine the issue of ownership of the Suit Property.

11. The court finds that the Learned Magistrate properly exercised his discretion when he set aside the judgement which was entered on 28/4/2016 without the participation of the 4th Respondent. The import of the ruling of the Learned Magistrate was to afford both the Appellant and the 4th Respondent an opportunity to have the case heard afresh and determined on merit with the participation of the 4th Respondent.

12. The appeal fails and the suit is referred back for hearing before a different Magistrate other than Honourable Orange, Senior Resident Magistrate. Each party will bear its own costs of the appeal.

Delivered virtually at Nairobi this 7th day of December 2020

K.BOR

JUDGE

In the presence of: -

Mr. James Makori for the Appellant

Ms. S. Kosgey holding brief for Mr. I. Kangatta for the 1st Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2nd to 4th Respondents