



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC APPEAL NO. 11 OF 2014

KEZIAH MUGURE NJUGUNA.....APPELLANT

VERSUS

NAOMI WAMBUI GACUCHA.....RESPONDENT

JUDGMENT

This appeal arose from the decision of M. W. Mutuku Ag. S.P.M made on 28th November, 2013 in Thika Chief Magistrates Court D.O Case No. 81 of 2010, Keziah Mugure Njuguna v Naomi Wambui Gacucha. The facts giving rise to the appeal are straight forward. The parcel of land known as L.R No. Ruiru/Kiu/Block 2/Githunguri 2511 (hereinafter referred to as “the suit property”) was at all material times registered in the name of the appellant’s husband, Samuel Njuguna Karera, deceased. Following the confirmation of grant in respect of the estate of the deceased on 16th July, 2008, the suit property was given to the appellant to hold in trust for her six children.

Sometimes in the year 2010, the appellant lodged a claim against the respondent at Thika Land Disputes Tribunal (hereinafter referred to as “the tribunal”) seeking an order that the suit property belonged to her deceased husband and not to the respondent who had constructed houses thereon. In a ruling delivered on 23rd September, 2010, the tribunal held that the suit property belonged to the appellant’s husband and that the said position should be maintained. The decision of the tribunal of 23rd September, 2010 was adopted as a judgment of the court at the Chief Magistrates Court at Thika in D. O. Case No. 81 of 2010 on 4th October, 2010.

The respondent was aggrieved with the decision of the tribunal and preferred an appeal against the same to the Land Disputes Tribunal Appeals Committee at Nyeri (hereinafter referred to as “the Appeals Committee”). The Appeals Committee heard the appeal and in a ruling delivered on 22nd July, 2011 upheld the decision of the tribunal and confirmed that the suit property belonged to the appellant. The appellant filed the decision of the Appeals Committee at the Chief Magistrates Court at Thika in the same D. O. Case No. 81 of 2010 (hereinafter referred to only as “D. O. Case No. 81 of 2010”) for adoption as judgment of the court and the same was adopted on 8th August, 2011.

The respondent was dissatisfied with the decision of the Appeals Committee and the adoption thereof as a judgment of the court and moved the High Court at Nairobi through an application for judicial review in Nairobi High Court J.R Misc. ELC Application No. 285 of 2011 seeking an order of certiorari to quash the same. In a judgment that was delivered by the High Court on 26th April, 2013, the respondent’s application was dismissed.

While the respondent’s judicial review application was pending at the High Court, the appellant filed an application by way of Chamber Summons dated 15th August, 2011 in D. O. Case No. 81 of 2010 seeking an order that she be permitted to evict the respondent from the suit property and to demolish all the structures she had put up on the property. The appellant’s application was brought on the grounds that she was the owner of the suit property and that her title had been confirmed by the decrees that were issued by the court following the adoption of the decision of the tribunal and that of the Appeals Committee. The appellant’s application was stayed pending the outcome of the respondent’s judicial review application.

The hearing of the appellant’s application resumed on 8th July, 2013 after the judgment in the judicial review application which the respondent lost. The application was heard by Hon. M. W. Mutuku Ag. SPM. The appellant who appeared in person urged the court to allow her application since the High Court had confirmed that the suit property belonged to her. In response to the application, the advocate who appeared for the respondent submitted that the respondent had filed a case against the appellant at the Chief Magistrates Court at Thika namely, Thika CMCC No. 953 of 2010 and that an order had been issued in that case barring the appellant from evicting the respondent from the suit property. In a short ruling that was delivered on 28th November, 2013, the learned magistrate dismissed the appellant’s application. The learned magistrate noted that there was a court order issued in Thika CMCC No. 953 of 2010 which was still in force restraining the eviction of the respondent from the suit property. The learned magistrate held that in view of that order, she could not issue an order for the eviction of the respondent from the suit property.

It is against that decision that the appellant preferred this appeal. The appellant challenged the decision of the learned magistrate on six grounds set out in her Memorandum of Appeal dated 8th May, 2014. In summary, the appellant contended that the learned magistrate erred

in not granting the orders that were sought in her application dated 15th August, 2011. The appeal was argued by way of written submissions. The appellant filed her submissions on 27th February, 2018. The respondent did not file submissions as directed by the court.

I have considered the record of the lower court, the Memorandum of Appeal and the submissions by the appellant's advocates. It was not disputed before this court that when the appellant's application seeking the eviction of the respondent from the suit property came up for hearing in the lower court, there was an order in force issued in another case namely, Thika CMCC No. 953 of 2010 restraining the appellant from evicting the respondent from the suit property. Until that order was discharged, the lower court could not issue an order for the eviction of the respondent from the suit property. Such order would have been in conflict with an order issued by a court of concurrent jurisdiction. Courts are not supposed to be agents of confusion. The learned magistrate was right in refusing to grant the appellant an order for the eviction of the respondent from the suit property while there was an order in force restraining such action. The learned magistrate did not therefore err in dismissing the appellant's application on that account.

I will also reject the appellant's appeal for another reason. D. O. Case No. 81 of 2010 was filed strictly for the adoption of the decision of the tribunal pursuant to Section 7 of the Land Disputes Tribunals Act, Chapter 303A Laws of Kenya (now repealed). The two decrees that were issued in favour of the appellant upon the adoption of the decision of the tribunal and the Appeals Committee merely declared and confirmed the appellant's ownership of the suit property. The two decrees did not direct that the respondent be evicted from the suit property. I am of the view that the appellant could not obtain an order for the eviction of the respondent in D. O. Case No. 81 of 2010 on the basis of these decrees. The role of the court in D. O. Case No. 81 of 2010 was simply to adopt the decisions of the tribunal and the Appeals Committee and to enforce the same. Since the decrees issued by the court following the adoption of the decisions of the tribunal and the Appeals Committee did not provide for the eviction of the respondent and demolition of her structures on the suit property, the court could not grant such orders in exercise of its powers under section 7 of the Land Disputes Tribunals Act, Chapter 303A Laws of Kenya (now repealed). The appellant had to file a substantive suit for the eviction of the respondent from the suit property since the tribunal and the Appeals Committee did not give her such award.

The upshot of the foregoing is that the appellant's appeal has no merit. The same is dismissed with no order as to costs since the respondent did not make any submissions in opposition to appeal.

Delivered and Dated at Nairobi this 24th day of January 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Mulako h/b for Mr. Kiragu for the Appellant

N/A for the Respondent

Catherine-Court Assistant